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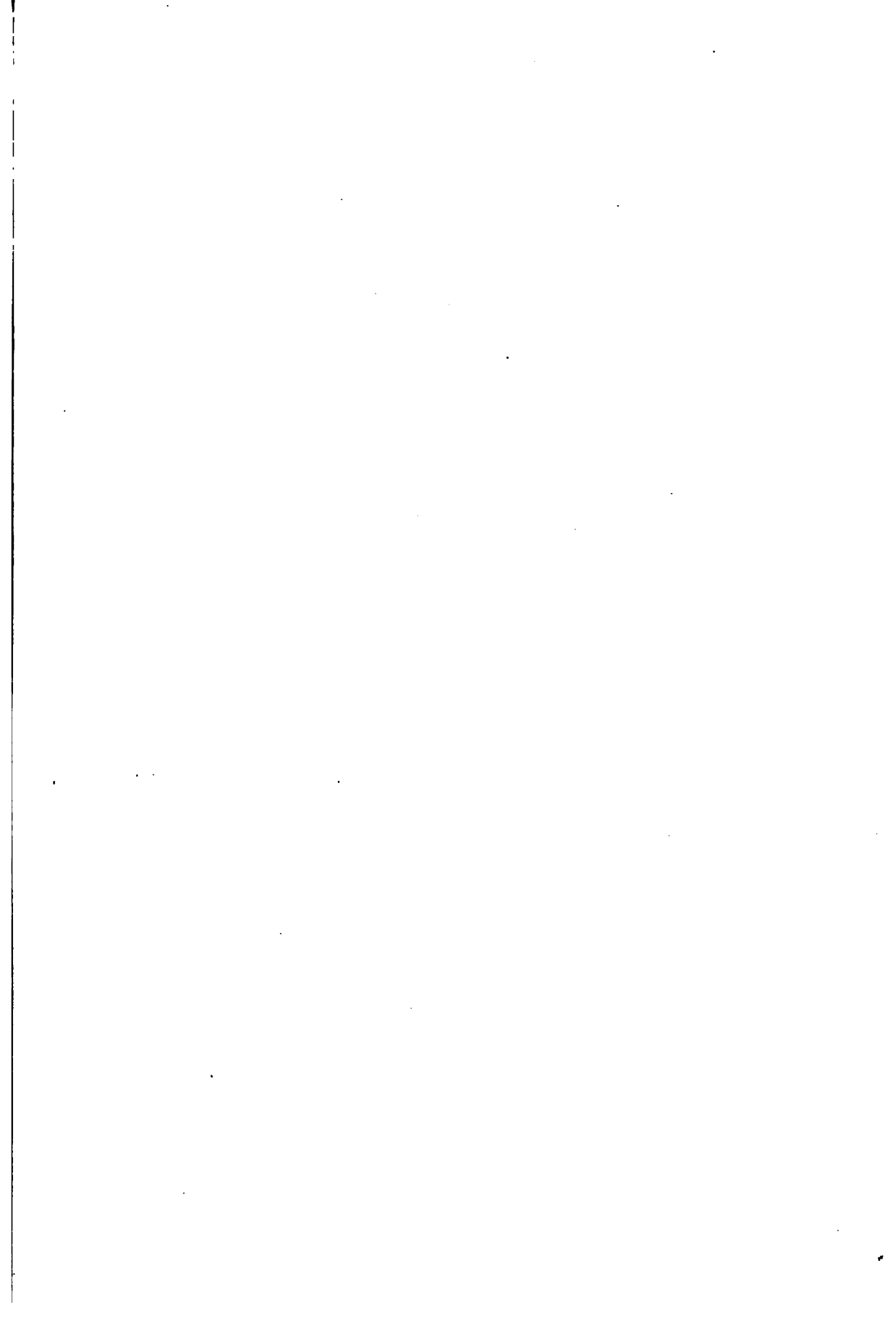














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# TABLE OF CASES REPORTED

<b>A.</b>		Berg v. Johnson ..... (Ark.) 489
Alaska Northern R. Co., Bal-		Bernheim v. Wallace ..... (Ky.) 938
laine v. .... (C. C. A.) 990		Bias v. Globe & R. F. Ins. Co.
Albright, Richardson Press v.		(W. Va.) 378
(N. Y.) 1195		Bidwell Coal Co. v. Davidson
Allen v. Railroad Commission (Cal.) 249		(Iowa) 1058
American Fuel Co. v. Industrial		Big Diamond Mill Co. v. Chi-
Commission .... (Utah) 1342		cago, M. & St. P. R.
Amoskeag Mfg. Co., Richard v.		Co. .... (Minn.) 1254
(N. H.) 1426		Blake, Keiningham v. .... (Md.) 1066
Amsbary v. Grays Harbor R. &		Bonham, Guiney v. .... (C. C. A.) 1282
Light Co. .... (Wash.) 1		Booth v. Scheer ..... (Kan.) 663
Anderson v. Rucker Bros. ... (Wash.) 544		Boas v. Hagan ..... (D. C.) 1509
Arnold, Boudeman v. .... (Mich.) 789		Bottineau County Bank, First
Ashley v. Three Justices .. (Mass.) 1463		State Bank v. ... (Mont.) 631
v. Wait ..... (Mass.) 1463		Boudeman v. Arnold ..... (Mich.) 789
Atlantic Mills, Kayworth v. ... (E. L.) 1322		Brand, Ogden-Howard Co. v.
		(Del.) 334
<b>B.</b>		Brantley, Jones v. .... (Miss.) 1353
Ball, Ex parte ..... (Kan.) 1848		Briggs v. Com. .... (Ky.) 363
Ballaine v. Alaska Northern R.		Brown, San Pedro, L. A. & S.
Co. .... (C. C. A.) 990		L. R. Co. v. ... (C. C. A.) 865
Bank, Bottineau County, First		v. United States Trust
State Bank v. ... (Mont.) 631		Co. .... (Ky.) 1142
Farmers' State, Peters		Bullock, State ex rel. Railroad
v. .... (Kan.) 1170		Comrs. v. .... (Fla.) 232
First State, v. Bottineau		Burkhart, State ex rel., v. Fer-
County Bank ... (Mont.) 631		gyson ..... (Iowa) 426
National, v. Whitney		
(Cal.) 298		<b>C.</b>
Union, United States v.		Cadillac Motor Car Co., John-
(C. C. A.) 1438		son v. .... (C. C. A.) 1023
Bank & T. Co., People's, v.		Canafax v. Bank of Commerce
United States Trust		(Okla.) 59
Co. .... (Ky.) 1142		Cardwell, Kohlhaugen v. .... (Or.) 11
Bank of Commerce, Canafax v.		Carlson v. Connecticut Co. (Conn.) 569
(Okla.) 59		Carpenter, State ex rel., v.
Bank of Oxford v. Love .... (Miss.) 394		Kreutzer ..... (Ohio) 876
Baptist City Mission Soc.		Carroll, Ex parte
v. People's Taber-		(Tex. Crim. App.) 901
nacle Congregation-		Castle v. Southern R. Co. ... (S. C.) 959
al Church ..... (Colo.) 102		Chambers, Riley v. .... (Cal.) 418
Baumann v. New York .... (N. Y.) 595		Chandler v. Industrial Commis-
Beeson v. Drake Oil Co. ... (W. Va.) 414		sion ..... (Utah) 930
		Chicago v. O'Connell ..... (Ill.) 916



Chicago Bonding & Ins. Co., Copper Process Co. v. .... (C. C. A.) 1477	Ex parte McGee ..... (Kan.) 831 Patterson ..... (Ark.) 1541
Chicago, M. & St. P. R. Co., Big Diamond Mill. Co. v. .... (Minn.) 1254	F.
Chicago, R. I. & P. R. Co. v. Forrester ..... (Okla.) 163	Farrer, State ex rel., v. Citizens' Trust & G. Co. .... (W. Va.) 79
Chiles v. Ft. Smith Commis- sion Co. .... (Ark.) 493	Farmers' State Bank, Peters v. (Kan.) 1170
Citizens' Trust & G. Co., State ex rel. Farrer v. (W. Va.) 79	Favorite v. Superior Ct. ... (Cal.) 290
Coco v. Oden ..... (La.) 679	Ferguson, State ex rel. Burk- hart v. .... (Iowa) 426
Collins v. Long ..... (Or.) 1370	Fine, Kumin v. .... (Mass.) 1161
Collison v. Curtner ..... (Ark.) 760	Fink v. Hillenbrand ..... (N. Y.) 1455
Com., Briggs v. .... (Ky.) 363	First State Bank v. Bottineau County Bank .. (Mont.) 631
Irvin v. .... (Ky.) 368	Fitzgerald, State ex rel. Peers v. .... (Minn.) 1582
Connecticut Co., Carlson v. (Conn.) 569	Forrester, Chicago, R. I. & P. R. Co. v. .... (Okla.) 163
Continental Casualty Co. v. Hardenbergh ... (Miss.) 229	Ft. Loramie, Gress v. .... (Ohio) 242
v. Pillsbury ..... (Cal.) 1110	Ft. Smith Commission Co., Chiles v. .... (Ark.) 493
Continental Ins. Co. v. Stratton (Ky.) 391	Foster, Seager v. .... (Iowa) 690
Cooper, State v. .... (N. C.) 1214	Friedberg, Eskew v. .... (Ky.) 1116
Copper Process Co. v. Chicago Bonding & Ins. Co. (C. C. A.) 1477	G.
Crosby, Estes v. .... (Wis.) 1377	General Acci., F. & L. Assur. Corp. v. Hymes .. (Okla.) 318
Curtis v. Curtis ..... (W. Va.) 1091	Gengo v. Mardis ..... (Neb.) 134
Curtner, Collison v. .... (Ark.) 760	George v. Dutton ..... (Vt.) 1014
D.	Gipple, Yearsley v. .... (Neb.) 636
Daniels, Tilton v. .... (N. H.) 1073	Globe & R. F. Ins. Co., Bias v. (W. Va.) 373
Davidson, Bidwell Coal Co. v. (Iowa) 1058	Grays Harbor R. & Light Co., Amsbary v. ... (Wash.) 1
Day, Thompson v. .... (La.) 660	Grbic, Ex parte ..... (Wis.) 325
Detroit, G. H. & M. R. Co., Pea- cock v. .... (Mich.) 964	Great Northern R. Co., Weeks v. .... (N. D.) 1178
Diamond Ice & S. Co. v. Klock Produce Co. ... (Wash.) 685	Greenleaf Johnson Lumber Co., Wynne v. .... (N. C.) 1081
Douglas, State v. .... (S. C.) 656	Gress v. Ft. Loramie ..... (Ohio) 242
Drake Oil Co., Beeson v. ... (W. Va.) 414	Guiney v. Bonham .... (C. C. A.) 1282
Dutton, George v. .... (Vt.) 1014	Gulf Refining Co., Horn v. (Tenn.) 1243 Moody v. .... (Tenn.) 1243
E.	H.
Edins, State v. .... (N. M.) 1831	Hagan, Boas v. .... (D. C.) 1508
Edward, Kallcock v. .... (Me.) 750	Hall v. State ..... (Fla.) 1034
Engels Copper Min. Co. v. In- dustrial Acci. Com- mission ..... (Cal.) 187	Hardenbergh, Continental Cas- ualty Co. v. .... (Miss.) 229
Eskew v. Friedberg ..... (Ky.) 1116	Hardy v. State .. (Tex. Crim. App.) 1357
Estes v. Crosby ..... (Wis.) 1377	Hartman v. Pendleton ..... (Or.) 904
Evans, Re. .... (Minn.) 1631	Hawkeye Oil Co., Lawrence Gas Co. v. .... (Iowa) 192
v. Evans ..... (Minn.) 1631	Haycock v. Sovereign Camp, Woodmen of World (Wis.) 378
v. Minneapolis Trust Co. (Minn.) 1631	v. Woodmen of World (Sovereign Camp) (Wis.) 378
Ex parte Ball ..... (Kan.) 1348	
Carroll ... (Tex. Crim. App.) 901	
Grbic ..... (Wis.) 325	

# CASES REPORTED.

vii

Head Camp, Woodmen of World, Valentine v. (Cal.)	380
Heitman, State v. .... (Kan.)	848
Hillenbrand, Fink v. .... (N. Y.)	1455
Muller v. .... (N. Y.)	1455
Hilliard v. State (Tex. Crim. App.)	1316
Hoehman, Kerley v. .... (Okla.)	141
Hogarty v. Philadelphia & R. R. Co. .... (Pa.)	1386
Holmes v. Holmes .... (Iowa)	1534
Horn v. Gulf Refining Co. .... (Tenn.)	1243
Houghton, State ex rel. Twin City Bldg. & Invest. Co. v. .... (Minn.)	585
Hymes, General Acci., F. & L. Assur. Corp. v. .... (Okla.)	318

## I.

Industrial Acci. Commission; Engels Copper Min. Co. v. .... (Cal.)	187
Industrial Commission, Ameri- can Fuel Co. v. .... (Utah)	1342
Chandler v. .... (Utah)	930
Insurance Co., Chicago Bond- ing & Copper Proc- ess Co. v. .... (C. C. A.)	1477
Continental, v. Stratton (Ky.)	391
Globe & R. F., Bias v. (W. Va.)	378
Irvin v. Com. .... (Ky.)	368

## J.

Johnson, Berg v. .... (Ark.)	489
v. Cadillac Motor Car Co. .... (C. C. A.)	1023
Seward v. .... (Okla.)	645
Johnston v. Schwenck .... (Ohio)	176
Jones v. Brantley .... (Miss.)	1353
Kelly v. .... (Ill.)	792
People v. .... (Ill.)	357

## K.

Kallock v. Edward .... (Me.)	750
Kansas Free Fair Assn., Stagg v. .... (Kan.)	478
Keeningsham v. Blake .... (Md.)	1066
Kelly v. Jones .... (Ill.)	792
Kenesaw Free Baptist Church v. Lattimer .... (Neb.)	98
Kerl, Re .... (Idaho)	1259
Kerley v. Hoehman .... (Okla.)	141
Keyworth v. Atlantic Mills .. (R. I.)	1322
Kleine v. Kleine .... (Mo.)	1335
Klock Produce Co., Diamond Ice & S. Co. v. .... (Wash.)	685
Kohlhagen v. Cardwell .... (Or.)	11

Kreutzer, State ex rel. Carpen- ter v. .... (Ohio)	676
Kumin v. Fine .... (Mass.)	1161

## L.

Lambert (Gerhard B.) Co., Tenenbaum v. .... (Ark.)	745
Landell v. Lybrand .... (Pa.)	461
Lattimer, Kenesaw Free Bap- tist Church v. .... (Neb.)	98
Lawrence Gas Co. v. Hawkeye Oil Co. .... (Iowa)	192
Leipzig, McNamara v. .... (N. Y.)	480
Liberty Trust Co., Manning v. (Mass.)	999
Long, Collins v. .... (Or.)	1370
Love, Bank of Oxford v. .... (Miss.)	894
Lybrand, Landell v. .... (Pa.)	461

## M.

McAllister, State ex rel., v. State .... (Mo.)	1226
McCormick, Meredith v. .... (Mich.)	669
Sheridan v. .... (N. D.)	523
McGee, Ex parte .... (Kan.)	831
McNamara v. Leipzig .... (N. Y.)	480
Manning v. Liberty Trust Co. (Mass.)	999
Mardis, Gengo v. .... (Neb.)	184
Marquis, People v. .... (Ill.)	874
Marshall v. Wabash R. Co. (Mich.)	435
Meinel, Mercer v. .... (Ill.)	351
Mercardo v. State (Tex. Crim. App.)	1312
Mercer v. Meinel .... (Ill.)	351
Meredith v. McCormick ... (Mich.)	669
Minneapolis Trust Co., Evans v. .... (Minn.)	1631
Moody v. Gulf Refining Co. (Tenn.)	1243
Muller v. Hillenbrand .... (N. Y.)	1455
Murray, State v. .... (Neb.)	563

## N.

National Bank v. Whitney .. (Cal.)	298
New York, Baumann v. .... (N. Y.)	595
Norfolk & W. R. Co. v. Public Service Commission (W. Va.)	155

## O.

O'Connell, Chicago v. .... (Ill.)	916
Oden, Coco v. .... (La.)	679
Ogden-Howard Co. v. Brand (Del.)	334
O'Neil v. Providence Amuse- ment Co. .... (R. I.)	1590

## P.

Pacific American Fisheries, ..	
Petersen v. .... (Wash.)	198
Pardee, Potts v. .... (N. Y.)	785
Patch, Randall v. .... (Me.)	65
Patterson, Ex parte .... (Ark.)	1541
Peacock v. Detroit, G. H. & M. R. Co. .... (Mich.)	964
Peers, State ex rel., v. Fitz- gerald .... (Minn.)	1582
Pendleton, Hartman v. .... (Or.)	904
People v. Jones .... (Ill.)	357
v. Marquis .... (Ill.)	874
Walker v. .... (Colo.)	855
People's Bank & T. Co. v. United States Trust Co. .... (Ky.)	1142
People's Tabernacle Congrega- tional Church, Bap- tist City Mission Soc. v. .... (Colo.)	102
Peters v. Farmers' State Bank (Kan.)	1170
Petersen v. Pacific American Fisheries .... (Wash.)	198
Peterson, State v. .... (Wash.)	652
Philadelphia & R. R. Co., Ho- garty v. .... (Pa.)	1386
Pillsbury, Continental Casual- ty Co. v. .... (Cal.)	1110
Pilsen Brew. Co. v. Wallace .. (Ill.)	579
Plank v. Swift .... (Iowa)	809
Postal Tele.-Cable Co., Query v. .... (N. C.)	1290
Potts v. Pardee .... (N. Y.)	785
Providence Amusement Co., O'Neill v. .... (R. I.)	1590
Public Service Commission, Norfolk & W. R. Co. v. .... (W. Va.)	155
Public Service Co. v. Reckten- wald .... (Ill.)	466
Purchase v. Seelye .... (Mass.)	503

## Q.

Query v. Postal Tele.-Cable Co. .... (N. C.)	1290
---	------

## R.

Railroad Commission, Allen v. (Cal.)	249
Railroad Comrs., State ex rel., v. Bullock .... (Fla.)	232
Railroad Co., Lehigh Valley, State v. .... (N. J.)	1534
San Pedro, L. A. & S. L., v. Brown .... (C. C. A.)	665
Railway & Light Co., Grays Harbor, Amshary v. (Wash.)	1

Railway Co., Alaska Northern, Ballaine v. .... (C. C. A.)	990
Chicago, M. & St. P., Big Diamond Mill Co. v. .... (Minn.)	1254
Chicago, R. I. & P., v. Forrester .... (Okla.)	163
Detroit, G. H. & M., Pea- cock v. .... (Mich.)	964
Great Northern, Weeks v. .... (N. D.)	1178
Norfolk & W., v. Public Service Commission (W. Va.)	156
Philadelphia & R., Ho- garty v. .... (Pa.)	1386
Southern, Castle v. .. (S. C.)	959
Wabash, Marshall v. (Mich.)	435
Randall v. Patch .... (Me.)	65
Recktenwald, Public, Service Co. v. .... (Ill.)	466
Re Evans .... (Minn.)	1631
Kerl .... (Idaho)	1259
Richard v. Amoskeag Mfg. Co. .... (N. H.)	1426
Richardson Press v. Albright (N. Y.)	1195
Riley v. Chambers .... (Cal.)	418
Ringle, Trebowoski v. .... (Wis.)	1271
Rossi, Ruddy v. .... (U. S.)	843
Royal Dutch West India Mail Co., United States v. .... (C. C. A.)	1438
Rucker Bros., Anderson v. (Wash.)	544
Ruddy v. Rossi .... (U. S.)	843

## S.

San Pedro, L. A. & S. L. R. Co. v. Brown .. (C. C. A.)	865
Schapiro, Stein v. .... (Minn.)	1264
Scheer, Booth v. .... (Kan.)	663
Schlemm, Whittle v. .... (N. J.)	1447
Schwenck, Johnston v. .... (Ohio)	170
Seager v. Foster .... (Iowa)	690
Seelye, Purchase v. .... (Mass.)	503
Seward v. Johnson ,.... (Okla.)	645
Shapiro, Stein v. .... (Minn.)	1264
Sheridan v. McCormick .... (N. D.)	523
Siedler v. Wahn .... (Pa.)	1362
Slate, State ex rel. McAllister v. .... (Mo.)	1226
Smith v. Smith .... (W. Va.)	1149
Southern R. Co., Castle v. ... (S. C.)	959
Sovereign Camp, Woodmen of World, Haycock v. (Wis.)	378
Stagg v. Kansas Free Fair Asso. .... (Kan.)	478
State ex rel. Railroad Comrs. v. Bullock .... (Fla.)	232

# CASES REPORTED.

17

State ex rel. Farmer v. Citizens' Trust & G. Co. (W. Va.) 79  
 v. Cooper ..... (N. C.) 1214  
 v. Douglas ..... (S. C.) 656  
 v. Edins ..... (N. M.) 1331  
 ex rel. Burkhardt v. Ferguson ..... (Iowa) 426  
 ex rel. Peers v. Fitzgerald ..... (Minn.) 1582  
 Hall v. .... (Fla.) 1034  
 Hardy v. ... (Tex. Crim. App.) 1357  
 v. Heitman ..... (Kan.) 848  
 Hilliard v. (Tex. Crim. App.) 1316  
 ex rel. Twin City Bldg. & Invest. Co. v. Houghton ..... (Minn.) 585  
 ex rel. Carpenter v. Kreutzer ..... (Ohio) 676  
 Mercardo v. (Tex. Crim. App.) 1312  
 v. Murray ..... (Neb.) 563  
 v. Peterson ..... (Wash.) 652  
 ex rel. McAllister v. Slate ..... (Mo.) 1226  
 Stearns, Young v. .... (Mass.) 1010  
 Stein v. Schapiro ..... (Minn.) 1264  
 v. Shapiro ..... (Minn.) 1264  
 Stratton, Continental Ins. Co. v. .... (Ky.) 391  
 Superior Ct., Favorite v. .... (Cal.) 290  
 Swift, Plank v. .... (Iowa) 309

## T.

Tenenbaum v. Lambert (Gerhard B.) Co. .... (Ark.) 745  
 Thompson v. Day ..... (La.) 660  
 White v. .... (Ky.) 1641  
 Three Justices, Ashley v. ... (Mass.) 1463  
 Tilton v. Daniels ..... (N. H.) 1073  
 Trebowoski v. Ringle ..... (Wis.) 1271  
 Twin City Bldg. & Invest. Co., State ex rel. v. Houghton ..... (Minn.) 585

## U.

Union Bank, United States v. (C. C. A.) 1438  
 United States v. Royal Dutch West India Mail Co. (C. C. A.) 1438  
 v. Union Bank ... (C. C. A.) 1438  
 v. United States Steel Corp. .... (U. S.) 1121  
 United States Steel Corp., United States v. (U. S.) 1121  
 United States Trust Co., Brown v. .... (Ky.) 1142  
 People's Bank & T. Co. v. .... (Ky.) 1142

## V.

Valentine v. Head Camp, Woodmen of World (Cal.) 380  
 v. Woodmen of World (Head Camp) ... (Cal.) 380

## W.

Wabash R. Co., Marshall v. (Mich.) 435  
 Wait, Ashley v. .... (Mass.) 1463  
 Walker v. People ..... (Colo.) 855  
 Wallace, Bernheim v. .... (Ky.) 938  
 Pilsen Brew. Co. v. .... (Ill.) 579  
 Waln, Siedler v. .... (Pa.) 1363  
 Weeks v. Great Northern R. Co. .... (N. D.) 1178  
 White v. Thompson ..... (Ky.) 1641  
 Whitney, National Bank v. ... (Cal.) 298  
 Whittle v. Schlemm ..... (N. J.) 1447  
 Woodmen of World (Sovereign Camp), Haycock v. (Wis.) 378  
 (Head Camp), Valentine v. .... (Cal.) 380  
 Wynne v. Greenleaf Johnson Lumber Co. .... (N. C.) 1081

## Y.

Yearsley v. Gipple ..... (Neb.) 636  
 Young v. Stearns ..... (Mass.) 1010

the first of these is the fact that the  
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### VOL. 8

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ELLA AMSBARY, Respt.,  
v.  
GRAYS HARBOR RAILWAY & LIGHT COMPANY, Appt..

*Washington Supreme Court (Dept. No. 2) — February 28, 1914.*

(78 Wash. 379, 139 Pac. 46.)

**Evidence — reproduction of conditions — sufficiency.**

1. Substantial reproduction of conditions is sufficient to render admissible evidence of the result of experiments upon the question how far from a street car a person lying beside the track could be seen.

[See note on this question beginning on page 18.]

— similarity of conditions of experiments.

2. Upon the question how far a man struck by a street car when lying on the ground beside the track could have been seen by the motorman, evidence is admissible of the similarity of circumstances under which the experiment to test that question was carried on, to those attending the accident.

[See 10 R. C. L. 1002.]

— discretion as to admission.

3. The question of admissibility of proof of similarity of conditions attending an accident and experiments is not a matter of discretion with the court.

— experiment — length of view of person beside track.

4. The result of experiments under similar conditions is admissible in evidence upon the question how far away the motorman in charge of a street car could see a person lying on the ground beside the track.

[See 10 R. C. L. 1001, 1002.]

**Appeal — exclusion of evidence of experiments — discretion.**

5. The exclusion by a trial court of evidence of experiments, although largely discretionary, may be reviewed on appeal.

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APPEAL by defendant from a judgment of the Superior Court for Chehalis County (Sheeks, J.) in favor of plaintiff in an action brought to recover damages for the death of her husband alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Bridges & Bruener for appellant.

Messrs. A. Emerson Cross and Hugo Metzler, for respondent:

While it might not be error for the trial court to admit evidence of experiments, it does not create error for the trial court to exclude it.

*Halverson v. Seattle Electric Co.* 35 Wash. 600, 77 Pac. 1058; *Lasityr v. Olympia*, 61 Wash. 655, 112 Pac. 752; *Jones, Ev.* 2d ed. § 410; *Chicago City R. Co. v. Brecher*, 112 Ill. App. 106; *Chicago & E. I. R. Co. v. Crose*, 113 Ill. App. 547; *Ord v. Nash*, 50 Nev. 335, 69 N. W. 964, 1 Am. Neg. Rep. 110; *De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & I. Co.* 2 Ga. App. 493, 58 S. E. 790; *Augusta R. & Electric Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213; *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 724, 109 N. W. 475.

The question asked Mr. Funk was properly one for an expert witness.

*Sears v. Seattle Consol. Street R. Co.* 6 Wash. 230, 33 Pac. 389, 1081, 7 Am. Neg. Cas. 86; *Bussanich v. Myers*, 22 Wash. 369, 60 Pac. 1117; *Holland v. Brindenstine*, 55 Wash. 470, 104 Pac. 626.

It was immaterial what caused Amshary to become unconscious and helpless.

*Herrick v. Washington Water Power Co.* 75 Wash. 149, 48 L.R.A. (N.S.) 640, 134 Pac. 934; *Mosso v. E. H. Stanton Co.* 75 Wash. 220, L.R.A. 1916A, 943, 134 Pac. 941; *Northern P. R. Co. v. Myers-Parr Mill Co.* 54 Wash. 447, 103 Pac. 453; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Labee v. Sultan Logging Co.* 59 Wash. 341, 109 Pac. 1023; *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514.

Accumulative evidence will not warrant a new trial.

*McKilver v. Manchester*, 1 Wash. Terr. 256; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Benson v. Hamilton*, 34 Wash. 201, 75 Pac. 805; *State v. Underwood*, 35 Wash. 558, 77 Pac. 863; *Thayer v. Spokane County*, 36 Wash. 63, 78 Pac. 200; *Shannon v. Tacoma*, 41 Wash. 220, 83 Pac. 186; *Ronald v. Pacific Traction Co.* 65 Wash. 434, 118 Pac. 311; *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147.

**Parker, J.**, delivered the opinion of the court:

The plaintiff seeks recovery of damages which she claims resulted to her from the death of her hus-

band, caused by the negligence of the defendant in the operation of one of its street cars. A trial before the court and a jury resulted in verdict and judgment against the defendant, from which it has appealed.

Appellant operates a street railway in and between Aberdeen and Cosmopolis. On October 10, 1912, at 7:25 in the evening, respondent's husband, having fallen "in a heaped-up condition," as expressed by a witness, near the westerly rail of appellant's track leading from Aberdeen to Cosmopolis, was struck on his head by the lower step of one of appellant's cars, resulting in his death soon after. He was seen to fall in that position a few minutes before being struck by the car. The evidence indicates that he was very much under the influence of intoxicating liquor at the time. Whether his fall was caused by his intoxication or by one of his fits, which the evidence indicates he was in some degree subject to, is not clear; nor is it certain as to whether he was unconscious or unable, of his own volition, to extricate himself from his dangerous position before he was struck by the car.

There is apparently no uncertainty as to the time being 7:25 in the evening, since this was readily ascertainable by the regular running time of the particular car. It also seems certain that darkness had come some time before the accident occurred, and that the only light of any consequence was from the headlight of the car and comparatively small electric lights at street crossings some 300 feet apart. The accident occurred about midway between two of these street lights. The car was running south on a straight, level track, for a distance of 670 feet, before striking deceased. A plank road runs along the westerly side of the street, parallel with the car track, with a space of 43 inches between them. This plank road is 24 inches higher than the track, the space between being nearly filled with sawdust,

which slopes from near the surface of the plank road down to the ends of the ties of the track. The lower step of the car was 20 inches above the ties of the track, and extended about 25 inches out beyond the rails. From these facts it would seem that deceased's position by the side of the track can be determined with a considerable degree of accuracy.

The speed of the car when the motorman first saw deceased was from 13 to 15 miles per hour, which is not claimed to be an excessive rate of speed at that place. The motorman claims that he was not able to see deceased until within 30 feet of him, and that the car was stopped as quickly as possible thereafter. The car ran past deceased, after striking him, about two or three car lengths, before it could be brought to a stop. The motorman also claims that no portion of deceased's body was upon the track before being struck by the car. The ties of the track were not planked or graded over so as to make the space occupied by the track suitable for ordinary travel. Indeed, the street was not improved at all for ordinary travel, except by the plank road along which, evidently, all ordinary travel of the street proceeded. The neighborhood is an outlying district near the common corporate boundary of Aberdeen and Cosmopolis. The evidence tended to show that a person dressed as deceased was, and in his position at the side of the track, would not readily be seen by a motorman on an approaching car, even though such car were supplied with a strong headlight.

The principal claim of negligence made by counsel for respondent on the part of the motorman seems to be that he did not exercise due care in observing the track ahead of the car, and discover deceased at the side of the track in time to stop the car before striking him. We do not understand that there is any serious contention against the motorman's claim that he could not stop the car at the rate it was going within a

distance of 30 feet, nor that the speed of the car was excessive at that place. For the purpose of corroborating the motorman and showing that he could not see the deceased until within such a short distance that the car could not be stopped before striking him, and for the purpose of showing the greatest distance at which the deceased could be seen from the approaching car, having in view deceased's peculiar situation, the color of his clothes, and the nature of the sloping sawdust upon which he rested, counsel for appellant offered testimony of witnesses to an experiment had after the accident occurred, under substantially the same conditions as at the time of the accident. This offer of proof was rejected by the trial court, which ruling is claimed to be erroneous by counsel for appellant, entitling it to a new trial. A witness who had arrived at the place of the accident soon after it occurred, while deceased lay upon the plank road, very near where he had been struck by the car, was upon the witness stand when the offer of proof was made by appellant's counsel as follows:

Q. Suppose that a man during the night where it was dark, a man was crouched down between the plank roadway there and the rail, nearest rail, and he was crouched so that the lower step of the car would hit him in the head and he was dressed in dark clothes. . . . I will ask you if it would be difficult for a motorman to see a man under the circumstances I have named.

A. It would be, it would be rather difficult.

Q. Did you recently make a dummy man?

A. I did. . . .

Q. About how long ago was that?

A. A little over two weeks ago.

Q. I will ask you whether or not you placed that dummy between the plank roadway and the nearest rail of the car track at about the location that you saw this man at the time of his injury.

Mr. Cross: Same objection.



Court: I sustain the objection.

Mr. Bridges: In order that we may dispose of this matter now I would like to make an offer. . . . We offer to show by this witness that he, about two weeks ago, made a dummy in the form of a man, dressed as the deceased was dressed and that after night on an occasion substantially the same as the night of the injury he took this dummy and placed it on the sawdust between the railroad track and the plank roadway in the position and location that the deceased was at the time of his injury, and that after that was done, a car, the same car that was run at the time of the injury to the deceased, was started from Aberdeen: that witnesses occupied a position in the front portion of the car with the motorman with certain information given them concerning the dummy, given them in advance, and that they were on the car in front with the motorman, the motorman being the same motorman that was driving the same car which was in the same condition as it was at the time of the accident, and we offer to prove by this and other witnesses the result of that investigation, the result of what happened there,—we offer to prove it by this and other witnesses, parties who were standing with the motorman looking through the motorman's window as to what they could see and when, if at all, they did see this dummy object. We offer to show that the conditions were the same as at the time of the injury.

Mr. Cross: Objected to as incompetent, irrelevant, and immaterial.

Court: I will sustain the objection.

Mr. Bridges: Exception.

Mr. Bridges: Such would be your honor's ruling if those witnesses whom I have mentioned were called?

Court: I presume so.

Mr. Bridges: I don't want to keep them here if that is the situation.

Court: Yes.

Mr. Bridges: Exception.

This experiment occurred two weeks before the trial, and eight months after the accident. The ruling of the trial court, and argument of counsel for respondent in support thereof, do not point to any theory upon which the correctness of the ruling is rested other than the seeming assumption on the part of the trial court and counsel that there was an insufficient similarity of conditions attending the accident and the experiment, the result of which was proposed to be shown. Plainly, the language of the offer was not deficient in that regard. It may be that, had counsel for appellant been permitted to proceed, there would have been a failure to show such substantial similarity of conditions as to render testimony concerning the result of the accident admissible. On the other hand, the similarity of conditions might have been proven sufficiently to render testimony as to the result of the experiment admissible and very helpful to the jury in determining the question of the motorman's negligence in so far as his observation of the track ahead of the car is concerned. It seems quite clear to us that counsel for appellant were entitled to lay the foundation for offering testimony touching the result of the experiment. Yet, this is the very thing they were, by the ruling of the court, prevented from doing; which ruling seems to have no other foundation than the court's assumption that there was, in fact, no sufficient similarity of circumstances attending the accident and the experiment. The real error of the court lies in the fact that counsel for appellant were not permitted to introduce evidence touching this preliminary question; while the court, if the theory of counsel for respondent be correct, was apparently deciding the question of counsel's right to prove the result of the experiment. The court was not yet called upon to rule upon the ad-

missibility of evidence touching the result of the experiment, and it seems clear that the offer of proof touching the preliminary question of similarity of conditions was material and relevant to that question.

Evidence—  
similarity of  
conditions of  
experiments.

We are of the opinion that the ruling of the court was clearly erroneous in so far as it excluded proof of the preliminary question of similarity of conditions. In its final analysis, this would seem to be decisive of the real question here presented; but in view of the fact that a new trial must follow because of this error, we deem it proper to make some further observations.

Counsel for respondent invoke the general rule that the admission of evidence as to the result of experiments of this nature is within the discretion of the trial court, and argue that there has been no abuse of such discretion upon the trial of this case. It can hardly be seriously argued that this rule of judicial discretion is applicable to the admissibility of proof of similarity of conditions attending the accident and the experiment, in the same sense that it is applicable to the question of the *sufficiency* of such preliminary proof

—discretion as  
to admission.

of similarity to render evidence of the experiment admissible. But counsel for respondent seem to argue that, because of the claimed involved conditions attending the accident, the court did not abuse its discretion in deciding, as counsel seem to assume, that it was impossible to reproduce such conditions with sufficient similarity to render evidence of the result of the experiment admissible. We are unable to see any other theory upon which the ruling of the court can be rested, in view of the fact that it declined to hear evidence upon the preliminary question of similarity of conditions. Counsel for respondent call our attention to *Halverson v. Seattle Electric Co.* 35 Wash. 600, 77 Pac. 1058, where the experiment

involved was a demonstration to show the movement and swinging effect of a street car operated upon a curve. The court there stated the attempted proof of similarity of conditions, and its holding upon the trial court's exclusion of the evidence as to the result of the experiment, as follows:

"Appellant next contends that the court erred in refusing to permit certain witnesses to testify to the results of experiments made by them in running the same car upon which the accident occurred through the same curve. The witnesses showed that these experiments were made under different conditions from those existing at the time of the accident. They were made at a different time of day, when the electric current would have less load and, therefore, more power. The experiments were also made with no load upon the car, and upon a dry rail, while the car at the time of the accident was heavily loaded with passengers and the rails were wet. . . .

"The similarity of the circumstances and conditions must be left to the sound discretion of the trial court, and determined by him, subject to review only for abuse. Where the conditions and circumstances are so different or dissimilar as to probably bring about different results, as they evidently were in this case, it is not an abuse of discretion to exclude the results of the experiments."

Manifestly, we have no such situation here. Had counsel been permitted to proceed, it is true they might have failed in their proof of similarity of conditions, as in that case; but, clearly, had they proved similarity of conditions according to—  
experiment—  
length of view  
of person  
beside track.  
their offer, they would have been entitled to show the result of the experiment. Counsel for respondent also rely upon the decision of this court in *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752, where one of the questions involved was the

quantity of light upon a certain portion of a sidewalk where an accident occurred. Aside from the citation and review of some authorities, the following is all that was there said upon the question presented:

"The appellant offered testimony tending to show that the lamp at the intersection of Fourth street and Columbia street on the night preceding the trial of this action was identical with the lamp at the same point on the night of the accident; that the voltage passing through the arc light system on the night of the accident was greater than the voltage on the night preceding the trial; and that on the night preceding the trial witnesses could readily read newspapers on the sidewalk at the place of the accident by the light of the lamp in question. The appellant further offered to prove by an electrical expert the quantity of light in candle power cast on the sidewalk at the place of the accident on a dark and cloudy night. These several offers were rejected, and the ruling of the court is assigned as error. Experiments made out of the presence of the court are competent evidence in a proper case, but before they can be admitted, it must appear that they were made under substantially the same conditions as existed at the time of the transaction in question, and the trial court is necessarily vested with a large discretion in determining the preliminary questions of fact upon which their admissibility depends.

"While we are not prepared to say that it would have been error to admit proof of these experiments, we do not think that the quantity of light given out by an arc light at all times and under all conditions is so certain and unvarying as to render the ruling of the court erroneous, or manifest an abuse of sound judicial discretion."

We do not think that case furnishes an answer to the problem here involved. That opinion fur-

nishes us but little light upon the nature of the offer of proof there made. However, a reference to the original briefs in that case indicates that it consisted of an offer of the testimony of witnesses touching the fact that the electric light involved was located the same at the time of the accident as at the time of the experiment, and that it was supplied at both times with current of the same voltage, as shown by the records of the light company. But it does not appear that there was any testimony of witnesses offered who saw the light and its effect both at the time of the accident and at the time of the experiment. We deem it a sufficient comment upon that decision to say that, upon its face, it seems to indicate the extreme limit of the exercise of the trial court's discretion in excluding the offered evidence, and we do not regard it as controlling beyond its application to the particular facts there involved, and as a statement of the general rule of judicial discretion touching the admission of evidence of the result of experiments.

In view of the fact that the purpose of the experiment here involved was to determine the result of conditions similar to those existing at the time of the accident, with a view to having witnesses testify as to the greatest distance at which deceased could have been seen from an approaching car, it was only necessary that such conditions be substantially reproduced in so far as

—reproduction  
of conditions—  
sufficiency.

they related to that particular question. As is said in 1 Wigmore on Evidence, § 442: "This similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question." Now, had counsel for appellant been permitted to prove, and been able to prove, substantial similarity of conditions according to this rule, it surely would have been an abuse of dis-

cretion on the part of the trial court to deny them the privilege of producing evidence in the form of testimony of witnesses who were present at the time of the experiment and thereby became enabled to testify as to the greatest distance at which the deceased could have been seen from the approaching car. Clearly, there is nothing inherent in the conditions indicated by this record that renders it impossible, or even improbable, that sufficient similarity of conditions could be reproduced to render admissible evidence of the result of the experiment.

Counsel for respondent seem to proceed upon the theory that a question of this nature is practically beyond review here because of the claimed large discretion vested in the trial court. A review of the authorities, however, will disclose many cases where trial courts have been reversed because of an abuse

Appeal—  
exclusion of  
evidence of  
experiments—  
discretion.

of their discretion in excluding such evidence. While, as we have already noticed, this is not

the exact question before us, yet in view of what will likely occur upon new trial, we deem it appropriate to notice a few of the decisions bearing upon this question. In *Gambrill v. Schooley*, 95 Md. 260, 63 L.R.A. 427, 52 Atl. 509, involving an experiment as to the distance at which a human voice could be heard under certain conditions, the court said: "The nineteenth and twentieth exceptions relate to the exclusion of evidence offered by the defendant and by Sutton, a civil engineer, who had surveyed the premises where the alleged slanderous words were spoken, that there was no change in the topography or circumstances and that they had experimented with the voice to ascertain if the voice of a person standing where the defendant is said to have stood when the words charged were uttered, and speaking in a loud tone, could be heard by one standing where the plaintiff is said

to have stood at that time and also where Brown and wife are said to have stood at the same time. The question was considered in *Richardson v. State*, 90 Md. 117, 44 Atl. 999, 15 Am. Crim. Rep. 222, and similar experiments as to the range and accuracy of vision were there held admissible, and that case was cited and relied on in the recent case of *Keyser v. State*, 95 Md. 96, 51 Atl. 1057. We think this evidence should have been received, the defense being that the words were not spoken."

The decision in *Richardson v. State*, 90 Md. 109, 44 Atl. 999, 15 Am. Crim. Rep. 222, referred to in this quotation, involved an experiment for the purpose of determining the ability of one person to see another under certain conditions. In *Wilson v. State*, — Tex. Crim. Rep. —, 36 S. W. 587, dealing with the problem of an experiment as to how distinctly the human voice could be heard under certain conditions, the court said: "Two theories are presented by the state: First, that the appellant intentionally killed Mrs. Ratliff; and, second, that with his malice aforethought he shot at the husband of Mrs. Ratliff, and accidentally killed his wife, the deceased. The testimony of one Hanson, taken before the examining court, was introduced in evidence by the state. He swore that he heard the appellant use certain words, speaking to the deceased, Mrs. Ratliff, at the time of the shooting; to wit, 'I will shoot through you. I will shoot you both.' It was admitted that Hanson was 100 yards away, and that the wind was blowing the sound from, and not towards, him. To test whether from his position he could have heard the words to which he testified, a number of persons went upon the ground on a day when conditions as to wind, etc., were the same, and under practically the same conditions. These parties were placed in the position of the witness Hanson and others at the well, at which point the shooting occurred, and the

words ascribed to the appellant were spoken by those at the well in different ranges of voice from the lowest to the highest; and it was proposed to be proved by these parties, and appellant alleges could have been proved by them, that they did not hear such words so spoken at the well, at the position occupied by Hanson, and that their hearing was good, which proof was rejected, and appellant excepted. The question before us is, Is such testimony admissible? It was. This precise question was before the supreme court of Ohio in *Smith v. State*, 2 Ohio St. 511, and it was there held that such testimony was admissible. The question came before the supreme court of Tennessee in *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128, and there such testimony was held admissible."

In *Johnson v. Chicago, R. I. & P. R. Co.* 80 Kan. 456, 103 Pac. 90, dealing with an experiment touching the ability of persons to both see and hear under certain conditions, the court said: "A witness familiar with the topography of the region was asked if he had made tests to determine whether the noise of trains coming toward the cut from the southwest would be deadened by the cut and the surroundings to a man on the highway. An objection was sustained, and the plaintiff complains of the ruling. The evidence sought was competent upon proof that the place was the same, and that the test was made under the same or similar circumstances. The rule is thus stated in *Atchison, T. & S. F. R. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191, approving an earlier statement made in *Missouri P. R. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554: 'If the conditions at the crossings were such that the statutory or ordinary signals were insufficient, then other and more effective warnings should have been given. It was competent to show by witnesses that had made a test at the same place, and under

substantially similar circumstances, how far the whistle or bell of trains could be heard, and the effect of the cut and obstructions in deadening the sounds of approaching trains.' Page 526. The same rule is applicable to evidence offered to show that the smoke and steam from engines in the cut could not be seen at the crossing. The following question was asked of a witness familiar with the locality: 'State whether or not you ever made tests to ascertain whether the smoke and steam emitted by a train can be observed by a person standing in the highway over the culvert described about 36 feet east of the crossing, if the train is running fast, on a clear day, and wind is blowing from the north.' Atmospheric conditions, the coal used, the time of its application to the fire, and other circumstances, would affect the weight of such testimony, but would not make it incompetent. The result of tests or experiments made under proper conditions is often admissible as tending to prove a fact in issue. *Gillett*, *Indirect & Collateral Ev.* § 66; *Innis v. The Senator*, 4 Cal. 5, 60 Am. Dec. 577; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Brown v. Sioux City & P. R. Co.* 94 Iowa, 309, 62 N. W. 737; *State v. Asbell*, 57 Kan. 398, 46 Pac. 770. In offering such testimony care should be observed to show that the tests were made within the rule stated as to place and circumstances, and the court will not allow the evidence unless these requirements are observed."

See also *Chicago, St. L. & P. R. Co. v. Champion*, — Ind. —, 23 L.R.A. 861, 32 N. E. 874; *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128; *Fisher v. Travelers' Ins. Co.* 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246; *Woelfel Leather Co. v. Thomas*, 68 Ill. App. 394; *Smith v. State*, 2 Ohio St. 511; *Clark v. State*, 38 Tex. Crim. Rep. 30, 40 S. W. 992. In the last cited case, the court made some very pertinent observa-

tions, as follows: "There are some difficulties attending the admission of this character of evidence. In the first place, in making an experiment some difficulty will be encountered in making it under the same conditions surrounding the original transaction, but it does not occur to us that that should be a reason why this character of testimony should be excluded. Of course, if the evidence regarding an experiment showed one made under circumstances and surroundings so dissimilar to the original transaction as that it would not shed any light upon it, there would be no error in its exclusion. See *State v. Fletcher*, 24 Or. 295, 33 Pac. 575. But if the evidence shows that the experiment was made under circumstances similar, or approximately similar, to those which surround the original transaction, and such experiment would serve to shed any light upon that transaction, we can see no reason for the exclusion of such experiment, although it might not have been made under exactly similar conditions, as attended the original transaction. The dissimilarity would not exclude, but would go to its weight before the jury. Another difficulty in connection with such testimony is that evidence of experiments made are collateral in their nature, and are liable to consume the time of the court in a trial of such collateral issues. It has been held, on this account, that the court will not stop a case in order that an experiment be made. *People v. Levine*, 85 Cal. 39, 24 Pac. 631, 22 Pac. 969. And it has been urged, as it is urged in this case, that the evidence was properly excluded; that such evidence is not admissible on account of the danger of fabrication. But in our opinion this furnishes no good reason for its exclusion. All evidence, we might say, can, under circumstances, be fabricated; but the liability of fabrication rarely, if ever, alone, furnishes a good reason for the exclusion of evidence. Upon principle and authority, this character of

testimony, where the experiment appears to have been made under conditions similar, or nearly similar, to those which attended the original transaction, and where such experiments would tend to shed any light upon said original transaction, is admissible."

In every one of the above noticed cases, the trial court was reversed because of its rejection of offered evidence as to the result of experiments had under substantially similar conditions as attended the original occurrence. We have quoted only from those involving hearing and seeing, but the others are equally applicable in principle. Of the decisions wherein trial courts have been affirmed, in receiving such evidence, the following, to which many more might be added, are of interest: *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; *State v. Woodrow*, 58 W. Va. 527, 2 L.R.A. (N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 Ann. Cas. 180; *Tackman v. Brotherhood of American Yeoman*, 132 Iowa, 64, 8 L.R.A. (N.S.) 974, 106 N. W. 350; *Augusta R. & Electric Co. v. Arthur*, 3 Ga. App. 513; *Brooke v. Chicago, R. I. & P. R. Co.* 81 Iowa, 504, 47 N. W. 74; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Beckett v. Northwestern Masonic Aid Asso.* 67 Minn. 298, 69 N. W. 923; *Young v. Clark*, 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315.

While due care should be exercised by the trial court in seeing that substantial similarity of conditions is proven as a prerequisite to admitting the evidence as to the result of an experiment, care should also be exercised not to reject such evidence when it is manifest that it will tend to shed light upon the original transaction, especially when the real question is circumscribed by such narrow limits as in this case; it being simply as to the distance at which a person upon an approaching car could see deceased

at the side of the track. It surely would not be very difficult to reproduce and show the similarity of conditions as to position and appearance of deceased by the track, as to the degree of natural darkness, and the quantity of artificial light present, and as to general surrounding conditions, to render the result of such an experiment of material aid to the jury in determining this, which became largely a controlling question in the case. It is worthy of note that the motorman's evidence stood alone upon this question. It was highly important that additional evidence thereon, if obtainable, should be presented to the jury.

We believe the authorities warrant the assertion that, while appellate courts will not lose sight of the general rule that the admission or rejection of evidence of the result of experiments is largely discretionary in a trial court, the exercise of such discretion will, upon appeal, be viewed somewhat more critically when such evidence is rejected than when it is received. This would seem to be so because of the fact that the admission or rejection of such evidence, in so many instances, has to do more with its weight than with its relevancy, strictly speaking.

Counsel for appellant contend that the trial court erred in giving certain instructions to the jury, and in refusing to give others which were requested, touching the claimed contributory negligence of deceased and the motorman's duty, in the light of the last clear chance doctrine. In view of the seeming uncertainty as to the mental condition in which deceased was just prior to being struck by the car, and the fact that, upon a new trial, more light may be thrown upon that question by the evidence, we deem it unnecessary to do more than refer counsel and the court to the recent decisions of this court in *Herrick v. Washington Water Power Co.* 75 Wash. 149, 48 L.R.A.(N.S.) 640,

134 Pac. 934; and *Mosso v. E. H. Stanton Co.* 75 Wash. 220, L.R.A. 1916A, 943, 134 Pac. 941. These decisions have both been rendered since the trial of this case, and we think will furnish all necessary light upon the questions involved in appellant's claim of error touching the instructions and requests therefor which are likely to arise upon a new trial. We therefore pass these claimed errors without discussion. We conclude that the judgment must be reversed, and appellant granted a new trial.

It is so ordered, and the cause remanded to the trial court for further proceedings.

Crow, Ch. J., Fullerton, Morris, and Mount, JJ., concur.

#### NOTE.

The various questions involved in the reported case (*AMSBARY v. GRAYS HARBOR R. & LIGHT CO.* ante, 1) as to the extent to which the admissibility of evidence of experiments is affected by the degree of correspondence between the conditions under which the experiments were made and those attendant upon the occurrence to be investigated; and the extent to which the decision of the trial court on the question will be reviewed by the appellate court,—are dealt with in the annotation on page 18, post.

The reported case is of interest, not only as being a typical case of its kind, but also as the only case which expressly points out that while the admission of evidence of experiments is largely in the discretion of the trial court, such discretion does not extend to a refusal to hear evidence upon the preliminary question of similarity of conditions.

Other decisions as to the admissibility of experiments of the kind involved in the reported case may be found in subdivision II. of the annotation above referred to, under the catch line "Visibility," subcatch line,—"of persons on or near track."

GEORGE KOHLHAGEN, Respt.,  
v.  
W. W. CARDWELL and Wife, Appts.

*Oregon Supreme Court (Dept. No. 2) — October 7, 1919.*

(— Or. —, 184 Pac. 261.)

**Evidence — similarity of conditions.**

1. The conditions in the experiment and in the transaction sought to be illustrated do not have to be exactly alike to warrant the admission of experimental evidence.

[See note on this question beginning on page 18.]

— as to delivery of hogs — witness's failure to see them.

2. Upon the question whether or not certain hogs were delivered in a butcher shop at a particular time, the bookkeeper may be permitted to testify that they could not have been so delivered without his seeing them, as a conclusion of fact.

[See 11 R. C. L. 564.]

**Appeal — evidence of expert — absence of effect — influence on jury.**

3. The admission of evidence of an expert having no logical effect in the case will not cause a reversal, on the theory that the jury, not being able to figure out for itself what benefit it is, would take it for granted that it was

beneficial, since the witnesses would not otherwise have been called.

[See 2 R. C. L. 247.]

**Evidence — experiment — loading hogs.**

4. Upon the question whether or not a given number of hogs were delivered in a wagon loaded as claimed, evidence is admissible of experiments in loading hogs in wagons of similar dimensions.

[See 10 R. C. L. 1002.]

**Costs — mileage of unsubpoenaed witnesses.**

5. The mileage within the state of witnesses voluntarily attending upon request, from another state, may be allowed as costs although they were not subpoenaed.

**APPEAL** by defendants from a judgment of the Circuit Court for Douglas County (Hamilton, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

**Statement by Bennett, J.:**

This is a very remarkable and unusual case. The plaintiff sues upon a promissory note. The defendants admit the note, but claim to have paid the same by the delivery of thirty-six head of hogs, weighing 7,772½ pounds, at the market price of 15 cents per pound, amounting to the total of \$1,165.87. The plaintiff denies this payment in toto, and denies that he ever received thirty-six hogs, or any hogs at all, from the defendant at the time in question, or upon the debt in question.

The defendant is corroborated in his claim that he delivered the hogs by his son and his wife, and by the testimony of two hired men, who

testified that they helped to butcher the hogs and haul them to Roseburg and deliver them to plaintiff. In addition to this, the defendant's story is corroborated, to some extent, by the testimony of people who lived along the road between defendant's ranch and Roseburg, and who claimed to have seen him hauling hogs in the direction of Roseburg at about the time in question. The defendant claims to have delivered the hogs at plaintiff's butcher shop in Roseburg, just at noon, and at a time when the plaintiff himself was not actually present. He claims to have delivered the hogs to James Kookan and George Hoefling, who were employees of



the plaintiff, working at the butcher shop in question. Defendant also testifies that one Andy Morgan, who was working for him at the time in his prune orchard, assisted in butchering the hogs, and rode with him on the wagon which he was driving to town, and helped to deliver the hogs to the plaintiff.

On the other hand, the plaintiff testified that he never received any hogs from the defendant on the debt, and plaintiff's books fail to show that any were received. Kooken and Hoefling, the two employees of plaintiff to whom defendant claims to have delivered the hogs, testify positively that no hogs were delivered. These witnesses are corroborated by Fred Neurither, who worked in the back of plaintiff's shop, and Alice Mann, the bookkeeper, and also by plaintiff's daughter, Florence Kohlhausen. All of these witnesses testified that no hogs were delivered by Cardwell. In addition to this testimony, the plaintiff, in this last trial, offered the testimony of Andy Morgan, one of the employees of the defendant at the time the hogs are alleged to have been butchered on his ranch, and whom, the defendant testified, assisted in the butchering and in transporting the hogs to Roseburg, and delivering them there to the plaintiff. This witness testified positively that he was at work at the defendant's ranch at the time in question, but that he did not assist in butchering any hogs there, or in transporting them to Roseburg, or delivering them to the plaintiff. In fact, he testified that no hogs were butchered at defendant's ranch at or about that time.

At the trial there was a verdict for the plaintiff. There are only two claims of error occurring at the trial, both of which refer to the admission of testimony.

When Alice Mann, plaintiff's bookkeeper, was on the stand, having testified to the particulars in regard to her presence at the shop that day, she was asked the following question:

Q. Now, would it be possible for thirty-six head of dressed hogs to have come into the shop, on the 1st day of March, 1917, or about that time, before you left on March 7th, and you not know it?

The objection to this question was overruled, and the witness answered:

A. It would be impossible for them to come, and me not see them when I came back. I would see even two or three hogs, and certainly could not overlook thirty-six.

This was one of the errors complained of. The other had reference to certain experiments as to the space occupied by hogs in the wagon. This will be noticed more particularly in the body of the opinion.

Messrs. Elbert B. Hermann and Rice & Orcutt, for appellants:

Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible where the conditions attending the alleged occurrence and the experiment are not shown to be similar.

Leonard v. Southern P. Co. 21 Or. 555, 28 Pac. 884; Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; Chicago, St. L. & P. R. Co. v. Champion, 9 Ind. App. 511, 53 Am. St. Rep. 358, 36 N. E. 221, 37 N. E. 21; Rowe v. Northport Smelting & Ref. Co. 35 Wash. 101, 76 Pac. 529; 10 R. C. L. § 190, p. 1002; Spires v. State, 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214; Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681; 3 Jones, Ev. § 410, p. 56.

Where the facts in controversy are capable of being detailed or described, and the jury able to understand them and draw conclusions from them, it is error to permit the witness to state his opinion.

State v. Mims, 36 Or. 315, 61 Pac. 888; Nutt v. Southern P. Co. 25 Or. 291, 35 Pac. 653.

Mileage will not be allowed for witnesses beyond the boundaries of the state.

Crawford v. Abraham, 2 Or. 163.

Where objection is made to a claim for the fees of a witness who has voluntarily attended the trial from a distance of more than 20 miles, the claimant must file an amended verified

statement showing the facts as to the materiality of the testimony, the necessity of an oral examination, the fact of voluntary attendance, and the distance traveled.

Spencer v. Peterson, 41 Or. 257, 68 Pac. 519, 1108.

Mr. B. L. Eddy; for respondent:

Evidence of the experiments as to loading dressed hogs was properly admitted, as tending to show the impossibility of loading twenty-four head of the hogs into the Good rack.

Hinkel v. Oregon Chair Co. 80 Or. 404, 156 Pac. 438, 157 Pac. 789; Leonard v. Southern P. Co. 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887; Chicago, St. L. & P. R. Co. v. Champion, 53 Am. St. Rep. 375, note; 5 Enc. Ev. 473; Peterson v. Standard Oil Co. 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; 10 R. C. L. p. 1001, § 188.

The conditions of the experiment were substantially the same as in the case claimed, and this is all that is required.

Hinkel v. Oregon Chair Co. 80 Or. 404, 156 Pac. 438, 157 Pac. 789; Leonard v. Southern P. Co. 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887; Maynard v. Oregon R. & Nav. Co. 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983; Fisher v. Travelers' Ins. Co. 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246; Eidt v. Cutter, 127 Mass. 522.

The admission of evidence of an experiment lies peculiarly within the discretion of the trial court, and its action will not be disturbed except for clear abuse of discretion.

Peterson v. Standard Oil Co. 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; 5 Enc. Ev. 473; Leonard v. Southern P. Co. 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887.

The testimony of the bookkeeper that the hogs could not have been delivered as claimed without her knowing it was admissible.

5 Enc. Ev. 691; 10 Enc. Ev. 478; Territory v. Clayton, 8 Mont. 1, 19 Pac. 293; Bruchman v. United States, 11 Ariz. 178, 89 Pac. 413; Atlanta Consol. Street R. Co. v. Beauchamp, 93 Ga. 6, 19 S. E. 24, 11 Am. Neg. Cas. 343; Barr v. Post, 56 Neb. 698, 77 N. W. 123; Innis v. The Senator, 4 Cal. 5, 60 Am. Dec. 577; First Nat. Bank v. Fire Asso. of Philadelphia, 33 Or. 180, 50 Pac. 568, 53 Pac. 8; Multnomah County v. Willamette Towing Co. 49 Or. 204, 89 Pac. 389.

A witness residing outside the state and attending the trial at the request

of a party is entitled to single mileage between the point on the state line where he enters the state and the place of trial.

Crawford v. Abraham, 2 Or. 163; Egan v. Finney, 42 Or. 599, 72 Pac. 133; 15 C. J. 128, § 280; State ex rel. Suter v. Wilder, 196 Mo. 418, 95 S. W. 396, 7 Ann. Cas. 158.

Upon the trial of objections to cost bill, the court will look at the whole record, if necessary.

Egan v. Finney, 42 Or. 599, 72 Pac. 133.

Bennett, J., delivered the opinion of the court:

We think there was no error in permitting the witness, Alice Mann, to testify as to whether or not the hogs could have been in the shop without her seeing them. This, of course, was in some sense a conclusion; but whether they could have been there and escaped her observation depended on a great number of small details—the general course of business, the place where hogs were hung, the arrangement of the building and position of windows and doors therein, her own position in the building, her own habits of observation and alertness of mind, and the extent to which she kept the business under her personal observation. These were all matters that could hardly have been accurately and fully reproduced to the jury. Under such circumstances, the witness is permitted to state her conclusion, which is treated as a conclusion of fact under the authorities.

Evidence—as to delivery of hogs—witness's failure to see them.

In Lawson on Expert and Opinion Evidence, p. 509, the author quotes with approval from the opinion in the case of Cavendish v. Troy, 41 Vt. 107, as follows: "Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of a witness to a conclusion are incapable of being detailed and described, so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add

his opinion, or the conclusion of his own mind."

In the Vermont case quoted from, the witness was being interrogated as to the residence of another party in a certain town, and was asked:

Q. From your opportunities of knowing, as you have now stated them, do you think it possible for Thomas to have lived in Jay that year, and you not have known it?

And the question was held proper.

In Rogers on Expert Testimony, p. 9, § 4, it is said: "Witnesses are allowed to express opinions based on facts within their personal observation, when the facts cannot be so described as to enable another to draw any intelligent conclusion therefrom."

It is also claimed that there was error in permitting the evidence of certain witnesses for the plaintiff in regard to experiments made by them in loading hogs in a wagon. The defendant had testified that the hogs delivered by him were carried in two wagons, twelve in a small or ordinary wagon, which, however, had a bed 16 inches longer than an ordinary wagon, and twenty-four of them in a large wagon with a rack. This rack, according to the testimony of the defendant, was 14 feet long and about the width of an ordinary wagon, and the rack on this wagon was 3 feet, 6 inches, high. There is a discrepancy between the testimony of this witness, as to the height of the wagon, and that of Dug Good, from whom the wagon was obtained, who testified that it was only 32, instead of 42, inches high. The testimony of the defendant is to the effect that the hogs were put in the wagon in layers, three in each layer, lengthwise across the bed of the wagon, and then others were piled in upon these in the most convenient way. According to the testimony of the defendant, the hogs taken in by him would average about 216 pounds in weight. The experiments made by the defendant were with an ordinary wagon, and the hogs weighed

219 pounds each, and the experiment was made with eight hogs.

In the matter of the experiment, there was no attempt to fill the wagon, which was only 29½ inches high, and the only effect of the testimony was to show about what space such hogs would occupy in a wagon. The testimony was to the effect that three such hogs could be laid lengthwise in a tier across the wagon. This was in accordance with the testimony of the defendant, who testified that the hogs transported were laid in the wagon in that way. The testimony was that two tiers of the hogs were 10½ feet long, and that each hog was 16 inches one way and 12 the other, and the three hogs in each row filled the bed up the full width, and when one hog was laid sideways across these, it filled the bed up to within 6 inches of the top. This testimony does not seem to have had much weight, and it probably did not influence the jury at all. Indeed, in some respects, as we have seen, it corroborated the testimony of defendant. If the large rack was 42 inches high, as testified by defendant, the testimony rather tended to show that twenty-four hogs could have been loaded in such a rack 14 feet long.

It is practically conceded in the brief of the learned attorney for the defendant that the evidence had no logical effect in the case; but it is urged that "the jury would naturally conclude that this evidence must be beneficial to the respondent, or he would not have called the witnesses, and, being unable to figure out for themselves what benefit it was, took it for granted that it was beneficial, and that these men would not have come in and testified unless their evidence was beneficial to the respondent."

We cannot assume that the jury were so lacking in intelligence as to be carried away and influenced by such artificial and illogical considerations. On the contrary, we must presume that they were men of ordi-

nary and usual intelligence, and that they would decide the case according to the evidence, without reference, to the mere number of witnesses called by the respective parties.

Appeal—  
evidence of  
expert—absence  
of effect—influence  
on jury.

The questions involved in this case were peculiarly for the jury, involving as they did so much of conflict in the direct testimony of the witnesses, and so many conflicting circumstances corroborating each side. The jury heard and saw the witnesses, and could compare their testimony and judge of their credibility. The case seems to have been fairly tried, as the record is unusually free even from claim of error. Even if we thought that the testimony as to the loading of these hogs was, on the whole, inadmissible, it would seem a trifling thing upon which to reverse a case which had otherwise been fairly tried. It is so unlikely and improbable that the evidence substantially affected the verdict, and it is so minor and unimportant in its character, we should hesitate to reverse the case upon that ground.

Besides, we think the evidence, so far as it went and so far as it had any effect at all, was admissible. It only went to the extent of showing what space in an ordinary wagon box eight hogs would fill. The hogs were practically the same size as the average of the hogs hauled by the defendant. The average of one lot was 215 pounds and a fraction over, and the other 219 pounds and a little over, or about 4 pounds' difference. This was about as close as was possible, and the wagon boxes were practically the same in width. The length of the wagon box, or its height, did not cut any figure so far as the experiment went, for it was not claimed that the hogs loaded on experiment filled the whole space of the wagon bed either as to length or height, so the only effect of the experiment was to show the space

Evidence—  
—experiment—  
loading hogs.

occupied by each hog, the number that could be put in a tier across the bed, and the length of two tiers of such hogs in the bed. For these measurements the conditions of the experiment were almost exactly similar with the conditions as to the hogs loaded by defendant. As we have already said, the evidence certainly did not go very far, and probably did not at all contradict the evidence of the defendant. Nevertheless, it might assist the jury somewhat, in arriving at a conclusion as to how many hogs could be loaded in such wagons, to know how much space would be taken by such a hog.

The conditions do not have to be, as we understand it, exactly alike, in order to sustain the admission of the experimental testimony. Such testimony is largely in the discretion of the court, and it is only necessary that the facts of the experiment be reasonably similar to those in the main contention, and not misleading in their character. In one of the Lake Labish Cases (Leonard v. Southern P. Co. 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887), the defendant contended that the fall of the bridge and the ensuing wreck were caused by someone having placed a loose rail across the rail of the defendant's track. The plaintiff, in rebuttal, produced a loose rail at the trial, and a car wheel, and undertook to show by experiment that the marks on the loose rail introduced by defendant could not have been caused in that way. The conditions were not exactly the same. The bottom rail was loose, instead of being fast to the track, and the wheel offered in evidence was only 26 inches, whereas the wheel of the locomotive was 33 inches, in diameter. It was urged that the conditions were not sufficiently similar to justify the introduction of the experiment in evidence. Mr. Justice Lord, delivering the opinion of the court, said: "In all cases of this sort, very much must necessarily be left to the dis-

—similarity of  
conditions.

cretion of the trial court; but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with."

In *Davis v. State*, 51 Neb. 301, 70 N. W. 984, there was a controversy as to whether or not the defendant could have unscrewed certain bolts, and drawn the spikes, and torn up the track with a monkey wrench and clawbar offered in evidence. The place in question was on a trestle, and the state was permitted to offer evidence as to experiments in tearing up a track at another place on the tracks of defendant, where the track ran along the ground and not on a trestle. The court held the evidence admissible, saying: "It was for the jury to consider the place where the displacement of the fixtures occurred, and the place where the experiment was made, and then to give such weight to the testimony of the state's witness who made the experiment as they thought it deserved."

In *Sonoma County v. Stofen*, 125 Cal. 32, 57 Pac. 681, the county treasurer, being sued for a balance of county money in his hands, claimed that he had been robbed of the money, and that the robber had knocked him down and left him unconscious, and locked him in the vault, where he remained for a number of hours. The vault was in his office, and was connected by doors with the sheriff's office in another part of the building. He claims to have kicked violently against the door after he became conscious, and made all the noise he could in that way. The state offered evidence of witnesses who had made experiments by kicking at the door in the vault, and the testimony of other witnesses, in the sheriff's office and other parts of the courthouse, who had heard the sound made in the vault. There had been some changes in the building, and it was not shown that the climatic or atmospheric conditions were the same. It was urged that the conditions

were not sufficiently similar to justify the evidence of the experiment. The court held otherwise, saying: "Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are, as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible; but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no causal operation upon the result."

The authorities are not very definite as to just how closely similar the conditions of the experiment must be to the facts in contention, in order to make the experiment admissible. We think, however, a fair statement of the rule would be that if the experiments are not likely to be misleading to the jury in any particular, and are under conditions similar, so that they would be of assistance to the jury in arriving at a correct verdict, the evidence is admissible.

We think the experiment in this case came within this rule. The hogs were practically of the same size as the average of those shipped by the defendant, and the wagon box was a standard wagon box in each case. These were the important conditions for this experiment, as far as it went. It is true that the wagons were not of the same length, but that fact was in no way misleading to the jury, for the difference was in evidence before them, and there was no attempt on the part of the plaintiff to show any more than the mere fact of how much space in length and in width the two tiers of hogs took and the height of such tiers. This was as far as the experiment went, and the length of the wagon box, or even its height, did not enter into the question at all. We think, therefore, the admission of the testimony in regard to these experiments was

within the sound discretion of the court.

The only other question involved refers to the taxation of costs. The plaintiff in his cost bill included mileage for the witnesses Kooken, Hoefling, and Morgan from the place where they entered the state line. These witnesses resided out of the state of Oregon, one at Seattle, Washington, one at Pocatello, Idaho, and one in Massachusetts. They were not subpoenaed, but came as witnesses at the request of the plaintiff. It is stipulated that they actually traveled the miles claimed from the state line to Roseburg, the place where the trial was held. It is claimed on behalf of the defendant that, as these witnesses did not reside within the state of Oregon, and were not subject to subpoena in this state, and as the court did not and could not effectively order their personal attendance, the plaintiff is not entitled to recover mileage for such witnesses.

We think the question is concluded by the principles announced and the reasoning in the cases of *Crawford v. Abraham*, 2 Or. 166, and *Egan v. Finney*, 43 Or. 599, 72 Pac. 133. In the *Crawford* Case it is said: "Mileage will not be allowed for witnesses beyond the boundaries of the state."

It is also said in that case: "The attendance of witnesses may be procured by request of parties, or by agreement; and the party so liable may recover disbursements for proper mileage and attendance. The statutory means of compelling the attendance of witnesses is by subpoena duly served; but we are at a loss to see how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary, who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do

no more than procure the attendance of the witness."

In this case the witnesses might unquestionably have been subpoenaed at the state line and compelled to attend, and in that event it seems clear that they would have been entitled to their mileage, from the state line, and, as is said in the *Crawford* Case, the defendant could lose nothing by the fact that they were not regularly subpoenaed. In *Egan v. Finney*, supra, the court held that the witnesses in question were not properly subpoenaed. One of them had come a long distance from Baker county. The court said: "These witnesses attended, however, in pursuance of a request, and, as the court found that their testimony was 'material, relevant, and competent,' they are entitled to single mileage and per diem, if their oral examination was important and desirable. . . . The issue in this suit involving an inquiry as to angles, lines, courses, and distances, an examination of the transcript, in the light of the maps introduced in evidence, shows that the oral examination of these witnesses was important and desirable. They are, therefore, entitled to single mileage."

These decisions establish the rule that a party may recover single mileage for witnesses who reside in some other county of the state, where their oral testimony is desirable, even although they may not have been regularly subpoenaed or served with an order of the court, and it is fully established in the *Egan* Case, as we think, that the court may look to the whole record as to the necessity and desirableness of securing the attendance of the witnesses.

It is true that in neither of these cases does it appear that any of the witnesses resided outside of the boundaries of the state, but in this regard we cannot see any distinction between the case of a witness who resides in Baker county, and one who comes across the state line into Baker county from another

state; in the latter case they are subject to a subpoena as soon as they cross the state line, and in neither case is the adverse party in any way prejudiced, or his costs increased, by the fact that they were not regularly subpoenaed and compelled to attend.

In this case, as we have already seen, it appears from the record that there was a very great conflict between the witnesses for the plaintiff and defendant on the vital point in the case. We think that, if there ever was a case where it was im-

portant and desirable that the witnesses should testify orally, so the jury could have an opportunity to observe them, and judge of their manner on the witness stand and of their credibility, this was such a case. We think, therefore, there was no error of the court in taxing single mileage for these witnesses from the state line to the place of the trial.

Affirmed.

Bean, Burnett, and Harris, JJ., concur.

### ANNOTATION.

#### Experimental evidence as affected by similarity or dissimilarity of conditions.

##### I. In general:

- a. The general rule, 18.
- b. Extent of permissible dissimilarity, 23.
- c. Review in appellate court, 24.
- d. Dissimilarity as affecting weight of evidence, 26.

##### II. Applications of the general rule, 26.

###### I. In general.

###### a. The general rule.

Notwithstanding the reluctance exhibited in some of the earlier cases to admit evidence of experiments on the ground that to do so is to permit a party to manufacture evidence in his own favor, and that if one experiment is permitted, others relating to the same subject must also be admitted on behalf of the opposite party, and innumerable issues be thus raised collateral to the main issue, permitting the suit to expand "like the banyan tree of India, whose branches drop shoots to the ground, which take root, and form new stalks, till the tree itself covers great space by its circumference,"—it has been very generally held that, subject to the condition presently to be discussed, experiments may be performed in the presence of the jury, or evidence be given of experiments performed out of court.

Obviously, the probative value of such experiments will depend upon the correspondence of the conditions under which they are performed to those

attendant upon the occurrences to be investigated. If there is an exact correspondence of such conditions, the experiments will amount to a demonstration, and be conclusive upon the issue; but as such exact correspondence is ordinarily unattainable, allowance must be made for the dissimilarity of conditions in determining the probative force of the experiments. Such dissimilarity, however, may affect not merely the weight of the evidence, but its admissibility; and it is to a consideration of this aspect of the subject that this annotation is addressed.

The general rule, as stated in the cases below cited, is that to render experiments permissible, or to admit evidence of experiments made out of court, the conditions need not be identical with those existing at the time of the occurrence, but that it is sufficient if there is a substantial similarity.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. McMichael* (1914) 115 Ark. 107, 171 S. W. 116; *St. Louis, I. M. & S. R. Co. v. Kimbrell* (1915) 117 Ark. 457, 174 S. W. 1183.

California.—*People v. Woon Tuck Wo* (1892) 120 Cal. 294, 52 Pac. 834; *People v. Phelan* (1899) 123 Cal. 551, 56 Pac. 424; *People v. Hill* (1899) 123 Cal. 571, 56 Pac. 443; *Sonoma County v. Stofen* (1899) 125 Cal. 32, 57 Pac. 681; *People v. Hadley* (1917) 175 Cal. 118, 165 Pac. 442; *People v. Wagner*

(1916) 29 Cal. App. 863, 155 Pac. 649.

**Colorado.** — *Starr v. People* (1900) 28 Colo. 184, 63 Pac. 299.

**Florida.** — *Hisler v. State* (1906) 52 Fla. 30, 42 So. 692.

**Georgia.** — *Hicks v. State* (1916) 146 Ga. 221, 91 S. E. 57; *Atlanta & W. P. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500; *De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & I. Co.* (1907) 2 Ga. App. 493, 58 S. E. 790.

**Illinois.** — *Hauser v. People* (1904) 210 Ill. 253, 71 N. E. 416; *People v. Pfanschmidt* (1914) 262 Ill. 411, 104 N. E. 204, Ann. Cas. 1915A, -1171; *Fein v. Covenant Mut. Ben. Asso.* (1895) 60 Ill. App. 274; *Woelfel Leather Co. v. Thomas* (1896) 68 Ill. App. 394; *Chicago City R. Co. v. Brecher* (1904) 112 Ill. App. 106; *Chicago & E. I. R. Co. v. Crose* (1904) 113 Ill. App. 547, affirmed in (1905) 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865; *Merchants Loan & T. Co. v. Boucher* (1904) 115 Ill. App. 101; *Chicago Folding Box Co. v. Schallawitz* (1905) 118 Ill. App. 9; *Upthegrove v. Chicago G. W. R. Co.* (1910) 154 Ill. App. 460; *Smith v. Stover Mfg. Co.* (1917) 205 Ill. App. 169.

**Indiana.** — *Lake Erie & W. R. Co. v. Mugg* (1892) 132 Ind. 168, 31 N. E. 564; *Thrawley v. State* (1899) 153 Ind. 375, 55 N. E. 95; *Chicago, St. L. & P. R. Co. v. Champion* (1892) — Ind. —, 23 L.R.A. 861, 32 N. E. 874; *Chicago, St. L. & P. R. Co. v. Champion* (1893) 9 Ind. App. 510, 53 Am. St. Rep. 358, 36 N. E. 221, 37 N. E. 21; *La Porte Carriage Co. v. Sullender* (1904) — Ind. App. —, 71 N. E. 922; *Vandalia R. Co. v. Duling* (1915) 60 Ind. App. 332, 109 N. E. 70.

**Iowa.** — *Brooke v. Chicago, R. I. & P. R. Co.* (1890) 81 Iowa, 504, 47 N. W. 74; *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Chicago Teleph. Supply Co. v. Marne & E. Teleph. Co.* (1907) 134 Iowa, 252, 111 N. W. 935; *Tackman v. Brotherhood of American Yeoman* (1906) 132 Iowa, 64, 8 L.R.A. (N.S.) 974, 106 N. W. 850; *State v. Nowells* (1907) 135 Iowa, 53, 109 N. W. 1016; *Scott v. Homesteaders* (1910) 149 Iowa, 541, 129 N. W. 310; *State v.*

*Sorenson* (1912) 157 Iowa, 534, 138 N. W. 411.

**Kansas.** — *Missouri P. R. Co. v. Moffatt* (1896) 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554; *Johnson v. Chicago, R. I. & P. R. Co.* (1909) 80 Kan. 456, 103 Pac. 90.

**Louisiana.** — *Seibert v. McManus* (1901) 104 La. 404, 29 So. 108.

**Maryland.** — *Hooker v. State* (1903) 98 Md. 145, 56 Atl. 390, 1 Ann. Cas. 644; *Security Cement & Lime Co. v. Bowers* (1914) 124 Md. 11, 91 Atl. 834; *Newkirk v. State* (1919) — Md. —, 106 Atl. 694.

**Massachusetts.** — *Hawks v. Charlemont* (1872) 110 Mass. 110; *Com. v. Piper* (1876) 120 Mass. 185; *Field v. Gowdy* (1908) 199 Mass. 568, 19 L.R.A. (N.S.) 236, 85 N. E. 884.

**Michigan.** — *Klanowski v. Grand Trunk R. Co.* (1887) 64 Mich. 279, 31 N. W. 275; *People v. Auerbach* (1913) 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915B, 537.

**Missouri.** — *Riggs v. Metropolitan Street R. Co.* (1908) 216 Mo. 304, 115 S. W. 969; *State v. Bass* (1913) 251 Mo. 107, 157 S. W. 782; *Holzemer v. Metropolitan Street R. Co.* (1914) 261 Mo. 379, 169 S. W. 102; *Burton v. Chicago & A. R. Co.* (1914) 176 Mo. App. 14, 162 S. W. 1064; *Wells v. Lusk* (1915) 188 Mo. App. 63, 173 S. W. 750; *Owen v. Delano* (1917) — Mo. App. —, 194 S. W. 756; *Griggs v. Dunham* (1918) — Mo. App. —, 204 S. W. 573.

**Nebraska.** — *Davis v. State* (1897) 51 Neb. 301, 70 N. W. 984; *Clarence v. State* (1910) 86 Neb. 210, 125 N. W. 540.

**New Mexico.** — *State v. Ortiz* (1919) — N. M. —, 180 Pac. 284.

**New York.** — *Re West Farms Road* (1905) 47 Misc. 216, 95 N. Y. Supp. 894; *People v. Fiori* (1908) 123 App. Div. 174, 108 N. Y. Supp. 416, 22 N. Y. Crim. Rep. 77.

**Ohio.** — *Smith v. State* (1853) 2 Ohio St. 511; *Baltimore & O. R. Co. v. Fouts* (1913) 88 Ohio St. 305, 104 N. E. 544, Ann. Cas. 1915A, 1256.

**Oklahoma.** — *Gibbons v. Territory* (1911) 5 Okla. Crim. Rep. 212, 115 Pac. 129.

**Oregon.** — *State v. Justus* (1883) 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337,



6 Am. Crim. Rep. 511; *Leonard v. Southern P. Co.* (1891) 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887; *State v. Fletcher* (1893) 24 Or. 295, 33 Pac. 575; *KOHLHAGEN v. CARDWELL* (reported herewith) ante, 11.

**Rhode Island.** — *Mitchell v. Sayles* (1907) 28 R. I. 240, 66 Atl. 574.

**Tennessee.** — *Byers v. Nashville, C. & St. L. R. Co.* (1895) 94 Tenn. 345, 29 S. W. 128; *Fisher v. Travelers' Ins. Co.* (1911) 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246.

**Texas.** — *Krueger v. Brenhan Furniture Mfg. Co.* (1905) 38 Tex. Civ. App. 398, 85 S. W. 1156; *Houston & T. C. R. Co. v. Ramsey* (1906) 43 Tex. Civ. App. 603, 97 S. W. 1067; *Missouri, K. & T. R. Co. v. Dunbar* (1908) 49 Tex. Civ. App. 12, 108 S. W. 500; *Freeman v. Moreman* (1912) — Tex. Civ. App. —, 146 S. W. 1045; *Kansas City, M. & O. R. Co. v. Hall* (1912) — Tex. Civ. App. —, 152 S. W. 445; *Texas & P. R. Co. v. Graham* (1915) — Tex. Civ. App. —, 174 S. W. 297; *Ft. Worth & D. C. R. Co. v. Yantis* (1916) — Tex. Civ. App. —, 185 S. W. 969; *Ames Portable Silo & Lumber Co. v. Gill* (1916) — Tex. Civ. App. —, 190 S. W. 1130; *Baker v. Loftin* (1917) — Tex. Civ. App. —, 198 S. W. 159; *Gulf, C. & S. F. R. Co. v. Whitfield* (1918) — Tex. Civ. App. —, 206 S. W. 380; *Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992; *Schauer v. State* (1900) — Tex. Crim. Rep. —, 60 S. W. 249; *Rupe v. State* (1901) 42 Tex. Crim. Rep. 477, 61 S. W. 929; *Morton v. State* (1902) — Tex. Crim. Rep. —, 71 S. W. 281; *Brown v. State* (1911) 74 Tex. Crim. Rep. 356, 169 S. W. 437; *Reagan v. State* (1919) — Tex. Crim. Rep. —, 208 S. W. 523.

**Utah.** — *Hayes v. Southern P. Co.* (1898) 17 Utah, 99, 53 Pac. 1001, 4 Am. Neg. Rep. 730; *Konold v. Rio Grande Western R. Co.* (1900) 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021.

**Vermont.** — *Hardwick Sav. Bank & T. Co. v. Drenan* (1900) 72 Vt. 438, 48 Atl. 645; *Thayer v. Glynn* (1919) — Vt. —, 106 Atl. 834.

**Virginia.** — *Richards v. Com.* (1908) 107 Va. 881, 59 S. E. 1104.

**Washington.** — *Rowe v. Northport Smelting & Ref. Co.* (1904) 35 Wash.

101, 76 Pac. 529; *Lasityr v. Olympia* (1911) 61 Wash. 651, 112 Pac. 752; *AMSBARY v. GRAYS HARBOR R. & LIGHT Co.* (reported herewith) ante, 1.

**West Virginia.** — *McClain v. Marietta Torpedo Co.* (1919) — W. Va. —, 100 S. E. 87.

**Wisconsin.** — *Zimmer v. Fox River Valley Electric R. Co.* (1905) 123 Wis. 643, 101 N. W. 1099; *Wilson v. Chipewa Valley Electric R. Co.* (1908) 135 Wis. 18, 114 N. W. 462, rehearing denied in (1908) 135 Wis. 23, 115 N. W. 330.

The general rule above stated is also indirectly supported by the cases which, without announcing the rule, admit evidence of experiments, or permit them to be performed, where the attendant conditions are substantially similar.

**United States.** — *Columbus Constr. Co. v. Crane Co.* (1900) 40 C. C. A. 35, 98 Fed. 946.

**Arkansas.** — *Bona v. S. R. Thomas Auto Co.* (1919) — Ark. —, 208 S. W. 306.

**California.** — *People v. Clark* (1890) 84 Cal. 573, 24 Pac. 313.

**Colorado.** — *Van Wyk v. People* (1908) 45 Colo. 1, 99 Pac. 1009.

**Georgia.** — *Standard Oil Co. v. Reagan* (1914) 15 Ga. App. 571, 84 S. E. 69, 8 N. C. C. A. 209.

**Illinois.** — *Pennsylvania Coal Co. v. Kelly* (1895) 156 Ill. 9, 40 N. E. 938; *Elgin, J. & E. R. Co. v. Reese* (1897) 70 Ill. App. 463; *Burt v. Garden City Sand Co.* (1908) 141 Ill. App. 603, affirmed in (1908) 237 Ill. 473, 86 N. E. 1055; *Mueller Bros. Art & Mfg. Co. v. Fulton Street Wholesale Market Co.* (1913) 181 Ill. App. 685; *First Nat. Bank v. Heeb* (1914) 188 Ill. App. 194; *Fippinger v. Glos* (1914) 190 Ill. App. 238; *Emerson v. Chicago City R. Co.* (1917) 208 Ill. App. 412.

**Indiana.** — *Hagee v. Grossman* (1869) 31 Ind. 223.

**Iowa.** — *Kimball Bros. Co. v. Citizens Gas & E. Co.* (1908) 141 Iowa, 632, 118 N. W. 891.

**Kansas.** — *State v. Asbell* (1896) 57 Kan. 398, 46 Pac. 770; *State v. Schneck* (1911) 85 Kan. 334, 116 Pac. 823; *State v. King* (1917) 102 Kan. 155, 169 Pac. 557.

**Kentucky.** — *Langdon-Creasy Co. v. Rouse* (1903) 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912B, 292; *Mann v. Reynolds* (1912) 150 Ky. 313, 150 S. W. 329; *Mansfield v. Com.* (1915) 163 Ky. 488, 174 S. W. 16; *Smith v. Middleboro Electric Co.* (1915) 164 Ky. 46, 174 S. W. 773, Ann. Cas. 1917A, 1164.

**Louisiana.** — *Spurlock v. Shreveport Traction Co.* (1906) 118 La. 1, 42 So. 575.

**Maryland.** — *Gambrill v. Schooley* (1902) 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500.

**Massachusetts.** — *Eidt v. Cutter* (1879) 127 Mass. 522; *Boston Woven Hose & Rubber Co. v. Kendall* (1901) 178 Mass. 232, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496; *Baker v. Harrington* (1907) 196 Mass. 339, 82 N. E. 33; *Com. v. Buxton* (1910) 205 Mass. 49, 91 N. E. 128; *Nelson v. Old Colony Street R. Co.* (1911) 208 Mass. 159, 94 N. E. 313.

**Michigan.** — *People v. Morriggan* (1874) 29 Mich. 5; *National Cash Register Co. v. Blumenthal* (1891) 85 Mich. 464, 48 N. W. 622.

**Minnesota.** — *Beckett v. Northwestern Masonic Aid Asso.* (1897) 67 Minn. 298, 69 N. W. 923; *Moehlenbrock v. Parke, D. & Co.* (1918) 141 Minn. 154, 169 N. W. 541.

**Mississippi.** — *Harrison v. Southern R. Co.* (1908) 93 Miss. 40, 46 So. 408.

**Nebraska.** — *Lillie v. State* (1904) 72 Neb. 228, 100 N. W. 316.

**New Hampshire.** — *Whitcher v. Boston & M. R. Co.* (1899) 70 N. H. 242, 46 Atl. 740; *Healey v. Bartlett* (1904) 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413.

**New York.** — *Gilbert v. Third Ave. R. Co.* (1887) 22 Jones & S. 270, 8 N. Y. S. R. 152; *Green v. Long Island R. Co.* (1909) 131 App. Div. 277, 115 N. Y. Supp. 590.

**North Carolina.** — *Otey v. Hoyt* (1854) 47 N. C. (2 Jones, L.) Cox v. Norfolk & C. R. Co. (1900) 126 N. C. 103, 35 S. E. 237; *Arrowood v. South Carolina & G. Extension R. Co.* (1900) 126 N. C. 629, 36 S. E. 151; *State v. Plyler* (1910) 153 N. C. 630, 69 S. E. 269.

**Ohio.** — *Schweinfurth v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 215, 54 N. E. 89.

**Oregon.** — *Hinkel v. Oregon Chair Co.* (1916) 80 Or. 404, 156 Pac. 438, affirmed on rehearing in (1916) 80 Or. 407, 157 Pac. 789.

**Pennsylvania.** — *Sullivan v. Com.* (1880) 93 Pa. 284; *Thomas, Roberts, Stevenson Co. v. Philadelphia & R. R. Co.* (1917) 256 Pa. 549, 100 Atl. 998.

**Rhode Island.** — *Cheetham v. Union R. Co.* (1904) 26 R. I. 279, 58 Atl. 881, 17 Am. Neg. Rep. 368.

**Tennessee.** — *Boyd v. State* (1884) 14 Lea, 161; *Hughes v. State* (1912) 126 Tenn. 40, 148 S. W. 643, Ann. Cas. 1913D, 1262.

**Texas.** — *Olivaras v. San Antonio & A. Pass. R. Co.* (1903) — Tex. Civ. App. —, 77 S. W. 981; *Wilson v. State* (1896) — Tex. Crim. Rep. —, 36 S. W. 587; *Hodge v. State* (1910) 60 Tex. Crim. Rep. 157, 131 S. W. 577; *Streight v. State* (1911) 62 Tex. Crim. Rep. 453, 138 S. W. 742; *Mason v. State* (1919) — Tex. Crim. Rep. —, 211 S. W. 593.

**Utah.** — *Young v. Clark* (1897) 16 Utah, 42, 50 Pac. 832, 8 Am. Neg. Rep. 315; *Palmer v. Oregon Short Line R. Co.* (1908) 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229.

**Vermont.** — *State v. Flint* (1888) 60 Vt. 304, 14 Atl. 178.

**Wisconsin.** — *Pollock v. State* (1908) 136 Wis. 136, 116 N. W. 851.

And see also the following cases which, without stating the rule, virtually apply it by excluding evidence of experiments on the ground of dissimilarity of conditions:

**Alabama.** — *Tesney v. State* (1884) 77 Ala. 33; *Miller v. State* (1894) 107 Ala. 40, 19 So. 37; *Evans v. State* (1895) 109 Ala. 11, 19 So. 535; *Alabama G. S. R. Co. v. Collier* (1896) 112 Ala. 681, 14 So. 327; *Alabama G. S. R. Co. v. Burgess* (1896) 114 Ala. 587, 22 So. 169, 2 Am. Neg. Rep. 483; *Mayer v. Thompson-Hutchinson Bldg. Co.* (1897) 116 Ala. 684, 22 So. 859, 3 Am. Neg. Rep. 513; *Decatur Car Wheel & Mfg. Co. v. Mehaffey* (1900) 128 Ala. 242, 29 So. 646; *Sherrill v. State* (1902) 138 Ala. 3, 35 So. 129; *Butler v. State* (1917) — Ala. App. —, 77 So. 72.

**California.** — *People v. Brotherton*

(1874) 47 Cal. 388; *People v. Solani* (1907) 6 Cal. App. 108, 91 Pac. 654.

**Colorado.**—*Daniels v. Stock* (1913) 23 Colo. App. 529, 130 Pac. 1031.

**Delaware.**—*Price v. Charles Warner Co.* (1899) 1 Penn. 462, 42 Atl. 699.

**Florida.**—*Lawrence v. State* (1903) 45 Fla. 42, 34 So. 87; *Spires v. State* (1905) 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214; *Reid v. State* (1914) 68 Fla. 105, 66 So. 725.

**Illinois.**—*Chicago & A. R. Co. v. Logue* (1893) 47 Ill. App. 292; *Elgin, A. & S. Traction Co. v. Wilson* (1905) 120 Ill. App. 371, affirmed in (1905) 217 Ill. 47, 75 N. E. 436, 19 Am. Neg. Rep. 145.

**Indiana.**—*Ramsey v. Rushville & M. Gravel Road Co.* (1882) 81 Ind. 394.

**Iowa.**—*Huggard v. Glucose Sugar Ref. Co.* (1906) 132 Iowa, 724, 109 N. W. 475.

**Kansas.**—*Wingfield v. McClintock* (1911) 85 Kan. 207, 113 Pac. 394.

**Kentucky.**—*Louisville R. Co. v. Hoskins* (1905) 28 Ky. L. Rep. 124, 88 S. W. 1087.

**Massachusetts.**—*Com. v. Tucker* (1905) 189 Mass. 457, 7 L.R.A. (N.S.) 1056, 76 N. E. 127; *Thornhill v. Carpenter-Morton Co.* (1915) 220 Mass. 593, 108 N. E. 474.

**Michigan.**—*Kinney v. Folkerts* (1891) 84 Mich. 616, 48 N. W. 283; *People v. Slack* (1892) 90 Mich. 448, 51 N. W. 533; *People v. Gotshall* (1900) 123 Mich. 474, 82 N. W. 274, 13 Am. Crim. Rep. 630; *O'Dea v. Michigan C. R. Co.* (1905) 142 Mich. 265, 105 N. W. 746.

**Minnesota.**—*Thiel v. Kennedy* (1901) 82 Minn. 142, 84 N. W. 657; *Winters v. Minneapolis & St. L. R. Co.* (1915) 131 Minn. 181, 154 N. W. 964.

**Missouri.**—*Graney v. St. Louis, I. M. & S. R. Co.* (1897) 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246, affirming on rehearing in (1897) — Mo. —, 38 S. W. 969, 1 Am. Neg. Rep. 290.

**New Hampshire.**—*Beckley v. Alexander* (1914) 77 N. H. 255, 90 Atl. 878.

**New York.**—*Interboro Brewing Co. v. Independent Consumers Ice Co.* (1915) 93 Misc. 24, 156 N. Y. Supp. 410.

**Virginia.**—*Going v. Norfolk & W. R. Co.* (1916) 119 Va. 543, 89 S. E. 914.

Causal conditions and circumstances must first be shown to have been substantially reproduced at the experiment. *Riggs v. Metropolitan Street R. Co.* (1909) 216 Mo. 304, 115 S. W. 969.

Such a similarity of conditions must be made to appear as will insure a reasonably just and accurate comparison. *Rowe v. Northport Smelting & Ref. Co.* (1904) 35 Wash. 101, 76 Pac. 529.

In *Vandalia R. Co. v. Duling* (1915) 60 Ind. App. 332, 109 N. E. 70, it is said: "In order that evidence of such a character may be admissible, it is not essential that the conditions be exactly reproduced in all their details. If so reproduced, credible evidence of an experiment and its result would amount to demonstration, and would be conclusive on the issue involved. It is sufficient if the conditions under which the experiment was made are shown to have been substantially the same as those that existed in the transaction being investigated. If substantially the same, any departure goes to the weight rather than to the admissibility of the evidence."

In *Sonoma County v. Stofen* (1899) 125 Cal. 32, 57 Pac. 681, it is said: "Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are, as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible, but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no causal operation upon the result."

The rule requires only substantial likeness. The fact that the evidence fails to show an entire likeness of circumstances in every respect will not, in all cases, render evidence of an experiment incompetent. If there be a general similarity, the lack of likeness in minor features goes to the weight of the evidence, and not to its admissibility. *State v. Nowells* (1907) 135 Iowa, 53, 109 N. W. 1016.

*b. Extent of permissible dissimilarity.*

The measure of the permissible extent of variation of the conditions of the experiment from those of the occurrence, as stated by the courts, is whether such variation is liable to confuse or mislead the jury. See

**California.**—*People v. Woon Tuck Wo* (1898) 120 Cal. 294, 52 Pac. 833; *People v. Phelan* (1899) 123 Cal. 551, 56 Pac. 424.

**Florida.**—*Hisler v. State* (1906) 52 Fla. 30, 42 So. 692; *Martin v. State* (1914) 68 Fla. 18, 66 So. 139.

**Georgia.**—*Hicks v. State* (1916) 146 Ga. 221, 91 S. E. 57; *Atlanta & W. P. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500.

**Illinois.**—*Chicago City R. Co. v. Brecher* (1904) 112 Ill. App. 106.

**Indiana.**—*Chicago, St. L. & P. R. Co. v. Champion* (1892) — Ind. —, 23 L.R.A. 861, 32 N. E. 874.

**Iowa.**—*Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 67 N. E. 680; *Scott v. Homesteaders* (1910) 149 Iowa, 541, 129 N. W. 310.

**Massachusetts.** — *Dow v. Bulfinch* (1906) 192 Mass. 281, 78 N. E. 416.

**New Hampshire.**—*Healey v. Bartlett* (1904) 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413.

**New York.**—*People v. Fiori* (1908) 123 App. Div. 174, 108 N. Y. Supp. 416.

**Oklahoma.** — *Gibbons v. Territory* (1911) 5 Okla. Crim. Rep. 212, 115 Pac. 129.

**Oregon.**—*KOHLHAGEN v. CARDWELL* (reported herewith) ante, 11.

**Texas.** — *Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992. *Olivaras v. San Antonio & A. P. R. Co.* (1903) — Tex. Civ. App. —, 77 S. W. 981.

**Wisconsin.** — *Zimmer v. Fox River Valley Electric R. Co.* (1905) 123 Wis. 643, 101 N. W. 1099; *Harper v. Holcomb* (1911) 146 Wis. 183, 130 N. W. 1128..

Thus, in *Hisler v. State* (1906) 52 Fla. 30, 42 So. 692, the court said that "evidence of this kind should be received with caution and only be admitted when it is obvious to the court from the nature of the experiments

that the jury will be enlightened rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful."

It has been held immaterial that the variations in the conditions are more favorable to the other party. *Halverson v. Seattle Electric Co.* (1904) 35 Wash. 600, 77 Pac. 1058.

But for an implication to the contrary, see *Elgin, A. & S. Traction Co. v. Wilson* (1905) 120 Ill. App. 371.

Whether it has a tendency to aid rather than to confuse the jury is not a question of law, but one of fact; so the question raised by an exception to the admission of such evidence is whether it was relevant to any issue in the case, not whether it would be likely to aid or confuse the jury. *Healey v. Bartlett* (1904) 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413.

If made under changed conditions, or in such circumstances that the experiments might be worthless or misleading, an objection to the testimony should specify these grounds of objection; and the mere objection to the evidence that it relates to an experiment not made in the presence of the accused is insufficient. *Hicks v. State* (1916) 146 Ga. 221, 91 S. E. 57.

Accordingly, the degree of similarity essential to the admissibility of evidence of an experiment will depend somewhat upon the purpose for which such evidence is sought to be introduced. A greater amount of latitude is permitted where the evidence is offered in rebuttal of evidence of experiments given on behalf of the other party. Thus, in *Illinois C. R. Co. v. Burns* (1889) 32 Ill. App. 196, an action brought to recover damages for the killing of plaintiff's horses by defendant's railroad train, where, as a part of the evidence for the defense, defendant had given the result of certain experiments made by placing a train in the position, as nearly as possible, of the one causing the injury, and detailing to the jury the opinion of those taking part therein as to how far away at certain points upon the

track the horses could probably have been seen from the engine, it was held that there was no such abuse of discretion on the part of the trial court as to call for interference, in permitting plaintiff to prove in rebuttal the result of an experiment made by himself and others, after defendant's evidence upon the subject had been given, in which they had placed a man on a ladder in the track, intending thereby to raise his head to the same height as though he was standing in the cab of a locomotive, and then placing others in the ditch at a point where it was claimed the horses were, and giving to the jury the result of such observations, the court saying: "In so far as the experiments made failed to comply with the true condition of things at the time of the accident, the results obtained would not be as satisfactory and convincing to the jury as when all the conditions of the experiment were precisely like those existing at the time of the accident, and the jury should and doubtless did make allowance for these imperfect conditions. But to say that appellant may place an engine at a given point, and permit an engineer standing thereon to state to the jury at what distance horses at the side of the track could be observed, and deny to appellee the right to show the result of experiments made by himself or his witnesses, because he cannot place an engine at the point of observation, but is compelled to use something else to bring his line of vision as nearly as may be to the place the engineer would occupy, would not be in accordance with reason or justice."

So also, dissimilarity between the conditions of the experiment and those of the occurrence under investigation is not necessarily objectionable, where the evidence is introduced not for the purpose of showing how the event took place, but as showing the qualification of witnesses to give an opinion as to how the event took place. Thus, in *People v. Thompson* (1899) 122 Mich. 411, 81 N. W. 344, a prosecution for manslaughter against an engineer alleged to have negligently left unattended a boiler which ex-

ploded, killing a number of persons, it was held that evidence was properly admitted of the results of experiments made to ascertain within what time a given pressure of steam could be raised in a boiler by the use of oil as fuel, where the record did not show that it was contended or argued that because steam could, by the use of oil as fuel under one boiler, be raised in a given time, therefore it would have a like effect under the boiler which was in charge of defendant, but it appeared that the result of the experiments was given as showing the qualifications of the witnesses who testified as to the probable effect of the firing of the boiler in question, in the manner in which it was fired.

The fact that the attention of the person making the test is especially directed to the subject of the test may constitute a variance in the condition. See *Ord v. Nash* (1897) 50 Neb. 335, 69 N. W. 964, 1 Am. Neg. Rep. 110.

#### *c. Review in appellate court.*

The similarity of circumstances and conditions goes to the admissibility of the evidence, and must be determined by the court. *Hisler v. State* (1906) 52 Fla. 30, 42 So. 692; *Spires v. State* (1905) 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214.

The admission of evidence of experiments, or permitting them to be performed in court, is a matter peculiarly within the discretion of the trial judge, and this discretion will not be interfered with unless it be apparent that it has been abused.

**Florida.** — *Hisler v. State*, supra; *Martin v. State* (1914) 68 Fla. 18, 66 So. 139.

**Georgia.** — *Atlanta & W. P. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500; *De Loath Mill Mfg. Co. v. Tutweiler Coal, Coke, & I. Co.* (1907) 2 Ga. App. 493, 58 S. E. 790; *Atlanta & W. P. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500; *Augusta R. & Electric Co. v. Arthur* (1907) 3 Ga. App. 513, 60 S. E. 213; *McClendon v. State* (1910) 7 Ga. App. 784, 68 S. E. 331; *Carolina Portland Cement Co. v. Marshall* (1911) 9 Ga. App. 555, 71 S. E. 942.

**Illinois.**—*Illinois C. R. Co. v. Burns* (1889) 32 Ill. App. 196.

**Indiana.**—*Vandalia R. Co. v. Duling* (1915) 60 Ind. App. 332, 109 N. E. 70.

**Iowa.** — *Stott v. Homesteaders* (1910) 149 Iowa, 541, 129 N. W. 310; *Huggard v. Glucose Sugar Ref. Co.* (1907) 132 Iowa, 724, 109 N. W. 475; *Chicago Teleph. Supply Co. v. Marne & E. Teleph. Co.* (1907) 134 Iowa, 252, 111 N. W. 935; *State v. Nowells* (1907) 135 Iowa, 53, 109 N. W. 1016; *Boerner Fry Co. v. Mucci* (1912) 158 Iowa, 315, 138 N. W. 866.

**Massachusetts.** — *Com. v. Tucker* (1905) 189 Mass. 457, 7 L.R.A. (N.S.) 1056, 76 N. E. 127; *Dow v. Bulfinch* (1906) 192 Mass. 281, 78 N. E. 416; *Baker v. Harrington* (1907) 196 Mass. 339, 82 N. E. 33; *Field v. Gowdy* (1908) 199 Mass. 568, 19 L.R.A. (N.S.) 236, 85 N. E. 884; *Com. v. Buxton* (1910) 205 Mass. 49, 91 N. E. 128; *Nelson v. Old Colony Street R. Co.* (1911) 208 Mass. 159, 94 N. E. 313; *Thornhill v. Carpenter-Morton Co.* (1915) 220 Mass. 593, 108 N. E. 474.

**Michigan.** — *People v. Auerbach* (1913) 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915B, 557.

**Minnesota.**—*Smith v. St. Paul City R. Co.* (1884) 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, 4 Am. Neg. Rep. 220; *Thiel v. Kennedy* (1901) 82 Minn. 142, 84 N. W. 657; *Brown v. Douglas Lumber Co.* (1910) 113 Minn. 67, 129 N. W. 161; *Winters v. Minneapolis & St. L. R. Co.* (1915) 131 Minn. 181, 154 N. W. 964; *Huestis v. Aetna L. Ins. Co.* (1913) 131 Minn. 461, 155 N. W. 643; *Moehlenbrock v. Parke, D. & Co.* (1918) 141 Minn. 154, 169 N. W. 541.

**Nebraska.**—*Ord v. Nash* (1897) 50 Neb. 335, 69 N. W. 964, 1 Am. Neg. Rep. 110.

**New Hampshire.**—*Beckley v. Alexander* (1914) 77 N. H. 255, 90 Atl. 878.

**Oklahoma.**—*Curtis & G. Co. v. Pribyl* (1913) 38 Okla. 511, 49 L.R.A. (N.S.) 471, 134 Pac. 71.

**Oregon.** — *Leonard v. Southern P. Co.* (1891) 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887; *KOHLHAGEN v. CARDWELL* (reported herewith) ante, 11.

**South Carolina.**—*Walker v. Columbia R. Co.* (1886) 25 S. C. 141.

**Utah.**—*Konold v. Rio Grande West-*

*ern R. Co.* (1900) 21 Utah, 879, 81 Am. St. Rep. 693, 60 Pac. 1021.

**Vermont.**—*Thayer v. Glynn* (1919) — Vt. —, 106 Atl. 834.

**Washington.**—*Halverson v. Seattle Electric Co.* (1904) 35 Wash. 600, 77 Pac. 1058; *Lasityr v. Olympia* (1911) 61 Wash. 651, 112 Pac. 752; *AMSBARY v. GRAYS HARBOR R. & LIGHT CO.* (reported herewith) ante, 1.

**West Virginia.**—*McClain v. Marietta Torpedo Co.* (1919) — W. Va. —, 100 S. E. 87.

**Wisconsin.** — *Wilson v. Chippewa Valley Electric R. Co.* (1908) 135 Wis. 18, 114 N. W. 462, rehearing denied in (1908) 135 Wis. 23, 115 N. W. 330; *Harper v. Holcomb* (1911) 146 Wis. 183, 130 N. W. 1128.

But where such evidence is admitted over proper objection, and the rule as to similarity of circumstances and conditions attending the appearance and the experiment does not appear to have been complied with in admitting the evidence, the appellate court will review the ruling, and if error be found therein, and it does not appear from the whole record that no harm could have resulted to the defendant from the admission of such evidence, the error may cause a reversal of the judgment. *Hisler v. State* (1906) 52 Fla. 30, 42 So. 692.

It is not entirely within the discretion of the trial court to admit or exclude such evidence. While it is largely within its discretion to determine whether the testimony showed that the experiment was made under such conditions as to fairly illustrate the point in issue, yet, when it is shown that the conditions were essentially the same in both instances, the testimony should be admitted and its weight determined by the jury. *Starr v. People* (1900) 28 Colo. 184, 63 Pac. 299.

In *AMSBARY v. GRAYS HARBOR R. & LIGHT CO.* (reported herewith) ante, 1, it is said: "We believe the authorities warrant the assertion that, while appellate courts will not lose sight of the general rule that the admission or rejection of evidence of the result of experiments is largely discretionary in a trial court, the exercise

of such discretion will, upon appeal, be viewed somewhat more critically when such evidence is rejected than when it is received. This would seem to be so because of the fact that the admission or rejection of such evidence, in so many instances, has to do more with its weight than with its relevancy, strictly speaking."

Where there is some ground of support for the action of the trial court in rejecting evidence of the result of experiments, its decision must stand. *Wilson v. Chippewa Valley Electric R. Co.* (1908) 135 Wis. 18, 114 N. W. 462, 115 N. W. 330.

The discretion of the trial court does not extend to a refusal to hear evidence upon the preliminary question of similarity of conditions. *AMSBARY v. GRAYS HARBOR R. & LIGHT CO.* (reported herewith) ante, 1.

There is no error in excluding evidence of an experiment where the matter on which it bears is of small consequence. *Ulrich v. People* (1878) 39 Mich. 245.

*d. Dissimilarity as affecting weight of evidence.*

If the essential conditions under which the experiment or observation is made are substantially the same as those of the actual occurrence which is being investigated, any departure or minor variation goes to the weight rather than the admissibility of the evidence.

*California.* — *People v. Phelan* (1899) 123 Cal. 551, 56 Pac. 424.

*Georgia.*—*Atlanta & W. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500; *Augusta R. & Electric Co. v. Arthur* (1907) 3 Ga. App. 513, 60 S. E. 213; *McClendon v. State* (1910) 7 Ga. App. 784, 68 S. E. 331.

*Illinois.*—*Hauser v. People* (1904) 210 Ill. 253, 71 N. E. 416; *People v. Pfanschmidt* (1914) 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171.

*Indiana.*—*Vandalia R. Co. v. Duling* (1915) 60 Ind. App. 332, 109 N. E. 70.

*Iowa.*—*State v. Nowells* (1907) 135 Iowa, 53, 109 N. W. 1016.

*Kansas.*—*Johnson v. Chicago, R. I. & P. R. Co.* (1909) 80 Kan. 456, 103 Pac. 90.

*Nebraska.*—*Davis v. State* (1897) 51 Neb. 301, 70 N. W. 984.

*Texas.*—*Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992; *Ft. Worth & D. C. R. Co. v. Yantis* (1916) — Tex. Civ. App. —, 185 S. W. 969.

*Vermont.*—*State v. Flint* (1888) 60 Vt. 304, 14 Atl. 178.

*II. Applications of the general rule.*

The rule is an abstract rule only, and its application varies with the particular circumstances of each case. Hence it is deemed desirable to trace the applications of the rule made by the court; and, for convenience in reference, these have been arranged and cross indexed with reference to the nature of the experiment and the point sought to be demonstrated thereby.

**Accident.**

Experiments to ascertain possibility of accidental discharge of gun or pistol, see *Firearms*—possibility of accidental discharge.

Experiments to determine whether shooting was intentional or accidental, see *Powder burns and marks*; also, *Shot*—scattering of.

*—reproduction of circumstances of.*

Experiments to determine visibility of approaching train, or of person or object on or near track, see *Visibility*.

In *Mayer v. Thompson-Hutchison Bldg. Co.* (1897) 116 Ala. 634, 22 So. 859, 3 Am. Neg. Rep. 513, an action for injuries by one who was struck by a brick falling from the cornice of a building alleged to have been improperly constructed, it was held error to allow the defendant to prove that one or more persons stood with safety upon a cornice of the building, which was shown to have been constructed similarly to the one from which the brick fell.

In *Decatur Car Wheel & Mfg. Co. v. Mehaffey* (1900) 123 Ala. 242, 29 So. 646, an action for the death of one who was thrown from a hanging scaffold, it was held that the court erred in permitting the plaintiff to introduce evidence of tests made by certain witnesses upon the scaffold two years after the alleged accident, for the purpose of showing to what extent the

scaffold could be made to swing or oscillate, where it appeared that at the time of such experiment the scaffold was not in the same condition as it was at the time of the accident, there being no braces upon it, whereas there were such braces at the time of the accident, to keep it steady.

In *Daniels v. Stock* (1913) 23 Colo. App. 529, 130 Pac. 1031, an action for damages on account of an alleged wound between the knee and ankle, which plaintiff claimed to have received while bathing in one of defendants' bathtubs in their public bathhouse, it was held that the trial court did not err in excluding the testimony of a witness, and a demonstration offered to be made by him in a bathtub, for the purpose of showing that it was impossible for a person to receive a scratch in the fore part of the leg between the knee and the ankle from a defect such as was alleged to have existed, there being no proof that the tub was exactly similar nor that the leg of the witness was sufficiently the same form as that of the plaintiff.

In an action for personal injuries received while shoveling coal into a tub, by means of which it was removed from a vessel, the plaintiff may demonstrate before the jury, with a model of the tub and with small pieces of coal and a pan, how the bucket operated when in use. *Pennsylvania Coal Co. v. Kelly* (1895) 156 Ill. 9, 40 N. E. 938.

In *Smith v. Stover Mfg. Co.* (1917) 205 Ill. App. 169, an action for injuries sustained by the tipping over of a heavy piece of machinery while being moved across a bridge about 10 feet long, made of six planks laid endways, in which plaintiff claimed that the single-wheel dolly upon which the front of the machine was supported bent down the plank on which it rested from 4 to 6 inches, causing its end to rise and so to strike a wheel of the rear dolly as it reached the end of the bridge, it was held that there was no error in excluding testimony that, while the bridge was in the same condition as on the day of the accident, witness took a machine exactly like the one in question and placed it on

the bridge and took measurements as to the depression caused thereby, since an entire machine might be placed on the middle of the bridge without causing so much depression of any single plank as would the weight of one end of it thrown upon a single plank.

In *Chicago City R. Co. v. Brecher* (1904) 112 Ill. App. 106, an action to recover damages for the death of plaintiff's decedent, occasioned by the alleged negligence of defendant, it appeared that the deceased was riding on the front footboard of an engine when it came to a crossing of defendant's tracks, where, by reason of the unsafe condition of such tracks at the crossing, the weight of the engine caused them to sink down so that the footboard was caught by some portion of the track and crossing, and was thereby broken, and the deceased was thrown off and killed. It was held to be error to admit evidence of an experiment made on the following day, after the crossing had been filled and tamped, by running the same engine, equipped with a new footboard which was of the same height as was the old one, without cars attached, over the crossing and track, the speed of the engine upon the two occasions not being the same, and there being no evidence that the temperature at the time of the accident and of the experiment was the same.

In *Chicago Folding Box Co. v. Schallawitz* (1905) 118 Ill. App. 9, an action for injuries sustained by the starting up of a printing press while plaintiff was reaching down into it, it was held error to permit witnesses to testify that on the following morning before the power started they pulled out the brake and sat on a bench, and that the press started by itself, as obviously the conditions at the time of the experiment were not the same as at the time of the accident, plaintiff having been in contact with the press when he was hurt, so that he might have come in contact with the shifter in such a way as to shift the belt.

In *Thiel v. Kennedy* (1901) 82 Minn. 142, 84 N. W. 657, an action to



recover damages for personal injuries sustained by an operative in a laundry, the plaintiff testified that, after she had stopped a centrifugal clothes drier and put her hand in it to take out the clothes, the drier started by reason of the belt slipping from the loose to the fixed pulley, and that the starting lever flew back and hit her in the face. It was held that there was no abuse of discretion on the part of the trial court in excluding evidence that, with the clothes-drier belt and shifting lever in the same position as it was on the day of the accident and with a girl of the size of the plaintiff in the most exposed position, nearest to the belt and shifting lever, standing in the position naturally occupied by a person taking clothes out of the drier, and in the position the plaintiff said she occupied at the time of the accident, when the lever was thrown over it would not come within a foot or foot and a half of her head or body, inasmuch as the introduction of such evidence would have tended to collateral issues as to whether the girl, belt, and lever were in the same position as they were when the accident happened, and as to the fairness of the experiment.

In *Emerson v. Chicago City R. Co.* (1917) 203 Ill. App. 412, an action to recover damages for injuries sustained while alighting from a street car, it was held that a witness was properly permitted to testify that right after the accident he put his heel on the step of the car to see if it would catch on the plate, as plaintiff claimed her injury had been caused, and that it did.

In *Chicago, St. L. & P. R. Co. v. Champion* (1892) — Ind. —, 23 L.R.A. 861, 32 N. E. 874, an action by one whose hand, while he was attempting to make a coupling between two cars, one of which had been "kicked" down the track, was crushed through the alleged negligence of the brakeman on the moving car in releasing the brake when it was within from 6 to 8 inches of the other car, which, according to the plaintiff's theory, caused it to spring or jump forward, it was held that it was error to exclude evidence

of an experiment made upon the siding on which the accident took place, by letting a car of the same kind as the one in use at the time of the injury down upon the siding by kicking it by an engine from about the same place from which the car was kicked at the time of the accident, and, when it was within 8 or 10 or 12 inches of the car to which it was to be coupled, letting off the brake in order to show that the car did not increase its speed. The court said: "The important fact sought to be established by the experiment was whether or not a car moving at a slow rate of speed down a slight incline, with the brakes set, would, when the brakes were suddenly loosed, jump or spring forward. If it would do so in one instance, it would, under ordinary conditions, repeat it every time the experiment was tried; for it would be the result of the operation of the laws of motion. The rate at which the car was moving, the suddenness with which the brakes were loosened, the degree of the inclination of the track, might affect the celerity of the movement, but would not affect the nature of the movement. If the question for investigation was the distance which it would jump, or the celerity of the movement, all these things might be important; but in determining whether it would or would not jump they are comparatively unimportant. In our opinion, the circumstances under which the experiment was made were sufficiently similar to the facts surrounding the happening of the accident to make it admissible in evidence for what it was worth, and for this error the judgment must be reversed." But upon a subsequent trial it was held by the appellate court in (1893) 9 Ind. App. 510, 53 Am. St. Rep. 358, 36 N. E. 221, rehearing denied in (1893) 9 Ind. App. 526, 58 Am. St. Rep. 369, 37 N. E. 21, that there was no error in the ruling of the trial court in excluding evidence of such experiment, on the ground that there was no offer to show that the track or car was in essentially the same condition, or whether the brake was tightly or loose-

ly set, or whether the car was kicked hard or easy.

Evidence that within a few days of the day on which plaintiff's buggy was overturned the witness, while driving a sleigh, in attempting to pass the same obstruction in the road, was overturned at or near the same place where the appellant's buggy was overturned, is properly excluded as outside of and foreign to the issue. *Ramsey v. Rushville & M. Gravel Road Co.* (1882) 81 Ind. 394.

In *Lake Erie & W. R. Co. v. Mugg* (1892) 132 Ind. 168, 31 N. E. 564, an action for the alleged wrongful killing of a railway brakeman, in which some evidence was given of statements made by the deceased to the effect that at the time the injury occurred his boot froze to the rail and he was unable to pull his foot away, it was held that the evidence of a witness, who was present when the statement was claimed to have been made, that he went on the same day and experimented, and found that the weather had the same effect on his boots, was properly excluded, the time of day being different and the conditions as to warmth and moisture of the boot exposed not being shown to have been the same.

In *LaPorte Carriage Co. v. Sullender* (1904) — Ind. App. —, 71 N. E. 922, an action for personal injuries sustained by a person struck by flying particles of emery or metal thrown off an emery belt, it was held that evidence offered for the purpose of showing that particles of emery or metal would be thrown only in the direction in which the belt was moving, and that it would not throw particles at a right angle to the belt in the direction in which plaintiff was standing when hurt, was properly excluded, since, in the nature of things, the amount and size of particles and the direction in which and the force with which they would be thrown would depend upon a number of things, such as the character of the metal being polished, the manner in which it was held on the belt, the speed at which the belt was running, or the condition of the belt itself, no attempt being made to show that the

experiments were based on conditions substantially the same as those existing at the time of the injury.

In *Brooke v. Chicago, R. I. & P. R. Co.* (1890) 81 Iowa, 504, 47 N. W. 74, an action to recover damages for personal injury to plaintiff's intestate while employed as a brakeman on defendant's railroad, based on the negligence of defendant in leaving a switch in a defective condition, whereby the decedent's foot was caught between the rails while making a coupling and he was thrown down and injured, it was held that a witness was properly permitted to testify as to experiments made by him in placing his own foot between the rails, showing where the foot would be caught and where not, the shoe that the decedent wore being before the jury and the witness who made the experiment being there, so that the relative sizes of the shoes worn by each could be known.

In *Huggard v. Glucose Sugar Ref. Co.* (1906) 132 Iowa, 724, 109 N. W. 475, an action to recover damages for injuries received by plaintiff while in defendant's employ, due to the fall of a piece of gas pipe from an upper story through an opening in the floor, in which one of the theories of the plaintiff was that the piece of pipe was in or upon a pile of bone dust upon the third floor, and that through the vibration of the building by wind, or the operation of the machinery, it was gradually moved toward the opening in the floor and fell through, it was held that there was no abuse of discretion on the part of the trial court in refusing to permit defendant to show the results of tests made by it as to the effect of vibrations upon a pile of bone dust and a piece of iron pipe for the purpose of showing that the pipe did not fall in the manner claimed, as the conditions of the accident manifestly could not be accurately reproduced.

In *Langdon-Creasy Co. v. Rouse* (1903) 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912B, 292, an action by an employee against her employer for injury sustained in lighting a gasoline lamp, it was held that the trial court properly refused to allow a demonstration

before the jury of the manner of filling and lighting the lamp, it not appearing that the lamp was in the same condition as when the accident occurred.

In an action for injuries received through stepping through a hole covered by a sack concealed with dust, evidence as to experiments made to show how a bag covered with dust would sag is not competent, where the hole over which the bag was placed was not shown to be of the same size as that through which plaintiff stepped. *Security Cement & Lime Co. v. Bowers* (1914) 124 Md. 11, 91 Atl. 834.

Evidence that experiments made after the explosion of a boiler, with similar machinery and with all conditions similar except the hinge, did not result in an explosion, is admissible for the purpose of showing that the explosion was caused by a defective hinge. *Boston Woven Hose & Rubber Co. v. Kendall* (1901) 178 Mass. 282, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657, 9 Am. Neg. Rep. 496.

In an action for personal injuries sustained while working upon a certain piece of machinery, there is no abuse of discretion on the part of the court in refusing to permit the defendant to operate the machine in the presence of the jury, who were allowed to examine the mill, it appearing that the machine had been altered considerably since the time of the accident. *Kinney v. Folkerts* (1891) 84 Mich. 616, 48 N. W. 283.

In an action by a brakeman for injuries claimed to have been occasioned by his alighting upon a projecting tie while swinging himself from the car to the ground, the plaintiff may properly be permitted to testify that since the injury he has made experiments in stepping from the car when at rest, and found that he could step naturally upon a tie that projected 29 inches from the rail, and that he did not think there would be any difficulty in doing so if the car was in motion. *Whitcher v. Boston & M. R. Co.* (1899) 70 N. H. 242, 46 Atl. 740.

In *Gilbert v. Third Ave. R. Co.* (1887) 22 Jones & S. 270, 8 N. Y. S. R. 152, an action for personal injuries in

which the plaintiff testified that he stood on the steps and platform of a street car, and by a sudden jerk of the car in starting was thrown off, it was held that a witness might be permitted to testify that he had seen a person, placed upon the step of the car as the plaintiff described himself to have been at the time of the accident, thrown in a different direction when the car was suddenly started.

In an action for injuries sustained by a passenger on a street car alleged to have been negligently operated at such speed that it was thrown from the rails on striking a curve, evidence of experiments made under substantially similar conditions, showing that such cars run at their highest possible speed upon the curve would keep upon the track, is admissible. *Cheetnam v. Union R. Co.* (1904) 26 R. I. 279, 58 Atl. 881, 17 Am. Neg. Rep. 368.

In a suit on an accident policy in which the complainant contended that the insured's death resulted from injuries by being thrown against the seat of a street car by its swerve in rounding a curve, while the defendants claimed that the fall resulted from the physical condition of the insured, it is competent to show experiments made with the same car running upon the same track, unchanged, at various speeds from 2 miles an hour to 10 miles an hour, indicating that the swerve of the car would cause a person to fall in a direction opposite to that in which the insured fell, although the persons who made the experiments were men, and the one who was injured was a small woman, this difference in conditions not altering the result. *Fisher v. Travelers' Ins. Co.* (1911) 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246.

In an action for the death of a passenger who fell from the platform of a street car while it was rounding a curve, it is proper to refuse to permit witnesses to testify to the results of experiments made by them in running the same car upon which the accident occurred, through the same curve, where it appears that these experiments were made at a different time of day, when the electric current

would have less load and therefore more power, and were made with no load upon the car and upon a dry rail, while the car at the time of the accident was heavily loaded with passengers and the rails were wet. *Halverson v. Seattle Electric Co.* (1904) 35 Wash. 600, 77 Pac. 1058.

In *Schweinfurth v. Cleveland, C. C. & St. L. R. Co.* (1899) 60 Ohio St. 215, 54 N. E. 89, an action for the killing of plaintiff's intestate by a train at a highway crossing, it was held that the jury might properly consider information obtained from experiments made in their presence at the crossing with an engine and train, horse and buggy, and men seated in the buggy, the circumstances being like those present at the accident. The court said: "Experiments made in the presence of the jury with a view of reproducing to their senses as nearly as may be the transaction or occurrence, in whole or in part, which is the subject-matter of investigation by them . . . serve to put the jury in possession of knowledge important in the determination of the issues on trial that they could not obtain so readily or accurately from the testimony of witnesses. They are in a measure a substitute for oral testimony, and often may afford evidence more satisfactory and reliable."

In *Leonard v. Southern P. Co.* (1892) 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887, it was held that in order to disprove that a scar upon the outside of the bottom flange of a railroad rail was made by a wheel on an engine as the wheel lay across the track, it was proper to permit a similar wheel, though somewhat smaller than that on the engine, to be rolled upon a section of a similar railroad rail across which was laid another similar section, in order to show that the wheel could not strike the lower flange as claimed, it being also shown that the larger the diameter of the wheel the further it would be from striking such flange.

In an action for personal injuries from a piece of wood thrown by a saw, evidence as to experiments made with the same saw under practically identical conditions is admissible. *Hinkel v. Oregon Chair Co.* (1916) 80 Or. 404,

156 Pac. 438, affirmed on rehearing in (1916) 80 Or. 407, 157 Pac. 789.

Upon the question whether a circular saw would throw the timber in the way claimed by the plaintiff, witnesses may testify that they saw the machine in operation subsequently to the accident, and that it would not and could not throw the timber in such direction; the only difference in the conditions under which the experiment was conducted being that the saw was slightly rusted and its teeth had been filed down. *Kreger v. Brenham Furniture Mfg. Co.* (1905) 38 Tex. Civ. App. 399, 85 S. W. 1156.

In *Hayes v. Southern P. Co.* (1898) 17 Utah, 99, 53 Pac. 1001, 4 Am. Neg. Rep. 730, an action for injuries sustained by an employee of a railroad company who, being in a coal shed having a railroad track through it, was struck by the beam of an engine while standing on the side of the track against a coal bin, where he had stepped aside on the approach of the engine, it was held not to be reversible error to admit evidence of an experiment made with an engine of the same beam which was run past the witness while standing at the place of the accident, without injuring him, notwithstanding the experiment was made with a man other than the plaintiff, inasmuch as the jury had an opportunity for observation and comparison of both of them, and although there was a difference in the rate of speed at which the engines were run, where the rate of speed would not have made any material difference in the result.

#### **Accidental discharge.**

Of firearms, possibility of, see *Firearms*—possibility of accidental discharge.

#### **Adhesiveness.**

See *Properties of substances* — adhesiveness.

#### **Affray.**

Possibility of seeing, as testified to by witness, see *Visibility* — possibility of seeing.

#### **Ammonia.**

Explosive qualities of, see *Properties of substances*—inflammability.

**Anesthetic.**

See Properties of substances.

**Audibility.**

Possibility of hearing crossing signals, see *Missouri P. R. Co. v. Moffatt* (1896) 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554, and *Elgin, J. & E. R. Co. v. Reese* (1897) 70 Ill. App. 463, under Visibility—of approaching train.

As to deadening of noise of approaching train by cut, see *Johnson v. Chicago, R. I. & P. R. Co.* (1909) 80 Kan. 456, 103 Pac. 90, under Visibility—of approaching train.

In *People v. Phelan* (1899) 123 Cal. 551, 56 Pac. 424, it was held that the court properly permitted evidence to be given of experiments made by the direction of the prosecution, for the purpose of contradicting the testimony of some of defendant's witnesses relating to sounds heard in the nighttime in the vicinity of defendant's cabin, although the experiments were conducted in the daytime and it was not shown that the atmospheric conditions, such as humidity, temperature, etc., were the same, the court saying: "The principal conditions were the same, and the jury could weigh and make allowance for the differences referred to. They affected the weight but not the competency of the evidence."

In *Sonoma County v. Stofen* (1899) 125 Cal. 32, 57 Pac. 681, it was held that for the purpose of impeaching the story of a county treasurer that he had been robbed and locked in the vault, and that he had vainly endeavored to attract attention by kicking upon the inner door with the heels of his boots, and who had testified that he did not strike upon the sheet iron lining of the sides of the vault, although he knew that there was a hollow space between it and the brick outer wall, evidence was admissible of experiments made by striking with clinched hands and books of account upon the sheet iron sides, and also of experiments made by striking or kicking upon the inner door, for the purpose of showing that the blows upon the sides were much more audible to persons stationed in different parts of the build-

ing than the blows upon the door, although the atmospheric and climatic conditions were not shown to have been the same upon the two days, and the condition of the courthouse had been altered somewhat by the removal of one door between the treasurer's and sheriff's offices and the replacing of the wooden panels and the upper portions of the other doors with glass, it not being apparent that different atmospheric conditions or the structural changes in the building would have materially affected the result.

For the purpose of contradicting a witness who testified to having heard one running from the direction of the spot where an affray took place, and that someone stopped just above the defendant's house and went into his gate, evidence of one that he had gone to the witness's house and had had a man run between the points indicated in the testimony of the witness, and did not hear him except when he fell over a stump, is properly excluded, it not appearing whether the runner making the experiment was, as compared with the defendant, large or small, a light runner or a heavy one, whether the atmospheric conditions and the general conditions as to noise or quiet were similar to those existing at the time of the occurrence, and whether the sense of hearing in the two men was equally keen. *Lawrence v. State*. (1903) 45 Fla. 42, 34 So. 87.

For the purpose of supporting the testimony of witnesses that they overheard a certain conversation, it is competent to show that persons located as were the witnesses could not hear conversation in an ordinary tone at the place where the conversation in question was carried on, where the conditions when such test was made were the same as those present when the conversation testified to occurred. *Starr v. People* (1900) 28 Colo. 184, 63 Pac. 299.

In an action for slander in which the defense was that the words were not spoken, evidence may be given of experiments as to whether or not words spoken under similar conditions where defendants stood could have been heard where plaintiff stood. *Gambrill*

v. Schooley (1902) 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500.

In *Dow v. Bulfinch* (1906) 192 Mass. 281, 78 N. E. 416, it was held that it could not be said as a matter of law that the trial court erred in excluding evidence of tests made eight years after the occurrence in question, as to the possibility of hearing sounds and conversation in the room below, through an opening around steam pipes, as testified to by a witness for the opposite party, the court saying: "The judge may well have thought that the trial of the question whether the conditions were in all respects the same, what changes, if any, had taken place in the adjustment of the heaters, what was the relative situation of the persons making the test, and whether the surrounding noises, if any, were the same, would lead to an extended inquiry upon collateral matters which would be of no practical assistance to the jury, and that the more direct and logical course was to explain to the jury the exact physical situation at the time of the alleged occurrences, and to leave it to their common knowledge whether, under such a state of things, the witnesses for the plaintiff were to be believed."

For the purpose of contradicting a witness who testified that when he was 100 yards away from the seat of the difficulty he heard certain words spoken, notwithstanding the wind was blowing the sounds from and not toward him, it is competent to permit witnesses to testify that their hearing was good, and that, standing in the position of the witness, they could not hear words spoken by persons standing in the place where the difficulty occurred, in different ranges of voice from the lowest to the highest, the conditions as to wind, etc., being practically the same. *Wilson v. State* (1896) — Tex. Crim. Rep. —, 36 S. W. 587.

#### **Automobile.**

Test as to speed of, see *Speed*.

In an action for personal injuries sustained in a collision between a carriage and the defendant's automobile, there is no abuse of discretion on the part of the court in excluding testi-

mony as to an experiment made by a witness to show in what time he could stop an automobile going at a given speed, at the place where it was claimed the accident occurred. *Beckley v. Alexander* (1914) 77 N. H. 255, 90 Atl. 878.

#### **Bacteria.**

In ice, see *Ice*.

#### **Banana peel.**

In *Ft. Worth & D. C. R. Co. v. Yantis* (1916) — Tex. Civ. App. —, 185 S. W. 969, an action for injuries sustained by a passenger who claimed to have slipped upon a banana peel in descending the steps of a railway car, in which a witness testified that the banana peel left a very distinct stain upon the doorsill and matting, while witnesses introduced in behalf of the defendant testified that almost immediately after the accident they made an examination and failed to discover any banana peel or stain, it was held proper to permit a witness to testify that he had placed a banana peel upon the outer sill of the door of the same car, stepped upon it with the weight of his body, permitted it to slip off upon the rubber doormat and pushed it along, making a smeared place upon the mat, and that the smeared place was yet visible for a distance of 50 feet, although the experiment had been made some eighteen to twenty hours previously, the fact that, after plaintiff's fall, the stain then made, if any, may have been stepped upon by persons going in and out of the car going rather to the weight of the testimony than to its admissibility.

#### **Bathtub.**

Injury received while bathing, see *Accident*—reproduction of circumstances of.

#### **Blow.**

Experiment to determine manner of striking, see *Homicide*.

In a prosecution for homicide the court may properly, in its discretion, reject evidence as to the force registered by a dynamometer when struck with a bat of substantially the same form and weight as that with which the murder was supposed to have been

committed. *Com. v. Piper* (1876) 120 Mass. 185.

**Boiler.**

Cause of explosion of, see Accident—reproduction of circumstances of.

**Boot.**

Freezing of, to track, see Accident—reproduction of circumstances of.

**Brake.**

Effect of release of, to make car jump forward, see Accident—reproduction of circumstances of.

**Building.**

Experiments to show stability of cornice, see Accident—reproduction of circumstances of.

**Bullet hole—how caused.**

In *Gibbons v. Territory* (1911) 5 Okla. Crim. Rep. 212, 115 Pac. 129, it was held that for the purpose of testing the veracity of defendant's story that he had been shot at by the deceased, and that the bullet passed through a certain door, which was introduced in evidence and exhibited to the jury, it was error to admit evidence of experiments made by witnesses by shooting at the door with a rifle of similar caliber to that used by the deceased, it appearing that the witnesses were not experts either in gunnery or timber and that the timber had been exposed and was four or five years older than when the trouble occurred.

**Burns.**

Distance within which powder burns and marks will be produced by discharge of weapon, see Powder burns and marks.

**Candle.**

Appearance given by light from, see Light.

**Cap.**

Catching of, in shutting door, see Door.

**Carrier.**

Time given passenger to alight, see Time.

Experiments in actions for personal injuries sustained by passenger, see Accident—reproduction of circumstances of.

**Cars.**

See Railroads; Street car.

Speed of, see Speed.

Injuries to passengers, see Passengers.

Accidents at crossings, see Highway crossings.

Experiments to ascertain distance at which person or object on or near track might have been seen, see Visibility.

**Cash register.**

In a suit to recover the price of a cash register claimed by the purchaser to be defective, there is no error in permitting the machine in question to be operated in the presence of the jury, there being proof that it was in the same condition that it was in when returned by the defendant. *National Cash Register Co. v. Blumenthal* (1891) 85 Mich. 464, 48 N. W. 622.

**Cattle.**

On railroad track, possibility of seeing, see Visibility—of live stock on track.

**Cement.**

Test of, see Properties of substances.

**Chemicals.**

See Drugs.

Experiments to show erasure by use of chemicals, see Ink.

**Child.**

On railroad track, possibility of engineer seeing, see Visibility—of person on or near track.

**Circular saw.**

Throwing of wood by, see Accident—reproduction of circumstances of.

**Concealment.**

See Visibility—existence of place of concealment.

**Conversation.**

Possibility of overhearing, see Audibility.

**Cornice.**

Safety of, see Accident—reproduction of circumstances of.

**Corrosiveness.**

See Fumes.

**Crossing.**

See Highway crossing.

**Coupling.**

Cars, see Accident—reproduction of circumstances of.

Experiments to show direction in which swerve of car in rounding curve would cause person to fall, see Accident—reproduction of circumstances of.

**Curve.**

Experiments to show that speed of car would not cause it to jump track, see Accident—reproduction of circumstances of.

In railroad track, obstruction of view of engineer by reason of, see Visibility—of person on or near track.

**Discharge.**

Experiments to ascertain possibility of accidental discharge of gun or pistol, see Firearms—possibility of accidental discharge.

**Distance.**

At which person or object on or near track might have been seen by motorman or locomotive engineer, see Visibility.

Within which train can be stopped, see Stopping train.

From which rays of locomotive headlight will fall upon crossing, see Visibility—conditions as to light.

At which powder marks or burns will be produced, see Powder burns and marks.

Experiment to determine distance from which shotgun was fired, see Shot—scattering of.

**—time necessary to traverse.**

It is error to admit evidence of an experiment made with a different horse, but a similar wagon, as to the time necessary to traverse a certain space. *Louisville R. Co. v. Hoskins* (1905) 28 Ky. L. Rep. 124, 88 S. W. 1087.

In *Klanowski v. Grand Trunk R. Co.* (1887) 64 Mich. 279, 31 N. W. 275, an action for injuries sustained by a collision on a highway crossing between a train and the vehicle in which plaintiff was riding, it was held that a witness was improperly permitted to testify that he went out in a wagon like plaintiff's and placed himself, without measurement, about where plaintiff told him he stopped, and watched for

the approach of the train, for the purpose of finding out how long, after he caught sight of it, it would take him to reach the crossing.

In a prosecution for arson it is error to permit two active young men to testify as to the time it took them to walk from the point where a witness testified he met defendant on the night of the fire, to the place of the fire and back to the defendant's home, for the purpose of convincing the jury that defendant, who was an old man in infirm health, could have made the trip in about the same time. *People v. Gotshall* (1900) 123 Mich. 474, 82 N. W. 274, 13 Am. Crim. Rep. 630.

In order to discredit an alibi based on evidence to the effect that defendant had been on the road with a load weighing about 1,000 pounds, a witness is improperly permitted to testify as to the length of time it took him to make the trip with a similar load, it not appearing that the kind and strength of the horses, the condition of the wagon, and the condition of the road were the same at both times. *State v. Ortiz* (1919) — N. M. —, 180 Pac. 284.

In *State v. Plyler* (1910) 153 N. C. 630, 69 S. E. 269, a prosecution for homicide in which one of the points made by the prisoner in his defense was that he could not have walked from his premises, where he was seen at a certain hour, to the scene of the homicide in time to have fired the gun that was supposed to have killed deceased, it was competent to permit a witness to testify, against the prisoner's objection, that he traversed the space between such spot and the scene of the homicide in three minutes.

In order to show that the prosecutrix was mistaken in her identification of the defendant as the person who committed an assault upon her with intent to rape, where it appears that defendant with three other persons, driving a wagon drawn by two mules, was preceded at a certain point on the road by three other wagons some 150 yards in advance of him, and that the wagon in which the defendant was riding passed the other wagons at a point further down the



road, having traveled about 830 yards while the preceding wagons were covering about 680 yards, evidence is admissible of experiments made by defendant as nearly as practicable under the same conditions as those attending the original transaction, for the purpose of showing that it was impossible that the wagon in which he was traveling could have stopped at the house of the prosecutrix, and for appellant and his codefendant to have alighted, gone a distance of 190 yards, committed the assault, and then returned to their wagon and overtaken the preceding wagons as the testimony showed. *Clark v. State* (1897) 38 Tex. Crim. Rep. 30, 40 S. W. 992.

Where a witness testified to having covered a certain route in a given time, other witnesses may, for the purpose of corroborating such testimony, testify as to the length of time taken by them to traverse the same ground, although it appears that part of the way thus walked over was through woods and on a sidehill and was more or less rough and stony, and that there was no path in which to walk, so that the witnesses could not be certain of following the identical course, such dissimilarity of conditions going to the weight and not the relevancy of the evidence. *State v. Flint* (1888) 60 Vt. 304, 14 Atl. 178.

#### **Door.**

In a prosecution for homicide in which it was proved as an inculpatory fact against defendant that the cap of the deceased, who was lying near the door of defendant's saloon, was wedged in under the door and could not have been pushed in from the outside, it was error to permit witnesses to testify as to experiments made with the cap of the deceased to show that, when put on the floor inside the door with the back mashed down and the door shut, it would catch under the door at the place and in the manner in which the witness had testified to having found it, where it was not shown that the door was in the same condition, or that at the time of the homicide the cap was mashed down behind as it was at the time of the experiment.

*Rupe v. State* (1901) 42 Tex. Crim. Rep. 477, 61 S. W. 929.

#### **Drugs.**

See also *Properties of substances*.

In *Mann v. Reynolds* (1912) 150 Ky. 313, 150 S. W. 329, an action against a druggist for negligently selling bichloride of mercury instead of calomel, it was held that the trial court properly permitted an apothecary to bring into court samples of calomel and of bichloride of mercury, although the bichloride of mercury was in crystalline form and not in powdered form like that sold by the druggist, the testimony being clear that it was one and the same drug.

#### **Electrical transformer.**

See *Transformer*.

#### **Electric car.**

See *Street car*.

#### **Electric motors.**

See *Motor*.

#### **Emery.**

Direction taken by flying particles of, see *Accident*—reproduction of circumstances of.

#### **Engine.**

See *Locomotive*.

#### **Engineer.**

Distance from which engineer might have seen person on or near track, see *Visibility*—of person on or near track.

#### **Erasure.**

Experiments to show erasure by use of chemicals, see *Ink*.

#### **Ether.**

See *Properties of substances*.

#### **Excavation.**

In highway, visibility of, see *Visibility*—of defect in highway.

#### **Explosion.**

Of boiler, cause of, see *Accident*—reproduction of circumstances of.

Of gasoline lamp, see *Accident*—reproduction of circumstances of.

See also, in this connection, *People v. Thompson* (1899) 122 Mich. 411, 81 N. W. 344, set forth *supra*, I. b.

#### **Explosiveness.**

See *Properties of substances*—explosiveness.

**Fall.**

Jarring of building as causing fall of object from upper story, see Accident.

**Fastening.**

Of platform gate on street car, see Gate.

**Fence.**

In *People v. Hill* (1899) 123 Cal. 571, 56 Pac. 443, it was held improper, for the purpose of establishing that a depression in a wire fence had been made by defendant in climbing over it, to permit a witness to testify that he had put his weight on the wire next to another post for the purpose of observing its effect, and that it made the downward appearance testified to, inasmuch as the relative weight of the two persons, the tension of the wire at the different posts, and the force with which each stepped upon the fence were elements to be considered before the experiment could illustrate the supposed act of the defendant.

**Fire.**

Causation of, by ignition of floor stain, see Properties of substances—inflammability.

Experiments to show that cinders of sparks may be larger than meshes of spark arrester, see Sparks.

In *Seibert v. McManus* (1901) 104 La. 404, 29 So. 108, an action for loss by fire alleged to have originated on defendant's premises from a furnace so installed as to set fire to wooden posts negligently permitted to remain in proximity thereto, it was held that plaintiff was improperly permitted to testify as to the result of an experiment made by him with a pyrometer at his own furnace, which resembled that of the defendant, in order to see at what degree of heat wood, without being in direct contact with fire, would ignite, the furnaces not being alike and the pyrometer having been inserted in plaintiff's furnace after a fire had been made therein and had been kept up steadily for a number of hours, with direct reference to the experiment which was to be made subsequently.

**Firearms.**

Experiments with, to determine dis-

tance within which discharge will produce powder burns or marks, see Powder burns or marks.

Experiments to determine scattering of shot, see Shot—scattering of.

See also Bullet hole—how caused.

In *State v. Bass* (1913) 251 Mo. 107, 157 S. W. 782, defendant was charged with having shot his wife, whose partly consumed body, taken from the ruins of the house to which he was supposed to have set fire in order to conceal his crime, proved to contain shot, which the defendant accounted for by the fact that he had in the house a large number of shotgun shells, placed in an earthen churn, which were heard to explode during the fire. It was held to be error to admit, on behalf of the state, evidence of experiments made by throwing shotgun shells into a fire, or building a fire around them, to show that when exploded unconfined the shot had no penetrating force, where it was not shown that the shells used were identical with or reasonably similar to those which were in defendant's house.

In a prosecution for murder there is no error in refusing to permit the defense to use the pistol and cartridges found on the person of the defendant at the time of his arrest for the purpose of testing the shooting capacity of the pistol by shooting into a section of the log taken from the cabin in which the deceased was shot, for the purpose of showing that a ball from this pistol would penetrate much further into the wood than the evidence showed was done by the pistol that probably did the killing, it not being shown from what point or position in the room any of the balls embedded in the wall were fired at the time of the affray, or that the cartridges were the same as those in evidence, or that the distance from which the shots were fired was known. *State v. Fletcher* (1893) 24 Or. 295, 33 Pac. 575.

—possibility of accidental discharge.

In *Mansfield v. Com.* (1915) 163 Ky. 488, 174 S. W. 16, a prosecution for homicide in which the theory of the defense was that the deceased, hold-

ing the barrel of his pistol in his hand, struck defendant on the top of his head with the butt end of it, thereby causing the pistol to discharge, it was held that a pistol of like make might be used in the presence of the jury for the purpose of demonstrating that it could not be discharged by striking the handle against any object or person, but only by pulling the trigger and at the same time pressing the safety device.

In a prosecution for homicide in which the defendant claimed that the deceased was killed by a shot from his revolver when he accidentally dropped it upon the floor, and in which the state showed that the pistol was so constructed that it could not be fired by being struck a blow, the defendant should be permitted to prove that an experiment had been made with the pistol by fastening it in a secure place and striking the hammer, while on the safety notch, a slight blow, and that this blow caused the hammer to strike and explode the cartridge, although the experiment was not made in the same way defendant claimed that the shot was fired, that is, by striking the floor. *Hodge v. State* (1910) 60 Tex. Crim. Rep. 157, 131 S. W. 577.

In a prosecution for murder in which the defendant claimed that the shooting was accidentally caused by the slipping of his gun from a stump against which he had set it, evidence of experiments made by a witness with a shotgun which was of a different construction and size than the rifle of defendant was properly excluded. *People v. Auerbach* (1913) 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915B, 557.

#### **Flash.**

Of gun or pistol, possibility of recognizing person by, see *Visibility*.

#### **Flavor.**

See *Properties of substances—flavor*.

#### **Flying particles.**

Direction taken by, see *Accident—reproduction of circumstances of*.

#### **Foot.**

Catching of, in railroad track, see

*Accident—reproduction of circumstances of*.

#### **Footboard.**

Of locomotive, catching of, at track intersections. See *Accident—reproduction of circumstances of*.

#### **Force.**

Of blow, see *Blow*.

#### **Forgery.**

Experiments to show erasure of writing by use of chemicals, see *Ink*.

#### **Freezing.**

Of boot to railroad track, see *Accident—reproduction of circumstances of*.

#### **Fumes.**

In *Eidt v. Cutter* (1879) 127 Mass. 522, in which the question in controversy upon which both parties introduced the testimony of experts was whether the injury to the plaintiff's house was caused by the fumes and gases from defendant's works, or by the emanation from a sewer, it was held that the experts were properly permitted to testify, in giving the grounds and reasons of their opinions, as to the details of experiments made by them under conditions and circumstances which, as they testified, were as nearly as possible like those surrounding the plaintiff's house, in the absence of the sewer.

In an action for injury to plaintiff's farm by the fumes from a smelter some 2 miles distant, it is error to permit experiments to be made before a jury by pouring sulphuric acid out of a bottle on a wooden stick, a pine branch, and a piece of cloth, there being no such similarity of conditions as to insure a reasonably just and accurate comparison. *Rowe v. Northport Smelting & Ref. Co.* (1904) 35 Wash. 101, 76 Pac. 529.

#### **Furnace.**

Experiment to determine possibility of fire originating from, see *Fire*.

#### **Gases.**

See *Fumes*.

#### **Gasolene.**

See *Properties of substances*.

#### **Gate.**

In an action against a street car company for the death of a passenger

who fell from the platform of a street car and was killed, in consequence of the gate not being securely fastened, in which the defendant seeks to prove by testimony that it was not possible for the link fastening the platform gate to stay upon the knob halfway or insecurely, it is proper to produce in court the contrivance itself and demonstrate its workings. *Spurlock v. Shreveport Traction Co.* (1906) 118 La. 1, 42 So. 575.

#### **Gummed paper.**

Experiment to determine adhesiveness of, see Properties of substances—adhesiveness.

#### **Guns.**

See Firearms.

#### **Hallway.**

Amount of light in, see Visibility—conditions as to light.

#### **Hearing.**

See Audibility.

Possibility of testator seeing and hearing attesting witnesses, see Wills—attestation of.

#### **Heel.**

Catching of, upon steps, see Accident—reproduction of circumstances of.

#### **Highway.**

Visibility of defects in, see Visibility—of defect in highway.

Amount of light given by street lamp, see Visibility—conditions as to light.

Overturning of other vehicle by obstruction in, see Accident—reproduction of circumstances of.

In an action against an abutting landowner for discharging water through a spout so that it ran upon the sidewalk, where it formed ice upon which the plaintiff slipped, it was not error on the part of the trial court to exclude a photograph taken during a rainstorm of much greater severity than any occurring at the time of the accident, for the purpose of showing the direction taken by water thrown from the spout and that such water could not and did not flow to the public walk. *Field v. Gowdy* (1908) 199 Mass. 568, 19 L.R.A. (N.S.) 236, 85 N. E. 884.

#### **Highway crossing.**

Accident at, see Accident—reproduction of circumstances of.

Distance from which light from locomotive headlight will fall upon, see Visibility—conditions as to light.

Visibility of approaching train from, see Visibility—of approaching train.

#### **Hole.**

As cause of accident, see Accident—reproduction of circumstances of.

#### **Homicide.**

Demonstration as to possibility of suicide, see Suicide.

Experiments tending to negative defense of suicide, see also Powder burns and marks.

Experiments to determine scattering of shot, see Shot—scattering of.

Distance within which powder burns and marks will be produced by discharge of weapon, see Powder burns and marks.

Experiments to ascertain possibility of accidental discharge of gun or pistol, see Firearms—possibility of accidental discharge.

Possibility of seeing as testified to by witness, see Visibility—possibility of seeing.

Upon a trial for murder in which it was a controverted question whether or not a stab in the body of a murdered person severed a particular vein, the trial court is justified in excluding evidence of an experiment made by a witness upon a dead body approximating in size that of the deceased. *Com. v. Tucker* (1905) 189 Mass. 457, 7 L.R.A. (N.S.) 1056, 76 N. E. 127.

In *Brown v. State* (1913) 74 Tex. Crim. Rep. 356, 169 S. W. 437, a prosecution for uxoricide in which the defendant claimed that his wife had been killed by a burglar who struck at them while they were lying in bed, with an iron bar, it was held admissible to show by a witness that, standing where defendant said the man stood, it would be impossible with the weapon used to make certain indentations on the wall, and that in order to produce such indentations one would have to stand in another place, and that it was immaterial whether or not the bed had or had not been slightly moved

from the place where it stood at the time of the homicide.

#### **Ice.**

Formation of, upon sidewalk, see Highway.

In an action on a contract for the sale of ice which the purchaser has refused to accept because of its quality, evidence that a bacteriological examination of ice taken from plaintiff's factory three days after the last delivery disclosed the presence of dangerous bacilli is inadmissible, although the defendant proved that neither the plant nor the operation of the plant were changed in those three days. *Interboro Brewing Co. v. Independent Consumers' Ice Co.* (1915) 93 Misc. 24, 156 N. Y. Supp. 410.

#### **Inflammability.**

See Properties of substances.

#### **Injury.**

Experiments to show personal injury could not have been caused by means alleged, see Accident—reproduction of circumstances of.

#### **Ink.**

In *Otey v. Hoyt* (1854) 47 N. C. (2 Jones, L.) 72, an action on a bond in which defendant admitted the genuineness of the signature, but claimed that the body of the bond was a forgery, that the ink had been extracted from the body of some genuine paper by the use of chemicals, and the writing composing the obligation declared on substituted, it was held to be error to permit a witness to testify as to an experiment showing the practicability of erasing writing by the use of chemicals, it not appearing that the ink used was the same, or whether the paper experimented on had been recently written or was a writing of long standing.

In *People v. Brotherton* (1874) 47 Cal. 388, a prosecution for forgery, it was held competent for the prosecution to show that certain chemicals found in the baggage of one of the defendants had been applied to a check written in imitation of the original check, which defendants were accused of having raised, with the same kind of ink, and that the ink was extracted from the body of the check without

affecting the signature, and leaving the part where the ink was extracted perfectly white, and the texture of the paper uninjured.

#### **Insanity.**

Effect of liquor to produce, see Properties of substances.

#### **Jarring.**

As causing fall of object from above, see Accident.

#### **Jerk.**

Throwing of passenger from step of street car, see Accident—reproduction of circumstances of.

#### **Kerosene.**

See Properties of substances.

#### **Lamp.**

Injuries sustained in attempting to light, see Accident—reproduction of circumstances of.

#### **Larceny.**

In a prosecution for larceny it is proper to permit a tailor to whom the prosecutor carried his coat to be mended, to testify as to experiments made to see whether such a pocketbook as he described could have been taken out through the cuts made in it, the coat being then in the same condition in which it was at the alleged robbery. *People v. Morrigan* (1874) 29 Mich. 5.

#### **Light.**

Possibility of recognizing a person by light from flash of gun or pistol, see Visibility.

Distance from which visible, see Visibility—of objects on or near track.

Amount of, cast by locomotive headlight, see Visibility—conditions as to light.

In a prosecution for arson in which the theory of the prosecution was that defendant set fire to the store by leaving a candle burning under a counter, which, upon burning down, ignited some excelsior and other rubbish, but in which there was no evidence that candles had ever been used in the store and no candle or any indication of one was found there when the fire was discovered, a police officer who had testified that a few minutes after defendant had left the store he had ob-

served a dim light therein may not be permitted to testify that he had experimented by placing a candle in the room under a counter about where the fire occurred, and then going across the street to about the same place where he had noticed the reflection on the walls of the room the night before the fire, when he noticed the same sort of reflection as that seen by him before the fire. *Hooker v. State* (1903) 98 Md. 145, 56 Atl. 390, 1 Ann. Cas. 644.

#### **Lighting.**

See **Visibility**—amount of light

#### **Live stock.**

On railroad track, possibility of seeing, see **Visibility**—of live stock on track.

#### **Locomotive.**

Experiments with, see **Accident**—reproduction of circumstances of.

#### **Locomotive headlight.**

Amount of light cast by locomotive headlight, see **Visibility**—conditions as to light.

#### **Lying in wait.**

Demonstration of impossibility of concealment as negating, see **Visibility**—existence of place of concealment.

#### **Machine.**

Unexpected starting of, see **Accident**—reproduction of circumstances of.

Operation of, see **Accident**—reproduction of circumstances of.

#### **Machinery.**

Weight of, as occasion of accident, see **Accident**—reproduction of conditions of.

#### **Marks.**

Distance within which powder burns and marks will be produced by discharge of weapon, see **Powder burns and marks**.

#### **Motor.**

In *Kimball Bros. Co. v. Citizens Gas & E. Co.* (1908) 141 Iowa, 632, 118 N. W. 891, an action to recover damages for failure to furnish an agreed current of electricity for the purpose of operating an elevator, it was held to be within the discretion of the trial court to admit the result of a test of the motor made in the power plant from which the current was taken, the vol-

tage and amperage being the same which defendant claimed it was furnishing at the building for which the elevator was designed.

#### **Motorman.**

Distance from which person on or near track might have been seen, see **Visibility**—of person on or near track.

#### **Murder.**

See **Homicide**.

#### **Obstruction.**

Of view, see **Visibility**—of approaching train

#### **Odor.**

See **Smelling**.

#### **Oscillation.**

Of hanging scaffold, see **Accident**—reproduction of circumstances of.

#### **Passenger.**

Experiments to ascertain cause of injury to passenger on street car, see **Accident**—reproduction of circumstances of.

#### **Penetrating force.**

Of shot or bullet, see **Firearms**.

#### **Photograph.**

See **X-ray pictures**.

#### **Pipe line collars.**

Nonconformity to standard, see **Sales**.

#### **Pistol.**

See **Firearms**.

#### **Pocketbook.**

Possibility of removal of, through cut in coat, see **Larceny**.

#### **Powder burns and marks.**

It is not essential to the admissibility of evidence as to the distance at which powder burns are produced that the experiments should be made upon a live human being. *People v. Solani* (1907) 6 Cal. App. 103, 91 Pac. 654.

In *Tesney v. State* (1884) 77 Ala. 33, in which, as bearing upon the question whether defendant had stabbed deceased in self-defense, it was a question whether deceased had shot him at close quarters or from a few paces distant, it was held that the court erred in admitting evidence of the result of a solitary experiment, made by firing at a coat similar to the one worn by defendant in order to show that no powder burns would be produced by a

shot at close quarters, the court saying: "Such evidence superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments with results as variant as the manner of loading the pistols, and the modes of making the experiments dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury and withdraw their minds from the consideration of the main issue."

In *People v. Clark* (1890) 84 Cal. 573, 24 Pac. 313, a prosecution for homicide, in which the distance of the deceased from the defendant at the time of the homicide was material as bearing upon the question whether the shooting was in self-defense, and in which it appeared that no powder marks were found upon the clothing or body of the deceased, it was held that a witness might be permitted to testify to experiments made by him with a rifle of the same make and caliber as that used by the deceased, to show the distance within which the discharge of such rifle would powder mark clothing.

Where the evidence is not only conflicting but far from satisfactory as to there being any powder marks plainly discernible around the wound which occasioned the death of the deceased, and the caliber of the revolver used for the experiment is not shown with certainty to be the same as that used by the defendant, and there is no evidence that the cartridge used for loading was the same in its contents, evidence of experiments made by discharging a revolver at a piece of white paper is properly excluded. *People v. Solani* (1907) 6 Cal. App. 103, 91 Pac. 654.

In *Fein v. Covenant Mut. Ben. Asso.* (1895) 60 Ill. App. 274, in which the question was whether a person whose life was insured had killed himself or had come to his death accidentally or as the result of a felonious act of a third person, and in which it was a disputed point whether or not there were powder marks on the face of the deceased, it was held that evidence of experiments made with a pistol of the same nature and caliber as that with which the insured had been killed, and

with cartridges from the same box, by shooting at a piece of white paper at varying distances, was properly admitted, the condition being substantially the same except that paper was used instead of the skin of a living man.

In *Thrawley v. State* (1899) 153 Ind. 375, 55 N. E. 95, a prosecution for homicide which defendant claimed to have occurred in a hand-to-hand conflict, while the prosecution adduced evidence to show that the deceased had been shot from a distance, it was held competent to permit a witness to testify to the result of experiments in shooting with defendant's revolver at blotting pads for the purpose of showing how far unburned grains of powder would carry, the same make and grade of cartridges being used as defendant had employed in the homicide, and it being shown that such cartridges were standard and very uniform in operation.

In *State v. Newells* (1906) 135 Iowa, 53, 109 N. W. 1016, in which it was a question whether or not the person whom defendant was accused of killing had committed suicide, it was held that there was no error in admitting evidence of an experiment made by shooting at a piece of the shirt worn by the deceased when he was killed, with the defendant's revolver, at a distance of 6 to 12 inches, for the purpose of noting the resulting powder marks or burns, if any, although it was not shown that the cartridges employed by the witnesses were the same as the particular cartridge from which the bullet was shot into the body of the deceased.

In *Scott v. Homesteaders* (1910) 149 Iowa, 541, 129 N. W. 310, in which the question was whether the insured, who died from a gunshot wound, had committed suicide, the defendant advanced the theory that where the muzzle of a pistol or revolver is held close enough against the point of injury to prevent communication with the outside atmosphere, no powder marks will appear on the outside of the wound, and introduced expert evidence to that effect, based upon alleged observation and experiment, in which no differentiation

was claimed as to the caliber of pistols or revolvers. It was held competent to permit testimony on the part of the plaintiff that, upon the discharge of a revolver placed against a piece of bacon supported by a cabbage head, powder marks appeared upon the exterior surface of the bacon, although such experiment was conducted with a pistol of smaller caliber than that with which the insured was presumably killed.

In *State v. Asbell* (1896) 57 Kan. 398, 46 Pac. 770, in which it was a question whether or not the person for whose murder defendant was being tried had committed suicide, it appeared that the hair around the bullet hole was not stained and that there were no powder marks on the flesh, and it was claimed that if the decedent had fired the pistol it would have necessarily been close to her head and the hair would have been singed and the flesh powder marked. It was held that a witness was properly permitted to testify to the result of experiments conducted by him by shooting at human hair and a paper target with the pistol with which the deceased was killed, and with cartridges similar to those found therein, at distances ranging from 6 inches to 10 feet.

Experiments made with the same revolver and the remaining ammunition contained therein by shooting at a piece of light cloth, for the purpose of determining the distance at which the revolver must have been held to produce the burned effect found upon the clothing of a woman, is admissible upon the question whether she was murdered or committed suicide. *Newkirk v. State* (1919) — Md. —, 106 Atl. 694.

In *Beckett v. Northwestern Masonic Aid Asso.* (1897) 67 Minn. 298, 69 N. W. 923, in which it was a question whether a person insured had committed suicide, and there was evidence tending to prove that there were no powder marks around the wound, it was held to be competent, for the purpose of rebutting the theory of suicide, to show the results of experiments made by discharging the same revolver loaded with similar cartridges and notic-

ing at what distances from the muzzle of the revolver hair and other substances were singed and powder burned.

In *Huestis v. Aetna L. Ins. Co.* (1915) 131 Minn. 461, 155 N. W. 643, in which it was a question whether the insured had shot himself accidentally or with suicidal intent, and the closeness of the gun to the place of the wound had some bearing on the probability of its being fired intentionally, the court admitted testimony as to the result of experiments with the same gun, loaded with similar shells, fired into sheets of cotton wadding.

In *McAlpine v. Fidelity & C. Co.* (1916) 134 Minn. 192, 158 N. W. 967, in which it was a question whether an insured person had committed suicide or been murdered, it was held that evidence of experiments made with the gun of the insured by shooting against white paper was properly excluded, evidence having been given of the results of other experiments with a substance furnishing a better illustration.

In *Lillie v. State* (1904) 72 Neb. 228, 100 N. W. 316, a prosecution for homicide in which, in determining whether the shots, one of which passed out through a curtain, the glass of the window, and a wire screen on the outside of the window, were fired by the defendant or by some other person, it became important to know at what distance from the window such shot was fired. The curtain, which was in evidence, was powder burned, and the state offered evidence of experiments which had been performed for the purpose of demonstrating how near it the shot must have been fired to produce such result. It was held that it was not an abuse of discretion on the part of the trial court to admit evidence of experiments in which the material used was a piece of muslin hung before a wooden surface, and about 6 inches distant, with revolvers and cartridges of various kinds, fired at various distances, a record being kept of each shot fired, and each bullet hole through the cloth being fully explained to the jury, the kind of revolver and cartridges used in connec-



tion therewith and the distance from which the shot was fired being shown, although it was not known what sort of cartridges or revolver were used by the assassin.

In *People v. Fiori* (1908) 123 App. Div. 174, 108 N. Y. Supp. 416, a prosecution for homicide in which it appeared that the clothing worn by the deceased contained powder and appeared to be burned or scorched, it was held that, in order to determine from what distance the shot which penetrated the clothing was fired, it was proper to admit evidence of an experiment made by discharging a revolver and cartridges of the same kind as those used by the defendant at pieces of cloth cut from a new garment and moistened to correspond with the presumable condition of the deceased's coat at the time of the killing, it being also attempted to comply with the conditions regarding the atmosphere, the test having been made on a rainy day, and it appearing that it was wet and rainy the night when the homicide was committed. But it appearing that the fatal shot did not penetrate the clothing of the deceased, but struck him in the head, it was held that such evidence injected into the case an element of dissimilarity which, instead of aiding the jury, would be quite liable to confuse them, and under such circumstances was not proper.

In *Sullivan v. Com.* (1880) 93 Pa. 284, a prosecution for murder in which the defense was set up that the deceased had committed suicide, the prosecution showed that there were no powder marks or burns upon the person or clothing of the deceased. It was held that it was proper to admit evidence of experiments made with the same revolver and cartridges, which were discharged at a piece of muslin at varying distances.

In a prosecution for homicide in which the theory of the defense was that the deceased committed suicide, witnesses may be allowed to state with what results they had fired the pistol with which the killing was done at different distances, for the purpose of ascertaining at what distance it would burn cloth like that worn by deceased,

or stain it with powder marks. *Boyd v. State* (1884) 14 Lea (Tenn.) 161.

In a prosecution for murder a witness may be permitted to testify to experiments made with a pistol used in the killing, for the purpose of showing how far it would powder burn cloth, similar to the shirt worn by the deceased. *Hughes v. State* (1912) 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262.

In order to show the distance of the weapon from deceased's head at the time of the homicide, evidence of experiments made as to the effect of powder fired from a pistol upon a pasteboard at various distances is inadmissible, a test on the pasteboard not being similar to firing at the skin of a human being. *Morton v. State* (1902) — Tex. Crim. Rep. —, 71 S. W. 281.

In *Streight v. State* (1911) 62 Tex. Crim. Rep. 453, 138 S. W. 742, a prosecution for homicide in which the state contended that when the pistol was fired it burned deceased's eyebrow, it was held error to reject evidence of experiments made with a pistol of the kind found lying by deceased, and the same character of shell, by shooting at a target prepared with human hair placed in the position and to represent human eyebrows, showing that with a bullet hole so placed as in the case of the bullet which killed the deceased it would be impossible at any range for the powder to burn the eyebrow off.

In *Reagan v. State* (1919) — Tex. Crim. Rep. —, 208 S. W. 523, a prosecution for homicide in which it became material, as bearing upon the question whether the fatal shot was fired in self-defense, to determine at what distance from the deceased it was fired, it was held error to admit evidence of experiments made by shooting the same pistol with the same kind of cartridges at white paper in order to determine the distance at which it would cause powder burns, it appearing that the clothing of the deceased was of dark color.

In *Pollock v. State* (1908) 136 Wis. 136, 116 N. W. 851, a prosecution for homicide, it was held competent for the purpose of discrediting defend-

ant's claim that he fired in self-defense when he and the deceased were in close proximity, to show that there were no powder marks on the body of the deceased, and to give evidence as to experiments made by shooting bullets from the same pistol, using similar cartridges, through the vest of the deceased at various distances, for the purpose of showing at what distance there would be no powder stains.

**Properties of substances.**

See also Corrosiveness.

In *Moehlenbrock v. Parke, D. & Co.* (1918) 141 Minn. 154, 169 N. W. 541, an action to recover for the death of a person alleged to have been caused by the administration of impure ether as an anesthetic, against the manufacturer thereof, it was held that evidence was admissible as to the effect of ether out of the same can, administered to another patient on the following day, human beings being physically sufficiently near alike so that it may be assumed that, when a drug produces a certain effect on one person, it will to a certain extent similarly affect another, taking into account age, strength, and other conditions present.

**— adhesiveness.**

In an action on a bond in which the plaintiff claimed that it was originally sealed with paper taken from the gummed margin of postage stamps, and that such seals had been lost, it was proper to refuse to permit the defendant to adhere the gummed margin of postage stamps to paper in the presence of the jury, and when dry to let the jury remove them, there being no offer to show that such margins, when once adhered to paper, will remain unaffected by time or the conditions under which they are kept or handled. *Hardwick Sav. Bank & T. Co. v. Drenan* (1900) 72 Vt. 438, 48 Atl. 645.

**— explosiveness.**

In *Standard Oil Co. v. Reagan* (1915) 15 Ga. App. 571, 84 S. E. 69, 8 N. C. C. A. 209, an action for damages occasioned by negligence in selling gasoline as kerosene, it was held no error to show that upon the application of a match to a quantity poured into a tin can the liquid sold as kero-

sene ignited much more readily than genuine kerosene, although the evidence in the case indicated that the liquid in question had been poured upon chips in a stove to which fire had already been applied.

**— flavor.**

In *Boerner Fry Co. v. Mucci* (1913) 158 Iowa, 315, 138 N. W. 866, an action against an ice cream manufacturer for the price of a quantity of vanilla sold to him by plaintiff, alleged not to be according to sample, it was held that the trial court was clearly within its discretion in refusing to permit the jury to taste of ice cream flavored with the vanilla in question, the professed purpose of the experiment being to show that the extract gave the ice cream a soapy taste, since it did not appear that such taste was not attributable to other ingredients.

In a prosecution for homicide, in which the defendant claimed to have been rendered temporarily insane by a drink which had been given him by a saloon keeper, his testimony that liquor tasted by him at the time of the trial had a taste very similar to that which he had drunk prior to the homicide is insufficient to let in evidence of experiments made with ordinary whisky and with a liquor claimed to be of the same character as the liquor which defendant had taken. *People v. Slack* (1892) 90 Mich. 448, 51 N. W. 533.

**— inflammability.**

In *Thornhill v. Carpenter-Morton Co.* (1915) 220 Mass. 593, 108 N. E. 474, an action for injuries sustained by the plaintiff from the sudden ignition of the volatile and inflammable gases contained in a stain when a match was lighted in the room where the stain was being applied to the floor, it was held that it could not be said that the trial court abused its discretion in refusing to permit a can of the stain to be lighted in the presence of the jury for the purpose of showing that it could easily be extinguished, the conditions under which the accident occurred being so manifestly different from the conditions when the experiment was proposed that it would not have assisted the

jury unless supplemented by collateral inquiry.

Where plaintiff's theory is that a fire was caused by the ignition of gases formed upon the explosion of an ammonia refrigeration system, consisting of ammonia gas intermingled with the gases formed by the accompanying lubricating oils, the production by defendant of liquid ammonia in court and the offer by counsel to submit it to certain tests and experiments is improper and harmful. *Mueller Bros. Art & Mfg. Co. v. Fulton Street Wholesale Market Co.* (1913) 181 Ill. App. 685.

**—cement.**

In *Burt v. Garden City Sand Co.* (1908) 141 Ill. App. 603, affirmed in (1908) 237 Ill. 473, 86 N. E. 1055, in which it was contended that cement delivered was not up to contract grade, it was held that tests made of the cement after it had been subjected to conditions which would change its qualities were incompetent, since they did not tend to show its condition and qualities at the time and place of delivery.

**Railroad.**

See also Railroad crossing; Railroad tie; Railroad track.

Coupling cars, see Accident—reproduction of circumstances of.

Experiments to show that cinders of sparks may be larger than meshes of spark arrester, see Sparks.

Suction of passing trains, see Suction.

Experiment to determine whether engine might pass person standing by bin in coal shed, see Accident—reproduction of circumstances of.

**Railroad crossing.**

Time within which crossing might be reached after catching sight of train, see Distance—time necessary to traverse.

**Railroad tie.**

Possibility of brakeman stepping upon, in swinging from car, see Accident—reproduction of circumstances of.

**Railroad track.**

Distance from which persons on or near railroad track might have been

seen, see Visibility—of persons on or near track.

Time necessary to remove rail, see Time.

Freezing of person's boot to track, see Accident—reproduction of circumstances of.

Possibility of catching foot between rails, see Accident—reproduction of circumstances of.

**Rain water.**

Discharge of, upon sidewalk, see Highway.

**Recognition.**

Of person by flash of gun or pistol, possibility of, see Visibility.

**Refrigerating system.**

Inflammability of gases generated by explosion of, see Properties of substances—inflammability.

**Release.**

Of brake, effect of, to make car jump forward, see Accident—reproduction of circumstances of.

**Revolver.**

See Firearms.

**River.**

In an action for damages for removing stone from a river, in consequence of which the river washed away the plaintiff's land, evidence that the removal of stone at another place on the river produced the same effect is properly excluded where the only evidence as to the similarity of conditions was that there was a likeness in the two situations so far as the witnesses could judge. *Hawks v. Charlemont* (1872) 110 Mass. 110.

**Running.**

Noise made by person in, possibility of hearing, see Audibility.

**Sales.**

See also Smelling; Properties of substances.

In *Columbus Constr. Co. v. Crane Co.* (1900) 40 C. C. A. 35, 98 Fed. 946, an action for damages arising from the failure of material furnished for the construction of a pipe line to conform to specifications, it was held that the court did not err in admitting proof of a test made during the progress of the trial, of certain collars produced in court as samples of defective collars

received of the defendant under the contract, although the test was made by applying them to pipe other than that delivered under the contract.

**Saw.**

Throwing of wood by, see Accident—reproduction of circumstances of.

**Scaffold.**

Safety of, see Accident—reproduction of circumstances of.

**Seeing.**

See Visibility.

Possibility of testator seeing and hearing attesting witnesses, see Wills—attestation of.

**Self-defense.**

Experiments to determine from what distance pistol or gun was fired, as bearing upon issue of self-defense, see Powder burns and marks; Shot—scattering of.

**Shooting.**

Distance within which powder burns and marks will be produced by discharge of weapon, see Powder burns and marks.

**Shot—scattering of.**

In *People v. Wagner* (1916) 29 Cal. App. 363, 155 Pac. 649, a prosecution for homicide in which defendant claimed that his gun had accidentally gone off while he was cleaning it, and, in explaining how the killing occurred, illustrated how he sat in the chair and how he held the gun before and at the moment of its discharge, it was held that the trial court erred in permitting the prosecution to show the result of certain experiments made by firing shots from the gun which killed the deceased at and into cardboard and blocks of wood which were intended to represent the deceased, and were supposedly placed in the position in which he stood at the time of the killing, the result of such experiment tending to show that if the gun had been discharged on the morning of the killing in the manner and under the same circumstances described by the defendant, the pattern and location of the shot would have been different from the pattern and location of the shot actually found upon the head of

the deceased and in the window case—ment, where it was not shown that the block of wood which was supposed to represent the head and body of the deceased stood in the same position and at the same angle as the deceased stood when he was shot.

For the purpose of discrediting the testimony of the defendant in a murder case as to the conditions under which he shot the deceased, his claim being that he had done so in self-defense, it is error to permit the introduction into evidence of certain targets into which a witness testified he had fired shots from a gun for the purpose of showing that had the shooting taken place under the circumstances testified to by defendant the shot would not have scattered as it did, it not appearing that in making such test the same or a similar gun was used, or that the shot, powder, and loading were similar, or that the target was so placed as to be similar in position to the body of the deceased when he was shot, as testified by the defendant. *Hisler v. State* (1906) 52 Fla. 30, 42 So. 692.

In *State v. Justus* (1883) 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337, 6 Am. Crim. Rep. 511, in which the defendant, who was accused of the murder of his father, claimed that he had accidentally shot him in letting down the hammer on his gun while at a certain distance from where his father was sitting, it was held error to admit evidence of experiments made with the same gun, loaded as defendant was accustomed to load his gun, and out of the defendant's powder flask, by discharging it at certain targets made out of pasteboard at different distances, since the characteristics of near gunshot wounds can by no possibility be reproduced or represented by experiments upon pasteboard.

**Shotgun.**

See Firearms.

**Sidewalk.**

Formation of ice upon, see Highway.

**Signal.**

Visibility of, see Visibility—of signal.

**Sounds.**

Possibility of hearing, see Audibility.

**Smelling.**

In *Hagee v. Grossman* (169) 31 Ind. 223, an action for breach of warranty of flour alleged to have proved unfit for use, it was held proper not to permit the jury personally to test its odor, where it was shown that it gave out a stronger smell when offered in evidence than when purchased.

**Space.**

Experiment to determine whether engine might pass person standing by bin in coal shed, see Accident—reproduction of circumstances of.

**Spark arrester.**

Experiments to show that cinders of sparks may be larger than meshes of spark arrester, see Sparks.

**Sparks.**

In *Thomas, Roberts, Stevenson Co. v. Philadelphia & R. R. Co.* (1917) 256 Pa. 549, 100 Atl. 998, in which the issue was whether a fire had been started by sparks from defendant's locomotive, and in which witnesses had testified that under no circumstances could a spark larger than the mesh of an arrester escape therefrom if the latter were in good repair and condition, it was held that there was no error in admitting evidence as to experiments which demonstrated that when bituminous coal was used there were sometimes emitted through an arrester in good condition sparks which, after leaving the smokestack, expanded in size to such an extent that when picked up they were considerably larger than the mesh of the arrester, although these experiments were not made under conditions precisely similar to those existing at the time the sparks in the instant case were emitted,—especially as other witnesses were allowed to give like testimony without objection.

In *E. T. & H. K. Ide v. Boston & M. R. Co.* (1909) 83 Vt. 66, 74 Atl. 401, an action against a railroad for loss by fire, in which a perforated plate of the kind used by the defendant as a spark arrester, and a wire netting device in use on some other road, were in evi-

dence, it was held that it was within the discretion of the trial court to permit the jury to make experiments with such appliances to determine which of the two would permit the passage of the larger cinders, although the evidence was that the spark-arresting devices, when put in an engine, are set at an angle, so that the size and shape of the apertures were factors merely in the relative efficiency of the devices in question.

**Speaking.**

Possibility of overhearing conversation, see Audibility.

**Speed.**

Distance in which automobile at given speed may be stopped, see Automobile.

In *Augusta R. & Electric Co. v. Arthur* (1907) 3 Ga. App. 513, 60 S. E. 213, an action for injuries sustained by a foot passenger who was knocked down by a street car, it was held that there was no error in permitting a witness to testify as to certain experiments made by him as to the speed of a car on the defendant company's track, running on a different day, and not at but near the scene of the casualty, especially as the witness testified that so far as he could judge the cars which were being compared ran at about the same rate of speed.

In *Fippinger v. Glos* (1914) 190 Ill. App. 238, proof of experiments made by experts as to the speed at which defendant's auto truck could be driven was held competent on behalf of defendant without proof that the conditions were identically the same, where it was practically impossible to produce the exact conditions, owing to the fact that defendant was not served with process until more than nine months after the accident.

**Stability.**

Of cornice of building, see Accident—reproduction of circumstances of.

Of hanging scaffold, see Accident—reproduction of circumstances of.

**Steam.**

Time necessary to raise, in boiler, see Explosion.

**Stain.**

Inflammable properties of, see Properties of substances—inflammability.

Visibility of, produced by treading upon banana peel, see Banana peel.

**Stairs.**

Condition of light upon, see Visibility—amount of light.

**Starting.**

Of machine, see Accident—reproduction of circumstances of.

**Step.**

Catching of heel upon, see Accident—reproduction of circumstances of.

Throwing of passenger from step of street car, see Accident—reproduction of circumstances of.

**Stopping.**

Distance in which automobile at given speed may be stopped, see Automobile.

A witness may not be permitted to testify as to the distance within which a car could be stopped, where his observation was not made at the scene of the accident. *Price v. Charles Warner Co.* (1899) 1 Penn. (Del.) 462, 42 Atl. 699.

**Stopping train.**

In *Upthegrove v. Chicago G. W. R. Co.* (1910) 154 Ill. App. 460, an action for injuries sustained in a railway wreck, it was held that the trial court did not err in refusing to permit defendant to show the result of a test made to ascertain the distance in which a train running over the track at the point where the accident occurred could be stopped, where it appeared that such experiments were not made with the same engine, and that the train did not contain either the same number of loaded cars or the same number of empty cars, nor that the same number of cars were air equipped as in the train upon which plaintiff was riding.

In an action against a railroad company for the death of a person struck by a train, evidence is admissible of a test made to determine whether the train that caused the death could have been stopped after the engineer saw or could have seen the deceased, by running the same train on a different day, after the accident, over the same

8 A.L.R.—4.

place, with the same number of coaches, and in applying every means of stopping the train as soon as it was possible, by being on the lookout, to see an object standing at the place of the accident. *Byers v. Nashville, C. & St. L. R. Co.* (1895) 94 Tenn. 345, 29 S. W. 128.

**Store.**

Possibility of seeing into, from street, see Visibility—possibility of seeing from certain points.

**Strap.**

Possibility of accidental strangling by, see Suicide.

**Street car.**

Speed of, see Speed.

Experiments to show that speed of car would not cause it to jump track, see Accident—reproduction of circumstances of.

Distance within which may be stopped, see Stopping.

Injury sustained by passenger in alighting from, see Accident—reproduction of circumstances of.

Throwing of passenger from step of street car, see Accident—reproduction of circumstances of.

Working of device fastening platform gate, see Gate.

Distance from which persons on or near tracks might have been seen, see Visibility—of person on or near track.

Distance from which switch might have been seen by motorman, see Visibility—of switch.

**Street.**

See Highway.

**Street lamp.**

Amount of light given by, see Visibility—conditions as to light; also Visibility—of defects in highway.

**Suction.**

Evidence of the effect of air upon mail sacks thrown from running trains is inadmissible upon the question of the effect upon a boy weighing 65 pounds, standing near a passing train. *Graney v. St. Louis, I. M. & S. R. Co.* (1897) 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246.

**Suicide.**

Experiments to determine from what distance discharge of weapon

will produce powder burns or marks, as bearing upon question of, see Powder burns and marks.

In *Tackman v. Brotherhood of American Yeoman* (1906) 132 Iowa, 64, 8 L.R.A.(N.S.) 974, 106 N. W. 350, in which the question was whether or not one found strangled by a strap in his barn met death by accident or suicide, the court permitted evidence of experiments showing that with the strap hanging in a certain manner an accidental fall upon the strap would tighten it around the neck three times out of four, where the custom of hanging the strap over the peg as it hung in the experiment and the fact that it was not tied around the neck of the decedent are shown, so that the only condition not shown and necessary to be inferred to make the conditions in the experiment the same as those under which the death occurred is that the strap hung in the form of a loop.

In *State v. Schneck* (1911) 85 Kan. 334, 116 Pac. 823, in which the question was whether a person found with her throat cut had committed suicide or had been murdered, it was held that the trial court properly refused to allow defendant to make a physical demonstration before the jury that a knife found under the body would cut a chunk of raw beef, the conditions being so different that the experiment would not have aided the jury in determining whether the wound could have been inflicted with the knife.

**Switch.**

Distance from which motorman might have seen, see Visibility—of switch.

**Tasting.**

See Properties of substances—flavor.

**Tie.**

Possibility of brakeman stepping upon, in swinging from car, see Accident—reproduction of circumstances of.

**Time.**

Necessary to traverse certain distance, see Distance—time necessary to traverse.

Necessary to raise steam in boiler, see Explosion.

In an action for injuries sustained by a passenger by reason of the starting of the train before she had time to alight, there is no error in refusing to admit testimony of a subsequent test made to determine the length of time that the engineer probably took to oil his engine at the point in question on the occasion of the accident. *O'Dea v. Michigan C. R. Co.* (1905) 142 Mich. 265, 105 N. W. 746.

In *Davis v. State* (1897) 51 Neb. 301, 70 N. W. 984, a prosecution for homicide in causing the derailment of a train and the death of a passenger, the theory was that the defendant had unscrewed the nuts from the fish-plate bolts with a monkey wrench introduced in evidence, and removed with a clawbar the spikes holding down a rail on the trestle, just prior to the occurrence of the wreck. A witness having testified as an expert for the defendant that it was impossible for a man with the monkey wrench in evidence to unscrew the nuts on the fish-plate bolts of the railway track, it was held proper to permit the state in rebuttal to prove by a nonexpert that with the monkey wrench in evidence he unscrewed eight nuts from as many fish-plate bolts on a portion of the railway track in all respects like the track on the trestle, with the exception that where the witness experimented the track was on the earth, and that with the clawbar he also removed all the spikes which held down a rail, and that he did all this work in twenty-one minutes; and that the difference in conditions existing between the track where the experiment was made and the track where the displacement occurred did not render the evidence incompetent, but was proper for consideration by the jury in determining the weight to be given to the evidence of the experiment.

**Track.**

See Railroad track.

**Train.**

Suction of passing train, see Suction.

Obstruction of view of, see Visibility—of approaching train.

Distance from which persons or objects on or near railroad track might have been seen, see *Visibility*.

Distance within which train can be stopped, see *Stopping train*.

#### **Transformer.**

Evidence as to a test of an electric transformer alleged to have been the cause of an accident is competent though made long after the accident, where the testimony shows that the transformer was, at the time of the making of this test, in the same condition that it was at the time of the accident, that no repairs had been made upon it, and that when a transformer is broken down it never rights itself by its own action or that of the electrical current, but has to be taken down and repaired. *Smith v. Middleboro Electric Co.* (1915) 164 Ky. 46, 174 S. W. 773, Ann. Cas. 1917A, 1164.

#### **Truck.**

Test as to speed of, see *Speed*.

#### **Vibrations.**

As occasioning fall of object from above, see *Accident*—reproduction of circumstances of.

#### **View.**

See *Visibility*.

#### **Viability.**

Of stain produced by treading upon banana peel, see *Banana peel*.

Of attesting witnesses to testator, see *Wills*—attestation of.

—possibility of seeing from certain point.

For the purpose of contradicting witnesses who had testified to having witnessed an affray, another witness is improperly permitted to testify that standing at a certain point he could not see the place where the difficulty occurred, it not appearing that the place from which he made his observation was the point where the defendant's witnesses testified they made theirs. *Sherrill v. State* (1902) 138 Ala. 3, 35 So. 129.

In a prosecution for homicide in which defendant testified that, after hearing a witness state on the examining trial that she was in her yard and saw all the fatal difficulty, he then went to the place of the difficulty and

from there observed that none of the witness's premises but the top of the house was visible, it was held that another witness was properly permitted to testify that he had found that he could see the place where the difficulty occurred from the witness's yard. *Mason v. State* (1919) — Tex. Crim. Rep. —, 211 S. W. 593.

In *Clarence v. State* (1910) 86 Neb. 210, 125 N. W. 540, a prosecution for homicide in which defendant's contention that he had acted in self-defense was supported by the testimony of witnesses who claimed to have seen the affray through a crack in a corn crib in which they were working, it was held error to permit witnesses on behalf of the state to testify that they had gone to the crib in question, from which the boards which formed the crack through which it was claimed the witnesses had looked had been removed, and had placed a team and wagon where it was said a team and wagon had stood at the time of the difficulty, and had nailed boards on the studding where it was said some of the boards had been before being removed, and that in looking out no one could have seen the parties involved at the place where they were said to have had the altercation, there being no proof by anyone present at the time of the tragedy that the original conditions had been restored, and it further appearing that there was corn in the crib at the time of the tragedy, upon which the witnesses thereof stood, while at the later time referred to by the impeaching witnesses the corn had all been removed.

In *State v. King* (1917) 102 Kan. 155, 169 Pac. 557, where the evidence tended to show that a robbery was committed in a store by four persons who came in an automobile, two of whom remained in the automobile in front of the store while the other two committed the robbery, it was held that evidence might be introduced to show that those who afterwards sat in an automobile in front of the store under conditions similar to those existing at the time of the robbery could see into the store to the place where the robbery was committed.



— of persons on or near track.

In *Alabama G. S. R. Co. v. Burgess* (1896) 114 Ala. 587, 22 So. 169, 2 Am. Neg. Rep. 483, an action for injuries received by a boy who was run into by a train while walking along the railroad track, in which it became a question on the trial how far from the place of injury the plaintiff and his little sister, who accompanied him, could be seen on the track and recognized as children from the direction the train came, it was held that witnesses were improperly permitted to testify to an experiment made by them about a month after the injury, by placing the plaintiff and a little girl at the place of the injury and observing from what distance they could be recognized as children, the conditions being too variant to aid the jury in determining the question whether the engineer exercised reasonable care to prevent the injury.

In *St. Louis, I. M. & S. R. Co. v. McMichael* (1914) 115 Ark. 101, 171 S. W. 115, an action for injuries by one who was struck by a train while sitting on the edge of a station platform, where he had dropped off to sleep, it was held that the court did not err in permitting witnesses to testify that they had gone upon the grounds and that at a point on the track a certain distance from where plaintiff was sitting at the time of his injury they could see a man sitting in a position described by them, notwithstanding the witnesses who made these observations were not on an engine moving at a speed of 35 or 40 miles an hour, there being testimony of expert passenger engineers to the effect that one accustomed to the movements of an engine could see a man as plainly from an engine going at that rate of speed as could one standing or walking on the track.

In *Chicago & A. R. Co. v. Logue* (1893) 47 Ill. App. 292, an action brought for the killing of a child by a train running at a high speed, it was held to be error to admit testimony as to the distance at which witnesses could distinguish a bucket of coal which they had placed upon the track, the circumstances and sur-

roundings being wholly different from those attendant on the engineer in the discharge of his duties.

In *Fein v. Covenant Mut. Ben. Asso.* (1895) 60 Ill. App. 274, it is said of the foregoing case: "This decision is above criticism. The elevation of the engineer above the track, the rapidity of the motion, the oscillation of the engine, the condition of the atmosphere, the distracting and responsible duties of the engineer were not taken into account in the coal-bucket experiment."

In *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680, an action to recover damages occasioned by the killing of a child on a railroad track, it was held that evidence of tests made with trains, one of which was the same train used when the accident occurred, and the other a train claimed to be substantially like it, for the purpose of ascertaining the distance at which the children could have been seen and also the distance required to stop the train when running at the same rate of speed as the train did on the day of the accident, was admissible, although one of such tests was made at a different time of day from that at which the accident occurred, where, so far as the record disclosed, the opportunity for seeing was equally good at both times.

In *Nelson v. Old Colony Street R. Co.* (1911) 208 Mass. 159, 94 N. E. 313, an action for damages occasioned by a collision between plaintiff's team and defendant's street car, about 6:30 P. M. in January, it was held that there was no error in permitting the witness to testify that between 7:30 and 8 o'clock of the same evening he stood in the vestibule of a car coming from the same direction as had the car which ran into the plaintiff, while a man was stationed at a point where the collision had occurred, that he first caught sight of the man at a point which, on measuring, was found to be 180 feet from the point where the man was standing, although the car upon which he was riding had both an incandescent and an oil headlight which assisted him in seeing, while the car

which struck the plaintiff was equipped with an incandescent electric headlight.

In an action for the killing of a child by a train, it is error to exclude experiments made on the same kind of a day as that on which the injury occurred, at the same hour of the day, and at the same place, tending to show how far the child might have been seen by the engineer. *Harrison v. Southern R. Co.* (1908) 93 Miss. 40, 46 So. 408.

In an action for injuries received by one who, while lying with one leg across a street car track, was run over at night, in which it was contended that the motorman had not shown due diligence in keeping a lookout, it is error to admit evidence of the results of experiments made with human figures prominently displayed, sitting upright close to the rail and at a place where the headlights of approaching cars struck them in time to see and to stop, where the evidence tends to show that the upright position of the figures was not a true representation of plaintiff's position on the track. *Riggs v. Metropolitan Street R. Co.* (1909) 216 Mo. 304, 115 S. W. 969.

In *Wells v. Lusk* (1915) 188 Mo. App. 63, 173 S. W. 750, an action for injuries sustained by one who was run over by a train while he was lying in a drunken sleep on the railroad track, in which the engineer testified that when he first caught sight of plaintiff 700 or 800 feet away he was unable to distinguish him as a human being, but at first thought that the object was a bunch of crows, who were in the habit of feeding on the grain that fell from box cars, and that the sun shining in his face interfered with his vision, it was held error to permit witnesses to testify that they visited the scene of the accident about two months thereafter and made tests as to the distance in which they could distinguish a person lying on the track where plaintiff was, as a human being, the court saying: "The testimony of the witnesses who made the so-called tests after the accident is of no aid in this case. They went to look at an object they knew to be a

man; they were not on a locomotive engine running 18 or 20 miles an hour; and experience teaches us that the ease with which we conclude that an object is a prostrate human being when we already know it is such can form no test as to what we can distinguish when we have no such previous knowledge. The jury could judge of the engineer's ability in this respect as well without this testimony as with it. The tests were made under different conditions entirely than were the observations of the engineer taken."

But in a similar case it was held competent to show that under the same conditions as to the night, the weather, the light, and all other circumstances, a man similar to the one who was run over, though weighing less, placed himself prone against the rail in the position occupied by the victim of the accident and awaited the approach of the same through train at the same hour of the evening, and that he was recognized by the engineer as a human being at a distance three times as far away as the engineer involved in the accident said he was when he first saw the victim as a dark object, and thought it was an old coat. *Owen v. Delano* (1917) — Mo. App. —, 194 S. W. 756.

So also in *Griggs v. Dunham* (1918) — Mo. App. —, 204 S. W. 573, an action against a street railroad for the killing of plaintiff's husband while drunk and lying on the track, evidence was held proper of a test made on a night like the one in which the deceased was killed by placing on the track an object the size and shape of a man, the surroundings being unchanged, for the purpose of showing the distance from which a man could be seen by one on a car in the position of the motorman.

In *Cox v. Norfolk & C. R. Co.* (1900) 126 N. C. 103, 35 S. E. 237, an action for damages for the negligent killing of plaintiff's intestate by defendant's train, it was held competent to permit a witness to testify that he had made certain experiments to see how far down the track a man could be seen.

To show that the vision of an engineer from the side of the engine on the outside of a 3-degree curve would be so obstructed by the boiler as to be limited to a very short distance, evidence of tests made on a curve of between 3 and 4 degrees is admissible. *Olivaras v. San Antonio & A. P. R. Co.* (1908) — *Tex. Civ. App.* —, 77 S. W. 981.

In *Houston & T. C. R. Co. v. Ramsey* (1906) 43 *Tex. Civ. App.* 603, 97 S. W. 1067, for the purpose of showing how far away a man on a railroad velocipede might have been seen by the engineer of a train, evidence was admitted of experiments made by witnesses who testified that a man about 6 feet high and in his shirt sleeves, wearing a white shirt, placed on the track about where the plaintiff's decedent was killed, could be seen by them from a point about 1,000 yards distant. This testimony was objected to on the ground that the circumstances under which the experiments were made were entirely different from those prevailing at the time of the accident in that in one case the engineer was sitting in the cab of his engine traveling at the rate of about 45 miles an hour and the deceased on a railroad velocipede on the track going from him, the time being about or after sundown, and the engineer not knowing or expecting the presence of anyone on the track, while in the case of the experiment, the time was in the afternoon, and the object with which the tests were made was in each case a man standing upright on the track at a point where the witnesses knew they were, the witnesses themselves standing on the ground some 3 or 4 feet lower than the engineer in his cab. The majority of the court, however, were of the opinion that the dissimilarity of conditions was not such as to render the evidence inadmissible.

Upon the question whether a person killed upon a railroad track by a fast train might have been seen by the brakeman, evidence that a witness sat upon a freight car similar to the one upon which the brakeman was, and in a similar position, and on a track as

straight and level as the evidence showed the track to be at the place where the accident occurred, and that he could see a man at certain distances, is admissible. *Freeman v. Moreman* (1912) — *Tex. Civ. App.* —, 146 S. W. 1045.

In *Gulf, C. & S. F. R. Co. v. Whitfield* (1918) — *Tex. Civ. App.* —, 206 S. W. 380, an action for the death of a person who was struck by a train, it was held that defendant might show the results of experiments showing that a man sitting on the end of a tie at the place where the injury occurred could not have been seen by a person in the cab of a locomotive at a greater distance than 130 feet.

In *Young v. Clark* (1897) 16 *Utah*, 42, 50 *Pac.* 832, 3 *Am. Neg. Rep.* 315, an action for injuries sustained by the plaintiff, who was struck by a train while attempting to cross a railway bridge, it was held that testimony tending to show that children, of the size of the children who were on the bridge, could be seen thereon from a certain point, was competent as bearing upon the question as to the care used by the engineer, and as to whether he could see the children from that point.

In *Palmer v. Oregon Short Line R. Co.* (1908) 34 *Utah*, 466, 98 *Pac.* 689, 16 *Ann. Cas.* 229, an action for the killing of a child by a railroad train, evidence of experimental tests made by witnesses who placed a child of about the age of the deceased upon the track at the point where the accident occurred and went down the track to determine how far such a child could be seen and recognized, the child experimented with being dressed in different colored clothes than was the child that was struck, and being placed in a sitting position on the track, was held admissible, although the experiment was made under conditions which were not the same as those in which the engineer was placed, the results of the experiment amounting to no more than both court and jury had a right to consider without any evidence on the subject.

Evidence of an experiment made for the purpose of determining at what

distance a man struck by a railway engine might have been seen by the engineer is inadmissible where, although made with an engine of the same class, the man with whom the test was made was stationed within 2 feet of the rail all the time, while the man who was struck was never within this distance of the rail until just as he was struck, and in the test the track was "comparatively straight," while in the actual case it was perfectly straight. *Going v. Norfolk & W. R. Co.* (1916) 119 Va. 543, 89 S. E. 914.

In *AMSBARY v. GRAYS HARBOR & LIGHT CO.* (reported herewith) ante, 1, an action for the death of a person who, having fallen in a fit or because of intoxication, near a street railway track, was struck by a car, it was held error to exclude evidence of an experiment made with a dummy in the form of a man, dressed as the deceased was dressed, and placed in the position and location that the deceased was in at the time of his injury, by noting from the front platform of the same car, driven by the same motor-man, with certain information concerning the dummy given in advance, the distance from which the dummy could be distinguished.

— of live stock on or near track.

In an action for the killing of live stock by a train, in which the defense rested very materially upon evidence that the engineer did not see nor could have seen such stock at a point sufficiently far from the place where they were killed to have stopped the train in time to prevent the accident, it is proper to show the distance from which such animals might have been seen. *Walker v. Columbia & G. R. Co.* (1886) 25 S. C. 141.

In an action for the killing of cattle by a railway train, in which the defendant contends that the engineer could not have seen the cattle in time to stop or control the train because of the embankment of a cut through which the train ran just before reaching the place of the accident, the plaintiff may be permitted to prove the result of certain experiments made by placing a steer at the place where the cat-

tle were killed and then in determining by sight and measurement how far the steer could be seen up the track in the direction from which the train was approaching. *Atlanta & W. P. R. Co. v. Hudson* (1907) 2 Ga. App. 352, 58 S. E. 500.

See also in this connection, *Illinois C. R. Co. v. Burns* (1889) 32 Ill. App. 196, as set forth in I. b, supra.

— of object on track.

In *Green v. Long Island R. Co.* (1909) 131 App. Div. 277, 115 N. Y. Supp. 590, an action for damages to a motor truck struck by a locomotive engine, in which there was testimony that there was a red light upon the truck at the time of the accident, it was held error to permit witnesses to testify that they had gone to the scene of the accident on a night when the weather conditions were substantially the same as at the time of the accident, and held the same red light at the height it was on the machine when it was struck, and to show from what distance it could be seen.

— of approaching train.

In an action to recover damages for the killing of cattle at a highway crossing by a train, in which the person in charge of the cattle testified that she neither saw nor heard the train until it was close upon the cattle, there is no error in admitting the evidence of witnesses as to experiments made by them to determine how far the train could be seen coming to the crossing from the highway, nor in answering the question as to whether they could have heard the whistle or bell if they had been sounded or rung. *Elgin, J. & E. R. Co. v. Reese* (1897) 70 Ill. App. 463.

For the purpose of contradicting testimony of the plaintiff that a car standing on a sidetrack obstructed his view of an approaching train, experiments made for the purpose of determining how far south the main track could be seen by a person standing midway between the main and side track at a point near where the accident occurred are not admissible, where it does not appear that any car or cars were on the sidetrack at the

time, but that a board was held up about opposite where it was claimed the south car was situated on the day of the accident, the board being held 2½ feet west of the rail, which would correspond with the distance a car would project over the rail in that direction. *Chicago & E. I. R. Co. v. Crose* (1904) 113 Ill. App. 547, affirmed in (1905) 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865.

Where it is claimed that an intervening bluff along which a railway was built prevented a traveler approaching a crossing from hearing the ordinary signals, it is competent to show by a witness who has made a test at the place of the injury, and under substantially similar circumstances, how far the signals can be heard, and the effect of the intervening bluff to obscure the vision and deaden the sound made by a passing train. *Missouri P. R. Co. v. Moffatt* (1896) 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554.

In *Johnson v. Chicago, R. I. & P. R. Co.* (1909) 80 Kan. 456, 103 Pac. 90, an action for the killing of a person by a railroad train at a highway crossing, it was held that a witness might testify to the result of tests which he had made to determine whether the noise of trains coming toward a cut would be deadened by the cut and the surroundings to a man on the highway, and whether smoke and steam from engines in the cut could be seen at the crossing, the court saying that atmospheric conditions, the coal used, the time of its application to the fire, and other circumstances would affect the weight of such testimony, but would not make it incompetent.

— of switch.

In an action for personal injuries received by a passenger on an electric car by reason of its running onto a siding and colliding with other cars standing there, witnesses are properly permitted to testify that they had ridden in the front end of a car going in the same direction as the car in which the plaintiff was a passenger, and that the switch could be seen for a distance of 300 feet where, it appearing in the evidence that it happened

in the afternoon on a clear day, any dissimilarity in the condition of the two occasions must have been unfavorable to the experiment. *Elgin, A. & S. Traction Co. v. Wilson* (1905) 120 Ill. App. 371, judgment affirmed in (1905) 217 Ill. 47, 75 N. E. 436, 19 Am. Neg. Rep. 145.

— existence of place of concealment.

In a prosecution for homicide, in which the theory of the state suggested a lying in wait on the part of defendant, and defendant's theory was self-defense, predicated on threat and a casual meeting at an unexpected place between himself and deceased, witnesses may be permitted to testify to an experiment made on the ground some months subsequent to the homicide under the same or nearly similar conditions, to show that the country did not furnish a place of concealment. *Schauer v. State* (1900) — *Tex. Crim. Rep.* —, 60 S. W. 249.

— of signal.

In *Baltimore & O. R. Co. v. Fouts* (1913) 88 Ohio St. 305, 104 N. E. 544, Ann. Cas. 1915A, 1256, an action by a railway conductor against the company for personal injuries sustained through the alleged negligence of the engineer in misinterpreting a signal given him by the plaintiff, it was held error to permit the plaintiff to attempt to reproduce in view of the jury, in the court room, the signal which he thought he gave, the controversy not being as to how he made the signal, but how it appeared to the engineer in his situation in the open country, as seen against the bright afternoon sky at 500 to 600 feet distant, when only the head and hand of the conductor were visible.

— of defect or obstruction in highway.

In *Ord v. Nash* (1897) 50 Neb. 335, 69 N. W. 964, 1 Am. Neg. Rep. 110, an action for injuries received in falling at night into an unguarded excavation in the highway, it was held that there was no abuse of discretion on the part of the trial court in rejecting as evidence the result of certain experiments made by witnesses who, on a cloudy night, with the assistance of a light in an adjoining house simi-

larly situated to one burning at the time of the accident, were able plainly to see the footpath and also the surface of the ground for a radius of several feet from the point where the injury was received.

In *Lasityr v. Olympia* (1911) 61 Wash. 657, 112 Pac. 752, an action for personal injuries received by one who, while passing along a street at night, tripped over a piece of wire netting stretched to protect a newly constructed cement sidewalk, in which the trial court rejected testimony offered by defendant, after showing that the street lamp lighting the place where the accident occurred on the night preceding the trial of the action was identical with the lamp at the same point on the night of the accident and that the voltage passing through the arc light system on the night of the accident was greater than the voltage on the night preceding the trial, that on the night preceding the trial witnesses could readily read newspapers on the sidewalk at the place of the accident by the light of the lamp in question. The supreme court held that while they were not prepared to say that it would have been error to admit proof of these experiments, yet the quantity of light given out by an arc light at all times and under all conditions is not so certain and unvarying as to render the ruling of the court erroneous or manifestly an abuse of sound judicial discretion.

In *AMSBARY v. GRAYS HARBOR R. & LIGHT CO.* (reported herewith) ante, 1, it was said with reference to *Lasityr v. Olympia* (1911) 61 Wash. 651, 112 Pac. 752, that the decision therein seems to indicate the extreme limit of the exercise of the trial court's discretion in excluding the offered evidence, and that they did not regard it as controlling beyond its application to the particular facts there involved.

— conditions as to light.

Proof of the condition of a street lamp and its power to diffuse light on the 21st of January is no evidence of its condition and power on the 1st of October preceding, where there is no proof that the structure of the lamp was the same at the one time as at

the other, nor any evidence whether the combustible material used at both times was the same. *Yates v. People* (1865) 32 N. Y. 509.

It is not sufficient ground for excluding the evidence of witnesses who made experiments as to the distance from which a locomotive headlight fell upon the highway crossing at which the accident occurred that they were made several months after the accident. *Burton v. Chicago & A. R. Co.* (1914) 176 Mo. App. 14, 162 S. W. 1064.

In *Arrowood v. South Carolina & G. Extension R. Co.* (1900) 126 N. C. 629, 36 S. E. 151, an action for the killing of a man by a train, it was held that the evidence of witnesses who went to the spot where the deceased was struck, on a dark night such as that on which the deceased was killed, and made observations of the light cast by one of defendant's engines with such a headlight as was used on all the engines of the defendant was competent to go to the jury for what it was worth upon the question whether the engineer might have seen the deceased.

In order to determine whether a brakeman engaged in spotting cars on a dark night when it was misting rain might have seen a coal chute by the light of the lantern which he carried, witnesses may properly be permitted to testify that on a night which was darker than the ordinary night, when there was no moon, and when, by reason of the sand blowing, objects were more difficult to distinguish than upon an ordinary night, they stationed themselves on a car similar to the one on which plaintiff was riding, and, using a lantern which was substantially the same as was used by the plaintiff, they could see the coal bins, the divisions between them, and could tell which of the bins were loaded with coal and which were empty, notwithstanding the difference in atmospheric conditions. *Kansas City, M. & O. R. Co. v. Hall* (1912) — Tex. Civ. App. —, 152 S. W. 445.

The evidence of witnesses to the effect that they had been able to read fine newspaper print in a hallway at

5 o'clock P. M. on the 18th of March is not competent upon the question whether the hallway was sufficiently lighted on December 13th between 4 and 4:30 P. M. *Bretsch v. Plate* (1903) 82 App. Div. 399, 81 N. Y. Supp. 868.

In *Baker v. Harrington* (1907) 196 Mass. 339, 82 N. E. 33, in which it was a question whether the stairs down which plaintiff fell on December 7th were sufficiently lighted, the observation of witnesses made in April at the time of day corresponding, with regard to sunset, with the time of day when the accident to the plaintiff had occurred, were held to be admissible in the discretion of the court, where accompanied by an instruction that unless the jury should find that the conditions existing when the witness made his observations were "precisely the same as at the moment" when the accident to the plaintiff occurred, they should disregard the testimony.

**—possibility of recognition by flash of . . . pistol.**

In *People v. Woon Tuck Wo* (1898) 120 Cal. 294, 52 Pac. 833, in which several witnesses for the prosecution testified they saw defendant shoot deceased with a pistol in the street near midnight and that they recognized the defendant at and immediately after the time when the shot was fired, and the testimony of the various witnesses who were at the scene at the time of or immediately after the accident was very conflicting as to the condition of the lights at that time, it was held that there was no error in excluding the testimony of a witness that he had examined the premises some three months after the homicide, and that he was unable to recognize any person at the place where the homicide was alleged to have been committed when standing at the point where the witnesses for the prosecution had stood, inasmuch as under the circumstances such testimony would have tended to confuse and mislead rather than enlighten the jury.

In *Smith v. State* (1853) 2 Ohio St. 511, a prosecution for assault with intent to murder, in which the prosecuting witness testified that, looking through a certain window, he recog-

nized defendant by the flash of his pistol, and in which the state brought witnesses who were not present at the shooting to prove experiments and observations subsequently made by them at the same place, under like circumstances as to light, position, firing with a pistol, etc., for the purpose of showing the possibility of recognizing the person discharging the pistol, it was held that the court erred in rejecting testimony offered on behalf of the defendant of experiments made under like conditions but at another place, the court saying that there was no such difference in common window glass that the judgment could not in any degree be aided by an experiment made with another pane.

In *Spires v. State* (1905) 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214, in which a witness testified to having recognized the defendant by the flash of a gun fired in her bedroom where there was no light burning on a dark night, it was held that the court did not err in refusing to grant a motion of defendant to try an experiment in the presence of the jury in a dark room with the gun offered in evidence to see whether the flash of the gun would make sufficient light to permit a person to be recognized, it not appearing how the gun was loaded on the night the crime was committed and the result being liable to be affected by the eyesight of the person making the test.

**Walking.**

Time necessary to cover given distance, see *Distance*—time necessary to traverse.

**Washing.**

Of bank of river, see *River*.

**Water.**

Where it is a question whether a new well is a satisfactory substitute for an old well located on land taken for public purposes, the claim of the owner being that the new well is affected by the seepage of tidewater, an analysis of the water drawn from both wells is not admissible where the water examined was not shown to have been taken from the respective wells under similar tidal conditions. Re

West Farms Road (1905) 47 Misc. 216, 95 N. Y. Supp. 894.

**Waters.**

See River.

**Weight.**

Effect of, to bend plank, see Accident—reproduction of circumstances of.

**Well.**

Comparison of water from, with another well, see Water.

**Will—attestation of.**

Upon the question whether a will was duly attested, witnesses who had testified as to the location of the bed in which the testator lay and the table upon which the witnesses signed may be permitted to testify that they had subsequently put the bed and table where they were when the will was made, and placed themselves in the positions occupied by the testator and the witnesses to the will at that time, and to state what they could hear and see from those positions. *Healey v. Bartlett* (1904) 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413.

**Witnesses.**

Possibility of testator seeing and hearing attesting witnesses, see Wills—attestation of.

Possibility of witness having heard sounds or conversation to which he testifies, see Audibility.

**Wounds.**

Experiments to determine distance from which shotgun was fired, see Shot—scattering of.

Experiments to show personal injury could not have been caused by means alleged, see Accident—reproduction of circumstances of.

**X-ray.**

In *Wingfield v. McClintock* (1911) 85 Kan. 207, 113 Pac. 394, an X-ray picture of a set of false teeth placed under a dead body, taken from the opposite side of the body, was rejected by the court as not having been taken under such conditions as to demonstrate that a like picture of the neck or stomach of a living patient would disclose the presence or absence of a set of teeth supposed to have been swallowed. E. S. O.

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W. F. CANAFAX, Plff. in Err.,  
v.

BANK OF COMMERCE, McLoud, Oklahoma.

*Oklahoma Supreme Court—November 18, 1919.*

(— Okla. —, 184 Pac. 1014.)

**Evidence — judicial notice — days and dates.**

1. Judicial notice will be taken of the coincidence of the days of the week with the days of the month, and of the days of the month on which Sunday falls.

[See note on this question beginning on page 63.]

**Appeal — instructions — evidence not on record.**

2. Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raises the questions on which instructions are based, this court will not, as a general rule, determine whether there was error in the rulings

of the court as to the instructions given and refused.

[See 2 R. C. L. 138.]

— refusal to record statements during trial — affidavit.

3. Where it is desired to review the action of the trial court in refusing to require the stenographer to take down statements made during the trial



of any cause, under the terms and provisions of § 1786 or § 1834, Rev. Laws 1910, and such statement or proceedings are attempted to be presented to this court by affidavit, such affi-

davit must show that such statements or proceedings had reference to the cause on trial and were such as might properly be made a part of the case made or other proceedings in error.

**ERROR** to the County Court for Lincoln County (Billingslea, J.) to review a judgment in favor of plaintiff and overruling a motion for a new trial in an action brought to recover possession of certain property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Erwin & Erwin, for plaintiff in error:

The court erred in overruling defendant's motion for new trial.

Lamm v. State, 4 Okla. Crim. Rep. 641, 111 Pac. 1002; Walker v. State, 6 Okla. Crim. Rep. 370, 118 Pac. 1005; Tudor v. State, 14 Okla. Crim. Rep. 67, 167 Pac. 341; Methvine v. Fisher, — Okla. —, 166 Pac. 702.

Where usury is charged, the lender forfeits on the original sum loaned twice the amount of the illegal interest, which forfeiture may be pleaded by way of defense or counterclaim.

Pearson v. Glen Lumber Co. 55 Okla. 280, 160 Pac. 48; Aetna Bldg. & L. Asso. v. Harris, — Okla. —, 170 Pac. 700.

Defendant was entitled to forfeiture for usury charged in the joint note.

Walker v. Daharsh, 52 Okla. 766, 153 Pac. 880; Security State Bank v. Chandler, — Okla. —, 166 Pac. 162.

Usury in an existing contract cannot be settled or receipted for in the ordinary manner of the execution of contracts, for there must be a purging of the transaction by the elimination of all excess interest over the legal rate, and the execution of a new note containing no part of the usury.

39 Cyc. 1002, 1003; Aetna Bldg. & L. Asso. v. Harris, — Okla. —, 170 Pac. 700; Miller v. Oklahoma State Bank, 53 Okla. 616, 157 Pac. 767.

The jury are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to their testimony.

Moore v. First Nat. Bank, 30 Okla. 623, 121 Pac. 626; Hisaw v. State, 13 Okla. Crim. Rep. 484, 165 Pac. 696.

Messrs. Goode & Johnson for defendant in error.

**Bailey, J.**, delivered the opinion of the court:

This is an action of replevin, brought in the county court of Lin-

coln county. After a general denial, plaintiff in error pleaded by way of counterclaim and cross petition the payment of various sums of money, and alleging that such sums were paid as usurious interest. To such answer and cross petition defendant in error filed a reply, consisting of a general denial, and further pleading a written release from all claims, debts, or demands by reason of the transaction as alleged in plaintiff in error's cross petition. Judgment was had against plaintiff in error, and a motion for a new trial was duly filed, and said motion for a new trial was overruled on March 26, 1917, and plaintiff in error allowed ninety days in which to prepare and serve a case made. On June 25, 1917, plaintiff in error did serve a purported case made. It will be noted that such case made was served ninety-one days after the order of the court allowing ninety days in which to serve case made. This being the fact, it is contended by defendant in error that such case made is a nullity for the reason that the same was not served within the time allowed.

It is true that the case made was not served within the ninety days allowed; however, this court will take judicial notice that June 24th, the ninetieth day, fell on Sunday. 15 R. C. L. p. 1100, ¶ 82. McIntosh v. Lee, 57 Iowa, 356, 10 N. W. 895; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877. Section 5341, Rev. Laws 1910, provides: "The time within which an act is to be done shall be computed by ex-

*Evidence—  
judicial notice—  
days and dates.*

(— Okla. —, 184 Pac. 1014.)

cluding the first day, and including the last; if the last day be Sunday, it shall be excluded."

The last day allowed for serving such case made being Sunday, such day will be excluded in the computation of time and the following day be included. *Smith County v. Labore*, 37 Kan. 480, 15 Pac. 577; *Grant v. Creed*, 35 Okla. 190, 128 Pac. 511; *Harn v. Amazon F. Ins. Co.* — Okla. —, 167 Pac. 473. We therefore hold that the purported case made was served within the time allowed.

Of the fifteen assignments of error presented by plaintiff in error, fourteen of such assignments charge error of the court in giving certain instructions and in refusing to give certain instructions tendered by plaintiff in error. The case made does not contain the evidence, nor any part thereof, nor is there any statement of what the evidence was or what facts were sought to be proven, nor is there any claim that the verdict is not supported by the evidence. Section 6005, Rev. Laws 1910, provides: "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

And under such provision of the statute as well as decisions of this court, in passing upon the errors assigned relative to the giving and refusing of the instructions referred to, the court will be compelled to look into the evidence and to ascertain if a right and proper verdict has been rendered. The burden is upon the plaintiff in error to show that such error has been committed as has probably resulted in a mis-

carriage of justice or constitutes a substantial violation of a constitutional or statutory right. If the verdict arrived at by the jury was a proper one, under all the evidence presented to them, the fact that the court may have improperly instructed the jury cannot stand as sufficient grounds for reversal. It is held in *Truman v. Buxton*, 37 Okla. 5, 130 Pac. 149, as follows: "We are committed to the rule that where a verdict and judgment are authorized by the evidence, and another would be unwarranted, the same will not be reversed on appeal on account of errors alleged to exist in the instructions."

And again: "Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raised the questions on which instructions are based, this court cannot, as a general rule, determine whether there was error in the rulings of the court as to the instructions or not." See also *Livingston v. Chicago, R. I. & P. R. Co.* 41 Okla. 505, 139 Pac. 260. And as was said in *Leroy v. McConnell*, 8 Kan. 273: "One of the errors complained of is the giving of certain instructions and the refusal to give others. It would be labor wasted to examine the instructions given, for, even if it were certain that they were not correct as legal principles, there would be the uncertainty as to whether they applied to the evidence in the case; and if they did not, then, though they may have been error, it is not shown to be prejudicial to the plaintiffs. The plaintiffs in error must show that such errors have been committed as have wrought prejudice to them, or may have done so, or there can be no reversal of the judgment. It is not necessary to bring up all the evidence in every case, but enough must be shown, either by the testimony or by statement in the bill of exceptions, for this court to see that the instructions are applicable to the evidence. The same remark

Appeal—  
instructions—  
evidence not  
in record.

applies to instructions refused." The fifteenth and last assignment of error is that "the court erred in refusing defendant's request to have taken, by the court stenographer, certain proceedings, to wit, certain improper remarks by counsel for plaintiff, as found in the affidavit marked 'exhibit A,' and made a part of the motion for a new trial."

Such affidavit being as follows: "At the trial of said cause on the 10th day of March, 1917, counsel of record for plaintiff in his argument to the jury made certain remarks outside the record which affiant considers prejudicial to the rights of the defendant. That thereupon affiant objected to such remarks and averments and asked that the same be taken down by the court stenographer, and that such request was refused by the court, to which affiant excepted on behalf of the defendant."

Counsel relies upon § 1786, Rev. Laws 1910, to support this assignment, aside from the question as to whether, in proceedings in the county court, the court stenographer, in recording the statements and proceedings during the trial of a cause, is to be governed by § 1786 or § 1834, Rev. Laws 1910. But assuming for the purpose of this assignment that § 1786, *supra*, controls, we do not think plaintiff in error has brought himself within the provisions of the statutes. In *Dabney v. Hathaway*, 51 Okla. 658, 152 Pac. 77, it is said: "The defendants lastly complain that 'the court erred in refusing to permit the stenographer to take certain remarks by the court in the presence of the jury, although requested to do so by the attorney for defendants.' They attach affidavits of W. H. Parker and Paul Pinson in support of this assignment. Counsel relies upon § 1786, Rev. Laws 1910, in urging this assignment. But the substance of that statute is: All

statements of counsel, the witnesses, or the court, made during the trial of any cause with reference to any cause pending for trial, when made by a party or attorney interested therein 'and all other matters that might properly be a part of a case made for appeal or proceedings in error,' shall be taken down and transcribed by the stenographer if requested, and a refusal of the court to permit this to be done shall be reversible error."

Here, as was observed in the case of *Dabney v. Hathaway*, *supra*, there is not the slightest indication in the affidavit filed in this case that the remarks of which complaint is made had any reference to the cause of action, or could in any way have been made a part of the case made. If the remarks complained of by defendant were concerning this case, or could have properly been made a part of the case made, then it is the duty of counsel to make a showing in the record to that effect.

We recognize the mandatory nature of the section of the statute referred to, and we do not mean to suggest any discretionary power in the trial court to limit or prevent the recording of any statements when made during the trial of any cause, with reference to such cause, or such other matters that might properly be made a part of a case made or in other proceedings in error; but, before the terms and penalties of such statutes are invoked, counsel should be at least required to make such showing as will enable this court to see that the statements complained of had reference to the trial, and indicate the nature of the remarks of which complaint is made.

For the reasons herein assigned, the judgment of the trial court is affirmed, and the opinion heretofore filed in this cause is withdrawn.

—refusal to  
record state-  
ments during  
trial—affidavit.

## ANNOTATION.

**Judicial notice of the coincidence of the days of the week with the days of the month.**

Courts will take judicial notice of the coincidence of the days of the week with the days of the month, that is to say, of the day of the week on which any day of the month falls.

**United States.**—*Brown v. Piper* (1875) 91 U. S. 37, 23 L. ed. 200 (as stating the rule).

**Alabama.**—*Allman v. Owen* (1857) 31 Ala. 167; *Sprowl v. Lawrence* (1859) 33 Ala. 674; *Ex parte Vincent* (1869) 43 Ala. 402; *Bethune v. Hale* (1871) 45 Ala. 522; *Rodgers v. State* (1874) 50 Ala. 102; *Brennan v. Vogt* (1892) 97 Ala. 647, 11 So. 893; *Koch v. State* (1896) 115 Ala. 99, 22 So. 471.

**California.**—*Campbell v. West* (1890) 86 Cal. 197, 24 Pac. 1000.

**Connecticut.**—*Beardsley v. Irving* (1909) 81 Conn. 489, 71 Atl. 580; *Schmidt v. Manchester* (1918) 92 Conn. 551, 103 Atl. 654.

**Florida.**—*Dawkins v. Smithwick* (1851) 4 Fla. 158 (as stating the rule).

**Georgia.**—*Werner v. State* (1874) 51 Ga. 426; *Dorough v. Equitable Mortg. Co.* (1903) 118 Ga. 178, 45 S. E. 22 (as stating the rule); *Williams v. Allison* (1912) 10 Ga. App. 340, 74 S. E. 442; *Charleston & W. C. R. Co. v. Cottonseed Oil Co.* (1918) 22 Ga. App. 337, 96 S. E. 586 (not necessary to decision).

**Indiana.**—*Chrisman v. Tuttle* (1877) 59 Ind. 155; *Swales v. Grubbs* (1890) 126 Ind. 106, 25 N. E. 877; *Roberts v. Farmers' & M. Bank* (1893) 136 Ind. 154, 36 N. E. 128; *Williamson v. Brandenburg* (1892) 6 Ind. App. 97, 32 N. E. 1022; *Western U. Teleg. Co. v. Fulling* (1912) 49 Ind. App. 172, 96 N. E. 967; *Stellhorn v. Allen County* (1915) 60 Ind. App. 14, 110 N. E. 89.

**Iowa.**—*Clough v. Goggins* (1875) 40 Iowa, 325; *McIntosh v. Lee* (1881) 57 Iowa, 356.

**Louisiana.**—*Whaley v. Houston* (1857) 12 La. Ann. 585.

**Maine.**—*First Nat. Bank v. Kings-*

*ley* (1891) 84 Me. 111, 24 Atl. 794 (as stating the rule).

**Maryland.**—*Kilgour v. Miles* (1834) 6 Gill & J. 268; *Sasscer v. Farmers Bank* (1853) 4 Md. 409; *Philadelphia, W. & B. R. Co. v. Lehman* (1881) 56 Md. 209, 40 Am. Rep. 415; *Ecker v. First Nat. Bank* (1885) 64 Md. 292, 1 Atl. 849 (as stating the rule).

**Michigan.**—*Hoard v. Stone* (1886) 58 Mich. 578, 26 N. W. 141; *Smith v. Mathis* (1913) 174 Mich. 262, 140 N. W. 548.

**Minnesota.**—*Finney v. Callendar* (1863) 8 Minn. 41, Gil. 23; *Starbuck v. Dunklee* (1865) 10 Minn. 168, Gil. 136, 88 Am. Dec. 68; *Webb v. Kennedy* (1874) 20 Minn. 419, Gil. 374.

**Mississippi.**—*Morgan v. Burrow* (1894) — Miss. —, 16 So. 432; *Winfield v. Jackson* (1906) 89 Miss. 272, 42 So. 183.

**Missouri.**—*State ex rel. Simms v. Todd* (1880) 72 Mo. 288; *Mason v. Crowder* (1885) 85 Mo. 526; *State v. Stanley* (1910) 225 Mo. 525, 125 S. W. 475; *Meriwether v. Overly* (1910) 228 Mo. 218, 129 S. W. 1; *Kuczma v. Droszkowski* (1912) 243 Mo. 57, 147 S. W. 1000; *Garth v. Motter* (1912) 248 Mo. 477, 154 S. W. 733; *Jordan v. Chicago & A. R. Co.* (1902) 92 Mo. App. 84.

**New Jersey.**—*Reed v. Wilson* (1879) 41 N. J. L. 29; *Singer v. First Criminal Ct.* (1910) 79 N. J. L. 386, 75 Atl. 433.

**New York.**—*Hunter v. New York, O. & W. R. Co.* (1889) 116 N. Y. 622, 6 L.R.A. 246, 23 N. E. 9 (as stating the rule); *Ryer v. Prudential Ins. Co.* (1903) 85 App. Div. 7, 82 N. Y. Supp. 971 (as stating the rule); *Cohn v. Kahn* (1895) 14 Misc. 255, 35 N. Y. Supp. 829.

**Ohio.**—*Warren v. Fountain Square Theater Co.* (1897) 7 Ohio N. P. 538.

**Oklahoma.**—*CANAFAX v. BANK OF COMMERCE* (reported herewith) ante, 59.

**Pennsylvania.**—*Wilson v. Van Leer* (1889) 127 Pa. 371, 14 Am. St. Rep.

854, 17 Atl. 1097; *Hantsch v. Levan* (1869) 1 Woodw. Dec. 456; *Whiteside v. Flora* (1902) 27 Pa. Co. Ct. 25; *Dime Deposit & Discount Bank v. Arnold* (1898) 6 Lack. Leg. News, 210.

**South Dakota.**—*Crisp v. Gochnour* (1914) 34 S. D. 364, 148 N. W. 624.

**Washington.**—*State v. Bergfeldt* (1905) 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 679; *Murray v. Seattle* (1917) 96 Wash. 646, 165 Pac. 895.

**Wisconsin.**—*Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.* (1910) 144 Wis. 224, 32 L.R.A.(N.S.) 436, 140 Am. St. Rep. 1007, 128 N. W. 861.

**England.**—*Page v. Faucet* (1587) Cro. Eliz. pt. 1, p. 227, 78 Eng. Reprint, 482; *Reg. v. Dyer* (1703) 6 Mod. 41, 87 Eng. Reprint, 803; *Hoyle v. Cornwallis* (1720) 1 Strange, 387, 93 Eng. Reprint, 584; *Hanson v. Shackelton* (1835) 4 Dowl. P. C. 48, 1 Harr. & W. 342.

**Ireland.**—*Pearson v. Shaw* (1844) 7 Ir. L. Rep. 1.

"The almanac is part of the common law of England, of which the court will take judicial notice." *Reg. v. Dyer* (1703) 6 Mod. 41, 87 Eng. Reprint, 803.

In *Page v. Faucet* (1587) Cro. Eliz. pt. 1, p. 227, 78 Eng. Reprint, 482, "the error assigned was, that the judgment was given at a court held there 16 February, 26 Eliz. and this day was Sunday, and it was so found by the examination of the almanacs of that year. And it was ruled that this examination was sufficient, and a trial per pais was not necessary, although it were an error in fact. And the judgment was reversed."

"The second day of November, 1914, fell on Monday,—a fact of which we are authorized to take judicial notice. Code Civ. Proc. § 1875, subd. 8." *People v. Rudolph* (1915) 28 Cal. App. 683, 153 Pac. 721.

In *Beardsley v. Irving* (1909) 81 Conn. 489, 71 Atl. 580, it was held to be error for the court to omit to instruct the jury whether or not a certain day was Sunday.

But it has been held that where the attention of the trial court has not been called to the fact that a certain date was Sunday, the appellate

court will not take notice that the day was Sunday. *Line v. Line* (1913) 119 Md. 403, 86 Atl. 1032, Ann. Cas. 1914D, 192, holding that the court would not consider the fact in ruling upon the admission of a bond in evidence.

So, it was held that unless the issue is raised by the pleadings and proof an appellate court will not take judicial notice that the date of the passage of an ordinance was Sunday. *Buxton v. Nashville* (1918) 132 Ark. 511, 201 S. W. 512, where the court said: "To permit appellants to remain silent, in the court below, on the issue as to whether the date mentioned was Sunday, and to invoke here the doctrine that the court will take judicial cognizance of the fact that such date was on Sunday, would be tantamount to firing upon the holdings of the trial court from a battery that was kept masked in the court below. This cannot be done."

In *Walton v. Stafford* (1897) 14 App. Div. 310, 43 N. Y. Supp. 1049, it was held that the appellate court would not, on appeal, take notice that a certain day was Sunday when the matter was not raised before the trial court; but in affirming the decision in (1900) 162 N. Y. 558, 57 N. E. 92, the court of appeals stated that it was conceded that the day was Tuesday, not Sunday.

It may be noted that it has been held that an averment in the answer that the note sued on was not made on the date alleged, but on a certain other date, is a good defense if the date alleged is Sunday, though not averred to be so. *Finney v. Callendar* (1863) 8 Minn. 41, Gil. 23. So as to the date of a hiring of a horse. *Webb v. Kennedy* (1874) 20 Minn. 419, Gil. 374. But that it has also been held that an information for breach of the Sunday law is not sufficient if it states that the act was done on a certain day, not stating that the day was Sunday. *Com. v. Gelbert* (1895) 170 Pa. 426, 32 Atl. 1091. The question as to sufficiency of pleadings in this regard in either civil or criminal cases is not within the scope of the note.

B. B. B.

HARRY RANDALL  
v.  
HERBERT C. PATCH.

*Maine Supreme Judicial Court — November 13, 1919.*

(— Me. —, 108 Atl. 97.)

**Constitutional law — police power — destruction of injured animal.**

1. The police power does not extend to the destruction of animals diseased or injured beyond recovery without notice to the owner and opportunity for him to be heard.

[See note on this question beginning on page 67.]

— construction — due process and law of land.

2. The phrases "law of the land" and "due process of law" as used in constitutional provisions are identical in meaning.

[See 6 R. C. L. 437.]

— necessity of notice and opportunity of hearing.

3. Notice and opportunity of hearing are of the essence of due process of law.

[See 6 R. C. L. 446.]

— necessity of judicial hearing.

4. A hearing before a judicial tribunal is not necessary to due process of law if opportunity for hearing before some tribunal is afforded.

[See 6 R. C. L. 450, 459.]

— power of legislature — procedure without hearing.

5. The legislature cannot authorize procedure which will deprive an owner of his property without notice and opportunity for hearing.

— condemnation of animal without notice.

6. The owner of an animal is deprived of his property without due process of law by its destruction, upon condemnation by a citizen as injured or diseased beyond recovery, without notice to or opportunity for hearing by the owner.

[See 1 R. C. L. 1168.]

— unnecessary law.

7. A law cannot be declared void because unnecessary or inexpedient.

[See 25 R. C. L. 808.]

**REPORT** by the Supreme Judicial Court for York County, upon an agreed statement of facts, for the determination by the full court of an action brought to recover damages for taking possession of and killing plaintiff's horse against his objection. *Action to stand for trial.*

The facts are stated in the opinion of the court.

Mr. Elias Smith for plaintiff.

Messrs. Emery, Waterhouse, & Paquin for defendant.

Deasy, J., delivered the opinion of the court:

Trover for a horse taken from the plaintiff's possession against his objection and killed by the defendant. It is conceded that when the acts complained of were done the defendant was an officer or agent of the Society for the Prevention of Cruelty to Animals, and that he had complied with all the provisions of § 59 of chapter 126, Rev. Stat. The constitutionality of § 59 is chal-

lenged. The section is as follows:

"Any officer or agent of any society for the prevention of cruelty to animals may lawfully cause to be destroyed forthwith, any animal found abandoned or not properly cared for, appearing in the judgment of two reputable persons called by him to view the same in his presence, to be diseased or injured or in a condition from lack of food, water or shelter, past recovery for any useful purpose."

This section, when enacted as § 12 of chapter 183, Public Laws of 1883, related to abandoned animals

only; the language being, "any animal found abandoned and not properly cared for."

By chapter 70 of the Public Laws of 1905 the word "and" was changed to "or." As thus amended, and otherwise by the same act slightly altered, it became § 59 as above quoted.

Neither in its original or amended form does it provide for compensation for, opportunity for hearing by, or notice to the owner.

The plaintiff claims that he has been deprived of his property without "due process of law" (U. S. Const. 14th Amend.) and in contravention of "the law of the land" (Me. Const. art. 1, § 6). The quoted phrases are identical in meaning. *State v. Knight*, 43 Me. 122; *Bennett v. Davis*, 90 Me. 105, 37 Atl. 864.

Notice and opportunity for hearing are of the essence of due process of law. *Bennett v. Davis*, supra; *Rusk v. Thompson*, 170 Mo. App. 76, 156 S. W. 64; *Smith v. State Medical Examiners*, 140 Iowa, 66, 117 N. W. 1117.

A hearing before a judicial tribunal is not essential, but there must be notice and a reasonable opportunity for a hearing before some tribunal. *Bennett v. Davis*, supra; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995.

An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and state Constitutions.

Section 60, chapter 126, Revised Statutes, in its present form, as amended in 1893 (Laws 1893, chap. 165, § 4), provides for notice and hearing. For want of such provisions in its original form (Acts 1883, chap. 183, § 13) it was held

unconstitutional by *King v. Hayes*, 80 Me. 206, 13 Atl. 882. See, to same effect, *Loesch v. Koehler*, 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, 43 N. E. 129; *Miller v. Horton*, 152 Mass. 544, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *Brill v. Ohio Humane Soc.* 4 Ohio C. C. 358, 2 Ohio C. D. 594; *Sahr v. Scholle*, 89 Hun, 42, 35 N. Y. Supp. 97; *Goodwin v. Toucey*, 71 Conn. 262, 41 Atl. 806; *Jenks v. Stump*, 41 Colo. 281, 15 L.R.A. (N.S.) 554, 124 Am. St. Rep. 137, 93 Pac. 17, 14 Ann. Cas. 914.

But the defendant urges that a horse which has been decided by two reputable persons to be injured or diseased and past recovery for any useful purpose is no longer property. The word "property," he contends, does not include a "wreck of what was once a steed," having no utility and no value. This reasoning, however, begs the question. The plaintiff claims that his animal is not past recovery and that it has value. To conclusively determine this question against the plaintiff without notice or hearing would be to nullify the constitutional guaranty.

The defendant argues that the determination of the necessity or expediency of any legal enactment is within the exclusive province of the legislature. This is true. The court cannot declare a law to be void for the reason that it is unnecessary or inexpedient; but it may be the duty of the court to pronounce invalid an act which violates an express mandate of the Constitution, even if the act is expedient and has been determined by the legislature to be necessary.

Again, the defendant contends that § 59 is a valid exercise of the police power. No court has ever undertaken to define the limits of the police power of the state. New occasions teach new applications of it. It is based upon

Constitutional law—construction—due process and law of land.

—necessity of notice and opportunity of hearing.

—necessity of judicial hearing.

—power of legislature—procedure without hearing.

—condemnation of animal without notice.

—unnecessary law.

—police power—destruction of injured animal.

society's right of self-defense and is coextensive with that right. *State v. Starkey*, 112 Me. 12, 90 Atl. 431, Ann. Cas. 1917A, 196.

Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation. For numerous illustrations see *State v. Robb*, 100 Me. 186, 60 Atl. 874, 4 Ann. Cas. 275; *Opinion of Justices*, 103 Me. 506, 19 L.R.A. (N.S.) 422, 69 Atl. 627, 13 Ann. Cas. 745; *State v. Starkey*, 112 Me. 10, 90 Atl. 431, Ann. Cas. 1917A, 196.

In cases of extreme and urgent necessity, as conflagrations (*Farmer v. Portland*, 63 Me. 47), or epidemics (*Seavey v. Preble*, 64 Me. 121), it justifies the destruction of property without preliminary notice or hearing, and even without compensation.

But § 59 provides for the destruction of property, and not for restrictions upon or regulation of its use, and it cannot be justified as a measure of urgent necessity.

If § 59, now as in its original form in the Act of 1883, related to abandoned animals merely, our conclusion might be different. The destruction by public authority of an abandoned animal deprives nobody of property. But the section in its present form does not refer to abandoned animals only. It purports to authorize the defendant to do, without notice or hearing, what the agreed statement says he did, to wit, that he "took the horse from the plaintiff's possession against his objection" and killed it. It thus contravenes an explicit constitutional mandate.

Action to stand for trial.

## ANNOTATION.

### Constitutionality of statute or ordinance providing for destruction of animals.

I. Abandoned animals; humanitarian statutes, 67.

II. Statutes for protection of public health or to prevent spread of disease among animals:

a. In general, 69.

b. Constitutional right to compensation, 70.

II.—continued.

c. Constitutional right to notice and opportunity to be heard, 71.

III. Statutes in relation to dogs:

a. In general, 74.

b. As affected by property rights in dogs, 77.

IV. Miscellaneous, 78.

#### *I. Abandoned animals; humanitarian statutes.*

The decisions generally deny, on the ground that the owner is deprived of property without due process of law, the constitutionality of statutes and ordinances providing, without notice and hearing, for the destruction of abandoned or disabled animals, other than dogs, enacted chiefly from humanitarian motives. *Loesch v. Koehler* (1895) 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, rehearing denied in (1896) 144 Ind. 284, 43 N. E. 129; *Waud v. Crawford* (1913) 160 Iowa, 452, 141 N. W. 1041; *King v. Hayes* (1888) 80 Me. 206, 13 Atl. 882; *RANDALL v. PATCH* (reported herewith) ante, 65; *Carter v. Colby* (1902) 71 N. H. 230, 51 Atl. 904; *Brill*

*v. Ohio Humane Soc.* (1890) 4 Ohio C. C. 358, 2 Ohio C. D. 594.

A statute authorizing any agent of any society for the prevention of cruelty to animals to kill any animal found neglected or abandoned and which, in the opinion of three reputable citizens, was injured or diseased past recovery, or by age had become useless, was held unconstitutional in *Loesch v. Koehler* (1895) 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, as depriving the owner of property without due process of law, so far as it permitted such killing without notice to him. Rehearing was denied in (1896) 144 Ind. 284, 43 N. E. 129.

And a statute authorizing a sheriff or other police officers to destroy any



horse or other animals disabled or unfit for further use was held unconstitutional in *Waud v. Crawford* (1913) 160 Iowa, 432, 141 N. W. 1041, in so far as it authorized the destruction, without notice or hearing, of an animal disabled by disease not contagious or infectious in character.

It was held in *King v. Hayes* (1888) 80 Me. 206, 13 Atl. 882, that a statute which allowed an agent of a society for the prevention of cruelty to animals to condemn, conclusively fix the value of, and destroy, a horse, without any notice, actual or constructive, to the owner, operated as an unconstitutional deprivation of property without due process of law.

A statute authorizing any officer or agent of any society for the prevention of cruelty to animals to destroy forthwith any animal found abandoned "or not properly cared for," appearing, in the judgment of two reputable persons called by him to view the same, to be diseased or injured or in a condition from lack of food, water, or shelter, past recovery for any useful purpose, was held in *RANDALL v. PATCH* (reported herewith), ante, 65, unconstitutional as depriving the owner of property without due process of law, in so far as it authorized the destruction, without notice or hearing, of a horse which was not abandoned.

And a statute providing that whenever an officer had taken into his possession an animal which appeared by reason of age, injury, or other cause, to be disabled for use, such officer should call upon three disinterested citizens, who should examine the animal, and if they found it disabled for use, the officer should at once cause the animal to be killed, was held in *Carter v. Colby* (1902) 71 N. H. 230, 51 Atl. 904, to violate the constitutional provision that no person should be deprived of property without due process of law, in so far as it authorized the taking of a horse from its owner and its killing without notice or opportunity for him to be heard.

A statute providing that any sheriff, constable, marshal, policeman, or

agent of any society for the prevention of cruelty to animals, might kill any animal found neglected or abandoned, and which, in the opinion of three reputable citizens, was injured or diseased past recovery, or by age had become useless, was held unconstitutional in *Brill v. Ohio Humane Soc.* (1890) 4 Ohio C. C. 353, 2 Ohio C. D. 594, in so far as it permitted the killing, without judicial proceedings, of an animal afflicted with a disease which was not contagious and did not render it dangerous. The court took this position, assuming that the animal was abandoned or neglected, although the facts were otherwise in this case.

In *Goodwin v. Toucey* (1898) 71 Conn. 262, 41 Atl. 806, the court said that if the statute were construed as authorizing the killing of an animal by an agent or officer of the Humane Society, not to prevent cruelty or the spread of contagious disease, but whenever such agent and two reputable citizens happened to be of the opinion that the animal was injured or sick "past recovery, or unfit for any useful purpose," it would be difficult to sustain its constitutionality. It was held, however, that the statute authorized the killing of an animal only in case it had been taken in charge by an officer or agent of the Humane Society under other statutory provisions authorizing them to take charge of animals found abandoned, neglected, or cruelly treated, and requiring notice to the owner, who might within a specified time re-take the property.

In a number of cases cited under II. c, *infra*, attention is called to the fact that the constitutionality of statutes and ordinances authorizing the destruction of animals without notice to the owner has been sometimes sustained on the ground that the owner had a right to a judicial hearing in a subsequent action for damages against the officer or agent who killed the animal. This view was taken in *Sahr v. Scholle* (1895) 89 Hun, 42, 35 N. Y. Supp. 97, where the defense to an action for killing the plaintiff's horse was that it was found abandoned, and

the defendant acted under statutory authority as an officer of the Society for the Prevention of Cruelty to Animals. The court said: "It was incumbent upon the defendant, in order to establish his defense, to prove the fact that the horse was injured past recovery for any useful purpose. The determination of such fact by two reputable citizens called to examine the horse, as required by the statute, was not conclusive upon its owner. Before there could be such a conclusive determination as would result in depriving the owner of his property, he was entitled to a hearing. In that way only can acts of the legislature conferring upon public officers the right to destroy private property be harmonized with the constitutional provision securing to every person due process of law before his property can be interfered with. A person whose property has been destroyed by a public officer, acting pursuant to a statutory authority, without notice to the owner, may always, therefore, have his common-law action for damages; and, if he can prove that the fact which authorizes the officer to act did not exist, he is entitled to a judgment."

*II. Statutes for protection of public health or to prevent spread of disease among animals.*

*a. In general.*

The validity of statutes or ordinances authorizing the destruction of animals, other than dogs, having infectious or contagious diseases, has been sustained in a number of cases as an exercise of the police power. *Durand v. Dyson* (1915) 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A. (N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46; *Newark & S. O. Horse Car R. Co. v. Hunt* (1888) 50 N. J. L. 308, 12 Atl. 697; *Torrueila v. Fernandez* (1908) 14 P. R. R. 591; *Chambers v. Gilbert* (1897) 17 Tex. Civ. App. 106, 42 S. W. 630, writ of error refused in (1900) 93 Tex. 726; *Livingston v. Ellis County* (1902) 30 Tex. Civ. App. 19, 68 S. W. 723; *Maynard v. Freeman* (1900) —

*Tex. Civ. App.* —, 60 S. W. 334; *Brooks v. Moore* (1907) 13 B. C. 91.

It was said in *Lowe v. Conroy* (1904) 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341, that the appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only in many instances be effectually dealt with by the destruction of the animals afflicted.

Power to enact an ordinance requiring the inspection of dairy cows and the destruction of such cows as were found to be affected with tuberculosis was held authorized by charter power "to maintain the city's cleanliness and health, and to this end to regulate the location of and the inspection and cleaning of dairies, . . . and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease." *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A. (N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46.

Without setting out the statute, the court, in *Brooks v. Moore* (B. C.) *supra*, held that the Animal Contagious Diseases Act 1903, under which the defendant, a government veterinary inspector, was assuming to act in proceedings to destroy horses of the plaintiff on the ground that they were affected with glanders, was *intra vires* the Parliament of Canada.

It was held that equal protection of the law was not unconstitutionally denied by a statute fixing the period at twenty-four hours within which an appeal might be taken from an order of a supervisor of health for the destruction of animals suffering from infectious or contagious disease, on the theory that the time was too short to permit the appeal to be available to a poor man. *Torrueila v. Fernandez* (P. R.) *supra*. The court said that the appeal was sufficient if notice thereof was served with the official who notified the owner of the decision ordering the destruction of the animal, and that the appeal was

thus available to rich and poor alike; but also that the appeal was not a constitutional right, and inability to exercise it did not therefore violate the Federal Constitution.

It was held in *Westchester Electric R. Co. v. Angevine* (1900) 52 App. Div. 239, 65 N. Y. Supp. 376, that a board of health of a city could not delegate to an officer of a society for the prevention of cruelty to animals the power to destroy horses found to be affected with glanders.

It was held, however, in *New Orleans v. Charouleau (La.) supra*, that a city council could delegate to the board of health power to destroy dairy cows having tuberculosis.

*b. Constitutional right to compensation.*

The destruction by the health authorities of animals suffering from a contagious disease, where such destruction is necessary to prevent the spread of the disease, does not deprive the owner of due process of law, although no provision is made for compensation for the destruction of animals actually diseased. *Torruella v. Fernandez* (1908) 14 P. R. R. 591.

And an ordinance requiring the inspection by the health authorities of dairy cows in a large city, and providing for the destruction of such cows as were found to be affected with tuberculosis, was held in *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46, not to be unconstitutional as authorizing the taking of property without due process of law in that it provided for no compensation to be made to the owner of the cows. It was said in the syllabus by the court: "It being shown that tuberculosis in a cow may be ascertained by a practically infallible test; and it being further shown that the presence of a cow so affected in a dairy in a city is a serious menace to the public health,—the public authorities have the same right to require the destruction of such cow without compensation to the owner and without judicial inquiry as they have to require the destruction of decayed fish, meats, and vegetables."

The destruction under statutory authority of animals affected with a contagious disease is not a taking of property for public use within the meaning of a constitutional provision requiring adequate compensation to be made to the owner when property is taken for public use without his consent. *Chambers v. Gilbert* (1897) 17 Tex. Civ. App. 106, 42 S. W. 630, writ of error refused in (1900) 93 Tex. 726; *Livingston v. Ellis County* (1902) 30 Tex. Civ. App. 19, 68 S. W. 723.

The proposition that cattle which have become so diseased as to be obnoxious to the public health or to be a public nuisance may be destroyed by the state in the exercise of its police power, without compensation to the owner, finds support in *Houston v. State* (1898) 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111, although it was unnecessary expressly to decide the question, since the demurrer to the complaint admitted that none of the cattle destroyed were affected with any disease and the issue was as to the liability of state for the destruction of healthy animals.

In *Durand v. Dyson* (1916) 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84, *Chambers v. Gilbert (Tex.) supra*, and *Maynard v. Freeman* (1900) — Tex. Civ. App. —, 60 S. W. 334, cited under II. c, *infra*, the statute provided for compensation, and the principal point considered was as to notice and hearing.

It was held in *Chambers v. Gilbert* (1897) 17 Tex. Civ. App. 106, 42 S. W. 630, writ of error refused in (1900) 93 Tex. 726, that a statute providing for payment by the county of the appraised value of diseased animals which were destroyed by the sheriff on order of the county judge did not violate constitutional provisions that the legislature should have no power to make any grant of public money to any individual or authorize any county or other political subdivision of the state to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever.

*c. Constitutional right to notice and opportunity to be heard.*

The validity of statutes and ordinances providing for the destruction of animals, other than those affected with contagious or infectious disease, has been sustained under the police power, although no provision was made for a notice to the owner and an opportunity for him to be heard, but the owner is frequently held entitled to a judicial hearing after the destruction, to contest the existence of the disease, the finding of the officers or persons called to inspect the animal before its destruction not being conclusive in this respect if there has been no notice and hearing, and not protecting the party killing the animal from payment of damages, if, in the subsequent action by the owner, the facts are not found to be such as bring the case within the statute or ordinance.

An ordinance requiring the inspection by the health authorities of dairy cows in a large city, and providing for the destruction of such cows as were found to be affected with tuberculosis, was held in *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 382, 46 So. 911, 15 Ann. Cas. 46, not to be unconstitutional, in that it did not provide for a judicial hearing before condemnation of the property.

In *Durand v. Dyson* (1916) 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84, the court sustained the constitutionality of a statute empowering the board of live stock commissioners to order the destruction of animals diseased or exposed to disease which was found to be of a dangerously contagious or dangerously infectious nature, and providing for compensation to the owner by agreement or by appraisal, but forfeiting his right to compensation unless after the appraisal was made he immediately destroyed the animals and disinfected the premises occupied by them. The cattle involved in this case were affected with hoof and mouth disease, and the court stated that it was generally recognized that where the disease among cattle is so very dangerous

and of so contagious or infectious a character as to be communicable to human beings through the consumption of the flesh or milk of the diseased animals, as in the case before it, legislatures have the power to confer on boards or commissions the right to destroy the animals; that in some cases hearings might be reasonably had before the destruction of the property, but that when the question was one regarding the destruction of animals or food which was not only unfit for human use, but might be fatal to those who used it, the emergency was such that the legislature should have the entire disposition of the matter without review by the courts.

Due course of law under state constitutional provision or due process of law under the 14th Amendment to the Federal Constitution, it was held in *Chambers v. Gilbert* (1897) 17 Tex. Civ. App. 106, 42 S. W. 630, were not denied by a statute providing that if at any time it should come to the knowledge of the county judge by affidavit of any creditable citizen of the county that glanders or farcy existed among certain classes of animals, it should be the duty of the judge to appoint three disinterested and intelligent citizens of the county, who should carefully and minutely examine the animals so reported to be diseased, and if, in their opinion, the animals were diseased, should condemn and appraise the same, and report to the county judge, who should command the sheriff to kill the animals so diseased, provision being made that, after destruction of the animals, the county should pay the appraised value, if any. A writ of error was refused in (1900) 93 Tex. 726.

And in *Maynard v. Freeman* (1900) — Tex. Civ. App. —, 60 S. W. 834, the question of the unconstitutionality of the above statute was raised, but the point dismissed on the authority of the *Chambers Case* (Tex.) *supra*.

See also *Riley v. Coleman County* (1916) — Tex. Civ. App. —, 181 S. W. 743, in which the court, referring to the Texas statute authorizing the killing of horses and other animals

affected with glanders, stated that the procedure therein authorized had been held constitutional as a proper exercise of the police power of the state, citing former decisions in that state. It was held, however, that no issue as to the constitutionality of the proceedings authorized by the statute was properly presented in that case.

The legislature may, in the exercise of its police power, authorize a state board of health to destroy horses affected with glanders, and such enactment is not subject to the objection that it is unconstitutional as depriving the owner of his property without due process of law, in that the destruction is authorized without notice to him and an opportunity for him to be heard, if the decision of the board that the disease exists is not made conclusive and the property owner is not deprived of a right after the destruction to contest the existence of the disease. *Newark & S. O. Horse Car R. Co. v. Hunt* (1888) 50 N. J. L. 308, 12 Atl. 697. The court said: "Plaintiff, however, contends that the determination of the officials that the prescribed disease exists is to be made without notice to the property owners and without affording them an opportunity to be heard, and on this ground claims that these acts are obnoxious to the constitutional provision invoked. If the legislature by these acts has made the determination of these officials, as to the existence of the common nuisance, a conclusive adjudication upon the rights of the property owner, then it is perfectly obvious that this legislation cannot be supported. It has been settled in this state that it is not within the power of the legislation to impart to a determination of this sort a conclusive character as against the property owner, and legislation intending that result was held to be futile. *Hutton v. Camden* (1876) 39 N. J. L. 122, 23 Am. Rep. 203. An examination of the acts in question clearly shows that there was no intent in the legislative mind to make the conclusions of the officials decisive of the right of the property owner as to the existence of that condition of things which these acts de-

clared should constitute in these cases a common nuisance, and would justify its abatement by the destruction of the animals diseased. . . . It has never been pretended that the 14th Amendment worked the abolition of the common-law rule which justified anyone specially affected by a nuisance in abating it without waiting for an adjudication that it was a nuisance which he might abate, but unless the fact of the nuisance was established by proof he was liable to the aggrieved property owner as for an unwarranted trespass."

In the preceding case, the decision of the officials before their destruction of the diseased animals as to the existence of the disease was held not conclusive on the owner, where he had no notice and no opportunity to be heard. The question whether such decision is conclusive is not, of itself, within the scope of the annotation; but the validity of statutes or ordinances providing for the summary destruction of animals affected with a contagious or infectious disease has been sustained, as has already been noted, in some instances on the ground that the owner is not deprived of due process of law, because he may have a judicial hearing in an action against the officer or other person who kills the animal, and the destruction without such a hearing may be imperative to protect the public health in case the disease actually exists.

Thus, the court in *Miller v. Horton* (1891) 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100, stated that grave questions would arise as to the constitutionality of the statute requiring the commissioners on contagious diseases among domestic animals to cause an animal infected with farcy or glanders to be killed, if their decision was conclusive that the animal was infected with the disease, where the animal might be killed without notice to the owner, and without compensation. It was held that the statute should not be so construed, but that it authorized the killing of actually infected horses only, and that the order of the commissioners would not protect one who killed a horse

which had not such disease, in a subsequent suit by the owner for compensation. The latter question is, of course, not within the scope of the present annotation.

And in an action for the killing of horses by a board of live stock commissioners, where the defense was that the horses were infected with glanders and that the killing was authorized by statutes permitting the killing of animals having contagious or infectious diseases, the court, in *Pearson v. Zehr* (1891) 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854, in holding that the determination of the members of the board that the disease existed was not conclusive, stated that to permit the commissioners to determine, *ex parte*, that some of the horses had the glanders and that others had been exposed thereto, and to hold that determination a justification for slaughtering them, without imposing upon the commissioners the burden of establishing affirmatively the actual existence of the disease and the exposure, would not be a valid exercise of the police power of the state, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.

See also *Sahr v. Scholle* (1895) 89 Hun, 42, 35 N. Y. Supp. 97, cited under I. *supra*, where, in an action for killing a horse which, it was claimed, was abandoned, the question was considered as to the conclusiveness upon the owner of the finding that the horse was injured past recovery for any useful purpose.

On this point, although the facts do not bring the case within the scope of the note, attention is called to *Lowe v. Conroy* (1904) 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341, in which the court said: "The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes

of the law,—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger to health,—yet it is no protection for destroying private property which in fact is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property be taken and adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it. In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the conditions which the statutes declare they may abate or remove."

Attention is called also to the distinction as to the power to declare public nuisances and to order their summary abatement between cases where the property involved is of comparatively small value and where it is of large value, instances of the destruction of diseased animals being placed by the Federal Supreme Court with the latter class of cases.

Thus, it was said in *Lawton v. Steele* (1893) 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, on facts not within the scope of the present annotation: "Where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; destruction of decayed

fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. . . . It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement."

### *III. Statutes in relation to dogs.*

#### *a. In general.*

Statutes and ordinances regulating the running at large of dogs, usually requiring their registration or licensing, prohibiting their running at large unless muzzled or collared, and providing for their summary destruction when found running at large in violation of the statute or ordinance, have generally been sustained as a valid exercise of the police power.

**United States.**—*Sentell v. New Orleans & C. R. Co.* (1897) 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773.

**Iowa.**—See *Sibley v. Lastrico* (1904) 122 Iowa, 211, 97 N. W. 1074 (validity assumed).

**Kansas.**—*State ex rel. Curtis v. Topka* (1886) 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310, 7 Am. Crim. Rep. 479.

**Kentucky.**—*Com. v. Markham* (1870) 7 Bush, 486.

**Maryland.**—*Hagerstown v. Witmer* (1897) 86 Md. 293, 39 L.R.A. 649, 37 Atl. 965.

**Massachusetts.**—*Blair v. Forehand* (1868) 100 Mass. 186, 1 Am. Rep. 94, 97 Am. Dec. 82; *Moréwood v. Wakefield* (1882) 133 Mass. 240. See *Tower v. Tower* (1886) 18 Pick. 262 (validity assumed).

**Mississippi.**—*Julienne v. Jackson* (1891) 69 Miss. 34, 30 Am. St. Rep. 526, 10 So. 43.

**New Hampshire.**—*Morey v. Brown* (1861) 42 N. H. 373.

**New York.**—*Fox v. Mohawk & H. River Humane Soc.* (1901) 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *People ex rel. Renshaw v. Gillespie* (1898) 25 App. Div. 91, 48 N. Y. Supp. 882; *People ex rel. Westbay v. Delaney* (1911) 73 Misc. 5, 130 N. Y. Supp. 833, affirmed without opinion in (1911) 146 App. Div. 957, 131 N. Y. Supp. 1137.

**North Carolina.**—*Mowery v. Salisbury* (1880) 82 N. C. 175; *State v. Clifton* (1910) 152 N. C. 800, 28 L.R.A. (N.S.) 673, 67 S. E. 751.

**North Dakota.**—*Litchville v. Hanson* (1910) 19 N. D. 672, 124 N. W. 1119, Ann. Cas. 1912D, 876.

**Oklahoma.**—*Roberson v. Gibson* (1917) — Okla. —, 162 Pac. 1120.

**Pennsylvania.**—*Monroe v. Walborn* (1908) 17 Pa. Dist. R. 1053.

**Utah.**—*Jenkins v. Ballantyne* (1892) 8 Utah, 245, 16 L.R.A. 689, 30 Pac. 760.

**Vermont.**—*State v. Smith* (1900) 72 Vt. 140, 47 Atl. 390; *McDermont v. Taft* (1910) 83 Vt. 249, 138 Am. St. Rep. 1083, 75 Atl. 276.

**Canada.**—*McNair v. Collins* (1912) 27 Ont. L. Rep. 44, 6 D. L. R. 510, 3 Ont. Week. N. 1639, 22 Ont. Week. Rep. 891, Ann. Cas. 1913C, 964.

Under charter power to declare, prevent, and remove nuisances, and to take such other measures for the preservation of the public health as the trustees may deem necessary, a town may require the muzzling of dogs and the killing of all dogs found running at large in violation of the ordinance; such an ordinance is a reasonable and

proper exercise of the police power. *Haller v. Sheridan* (1867) 27 Ind. 494.

An ordinance providing that a dog seized while running at large shall be killed if not ransomed by payment of \$1 before 10 o'clock of the morning after it has been detained twenty-four hours, and providing for a notice of the seizure to be given to the owner of any dog having a collar with the owner's name thereon, is not unconstitutional, or so unreasonable that the court can hold it void. *Hagerstown v. Witmer* (1897) 86 Md. 293, 39 L.R.A. 649, 37 Atl. 965.

The police power was held in *Leach v. Elwood* (1878) 3 Ill. App. 453, to authorize a municipal corporation to enact an ordinance empowering the mayor, on an alarm of mad dogs, to prohibit, by public notice, unmuzzled dogs from running at large within the city limits and authorizing the killing of all dogs found at large without a muzzle.

An ordinance requiring all dogs to be securely muzzled, and declaring any dog found running at large without a muzzle to be a nuisance, and making it the duty of the marshal and policemen to kill any such dog, has been held a valid exercise of the power to enact ordinances for the protection of life, health, and property. *Walker v. Powell* (1901) 156 Ind. 639, 53 L.R.A. 749, 59 N. E. 20.

A statute requiring the payment of a license fee for dogs, and authorizing the destruction of any dog which, having been seized for nonpayment of the license, is not redeemed within forty-eight hours after the seizure, does not unconstitutionally take property without due process of law in that it provides for the destruction of the animal without notice to the owner. *Fox v. Mohawk & H. River Humane Soc.* (1901) 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *People ex rel. Westbay v. Delaney* (1911) 73 Misc. 5, 130 N. Y. Supp. 833, affirmed without opinion in (1911) 146 App. Div. 957, 131 N. Y. Supp. 1137.

It was held in *Fox v. Mohawk & H. River Humane Soc.* (N. Y.) *supra*, that the authority given by statute to

a humane society to destroy or appropriate unlicensed dogs was not an unconstitutional delegation of governmental power to a private corporation, since unlicensed dogs had long been regarded as subject to destruction by any person. This decision was followed in *People ex rel. Westbay v. Delaney* (N. Y.) *supra*.

An ordinance requiring the registration of dogs, and the wearing of a suitable collar with the owner's name or initials by dogs which were registered, and providing that any dog not registered and collared should be liable to be killed by any person, was held in *Jenkins v. Ballantyne* (1892) 8 Utah, 245, 16 L.R.A. 689, 30 Pac. 760, not to constitute a violation of the constitutional provision against depriving a person of property without due process of law, but a valid police regulation.

The Vermont statute, which was considered a valid exercise of the police power in *McDermont v. Taft* (1910) 83 Vt. 249, 138 Am. St. Rep. 1083, 75 Atl. 276, provided that the owner or keeper of a dog should cause it to be registered and licensed and to wear a collar distinctly marked with the name of its owner or keeper, and that "any person may, and every police officer and constable shall, kill or cause to be killed" dogs not so licensed and collared, "whenever and wherever found."

A statute providing that no dog should be entitled to the protection of the law unless placed on the assessment rolls, and that in civil actions for the killing or for injuries to dogs the owner could not recover beyond the amount of the value of the dog as fixed by him in the last assessment preceding the killing or injuries complained of, was held a valid exercise of the police power in *Sentell v. New Orleans & C. R. Co.* (1896) 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 698, 1 Am. Neg. Rep. 773.

A statute authorizing a justice of the peace, on complaint that a dog is dangerous, to order the owner to kill the dog, and prescribing, in case of noncompliance within forty-eight hours, a penalty of \$2.50 and the fur-



ther sum of \$1.25 for every forty-eight hours thereafter until the dog is killed, does not deprive the owner of the dog of due process of law, in that he is given no opportunity to be heard by the justice, where in an action to enforce the penalty he has full opportunity to be heard and to contest the truth of the complaint on which the order was made. *People ex rel. Renshaw v. Gillespie* (1898) 25 App. Div. 91, 48 N. Y. Supp. 882.

Under statutory authority to prevent the running at large of dogs and to destroy the same when at large contrary to any prohibition to that effect, it was held in *Gibson v. Harrison* (1901) 69 Ark. 385, 54 L.R.A. 268, 63 S. W. 999, that a municipal corporation might exact a fee of \$1.50 for the privilege of keeping a dog, and in case of its nonpayment impose a fine upon the owner and provide for the killing of the dog.

Under a "general welfare" charter clause, it was held in *Fincher v. Colum* (1907) 2 Ga. App. 745, 59 S. E. 22, that a city council might pass an ordinance requiring owners of dogs to register them, secure tags, and pay fees therefor, and authorizing the killing of all untagged dogs.

It was held in *Rose v. Salem* (1915) 77 Or. 77, 150 Pac. 276, that the city had power to prohibit dogs from running at large under charter authority "to prevent domestic animals from running at large within the city," and "to license, tax, impound, sell or kill dogs."

Under authority to pass by-laws for restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-laws, a township council may prohibit dogs from running at large unaccompanied by their owners, and provide that any dog found so running at large at a greater distance than  $\frac{1}{2}$  mile from the owner's premises may be killed by any resident, although in the authority for passing the by-law it is also provided that for the purposes therein named a dog should be deemed to be running at large "when found in a street or other public place," and not under the control

of any person, the latter clause merely affecting the burden of proof, and not limiting the power to justify the killing of a dog to those cases where it is in a street or other public place. *McNair v. Collins* (1912) 24 Ont. L. Rep. 44, 6 D. L. R. 510, 3 Ont. Week. N. 1639, 22 Ont. Week. Rep. 891, Ann. Cas. 1913C, 964.

Attention is called to *Faribault v. Wilson* (1885) 34 Minn. 254, 25 N. W. 449, 6 Am. Crim. Rep. 544, holding that under charter power to regulate or prevent the running at large of dogs and to authorize their destruction in a summary manner when not licensed or at large contrary to ordinance, the remedy by destruction of dogs was not the only one a city might impose for violation of an ordinance regulating the keeping of dogs, but that a fine might be on the owner.

See also *Whitfield v. Paris* (1892) 84 Tex. 431, 15 L.R.A. 783, 31 Am. St. Rep. 69, 19 S. W. 566, where, in holding that a city was not liable for the recklessness of a policeman in shooting at an unmuzzled dog on a public street whereby he seriously wounded a person on the street while he was attempting to enforce an ordinance making it his duty to kill unmuzzled dogs, the court stated that the enactment of the ordinance referred to was an exercise by the city of its police power.

But on the ground that the title of the ordinance, which was "An Ordinance Prohibiting Animals from Running at Large in the City," did not express, as required by statute, the subject-matter of a section thereof which provided for the registering, taxing, and collaring of dogs, and made it the duty of the marshal to kill any dog found running at large in the city without a collar and tag, and rendered the owner criminally liable if the tax was not paid and the dog registered, irrespective of whether he was permitted to run at large or not, said section was held invalid in *Stebbins v. Mayer* (1888) 38 Kan. 573, 16 Pac. 745.

And in several cases ordinances providing for the summary killing of dogs have been held unconstitutional, as depriving the owner of property with-

out due process of law. *People ex rel. Shand v. Tighe* (1894) 9 Misc. 607, 30 N. Y. Supp. 368; *Rose v. Salem* (1915) 77 Or. 77, 150 Pac. 276; *Lynn v. State* (1894) 33 Tex. Crim. Rep. 153, 25 S. W. 779.

An ordinance providing that if any dog should attack a person except on the owner's premises, on complaint made to the mayor or police justice, such officer should inquire into the complaint, and, if satisfied of its truth, and that such dog is dangerous, should order the owner to kill him immediately, and providing that if the owner should refuse to do so within forty-eight hours he should forfeit \$10 and also \$5 for every forty-eight hours thereafter until the dog was killed, was held in *People ex rel. Shand v. Tighe* (N. Y.) *supra*, unconstitutional in so far as it authorized the issuance of an order for the owner to kill the animal without notice and an opportunity to be heard.

Although apparently not necessary to the decision, the court in *People ex rel. Shand v. Tighe* (N. Y.) *supra*, stated that it found no authority going so far as to suggest that a statute authorizing a city council to pass an ordinance to "regulate and license" dogs conferred power to pass an ordinance to kill them.

It was held in *Lynn v. State* (1894) 33 Tex. Crim. Rep. 153, 25 S. W. 779, that an ordinance making it the duty of the city marshal and policemen to shoot all dogs not muzzled, found in any street, alley, sidewalk, or other public highway within the city limits, was unconstitutional, in that it deprived the owner of property without due process of law, and violated a provision of the Penal Code subjecting to a fine any person who should discharge firearms on a street. This conclusion was reached notwithstanding a statute authorizing cities to restrain and prohibit the running at large of dogs and to authorize their destruction when at large contrary to ordinances.

See also the following subdivision.

**b. As affected by property rights in dogs.**

Many of the decisions cited above were in jurisdictions in which, doubt-

less, dogs are recognized by statute as property. And, as expressly recognizing the proposition that the summary destruction of dogs running at large in violation of an ordinance is within the police power, even though dogs are property, see *Litchville v. Hanson* (1910) 19 N. D. 672, 124 N. W. 1119, Ann. Cas. 1912D, 876.

It was said in *Sentell v. New Orleans & C. R. Co.* (1896) 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773, that, assuming that dogs were property in the fullest sense, they would still be subject to the police power of the state and might be destroyed as in the judgment of the legislature was necessary for the protection of its citizens. The court stated that damage done by dogs is usually such as is beyond the reach of judicial process, that legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance, and that such legislation is clearly within the police power of the state. See this case under III. a, *supra*.

The validity of an ordinance requiring the payment of an annual license on dogs, and making it the duty of the marshal to seize and impound any dog not licensed, and, after two days, if no person has claimed the dog and paid the license or produced a license showing previous payment, to destroy such dog, was sustained in *Re Ackerman* (1907) 6 Cal. App. 5, 91 Pac. 429, as against the objection that the ordinance was unreasonable in that it provided for the destruction of the dog without notification of the owner. It was held that the ordinance did not unconstitutionally take property without due process of law, but was a valid exercise of the police power, and that this conclusion was not affected by the fact that in that state under statute a dog was property.

It was said in *Julienne v. Jackson* (1891) 69 Miss. 34, 30 Am. St. Rep. 526, 10 So. 43, in sustaining the constitutionality of an ordinance providing that between certain dates all dogs running at large without a muzzle and tag should be destroyed by any policeman of the city: "It is held

with great unanimity by the courts that regulations of the most stringent character, and the most summary proceedings for the destruction of these animals kept contrary to such regulations, are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law."

However, in at least one case the court refused to sustain the validity of an ordinance providing for the destruction of dogs, the decision being placed on the ground that dogs were declared by statute in that state to be property.

Thus, an ordinance making it unlawful for dogs to run at large in the city limits, authorizing the street commissioner or his agents to impound any dog found running at large, and providing that whenever any dogs should be impounded notice should be given to the owner or custodian, if known, and, if the dog was not claimed within three days, it should be killed, was held unconstitutional in *Rose v. Salem* (1915) 77 Or. 77, 150 Pac. 276, as depriving the owner of his property without due process of law. The court admitted that in many of the states the courts had held similar ordinances valid, but stated that in all cases of this sort which had been called to its attention emphasis was laid on the assumption that dogs were property in a limited or qualified sense only, and were not at common law the subject of larceny; whereas, in that state it was larceny to steal a dog, and dogs were expressly declared by statute to be personal property.

A distinction between the right to destroy dogs and such other domestic animals as horses and oxen, without notice to the owner, is made in *Fox v. Mohawk & H. River Humane Soc.* (1901) 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353. Although the court held that the summary destruction or appropriation of a dog by a humane society, without notice to the owner, when he had failed to procure a license for the dog as required by statute, did not constitute a taking of his property without

due process of law, it stated that such a confiscation without judicial process would, in the case of domestic animals such as horses, oxen, and the like, even though these animals were trespassing, be unconstitutional. The court stated that under any circumstances there was but a qualified property in such animals as dogs, and that, in fact, there might be said to be no property in them as against the police power of the state.

In other cases the nature of the property in dogs has been mentioned as one of the grounds for sustaining the validity of the statute or ordinance providing for their summary destruction.

It was said in *McDerment v. Taft* (1910) 83 Vt. 249, 138 Am. St. Rep. 1083, 75 Atl. 276, that while dogs are recognized by the law as a species of property, they belong to that class of property the keeping of which may be stringently regulated by the legislature in the exercise of its police power, even to the extent of providing for their destruction, in given circumstances, without judicial proceedings and in a most summary way.

An ordinance requiring the owner of a dog to pay a tax and to collar the dog, and making it the duty of the city marshal to kill every dog found running at large in violation of the ordinance, the marshal to receive for his services \$1 for each dog killed, was held in *Independence v. Trouville* (1875) 15 Kan. 70, not invalid, at least not in any such respect as would excuse the city from payment of the compensation to the marshal provided for by the ordinance. The court said that the ordinance could certainly not be held invalid because of the sacredness of the property in dogs, that property in dogs was of such a low character that it could hardly be considered as property at all. And on this ground the court distinguished the case from that of more valuable animals, such as a cow, which must be taken up and impounded and notice given to the owner.

#### IV. Miscellaneous.

In *Ross v. Desha Levee Bd.* (1907) 83 Ark. 176, 21 L.R.A. (N.S.) 699, 119

Am. St. Rep. 181, 103 S. W. 380, it was held that a statute permitting the summary killing of hogs found running at large on or near public levees did not unconstitutionally de-

prive the owner of his property, where prevention of the weakening of the levees by the rooting of hogs was necessary to the public safety.

R. E. H.

STATE OF WEST VIRGINIA EX REL. C. S. FARMER, Admr., etc., of  
Beulah Westerman, Deceased,

v.

CITIZENS' TRUST & GUARANTY COMPANY.

*West Virginia Supreme Court of Appeals—October 14, 1919.*

(— W. Va. —, 100 S. E. 685.)

**Executor and administrator — personal debt to estate — liability of surety.**

1. A debt due from a personal representative to the estate which he represents is not for all purposes to be regarded as money on hand; but where at the time of his appointment and qualification such representative was insolvent and unable to pay his debt, and so continued throughout the period of his administration, there being no laches on his part, such debt is to be treated as any other debt owing to the estate, and the surety on his official bond is not liable thereon for more than could have been enforced against the principal at any time within such period.

[See note on this question beginning on page 84.]

**Pleading — motion to strike — effect.**

2. A motion to strike out a plea has the same effect upon the legal sufficiency thereof that a demurrer thereto would have had.

[See 21 R. C. L. 595.]

**Executor and administrator — surety — extent of obligation.**

3. A surety on the official bond of an administrator or executor, where there is no statute or stipulation in the bond to the contrary, obligates himself only to account for losses occasioned by the failure of the fiduciary to use due diligence in pursuing and collecting claims owing to the estate, and to make proper application of the assets that come into his hands.

[See 11 R. C. L. 303 et seq.]

— debt due as former administrator.

4. Where the principal in a bond given by a husband as administrator

of his deceased wife, the chief assets of whose estate she acquired by will from her deceased father, upon whose estate the husband as executor of the will also administered, but without bond, the will so providing, did not in his lifetime account for or deliver to the wife, except in part, the estate so devised and bequeathed to her, and died leaving the residue unadministered, the surety on his official bond as such administrator, when sued thereon by the administrator of the unadministered assets of the wife's estate, may, to defeat recovery, plead, rely on, and show the inability of the principal therein to pay the same to the wife's estate after her death, because of the insolvency of the principal during the entire period covered by his administration of her estate.

[See 11 R. C. L. 118.]

Headnotes by LYNCH, J.

CERTIFICATION by the Circuit Court for Wood County to the Supreme Court of Appeals of a ruling denying plaintiff's motion to strike defendant's special plea from the file, in an action brought to enforce its liability as surety on an administrator's bond. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. A. C. Chapman for plaintiff.  
Messrs. Kreps, Russell, & Hiteshew,  
for defendant:

The sureties are liable for a debt of their principal only under circumstances that would render them liable for a debt due by a third person.

United Brethren First Church v. Akin, 2 Ann. Cas. 355, note; 11 R. C. L. 118; Sanders v. Dodge, 140 Mich. 236, 112 Am. St. Rep. 399, 103 N. W. 597.

Lynch, J., delivered the opinion of the court:

Plaintiff, as administrator de bonis non of the estate of Beulah Westerman, daughter of W. S. Wiley, deceased, and wife of C. G. Westerman, deceased, who qualified and became the administrator of the estate devised and bequeathed to her by the will of her father, brought against Citizens' Trust & Guaranty Company, surety on Westerman's bond as administrator, this action of debt on the bond to recover assets belonging to her estate in the hands of Westerman, unadministered, at the date of his death; and to defeat recovery thereon defendant, in addition to nil debet, conditions performed, and conditions not broken, pleaded specially the insolvency of Westerman from the time he qualified as such administrator to the date of his death. This plea the court refused to strike from the file on plaintiff's motion, but did certify its ruling thereon to this court to test the correctness thereof, thus presenting the single question whether, because of such insolvency, any liability on the bond attached to the defendant as surety therein.

The decisions of this state furnish no precedent or criterion to guide us in reaching a proper conclusion upon this proposition. What is not less embarrassing, we meet at the outset a contrariety of judicial opinion wherever the question has been discussed. The facts may be gathered from the opinion in *Morris v. Westerman*, 79 W. Va. 502, 3 A.L.R. 1237, 92 S. E. 567, which, so far as they are now important, are these: C. G. Westerman qualified as executor of the will of W. S. Wiley about January 22, 1903, in Wetzel county,

but without bond; the will specifically dispensing with the indemnity. Beulah Wiley took under the will the greater part of the valuable estate of her father, only part of which came into her hands, either through her husband or from any other source, at any time while her husband had charge of her father's estate. Subsequently Mrs. Westerman died, and her husband became administrator of her estate, and gave the bond on which this action is brought to enable him to qualify as such, and who did so qualify and did administer upon her estate until the date of his death, whereupon plaintiff became the administrator of the unadministered assets, and brought this action to recover from the surety on Westerman's official bond that portion of her father's estate which her husband, first as his executor and then as her administrator, had failed to turn over to her, or, after her death, to her estate.

The condition of the administration bond involved here is that the principal, "C. G. Westerman, administrator of the estate of Beulah [or Mrs. C. G.] Westerman, deceased, shall faithfully pay the rents and profits or proceeds of said estate which may lawfully come into his hands, or to the hands of any person for him, to such person or persons as are entitled thereto, and shall in all other things well and truly discharge his duties as such administrator."

The special plea filed by defendant sets up by way of defense the following: "That C. G. Westerman was, at the time he was appointed and qualified as administrator of the estate of Beulah Westerman, deceased, insolvent, and . . . continued to be insolvent during the entire period that he was administrator, . . . to wit, up until the date of his death, . . . and that at no time during the said period . . . could the said debt decreed [in *Morris v. Westerman*] as owing from the estate of C. G. Westerman, deceased, to the said C.

S. Farmer, administrator d. b. n. of the estate of Beulah Westerman, deceased, have been collected from the said C. G. Westerman, and that at no time during the aforesaid period . . . could a greater amount have been collected from C. G. Westerman upon the aforesaid debt than was actually recovered and received . . . from and out of the estate of C. G. Westerman, deceased."

Whether Westerman in fact was or was not insolvent when his wife died, or when he died, or in the meantime, is immaterial, so far as this discussion is concerned. For that purpose the facts set up in the plea are taken as true, for a motion to strike has, we think, the same effect upon the question of the sufficiency of a pleading as a demurrer thereto would have

Pleading—  
motion to strike  
—effect.

had. Besides, like every other material fact alleged by a pleading, Westerman's insolvency as set up in the special plea is a fact to be proved by him who relies on it by way of defense—in this instance, the surety in the fidelity bond. We are dealing now only with the right of the defendant to plead and rely on insolvency to exonerate itself from the liability sought to be enforced against it, and, if it can, to sustain the plea by necessary proof, the burden of which rests upon it.

The single question presented is whether the allegation of the insolvency of the administrator during the time covered by his administration, and his consequential inability at any time during the administration to collect the debt owed by him to the estate of his wife, constitutes a valid defense to the action instituted against the surety on his official bond. As already indicated, instead of there being a general concurrence, there is a marked lack of harmony among the judicial decisions upon the question. This confusion is largely due to the diversity of authority at the common law as to the manner of treating a debt owed by a personal representative to his decedent at the time of his

appointment. Many courts by a legal fiction treat such debt as immediately liquidated and as constituting assets in the hands of the representative from the moment of his qualification, upon the theory that, as the personal representative cannot demand or receive payment of himself, or sue himself, and since he is bound to account for his own debt as for all other debts, the law presumes that he has done what he is legally bound to do, and therefore charges him with the amount as a debt paid.

What is generally known as the "Massachusetts rule" upon the subject seems to have been announced as early as 1814 in *Stevens v. Gaylord*, 11 Mass. 256, and since followed, not only in that state, but in many others, and in substance and effect, as stated at pages 268, 269, is: "As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator, as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be now in the hands of the party in his character of administrator. . . . The consequence is that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased."

The rule was further extended in *Leland v. Felton*, 1 Allen, 531, to apply to debts due to the estate of a testator from the executor named in his will, though the latter was insolvent at the time he accepted the trust, and although he had never charged the debts in his account, and an account had been allowed in which they were not included, but were mentioned as notes which it had been impossible to collect, and though he had resigned his trust, and an administrator de bonis non

had been appointed in his place. The latter case of *Bassett v. Fidelity & D. Co.* 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205, adheres to the same rule, and holds that the surety on an executor's bond is liable for the full amount due the testator from an insolvent firm of which the executor was a member, although the firm and the executor were insolvent at the time the latter assumed the trust. The reasoning relating to this conclusion is that an executor or administrator is appointed for the sole purpose of enforcing, in behalf of those interested in the estate, the rights of the estate against others. "For that reason," says the court, "on broad principles of policy it was laid down by the common law of England that he must yield all controversy as to the debt due from himself, and treat it as an asset of the estate," since "no one is bound to accept the office, and, if he elects to do so, he thereby tacitly assents to this condition." The Massachusetts court has recognized no distinction in the application of this doctrine to assignees in insolvency cases (*Benchley v. Chapin*, 10 Cush. 173), to guardians (*Mattoon v. Cowing*, 13 Gray, 387), and to receivers in insolvency cases (*Com. v. Gould*, 118 Mass. 300).

The supreme court of Oregon indorses the same doctrine in *United Brethren First Church v. Akin*, 45 Or. 247, 66 L.R.A. 654, 77 Pac. 748, 2 Ann. Cas. 353, and holds the sureties on the bond of an executor liable for the amount of his personal debt to the estate, though they executed the bond without any knowledge of indebtedness by the executor to the decedent, or of the executor's insolvency and inability to pay the debt. This holding, however, seems to be warranted by a statute of that state, as it is perhaps by statutes of other states, providing that an executor of an estate shall be liable for any claim of the testator against him, "as for so much money in his hands."

The attempt to compel the sureties of an executor or administrator,

the rule being the same in each case, to pay a debt due from him to the estate administered, when, had another person not so indebted been appointed as such, he could not possibly have collected it because of the continued insolvency of the debtor, certainly may frequently be fraught with serious consequences, and for that reason ought not to be sanctioned without due consideration, especially when no warrant can be found therefor other than the legal fiction that such a debt is to be treated as so much cash belonging to the estate at the time of the appointment—a fiction adopted and approved, it is said, merely for the purpose of justice and convenience. But if such were the purposes, its application ought not to be extended to cases where gross injustice will result. The rule necessarily must be based upon a presumption that all men are solvent and able to pay their obligations; but since that presumption is obviously not true in fact, to enforce the rule under all circumstances may work great hardship. When applied to a case where the personal representative was insolvent at the time of his appointment, and so continued until his death or discharge, a peculiar injustice might be caused by placing him in such a position that he might be charged with contempt or embezzlement for failure to pay over moneys with which he is charged, but which he has never received, since he was not able to pay, or by charging his sureties with liability beyond the faithful discharge of the duties of such personal representative, and in effect making them guarantors of such debts due the estate instead of sureties. Despite these evident hardships, there are some states which enforce the strict rule of liability against the representative and his sureties, irrespective of his continued insolvency and inability to pay. *Bassett v. Fidelity & D. Co.* *supra*; *United Brethren First Church v. Akin*, *supra*; *Wright v. Lang*, 66 Ala. 389; *Arnold v. Arnold*, 124 Ala. 550, 82 Am. St.

(— W. Va. —, 100 S. E. 685.)

Rep. 199, 27 So. 465; Judge of Probate v. Sulloway, 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720; McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. 231; James v. West, 67 Ohio St. 28, 65 N. E. 156; 2 Woerner, Administration, 2d ed. § 311; 11 R. C. L. 118; notes in 2 Ann. Cas. 355; and 112 Am. St. Rep. 409.

But the better rule, as it seems to us, is that followed by the majority of courts, which, while treating the liability as money on hand for administration purposes, properly considered, do not so deem or treat it for all purposes, but place the duty of the fiduciary toward his own debt to the estate upon the same level as other debts due thereto.

Executor and administrator—surety—extent of obligation.

Such rule does not make of the surety a guarantor of the payment of the debt

owed by the personal representative, the collection of which, had it been owed by any other, would have been excused upon proof of the continued insolvency of such debtor. Thus, as remarked by the supreme court of Vermont in *Lyon v. Osgood*, 58 Vt. 707, 715, 7 Atl. 8: "The extension of the legal fiction of payment, so as to make the surety liable for the executor's debt beyond his means to pay, when not guilty of laches, would often work great injustice to the surety. The surety ought not to be required to contribute from his own funds to make up an estate for the deceased, which he, in fact, was not possessed of at the time of his death. . . . In the absence of laches, we think the surety is liable upon his bond for the executor's debt only to the extent of the executor's ability to pay it."

*Harker v. Irick*, 10 N. J. Eq. 269, restates the same proposition. The supreme court of Kentucky in *Buckel v. Smith*, 26 Ky. L. Rep. 991, 82 S. W. 1001, puts the debt of an administrator or executor on the same footing as a debt owed to the estate by any other person. Besides the fiction already referred to, there

is apparent no solid foundation on which to base a difference between the two liabilities. The sureties, where there is no statute to the contrary, such as necessarily would operate as notice to them, obligate themselves only to account for losses occasioned by the failure of the fiduciary to use due diligence in pursuing and collecting claims owing to the estate, and to make proper application of the assets that come into his hands. But where he was

—personal debt to estate—liability of surety.

always insolvent, and for that reason wholly unable to pay a debt owed by him to the estate, upon what theory of justice, propriety, public policy, or lawful right, other than the mere fiction referred to, can the sureties be compelled to respond for such unavoidable failure?

The bond executed by deceased and his surety does not purport to impose absolute liability. Its condition is (1) that the principal shall faithfully pay the rent and profits or proceeds of the estate which may lawfully come into his hands, or to the hands of any person for him, to such person or persons as are entitled thereto; and (2) shall in all other things well and truly discharge his duties as such administrator. With respect to debts other than his own, the personal representative is chargeable only with the faithful discharge of his duty to make a prompt and efficient attempt to collect them, and when such collection is rendered impossible by the insolvency of the debtor, his surety is not responsible therefor. Debts owed by the representative should be treated in the same manner, and when at the time of his appointment, and continuing until his discharge or death, he was insolvent and unable to collect such debt from himself, his surety should not be responsible for that which no diligence could have prevented. Such is the rule followed in the great majority of states. *Re Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *Sánchez v.*



Forster, 133 Cal. 614, 65 Pac. 1077; State ex rel. McClamrock v. Gregory, 119 Ind. 503, 22 N. E. 1; Buckel v. Smith, 26 Ky. L. Rep. 991, 82 S. W. 1001; Sanders v. Dodge, 140 Mich. 236, 112 Am. St. Rep. 399, 103 N. W. 597; McCarty v. Frazer, 62 Mo. 263; Howell v. Anderson, 66 Neb. 575, 61 L.R.A. 313, 92 N. W. 760; Harker v. Irick, 10 N. J. Eq. 269; Baucus v. Barr, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939; Re Piper, 15 Pa. 533; Rader v. Yeargin, 85 Tenn. 486, 3 S. W. 178; Lyon v. Osgood, 58 Vt. 707, 7 Atl. 5; 2 Woerner, Administration, 2d ed. § 311; 11 R. C. L. 118; notes in 2 Ann. Cas. 355 and 112 Am. St. Rep. 409. See also Wachsmuth v. Penn Mut. L. Ins. Co. 241 Ill. 409, 26 L.R.A.(N.S.) 411, 132 Am. St. Rep. 226, 89 N. E. 787.

Of course, if the personal repre-

sentative was solvent when he assumed the duties of his office, and later became insolvent and unable to pay his debt, or if he was insolvent at first, but later became solvent, the surety might well be liable for a default under such circumstances, as many cases hold, though, according to the averments of the special plea, such question is not now presented. The averments of that plea, <sup>—debt due as former administrator.</sup> if proved upon the trial of the case, will constitute a bar to the action. No other questions are properly presented in the record for our consideration at this time.

Our order, therefore, will affirm the ruling upon the motion to strike out the special plea, and direct the certification of our decision to the Circuit Court of Wood County.

## ANNOTATION.

### Bond of executor or administrator as covering debt due from principal to decedent.

#### I. Introductory, 84.

#### II. Majority rule:

##### a. Rule stated, 84.

##### b. Application of rule:

1. Bond of administrator, 86.
2. Bond of executor, 90.

#### I. Introductory.

In considering herein the question, whether the bond of an executor or administrator covers a debt due from the principal to the decedent, the numerous cases involving the nature and extent of the personal liability of a representative as a debtor of the estate have been included only in so far as they appertain to the liability of the sureties on the representative's bond.

Two opposing doctrines seem to exist in the American jurisdictions relative to the bond of a representative as covering a debt owed by him to the decedent. The minority rule,—the so-called "Massachusetts rule,"—is based apparently on a legal fiction, and, although it has some following, it has been severely criticized as being too

#### III. Minority rule:

##### a. Rule stated, 92.

##### b. Application of rule:

1. Bond of administrator, 94.
2. Bond of executor, 95.

#### IV. Rule in California, 96.

harsh and impractical in its application.

#### II. Majority rule.

##### a. Rule stated.

The more favored rule in America seems to be that the bond of an administrator or executor covers a personal debt owed by the principal to the decedent only to the extent that it binds him to a faithful performance of his duties as administrator; that is, he must exercise due diligence and honesty in the collection of debts, including a debt owed by himself, and the sureties are liable for his failure to do so. But where it appears that the debtor-representative is unable to pay, the debt becomes uncollectable, and the sureties on the bond are not liable therefor.

**United States.**—See *Wilson v. Rose* (1828) 3 Cranch, C. C. 371, Fed. Cas. No. 17,831.

**Connecticut.**—*Davenport v. Richards* (1844) 16 Conn. 310.

**Illinois.**—*Rahe v. Jobusch* (1915) 197 Ill. App. 200. See also *Wachsmuth v. Penn Mut. L. Ins. Co.* (1909) 241 Ill. 409, 26 L.R.A.(N.S.) 411, 132 Am. St. Rep. 226, 89 N. E. 787.

**Indiana.**—*State ex rel. McClamrock v. Gregory* (1889) 119 Ind. 503, 22 N. E. 1.

**Iowa.**—*McEwen v. Fletcher* (1914) 164 Iowa, 517, 146 N. W. 1, Ann. Cas. 1916D, 631.

**Kentucky.**—*Hickman v. Kamp* (1867) 3 Bush, 205; *Costigan v. Kraus* (1914) 153 Ky. 818, 166 S. W. 755, Ann. Cas. 1915D, 115; *Buckel v. Smith* (1904) 26 Ky. L. Rep. 991, 82 S. W. 1001. Compare *Kirby v. Moore* (1907) 30 Ky. L. Rep. 1022, 99 S. W. 1156.

**Maryland.**—*Kealhofer v. Emmert* (1894) 79 Md. 248, 29 Atl. 68; *Linthicum v. Polk* (1901) 93 Md. 84, 48 Atl. 842. Compare *Lambrecht v. State* (1881) 57 Md. 240.

**Michigan.**—*Sanders v. Dodge* (1905) 140 Mich. 236, 112 Am. St. Rep. 399, 103 N. W. 597.

**Missouri.**—*Scott v. Governor* (1826) 1 Mo. 686; *McCarty v. Frazer* (1876) 62 Mo. 263; *Young v. Thrasher* (1892) 48 Mo. App. 327; *Wilson v. Ruthrauff* (1900) 82 Mo. App. 435; *State ex rel. Welch v. Morrison* (1912) 244 Mo. 193, 143 S. W. 707.

**Nebraska.**—*Howell v. Anderson* (1902) 66 Neb. 575, 61 L.R.A. 313, 92 N. W. 760.

**New Jersey.**—*Harker v. Irick* (1854) 10 N. J. Eq. 269; *Ordinary v. Kershaw* (1861) 14 N. J. Eq. 528; *Terhune v. Oldis* (1888) 44 N. J. Eq. 146, 14 Atl. 638.

**New York.**—*Gottsberger v. Smith* (1856) 5 Duer, 566, affirmed in (1859) 19 N. Y. 150; *Baucus v. Barr* (1887) 45 Hun, 582, affirmed in (1887) 107 N. Y. 624, 13 N. E. 989; *Keegan v. Smith* (1901) 60 App. Div. 168, 70 N. Y. Supp. 260, affirmed in (1902) 172 N. Y. 624, 65 N. E. 1118; *Re David* (1904) 44 Misc. 337, 89 N. Y. Supp. 927. See also *Baucus v. Stover* (1882) 89 N. Y. 1.

**North Carolina.**—*Gay v. Grant* (1888) 101 N. C. 206, 8 S. E. 99, 106.

**Pennsylvania.**—*Garber v. Com.* (1847) 7 Pa. 265; *Re Piper* (1850) 15 Pa. 538; *Bard's Estate* (1903) 13 Pa. Dist. R. 552.

**Tennessee.**—*Spurlock v. Earles* (1874) 8 Baxt. 437; *Rader v. Yeagin* (1887) 85 Tenn. 486, 3 S. W. 178.

**Vermont.**—*Lyon v. Osgood* (1886) 58 Vt. 707, 7 Atl. 5. Distinguish *Probate Ct. v. Merriam* (1836) 8 Vt. 234.

**West Virginia.**—See the reported case (*STATE EX REL. FARMER v. CITIZEN'S TRUST & G. Co.* ante, 79).

Thus, it was said in *Harker v. Irick* (1854) 10 N. J. Eq. 269: "If a person becomes surety for one as administrator, who at the time is a debtor to the estate and is insolvent, and is never able to discharge such indebtedness, such surety is not bound for such a delinquency of his principal. He is only bound for the faithful performance of his duties as administrator. It could be no breach of trust or delinquency in duty for the administrator not to do what is beyond his power and control to perform. If, under such circumstances, the administrator should, in the settlement of his accounts with the court, charge himself with the debt, and the accounts should be passed in such a shape as to bind the surety for the debt, the surety would be relieved, upon application to the proper tribunal, from such responsibility. It would be a fraud upon the surety to exact the debt from him, whether the administrator did or did not, by his mode of accounting, contemplate a fraud. But if at the time the surety assumes his responsibility the administrator owes the estate, and is solvent and able to pay, the amount of the debt will be considered, in law and equity, as so much money in his hands as administrator at the time, and consequently the surety will be responsible for it. It is the duty of the administrator to collect the debts of the estate without delay; and certainly any delay which places the debt he himself owes the estate in jeopardy, and results in its loss, is a gross violation of his duty as administrator."

Criticizing the so-called Massachu-

setts rule, the court, in *Howell v. Anderson* (1902) 66 Neb. 575, 61 L.R.A. 313, 92 N. W. 760, said: "The Massachusetts rule, as we will call it for convenience, is based on a legal fiction and the presumption that all men are solvent and able to pay their obligations. It was but a short cut to say that one who was an administrator could not sue himself, therefore he would be required to account to the estate for his individual debt as so much cash. It was an easy way of solving a difficult problem, and one which we fully approve of, where the fact of insolvency is not satisfactorily made to appear. In case the administrator was solvent at the time of his appointment, or any time during the administration of his office, and before his final settlement and discharge, he should be required to pay over in cash the amount of his antecedent debt. In such a case the rule contended for by plaintiff is a salutary one. It results in no hardship to anyone, and for that reason should be invoked and enforced. But it seems to us that this rule should have no application where it is made to appear that the administrator was wholly insolvent when appointed, while acting, and at the time of settlement. The defendant in this case filed his report in response to the citation and brought his individual note into court, together with the other uncollectable claims due the estate, and turned them all over to the county judge. As the estate had not been fully administered, it was the duty of the county judge to appoint an administrator *de bonis non*, into whose hands the administrator's note, as well as the others uncollectable and uncontroverted, would go. The result to the estate would have been the same had another person than the defendant been appointed administrator. The estate has in no wise suffered by any act of his, subsequent to his appointment. It appears beyond question that at the time the defendant was appointed administrator of Howell's estate, he was wholly insolvent; that he remained in such insolvent condition during the entire time that he served as such adminis-

trator, and was insolvent at the time of his resignation and proposed settlement; that by reason of his condition it was at all times impossible for him to pay the antecedent debt he owed to the estate."

See also *Wachsmuth v. Penn Mut. L. Ins. Co.* (1909) 241 Ill. 409, 26 L.R.A.(N.S.) 411, 132 Am. St. Rep. 226, 89 N. E. 787, wherein the court said, by way of dictum: "So far as we are advised, this question has never been passed on by this court. It seems to us that the rule laid down in Massachusetts is liable to work a great hardship upon administrators and the sureties upon their bonds. To compel sureties on administrators' bonds to augment the estate of the deceased by requiring them to pay a debt which an insolvent administrator happens to owe the estate is imposing upon them a burden not contemplated, and in many cases a great hardship. Leaving out of view the rights of the sureties, it would seem equally shocking to our sense of justice to proceed against an administrator personally for a failure to pay over money which he, in fact, did not have, and which he had no means of procuring. Where, however, the administrator is solvent, no such hardship can be imposed upon either the sureties or the administrator. The rule thus applied will accomplish the desired end in most cases, and avoid the harsh consequences that would occasionally result from the application of the unrestricted Massachusetts rule."

#### *b. Application of rule.*

##### *1. Bond of administrator.*

In *State ex rel. McClamrock v. Gregory* (1889) 119 Ind. 503, 22 N. E. 1, an action upon an administrator's bond, it appeared that the administrator at the time of his appointment owed certain sums of money to the decedent, which he failed to account for upon the settlement of the estate. The court held, relative to the question of the liability of the sureties upon the bond, that the debt of the administrator was to be accounted for the same as the other debts, and the proper performance of this duty

was covered by the bond, but the insolvency of the debtor-administrator during the period of administration could be shown in discharge of the sureties' liability.

In *Sanders v. Dodge* (1905) 140 Mich. 236, 112 Am. St. Rep. 399, 108 N. W. 597, a proceeding for the final accounting of an administrator, it appeared that the latter was indebted to the estate of the decedent, but, owing to his insolvency, was unable to account for the debt. A statute provided that "no executor or administrator shall be accountable for any debts due to the deceased, if it shall appear that they remain uncollected without his fault." It was held that the bond of the administrator did not cover the debt owing by him to his intestate, where it appeared that he was hopelessly insolvent.

So in *McEwen v. Fletcher* (1914) 164 Iowa, 517, 146 N. W. 1, Ann. Cas. 1916D, 631, the court held that for the purpose of charging the sureties on an administrator's bond, an indebtedness owed by the administrator to the decedent should not be regarded as an asset as of the time of its maturity so as to charge the sureties on the bond irrespective of whether the debtor was solvent, but the liability should be measured by the ability of the administrator to pay the debt and his failure to perform the duties of his office in diligently collecting the same.

In *Wilson v. Ruthrauff* (1900) 82 Mo. App. 435, the court held that liability under the bond of an administrator for failure to collect a debt owing by him to the decedent was dependent on the debtor's ability to pay, for, while the debt owing by an administrator to an estate was an asset in his hands, it was not necessarily a collectable asset, and was not to be treated as cash, since the debtor-administrator might be insolvent.

In *Scott v. Governor* (1826) 1 Mo. 686, the court held that the security on an administrator's bond was not liable for a debt owing by the administrator to the decedent during the latter's lifetime, but could be assessed damages for the neglect of the ad-

ministrator to file an inventory of such credits of the intestate, since the bond covered the due performance by the administrator of his official duties.

Where it appeared that an administrator, who sought to be discharged of his official liability, was indebted to the decedent, and it further appeared that throughout the term of his administration he was hopelessly insolvent, the court held that the situation was the same as though the debt of any other person was uncollectable, and that the administrator and his sureties were discharged of their liability by the provision of a statute (Comp. Laws, § 279, chap. 23) that no executor or administrator should be accountable for any debts due to the deceased if it appeared that they remained uncollected without his fault. *Howell v. Anderson* (1902) 66 Neb. 575, 61 L.R.A. 313, 92 N. W. 760.

In *Ordinary v. Kershaw* (1862) 14 N. J. Eq. 528, the court held that where a judgment had been rendered against a surety on an administration bond for an amount owing from the personal representative to the intestate, and it clearly appeared that the administrator was insolvent, the judgment operated as a fraud on the surety, for which he could obtain relief in a proper proceeding in chancery, saying: "Unquestionably, if the administrator was solvent, the debt due the estate was assets in his hands, to be accounted for as such. The debt was inventoried and appraised as good, it was accounted for as assets, and decreed to be such in the hands of the administrator. This court is now asked, in a collateral proceeding, to declare that the decree was erroneous, and that the debt was not assets in the hands of the administrator. That can only be done directly, either by application to the court by which the decree was made, or by bill in chancery. As against the surety, if in case of clear insolvency the administrator should charge himself with a debt of his own, or of a third person who was insolvent, by design or by mistake, and a decree should be made accordingly, it would operate as a fraud upon the

surety, and would be relieved against in chancery."

In *Terhune v. Oldis* (1888) 44 N. J. Eq. 146, 14 Atl. 638, the court stated the rule to be that where an administrator owes the estate, and is solvent and able to pay, the amount of the debt will be considered as so much money in his hands, for the proper accounting of which he and his sureties on the official bond are liable; but if it satisfactorily appears that he is unable to pay he will not be charged with the debt as cash.

So, in *Harker v. Irick* (1854) 10 N. J. Eq. 269, the court held that a surety was bound only for the faithful performance of his principal's duties as administrator, and his bond did not cover a debt owing by the principal to the decedent, where it appeared that the debtor was insolvent and unable to pay.

The reported case (*STATE EX REL. FARMER v. CITIZENS' TRUST & G. CO.* ante, 79) supports the majority rule, adopting the theory that the bond of an administrator covers only the obligation of the representative to use due diligence and honesty in the collection of debts, including a debt owed by him to the decedent, and does not make the surety on the bond liable for the administrator's failure to account, where it appears that he is insolvent and unable to pay, the debt then becoming uncollectable.

In *Keegan v. Smith* (1901) 60 App. Div. 168, 70 N. Y. Supp. 260, affirmed in (1902) 172 N. Y. 624, 65 N. E. 1118, an action on an administrator's bond, it appeared that the administrator failed to account for a debt owing by him to his intestate, and in the proceeding before the surrogate judgment was rendered against him and his sureties on the bond, the surrogate finding that he was solvent and able to pay. The court, on appeal, affirmed the finding of the surrogate, holding that the bond covered the proper accounting for the debt due from the administrator to the decedent, the same as any other debt owing to the estate, and the sureties on the bond could escape liability only by showing that the debt was uncollectable.

In *Gottsberger v. Smith* (1856) 5 Duer (N. Y.) 566, affirmed in (1859) 19 N. Y. 150, the court held that where a debtor of an estate was appointed administrator, the case might rest on the ground that the sureties on the administration bond were prima facie responsible for the due application of the amount, the debt being assets, but justice would require that they (the sureties) would have the same right to prove, in their discharge, that the debt was uncollectable, as their principal, the administrator, would have to prove that the debt of a third person was not collectable.

In *Buckel v. Smith* (1904) 26 Ky. L. Rep. 991, 82 S. W. 1001, wherein it was sought to charge the surety on the bond of the administrator with a debt which the latter owed the estate of his intestate at the time of his appointment, the court returned the case to the chancellor for him to consider and weigh the evidence that might be adduced as to the administrator's solvency, saying that the sureties did not undertake more than that the principal would diligently and honestly do what could be done in the administration of the estate committed to him.

In *Hickman v. Kamp* (1867) 3 Bush (Ky.) 205, wherein it appeared that an administrator was indebted to his intestate's estate, the court held that where it appeared that the debtor-representative had sufficient property to pay the debt, it must be considered as collected, and as such it was covered by the bond of the administrator, and the surety thereon was liable for the failure of his principal to account for the debt.

Compare *Kirby v. Moore* (1907) 80 Ky. L. Rep. 1022, 99 S. W. 1156, an action against an administrator and the surety on his bond, wherein it appeared that the former was indebted to the decedent as the transferee of certain real estate notes, and that he failed to account for the debt in the final settlement of the estate. The court held that the defendants were liable on the bond, saying that where a debtor qualifies as the personal representative of his creditor, the debt becomes an asset of the estate, which

is covered by the bond. This rule, however, was qualified in *Costigan v. Kraus* (1914) 158 Ky. 818, 166 S. W. 755, Ann. Cas. 1915D, 115, and *Buckel v. Smith* (Ky.) *supra*.

In *Gay v. Grant* (1888) 101 N. C. 206, 8 S. E. 99, 106, wherein it appeared that an administrator was indebted to his intestate and that he had ability to pay the debt, although he was insolvent in that his property was not subject to legal process, the court held that his official bond covered the debt owing to the decedent, and the sureties thereon were liable for the failure of their principal to account for the debt.

In *Kealhofer v. Emmert* (1894) 79 Md. 248, 29 Atl. 68, wherein it appeared that an administrator owed a certain sum to the decedent as indemnification for a former payment by her as a surety on his bond in a prior administration, the court held that the debt was of the character included in a statute (§§ 224 and 225 of article 93 of the Code) which required every administrator, when returning the list of debts due to the decedent, to include among them any just claim which the decedent had against him, and the court held, further, that the sureties on the bond were liable for the improper performance or nonperformance of the requirements of these statutory provisions, where it appeared that the administrator was solvent and able to pay.

So, in *Linthicum v. Polk* (1901) 93 Md. 84, 48 Atl. 842, the court held that, conceding that money withheld by an administratrix was only a debt owing to the estate of the decedent, she was required to account for the sum due as if it was so much money in her hands, and on failure her bond could be sued, provided it appeared that she was solvent and able to pay, the court saying that the statute protects the sureties if the administrator or executor is insolvent, or unable to pay his debts at the time of his qualification, but adding that his commissions are to be applied to the payment of the debt, and that if he is a distributee the amount due by him must be deducted.

Compare *Lambrecht v. State* (1881)

57 Md. 240, wherein the court held that the legislature, in enacting § 224, article 93, of the Code, did not intend to open the door to the inquiry whether the executor had the means and ability to pay his debt owing to the decedent, but by express words declared the bond responsible for the debt of the executor; and the sureties, when they entered into the bond, must be held to have assumed such responsibility.

In *Re Piper* (1850) 15 Pa. 533, it was held that where an administrator was the debtor of the decedent, and was able to pay but failed to do so, the sureties on his bond were liable, for the bond covered the obligation to account for the debt and use vigilance and diligence in pursuing and collecting the same, in like manner as in collecting the debt of a third person. The court said: "There is no inclination in this court to extend the liability of the sureties of an administrator by construction, or make them chargeable beyond the terms of their bond for the default of their principal. As the trust of administering is the voluntary act of the party who elects to do it, it is the wise policy of the law, in order to secure a faithful administration of the assets, to enjoin vigilance, attention, and fidelity on the part of the administrator, and to require that he shall give bond with approved sureties, who are responsible to all interested for the attention and fidelity required by law. This bond is not a matter of form, and if the administrator has not faithfully accounted for the goods and chattels, etc., of the decedent, in his hands to be administered, the responsibility with its consequences must fall on the sureties, if the administrator fails to account and pay. In considering the question of liability under this administration, it is as favorable to the sureties as the court can allow, to give them all the advantage of showing now the insolvency and inability of the administrator to pay any part of his indebtedness to the estate of the decedent, to the same extent as might have been shown had he returned this liability in his inventory and presented it in his account, asking a credit

for it, to the protection of his sureties, by reason of his total inability to pay."

In *Garber v. Com.* (1847) 7 Pa. 265, the court held that an administrator who owed a personal debt to the estate of the decedent could show his insolvency and inability to pay the same, for the purpose of discharging the sureties on his bond.

So, in *Bard's Estate* (1903) 13 Pa. Dist. R. 552, the court held that the bond of an administrator did not cover an uncollectable claim owed by him to the estate, saying: "It does not necessarily follow that 'an insolvent debtor-administrator shall be surcharged with the amount of his obligation, even if he attempt to conceal it. His conduct may be reprehensible, yet, if it was not possible to collect the debt from him, or for him to pay it, his bondsmen cannot be held. The measure of their responsibility is prescribed by the condition of the bond, which does not include the payment of uncollectable claims. As contended, the burden is clearly on those asking that the accountant be surcharged, to show that the amount owing can be or could have been collected.'" But if it appeared, and the facts so showed in the present case, that the debt could have been paid by the principal, the sureties were liable.

In *Rader v. Yeargin* (1887) 85 Tenn. 486, 3 S. W. 178, the court held that the bond of an administrator did not cover a personal debt owing by him to the decedent so as to impose a liability on the surety, except in so far as it guaranteed the proper performance by the administrator of his official duties, that is, that he would use the same degree of diligence in collecting his personal debt as was imposed on him in collecting a debt from a third party.

#### 2. Bond of executor.

In *McCarty v. Frazer* (1876) 62 Mo. 263, the court held that where it appeared that an executor, who was indebted to his testatrix, was insolvent, his debt could not be considered as money in hand so as to bind the sureties on his official bond, for by the

statute (*Wagner's Stat.* § 18, p. 110) credit must be given the executor of an estate for all the debts charged in the inventory as due to the estate, if the court was satisfied that the debtor was insolvent.

In *State ex rel. Welch v. Morrison* (1912) 244 Mo. 193, 148 S. W. 907, wherein it appeared that the executors of an estate failed to account for debts owing by them to their intestate, the court held that, it appearing that the executors were solvent, the indebtedness due from them to the estate became assets in their hands, for which they and their sureties were liable.

Where it appeared that an executor owed a personal debt to the testator, the court held, in an action to charge the sureties on the executor's bond for the latter's failure to account for the debt, that the simple fact that a person became a surety on an executor's bond did not create a liability for a debt which the executor might owe personally to the estate, but where it appeared that the executor was solvent and able to pay the debt, then his failure so to do became a failure in the discharge of his duties, for which the sureties on his bond became liable. *Rahe v. Jobusch* (1915) 197 Ill. App. 200.

In *Davenport v. Richards* (1844) 16 Conn. 310, an action on the probate bond executed by executors, it appeared that one of the executors was indebted to the decedent on two promissory notes. The court held that, in the absence of a showing that the maker of the notes was insolvent, the sureties were liable for a failure to account for the debt, since the amount of the notes must be considered and treated as so much money in the hands of the debtor-executor and his co-executor.

In *Costigan v. Kraus* (1914) 158 Ky. 818, 166 S. W. 755, Ann. Cas. 1915D, 115, it was held that the surety on an executor's bond was not liable for the failure of the principal to account for a debt owing from him to the decedent, where it appeared that throughout the term of the executor's trust he was insolvent and unable to pay the debt.

In *Baucus v. Barr* (1887) 45 Hun (N. Y.) 582, affirmed in (1887) 107 N. Y. 624, 13 N. E. 939, the court held that the obligation imposed on an executor and covered by his bond was only that he should be faithful, honest, and diligent in the administration of the estate, and that the provisions of a statute (2 Rev. Stat. p. 84, § 18), to the effect that a debt owing from an executor to the testator should be treated as money in hand, were limited and governed by the ordinary obligation. So, where it appeared that at all times during his administration the executor was insolvent, the court held that the sureties on his bond were not liable for his failure to account for a debt owing from him to the estate, since under the bond they did not guarantee the payment of a personal debt owed by the principal to the decedent, but only guaranteed that he would diligently and faithfully obey all orders of the surrogate touching the administration of the estate.

In *Re David* (1904) 44 Misc. 337, 89 N. Y. Supp. 927, wherein it appeared that an executor, who owed money to the estate of his testator for a debt due the decedent during his lifetime, was at all times solvent and able to pay the same, but failed to do so, the court held that he and the sureties on his official bond were liable for an executor who owes a debt to his testator or intestate is chargeable with the same as for so much money in his hands, except where it clearly appears that he is insolvent and unable to pay.

In *Spurlock v. Earles* (1874) 8 Baxt. (Tenn.) 437, wherein it appeared that a testator appointed a debtor as his executor, the court held, on the failure of the debtor-executor to account for the amount of the debt, that the executor's bond imposed the obligation to perform all the duties required by law, which included the collection of all assets, and therefore the sureties on the bond were liable for the debt the same as for other debts due the estate, to the extent that the same could, with due and proper diligence, have been collected if it had been due from a third person.

See also *Baucus v. Stover* (1882) 89 N. Y. 1, wherein the court held that under a statute (2 Rev. Stat. 84, § 13) an executor was liable for a debt owing by him to his testator, as for so much money in hand, irrespective of his ability to pay the same, but queried whether the debt was covered by his bond so as to make the sureties liable.

In *Wilson v. Rose* (1828) 3 Cranch, C. C. 371, Fed. Cas. No. 17,831, it appeared that an executor failed to return, as one of the assets of an estate, a debt owing from him to the testator. The court held that since the Statute of Limitations had not run against the debt it was a valid asset which the executor was bound to give in, and having failed to do so his testamentary bond was liable. In that case the court did not discuss the question of the executor's solvency.

In *Lyon v. Osgood* (1886) 58 Vt. 707, 7 Atl. 5, the court held that an executor's bond did not cover a liability for failure on the part of the executor to pay a debt owing to his testator, where it appeared that the executor was insolvent, though the executor in his report treated his debt as available assets, saying: "If the executor is not chargeable with the debt as assets until he has received the money thereon, when not guilty of laches, he should not be held chargeable as regards the liability of his surety, for his own indebtedness, beyond his actual means or ability to pay; for only to that extent does he, by his appointment, receive money from himself belonging to the estate. His ability to pay his indebtedness is the extent of the assets in his hands upon his obligation to the deceased. The surety by signing the administration bond has aided him to get possession of assets from his indebtedness only to the extent of his ability to pay it; and he should not be held liable for a greater sum on such indebtedness, unless the executor, after his appointment, becomes able to meet and discharge a greater sum."

But in *Probate Ct. v. Merriam* (1836) 8 Vt. 234, the court held that it was the duty of a solvent executor to inventory and account for any in-



debtedness owed by him personally to the estate, and that his official bond covered his obligation to do so, upon default of which the sureties on the bond were liable. Although not expressly stated, the distinction between that case and *Lyon v. Osgood* (Vt.) *supra*, seems to be that in the *Merriam Case* the executor was solvent and able to account for his debt.

### III. *Minority rule.*

#### a. *Rule stated.*

A minority of the American jurisdictions have followed and adopted the so-called "Massachusetts rule," to the effect that the bond of an executor or an administrator covers a debt owing from the representative to his testator or intestate, irrespective of his ability to pay the same. This rule seems based on the legal fiction that the appointment of a debtor as the personal representative of the deceased creditor operates as a payment of the debt, which becomes so much money in the hands of the administrator for the due accounting of which he and his sureties are liable.

**Alabama.**—*Wright v. Lang* (1880) 66 Ala. 389. See also *Purdum v. Tipton* (1846) 9 Ala. 914.

**Massachusetts.**—*Stevens v. Gaylord* (1814) 11 Mass. 256; *Winship v. Bass* (1815) 12 Mass. 198; *Leland v. Felton* (1861) 1 Allen, 531; *Chapin v. Waters* (1872) 110 Mass. 195; *Choate v. Thorndike* (1885) 138 Mass. 371; *Bassett v. Fidelity & D. Co.* (1904) 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205. See also *Kinney v. Ensign* (1836) 18 Pick. 236; *Ipswich Mfg. Co. v. Story* (1842) 5 Met. 313.

**New Hampshire.**—*Judge of Probate v. Sulloway* (1896) 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720. See also *Norris v. Towle* (1874) 54 N. H. 290.

**Ohio.**—*Perkins v. Scott* (1895) 9 Ohio C. C. 207, 6 Ohio C. D. 226; *McGaughey v. Jacoby* (1896) 54 Ohio St. 487, 44 N. E. 231; *Cheney v. Powell* (1900) 20 Ohio C. C. 398, 11 Ohio C. D. 279; *James v. West* (1902) 67 Ohio St. 28, 65 N. E. 156; *Dorger v. Woodward* (1904) 27 Ohio C. C. 123. Distinguish *Campbell v. Johnson* (1885)

41 Ohio St. 588. Compare *McCoy v. Allen* (1895) 9 Ohio C. C. 607, 6 Ohio C. D. 659.

**Oregon.**—*United Brethren First Church v. Akin* (1904) 45 Or. 247, 66 L.R.A. 654, 77 Pac. 748, 2 Ann. Cas. 353; *Re Marks* (1916) 81 Or. 632, 160 Pac. 540.

**South Carolina.**—*Jacobs v. Woodside* (1876) 6 S. C. 490; *Twitty v. Houser* (1876) 7 S. C. 153.

Thus, the court said in *McGaughey v. Jacoby* (1896) 54 Ohio St. 498, 44 N. E. 231: "The indebtedness of the executor to the testator being regarded by the law as so much money in his hands, and assets in that form, with which he is chargeable in the administration of his trust, its proper application and distribution by him to the parties entitled thereto is a duty coming within the conditions of the bond which the executor is required to give, and for the performance of which the sureties undertake to be responsible; so that their liability for his failure to make faithful administration of that fund is within the express terms of their obligation."

In *Stevens v. Gaylord* (1814) 11 Mass. 256, an early case laying down and applying the so-called "Massachusetts rule," it was held that an administrator and his sureties in the administration bond were liable for the amount of a debt owed by the administrator to the decedent, in the same manner as if the personal representative had received it from any other debtor of the deceased, for when the debtor was appointed administrator it operated as a payment of the debt, and it became assets in the hands of the administrator, for the due accounting of which the sureties were liable. The court said: "It may be thought injurious to the sureties of the debtor that they should thus be made liable for a debt due from the administrator. To this it may be answered that, if such be the legal effect of the bond, it is presumed to have been contemplated by the parties at the time of executing it; and they cannot afterwards complain of the natural and legal consequence of their own voluntary act. But how is the

condition of the sureties worse than if any other person had owed the same debt, and the administrator had released the debtor without receiving payment, or upon taking a note payable to himself for the amount? To examine this point a little further, let us suppose that an administrator, being a debtor to the intestate, after inserting his debt in the inventory, and bringing it into his account to the credit of the intestate's estate, should settle his account in the probate court, and that a decree should there be made for distributing the residue remaining in his hands on such account; if the administrator should become insolvent, or refuse to pay the balance, pursuant to the decree, and an action should be instituted on the part of the next of kin on the administration bond, would the sureties be exonerated because a part or the whole of that balance arose from a debt originally due from the administrator himself? They are obviously in no worse condition than if the administrator had received the like amount from any other debtor, and, after crediting it in his account, had become unable to pay. If it should be said that the representatives of a deceased administrator, under such circumstances, would be liable for the amount of his original debt, if not actually paid by him in the course of administration, . . . there seems to be no inconsistency in holding that the sureties are also liable on their bond for the same amount. The chance of such a future remedy ought not to deprive the creditors or next of kin of their resort to the sureties while the administrator is living, during all which time they have no other remedy."

In *Winship v. Bass* (1815) 12 Mass. 199, the court held that an executor's bond covered a debt owing by him to the principal, saying: "Executors and administrators are upon the same footing, both being trustees for the legatees or next of kin; unless, in the case of an executor, it should manifestly appear from the will itself that the testator intended him a benefit. As early as 1703, an act of the provin-

cial legislature passed, in effect abolishing all distinction between an executor and an administrator, as to their interest in the estate of the deceased. By the Act of 1 & 2 Anne, chap. 5, § 1, it is provided that in wills where, after payment of debts and of any certain particular legacy or legacies, the residue or remainder of the estate is bequeathed generally to any one or more persons, other than the executors themselves, in every such case an inventory of the estate shall be presented upon oath, and no bond be accepted in lieu thereof; and the executors shall be liable to account as administrators are, by law, obliged to do; and a right of action is given to any residuary legatee against the executors. From the time of the passing of this act, whatever may have been the law of the country before, we apprehend that no debtor, appointed an executor, was, by such appointment, discharged of his debt, when there was a residuary legatee named in the will, and no notice taken of his debt. For, by that statute, he was to account in such case as an administrator would be holden to account; and there is no pretense that a debtor, by taking out letters of administration upon his deceased creditor's estate, can discharge himself of his debt. The remedy at law against him may be suspended during his administration, but will revive after it ceases; and, indeed, he may be charged upon his administration bond as having received the amount of his debt. For, having voluntarily assumed the trust, which prevents any other from receiving and being unable to sue himself, he shall be considered as having paid the debt, and as holding the amount in his hands as administrator."

See also *Kinney v. Ensign* (1836) 18 Pick. (Mass.) 236, wherein the court stated by way of dictum the theory of the "Massachusetts rule" in the following form: "The taking of administration by the debtor is not in fact or in law, to all purposes, payment of the debt; as between the administrator himself, and those beneficially interested in the estate, he is

held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself."

So, in *Ipswich Mfg. Co. v. Story* (1842) 5 Met. (Mass.) 813, wherein the court, although not expressly holding or discussing the liability under an executor's or administrator's bond for the payment of a personal debt owed the decedent, stated the theory of the minority rule as follows: "It is not now necessary to consider the old rule that a testator, by making a debtor his executor, released his debt. That rule has been qualified to a great extent in England, and has never been in force here. It is now understood that when an executor or administrator was indebted to his testator or intestate at the time of his decease, although the right of action cannot exist, because a man cannot sue himself, yet the debt is not considered as extinguished in any way, but rather to be accounted for as paid. In other words, the debt becomes, *prima facie*, assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account as assets actually realized. . . . It proceeds upon the ground that, when the same hand is to pay and receive money, that which the law requires to be done shall be deemed to be done, and therefore that such debt due from the administrator shall be assets *de facto*, to be accounted for in probate account. Such presumption would arise from the mere taking of administration."

#### *b. Application of rule.*

##### *1. Bond of administrator.*

In *Choate v. Thorndike* (1885) 138 Mass. 371, wherein it appeared that an administrator *de bonis non* was formerly a surety on a probate bond of the administratrix of the same estate, who was removed for her failure to

account, the court held that the administrator's liability on his bond for the former administratrix became a debt owing by him to the estate, which was covered by his present bond; and the sureties thereon were liable for his failure to charge himself with the debt.

In *Dorger v. Woodward* (1904) 27 Ohio C. C. 123, wherein it appeared that an administrator was indebted to his intestate, the court held, following *McGaughey v. Jacoby* (1896) 54 Ohio St. 487, *infra*, that the amount of the debt became assets in the hands of the administrator, and as such was covered by the bond on which his surety was liable, regardless of the principal's solvency or insolvency. To the same effect, see *James v. West* (1902) 67 Ohio St. 28, 65 N. E. 156; *Perkins v. Scott* (1895) 9 Ohio C. C. 207, 6 Ohio C. D. 226. But in *Campbell v. Johnson* (1885) 41 Ohio St. 588, wherein the court held that the general rule adopted in Ohio, that the debt of an administrator is not released by his appointment but becomes assets in his hands, and as such is covered by the administration bond, did not apply where it appeared that the administrator and the sole beneficiary of an estate conspired to make the surety responsible for a worthless claim.

And compare *McCoy v. Allen* (1895) 9 Ohio C. C. 607, 6 Ohio C. D. 659, wherein the court held that where the administrator was insolvent at the time of his appointment, neither he nor the sureties on his bond should be charged with the amount of an uncollected debt owed by him to the decedent.

In the case of *Re Marks* (1916) 81 Or. 632, 160 Pac. 540, the court held that where it appeared that an administrator owed a debt to his intestate the debt would be considered and treated as so much money in his hands on his appointment, and as such was covered by the official bond on which his sureties were liable.

In *Jacobs v. Woodside* (1876) 6 S. C. 490, the court held that the debt of an administrator to the decedent was not extinguished by his appoint-

ment, but became money in hand for the due accounting of which the sureties on the official bond were liable, saying: "The executor or administrator, thus combining in himself the character both of debtor and creditor, thereby preventing all remedy for the recovery of his debt to the estate, which in law he alone represents, so far from being discharged or released by the mere act of his appointment, or the grant of letters testamentary or of administration, is regarded as holding the amount as cash in his hand, as the other effects of the decedent, subject to a due course of administration. His relation to the debt is changed by the very nature of his office. He cannot occupy a position which, on the one hand, would impose upon him the obligations of a debtor, while on the other it would entitle him to the rights of a creditor. To prevent the loss which might otherwise follow from the complete suspension of the remedy, the debt must be regarded as assets either in the hands of the administrator or the executor, and the bond of the former, in his case, will stand as its security."

In *Twitty v. Houser* (1876) 7 S. C. 153, wherein it appeared that an administrator was indebted to his intestate on a promissory note given during the latter's lifetime, the court held that the bond of the sureties covered the debt regardless of the principal's ability to pay.

And see *Purdum v. Tipton* (1846) 9 Ala. 914, wherein the court, although not discussing the liability of a surety on an administration bond, held that the administrator, on the settlement of his accounts, was chargeable with a debt due from himself to the decedent, although it appeared that he was insolvent.

In *Norris v. Towle* (1874) 54 N. H. 290, the court left the question open whether the insolvency of a debtor-administrator would discharge the liability of his sureties for the debt.

## 2. Bond of executor.

In *Wright v. Lang* (1880) 66 Ala. 389, wherein it appeared that an executor failed to account in his final

settlement for certain notes made by him, payable to his testator, and it appeared further that the notes were worthless because of the insolvency of the maker, the court held that the sureties on the executor's bond were liable, since the bond covered the debt; the law presuming, on the appointment of the debtor as executor, the instantaneous payment of the debt, making it an asset in the executor's hands for which the sureties were liable.

In *Leland v. Felton* (1861) 1 Allen (Mass.) 531, wherein it appeared that an executor named in a will was indebted to his testator, and in an account rendered in the probate court he did not charge himself with the debt, the court held that the executor and the sureties on his bond were liable for the amount of the debt. The court held, further, that the alleged fact that the executor was insolvent was no legal defense, saying: "Having taken the office, and thereby placed himself in the position of executor, and so continued for this length of time, it is no answer now to charging his indebtedness in his account of administration that, if payment of all his other debts had been enforced, as well as this, he would have been unable to meet them."

Where it appeared that an executor sold certain real estate of his testator in order to pay debts and legacies, and in the petition to secure leave to sell he failed to include a debt owing from himself to the decedent, the court held that the sale was a breach of his bond for the faithful administration of the estate, since his personal debt to the testator became assets in his hands, covered by the bond, for which he and his sureties were responsible in like manner as if he had received it from any other debtor of the deceased. *Chapin v. Waters* (1872) 110 Mass. 195.

And in *Bassett v. Fidelity & D. Co.* (1904) 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205, wherein it appeared that an executor was a member of a firm which owed a debt to his testator, the court held that the executor's bond covered the debt, and the

sureties thereon were liable for the failure of their principal to account for the same, although during the period of his trust both he and the firm were insolvent, saying: "An executor or administrator is appointed for the sole purpose of enforcing, in behalf of those interested in the estate, the rights of the estate against others. When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy, it was laid down by the common law of England that he must yield all controversy as to the debt due from himself, and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condition."

In *Judge of Probate v. Sulloway* (1896) 68 N. H. 511, 49 L.R.A. 347, 73 Am. St. Rep. 619, 44 Atl. 720, wherein it appeared that a testator appointed his debtor as executor, and the latter, throughout his period of trust, was insolvent and unable to pay the debt, the court held that the defendants as sureties on his official bond were liable for the amount of the debt, for by the statute (§ 7, Act of July 2, 1822), which abolished the old common-law rule that the appointment of a debtor as executor extinguished the debt, all debts due from an executor or administrator became assets in hand, for which he was accountable regardless of his ability or inability to pay.

Where an executor was indebted to his testator and it appeared that he failed to account for the debt, being insolvent throughout the term of his trust, it was held that the debt became assets with which the executor was chargeable, and at its maturity was treated as paid, and thereafter as so much money in hand, for the faithful administration and distribution of which the sureties on the executor's bond were responsible. The court applied a statute (Rev. Stat. § 6069) providing as follows: "The naming of any person executor in a will shall not operate as a discharge or bequest of

any just claim which the testator had against such executor; but such claim shall be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time such debt or demand becomes due; and he shall apply and distribute the same in payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased." *McGaughey v. Jacoby* (1896) 54 Ohio St. 487, 44 N. E. 231.

See to the same effect, *Cheney v. Powell* (1900) 20 Ohio C. C. 398, 11 Ohio C. D. 279.

In *United Brethren First Church v. Akin* (1904) 45 Or. 247, 66 L.R.A. 654, 77 Pac. 748, 2 Ann. Cas. 353, an action against an executor and the sureties on his official bond, it appeared that the executor was indebted to his testator during the latter's lifetime. The court held that under a statute (B. & C. Comp. Stat. § 1144) the executor was chargeable with the debt as for so much money in his hands, and for the proper and due payment and distribution of this money the sureties were liable.

#### IV. Rule in California.

In California, the majority rule is applied by the courts to the bonds of administrators, while the minority rule has been, under the provisions of a statute (Cal. Code, § 1447) applied to the bond of an executor. *Treweek v. Howard* (1895) 105 Cal. 434, 39 Pac. 20; *Re Walker* (1899) 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *Sanchez v. Forster* (1901) 133 Cal. 614, 65 Pac. 1077.

Thus, the court held in *Sanchez v. Forster*, supra, that the liability of the sureties on the bond of an administrator for a debt owing by the latter to the decedent depended on whether the debt remained uncollected through the fault of the representative; that is, if the administrator, during his administration of the estate, had the financial ability to pay the debt and failed to do so, the sureties were liable under the bond. The court held, further, that the contrary rule

laid down in *Treweek v. Howard*, supra, abstracted infra, was induced by a statute (Code Civ. Proc. § 1447) which imposed the restrictions therein stated only as to executors, and did not apply to administrators.

In the case of *Re Walker* (1899) 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991, a proceeding to settle the final account of an administrator, wherein it appeared that the representative of the decedent was indebted to the latter, and the debt owing had remained uncollected, the court held that, under the general rule, the debt became money in hand on the appointment of the debtor as administrator, and he and his sureties were chargeable with the same, but that the rule, being a legal fiction, must be strictly limited so as not to cause injustice, saying: "The appellant admits that the general rule is that the administrator is to be charged with a debt due from him to the estate as money on hand, but contends that he may show,—at least, on his final settlement,—that he has never at any time, while administrator, had the means to enable him to pay the debt or any part thereof. Further than this, unquestionably, the contention could not logically go, since, as he cannot sue himself, and yet it is his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law, and his sureties may also be held, for it is so nominated in the bond. But in this case it stands, for the purposes of this appeal, admitted that the administrator has at no time during his term had one dollar which he could have so applied; and the decree finds and adjudges that he has something over ten thousand dollars in cash on hand, which decree renders him liable to be imprisoned for contempt for not paying over as directed, and perhaps liable to prosecution for embezzlement, and constitutes an estoppel against his bondsmen, who will in consequence be re-

8 A.L.R.—7.

quired to pay money to the estate which has not been lost by the administrator, and which otherwise the estate would never have received. They have not only become liable for the faithful discharge of his duties, which is all they expressly undertook, but also that the administrator is solvent and will pay his indebtedness to the estate. In other words, they are held liable, although the administrator has in fact faithfully performed the duties of his trust according to law, because of a fiction of the law that money due from such an administrator shall, as against him, be deemed money in hand. All fictions of the law, we have been taught, were created to enable the court to do justice, and where to indulge a fiction is to cause injustice, its just limit has been found. "In fictione juris semper acquitas existit."

In *Treweek v. Howard* (1895) 105 Cal. 434, 39 Pac. 20, an action against an executor and the sureties on his official bond, it appeared that the executor was indebted to the decedent during his lifetime for a certain sum of money, and failed, in making his final report, to account for this debt. The California Code (§ 1447) provides as follows: "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due." Under that act it was held that the debt, on the appointment of the debtor as executor, became money in the hands of the executor, and, as such, was a part of the estate covered by the bond on which the sureties became liable.

In the case of *Re Walker*, supra, the court said that while the holding in *Treweek v. Howard*, supra, was perhaps justified by the facts of that case, so far as it rested on the statute it was inconsistent with the decisions under the New York act from which the statute was taken.

R. E. B.

KENESAW FREE BAPTIST CHURCH OF KENESAW, NEBRASKA,  
v.

G. S. LATTIMER (G. S. LATIMER) et al., Appts.

*Nebraska Supreme Court — September 27, 1919.*

(— Neb. —, 174 N. W. 296.)

**Religious society — right of majority to control property.**

1. When a church, strictly congregational or independent in its organization, is governed solely within itself, either by a majority of its membership or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and holds property either by way of purchase or donation, with no other specific trust attached to it than that it is for the use of that church, the numerical majority of the membership of the church may ordinarily control the right to the use and title of its property.

[See note on this question beginning on page 105.]

**— severing ecclesiastical connection — effect.**

2. Such local church may sever its ecclesiastical connection and still be entitled to control the temporalities of the church, where such change does not involve any diversion of the property from the original trust. In such case the civil courts will only inquire as to who constitute the religious society and its legitimate successors, and award to them the use of the property, and will not ordinarily, in case of a schism in the organization,

inquire into the existing religious opinion of those who adhere to the original local organization.

[See 23 R. C. L. 453.]

**— obligation to establish corporate capacity.**

3. A religious society is not bound to establish its corporate capacity in order to maintain an action to quiet title to the church property against trustees who are threatening to interfere therewith.

[See 23 R. C. L. 462.]

Headnotes 1 and 2, by CORNISH, J.

APPEAL by defendants from a decree of the District Court for Adams County (Dorsey, J.) in favor of plaintiff in an action brought to quiet title to certain church property. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Hugh La Master, for appellants:

No proof of the corporate character of the plaintiff having been offered, and its corporate character having been expressly denied, the action should have been dismissed.

Thomp. Corp. § 3228; Rottmann v. Bartling, 22 Neb. 375, 35 N. W. 126; Park v. Chaplin, 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674; General Assembly v. Overtoun [1904] A. C. 515.

A trust cannot be terminated until its objects are fulfilled.

2 Perry, Trusts, § 920; Watson v. Watson, 223 Mass. 425, 111 N. E. 904; Metcalfe v. Union Trust Co. 181 N. Y. 39, 73 N. E. 498; 39 Cyc. 99.

Where a local congregation is itself

a member of a larger and more important religious organization it is under the government and control of such larger organization.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Pounder v. Ashe, 44 Neb. 672, 63 N. W. 48; Immaculate Conception v. Murphy, 89 Neb. 524, 35 L.R.A. (N.S.) 926, 131 N. W. 946; St. Vincent's Parish v. Murphy, 83 Neb. 630, 35 L.R.A. (N.S.) 919, 120 N. W. 187.

The object and purpose of a trust once established cannot be altered by those who come later.

Kniskern v. St. John's & St. P. Lutheran Churches, 1 Sandf. Ch. 439; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Immaculate Concep-

(— Neb. —, 174 N. W. 296.)

tion v. Murphy, 89 Neb. 524, 35 L.R.A. (N.S.) 926, 131 N. W. 946; Pounder v. Ashe, 44 Neb. 672, 63 N. W. 48; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

Where a church is established in accordance with the faith and polity of a certain denomination, the property becomes impressed with a trust character, and the courts will protect such trust and not allow the property to be diverted to another and different organization having different beliefs and a different organization.

St. Vincent's Parish v. Murphy, 83 Neb. 631, 35 L.R.A. (N.S.) 919, 120 N. W. 187; Bonacum v. Harrington, 65 Neb. 831, 91 N. W. 886; Miller v. Gable, 2 Denio, 492; Kniskern v. St. John's & St. P. Lutheran Churches, 1 Sandf. Ch. 439; Pounder v. Ashe, 44 Neb. 672, 63 N. W. 48; Smith v. Pedigo, 145 Ind. 361, 19 L. R. A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363.

The civil courts will not review the action of the highest ecclesiastical authorities in matters of church government and discipline.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Immaculate Conception v. Murphy, 89 Neb. 524, 35 L.R.A. (N.S.) 926, 131 N. W. 946; St. Vincent's Parish v. Murphy, 83 Neb. 631, 35 L.R.A. (N.S.) 919, 120 N. W. 187.

The executive committee is duly incorporated under the statutes.

Immaculate Conception v. Murphy, 89 Neb. 524, 35 L.R.A. (N.S.) 926, 131 N. W. 946.

Mr. C. C. Flansburg, for appellee:

It is not necessary to plead the corporate character of plaintiff and therefore not necessary to prove it.

Exchange Nat. Bank v. Capps, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106; Fletcher v. Co-operative Pub. Co. 58 Neb. 511, 78 N. W. 1070.

A general denial does not put in issue the corporate character.

Fletcher v. Co-operative Pub. Co. supra; Chamberlain Bkg. House v. Kemper, H. & McD. Dry Goods Co. 3 Neb. (Unof.) 549, 92 N. W. 175.

When a church, strictly congregational or independent in its organization, is governed solely within itself, either by a majority of its membership or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and holds property either by way of purchase or donation, with no other spe-

cific trust attached to it than that it is for the use of that congregation, the numerical majority of the membership of that church can and will control the right to the use and title of said property.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Mack v. Kime, 129 Ga. 1, 24 L.R.A. (N.S.) 675, 58 S. E. 184; Brown v. Clark, 102 Tex. 323, 24 L.R.A. (N.S.) 670, 116 S. W. 360; First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; Keyser v. Stansifer, 6 Ohio, 364.

The majority section of a local Congregational church, independent in government, may voluntarily sever its ecclesiastical connection and may control the temporalities of the church where such change does not involve any diversion of the property from the original trust.

Lawson v. Kolbenson, 61 Ill. 405; Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 49.

Cornish, J., delivered the opinion of the court:

Appeal by defendants from a decree quieting title in the plaintiff to certain church property held by them as trustees, and enjoining them from interference therewith. In 1883-84 when funds were raised and the church building erected, the Freewill Baptist denomination at Kenesaw was an independent governing body, owing no obedience to any higher authority. Quarterly meetings, composed of delegates from two or more local churches, could admonish a church when, in its opinion, it became an alien to the faith and practices of the denomination. It could determine whether the church was worthy of its fellowship or not. A local church, being independent, had the right to withdraw from the quarterly meeting and to join another evangelical denomination. This body would send delegates to the yearly meeting, which body sustained about the same relation to the quarterly meeting that the quarterly meeting did to the local church. Still higher was the General Conference, a national organization, which aimed to consolidate the body, harmonize its different parts, and produce unity of



sentiment and discipline. Its powers, too, were only admonitory.

In the nine articles of the constitution of the local church it was provided that its trustees should provide for purchasing, selling, insuring, and caring for its property, and amongst others a provision as follows: "Other matters shall come under the rulings of General Conference."

In October, 1883, the General Conference appropriated \$200 for erecting a house of worship at Kenesaw. The remainder of the \$1,503.18, required to erect the church, was pledged without condition for the building of the church by local contributions of the citizens of Kenesaw before the church was organized. At the time of the completion of the church, \$400 was owing, which the church assumed and paid.

At this time one Rev. A. D. Williams acted as church clerk, was its first pastor, and the active person in procuring the church fund. He was also chairman and one of the five members of the executive committee of the Nebraska Yearly Meeting, a corporation, to whom the property was deeded, "in trust for the Freewill Baptist Church of Kenesaw, Nebraska." This executive committee was created "to be a board of missions and church extension, to secure, hold, use, and convey funds, in money, houses, or lands, for the propagation of the gospel," etc. It was named a "System of Co-operation," organized in part to hold title in trust "for the churches or purposes for which it was secured," in cases where it had afforded aid. It would seem that the fund raised was pledged before the creation of this executive committee and co-operative system; but from the time Mr. Williams became its chairman, January 21, 1884, the committee, through him, may be said to have given aid in the construction of the building. Later the congregation built and paid for a parsonage upon the church grounds.

Years afterwards, by concerted action of the national organizations

of the Freewill and Missionary Baptists, it was determined that there was no such difference in their denominations as to require their continued separation, and a basis of union was agreed upon and approved by the General Conference of Freewill Baptists. Twenty-eight constituent bodies of the General Conference, representing 44,481 members, approved, and five bodies, representing 1,721, disapproved, of the basis of union. Among those disapproving was the Nebraska Yearly Meeting. The plaintiff church, however, approved of the action taken. Afterwards the Nebraska Yearly Meeting organized another General Conference, and in 1915 refused recognition of delegates from the plaintiff church, on the grounds that it had taken itself out of the denomination. It also refused to deed the church property to the plaintiff, and would seem to claim the right, if in its judgment it seems proper, to hold the property for the uses of another congregation, conforming to the present views of the Nebraska Yearly Meeting. It should be added that the plaintiff represents every member of the present congregation at Kenesaw, so that what might be considered as the individual right of a member of the church is not involved.

The question is whether the members of the local church, as an independent body, can control the right to the use and title of the church property, in spite of the fact that the system of co-operation governing the executive committee provides that it shall be the judge whether the church has taken itself out of the denomination, or has become extinct, and when and in what way the property shall be disposed of for the purposes for which it was secured.

Disputes of this character have been classified as follows: First, cases where the property has been by the deed or will of the donor, or other instrument, by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of

some specific form of religious doctrine or belief; second, cases where the property is held by a religious congregation, which by the nature of its organization is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority; third, cases where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization. It will be remembered that the trust created in the deed in controversy was "for the Freewill Baptist Church of Kenesaw, Nebraska."

No doubt individuals may dedicate their property for the propagation of a definite religious doctrine or belief, so long as it violates no law or morality, in which case the property cannot be diverted from its special purpose. When, however, as in the instant case, property is given

Religious society—right of majority to control property.

to a church which is a strictly congregational or independent organization,

governed solely within itself, with no specific trust attached, other than that it is given for church purposes, the case is different. In such case the ordinary contributor to a particular church regards it as a living organism, subject to change and growth. He would not attach conditions to the contrary, if he could. So long as it continues by regular succession, retaining its identity as the church to which the donation was made, he will not complain, even though there are changes of doctrine or method which do not amount to an abandonment of the original purpose. This was the attitude of the Yearly Meeting. It has thought itself free not to follow the action of the General Conference.

The defendants contend that differences exist between the old organization and the union touching freedom of the will, general atonement, open communion, and perseverance of the saints. We will not go into a discussion concerning the extent of these differences. We do not believe that they are of such a character as to show an intention, on the part of the governing body of the local church, to violate its implied trust and abandon the purposes for which the church was organized. We do not believe that the local church, in following the recommendations of the General Conference, have acted outside of their own rights or violated any of the rights of the executive committee. No member of the local congregation complains. The general rule appears to be that, when a majority section of the church, independent in government, voluntarily followed the action of the General Conference, which resulted in severing its connection with the Yearly Meeting, it did not thereby lose

—severing ecclesiastical connection—effect.

its identity, and is entitled to control the temporalities of the church; such change not involving any diversion of the property from the original trust.

We are of opinion that the congregation of the Kenesaw Freewill Baptist Church are entitled to have their property in the hands of those who are in accord with their purposes, and who do not deny them the right to take the step which they have taken in their church affiliations.

Error is assigned that plaintiff failed to prove its corporate character and that such failure must defeat its action. We are of opinion that under the circumstances of this case the plaintiff

—obligation to establish corporate capacity.

was not required to either plead or prove its corporate character. For cases bearing upon questions discussed, see *Mack v. Kime*, 129 Ga. 1, 24 L.R.A. (N.S.) 675, 58 S. E.

184; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Brown v. Clark*, 102 Tex. 323, 24 L.R.A. (N.S.) 670, 116 S. W. 360; *Schradi v. Dornfeld*, 52 Minn. 465, 55 N. W. 49; *Immaculate Conception v. Murphy*, 89 Neb. 524, 35 L.R.A. (N.S.) 926, 131 N. W. 946; *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223.

The judgment of the District Court is affirmed.

Letton, J., not sitting.

Petition for rehearing denied December 15, 1919.

#### NOTE

The general subject of the determination by the civil courts of property rights as between contending factions of an independent or congregational church is discussed in the annotation following *BAPTIST CITY MISSION SOC. v. PEOPLE'S TABERNACLE CONG. CHURCH*, post, 105. The question involved in the reported case (*KENESAW FREE BAPTIST CHURCH v. LATTIMER*, ante, 98) as to the right to withdraw from a voluntary ecclesiastical connection is discussed in subdivision VII. of that note. It will be observed that the reported case differs from most of the cases in that subdivision in that there was no dissenting faction of the local society.

### BAPTIST CITY MISSION SOCIETY OF DENVER, Plff. in Err., v. PEOPLE'S TABERNACLE CONGREGATIONAL CHURCH OF DENVER.

*Colorado Supreme Court—July 1, 1918.*

(— Colo. —, 174 Pac. 1118.)

#### Religious societies — power to convey property.

1. The majority present at a church meeting cannot convey church property to another religious denomination against the protest of the minority, although no express trust was established by those donating the funds with which the property was purchased.

[See note on this question beginning on page 105.]

#### Evidence — purpose of deed.

2. The purpose for which property was conveyed to, and is being used by, a religious society, may be shown by

parol if it is not set out in the title papers.

[See 10 R. C. L. 1050; 23 R. C. L. 452; 26 R. C. L. 1202.]

ERROR to the District Court for the City and County of Denver (Perry, J.) to review a judgment in favor of plaintiff in an action brought to cancel an alleged deed of its property to the defendant society. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Henry E. May and Henry B. Babb for plaintiff in error.

Messrs. Thomas H. Hood and Murray & Ingersoll, for defendant in error:

The majority of the membership of a Congregational church has no right to give away the whole, or any part,

of that church's property over the protest of a minority of its membership.

*Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 3, 62 Pac. 839, 21 Mor. Min. Rep. 74; *Bouldin v. Alexander*, 15 Wall. 131, 140, 21 L. ed. 69, 71; *Lindstrom v. Tell*, 131 Minn. 207, 154 N. W. 969; *Schnorr's Appeal*, 67 Pa. 148,

5 Am. Rep. 415; Smith v. Pedigo, 145 Ind. 379; 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Franke v. Mann, 106 Wis. 129, 48 L.R.A. 856, 81 N. W. 1014; First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 573; Cape v. Plymouth Cong. Church, 130 Wis. 179, 109 N. W. 928; Watson v. Jones, 13 Wall. 679, 723, 20 L. ed. 666, 674; Hale v. Everett, 58 N. H. 1, 16 Am. Rep. 82; Mt. Helm Baptist Church v. Jones, 79 Miss. 501, 30 So. 714; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 147, 13 L.R.A. 198, 49 N. W. 81; Everett v. Jennings, 137 Ga. 253, 73 S. E. 375; Stebbins v. Jennings, 10 Pick. 181, Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783; Baker v. Ducker, 79 Cal. 365, 21 Pac. 764; Yanthis v. Kemp, 43 Ind. App. 207, 85 N. E. 976, 86 N. E. 451; Monk v. Little, 122 Ark. 11, 182 S. W. 511; Wheelock v. First Presby. Church, 119 Cal. 486, 51 Pac. 841.

Hill, J., delivered the opinion of the court:

This controversy is between two religious corporations representing different religious denominations. It involves the ownership of what is called the People's Tabernacle in the city of Denver. It appears that in 1884 the defendant in error was organized as the People's Tabernacle Congregational Church of Denver, and thus continued up to the time of this controversy. As per its name and articles of faith, it was understood to be what is termed a Congregational church or society. It affiliated with the others of that denomination, and for a great many years received funds from the Congregational Home Missionary Society. In 1900 it acquired the land in controversy and erected a church edifice thereon. The funds received for the purchase of other lots and buildings formerly owned by this society, as well as for these lots, and the construction of the building thereon, were secured, some from its members, but principally by public donations through the efforts of its former pastor, Rev. T. A. Uzzell, who devoted over a quarter of a century to the work carried on by this organization. There is testimony tending to show that, while many of

those who made the largest contributions thus gave to him at his solicitation upon account of their appreciation of his work and their confidence in him, without regard to the denominational character of his church, and without any strings upon it, that is, as to how he or the organization was to use it, it was likewise shown that during the period in which practically all these funds were raised he was generally known and understood to be a Congregational minister, and that his church, while somewhat on the missionary order, was likewise recognized and understood to be a Congregational church. The record further discloses that under his pastorship the church or mission prospered and did much good in its community, and that at the time of his death, 1910, it was in a prosperous and healthy condition, both spiritually and financially, that it then had about \$1,700 in its treasury, that the church property was of a value of about \$50,000 and was clear of encumbrance.

The record discloses that, after Parson Uzzell passed away, dissension arose among the membership of the church, occasioned apparently by inability to raise money, with the result that thereafter, at a meeting purported to be called for that purpose and by a vote of the membership present, being sixty-four for, and fifty-eight against, a deed was authorized to be executed for the property to the Baptist City Mission Society, which it is conceded is a part of the religious organization known as the Baptist denomination. This deed contains certain conditions. One was that the Baptist societies would pay all the debts of the Tabernacle Church, which then had reached about \$700, and also a special improvement tax against the property of about \$1,700. Other clauses provided for membership under certain conditions of the members of the church in the Baptist society. It also, under certain conditions, permitted a resale of the property. The result

of its conditions as a whole permitted of its entire future control by the Baptist Church and of that creed and faith. Protests were made by many of the minority who were present at the meeting. Later eighty-two members of the church signed a written protest. This was ignored, the conveyance made, possession given, and the property turned over to the new organization. This suit was brought to have the deed declared void, for its cancellation, etc. Trial was to the court, which found that the attempted transfer was a diversion of the temporalities of the said defendant in error church, and was in violation of the trust under and by virtue of which said temporalities were held, and a breach of duty on the part of those attempting to execute said deed, for which reason it was ordered canceled, etc.

The defendant in error urges many irregularities in the proceedings leading up to the execution of the deed, and lack of performance with its conditions, which its counsel contend are alone sufficient to have the transaction set aside. As we view it, these matters need not be gone into; but assuming, without so holding, that they were regular and sufficient in the respects complained of, the question then to be determined is: Can a majority of those present, at a meeting called for that purpose, order the execution of a deed to their church property to another denomination practically without consideration, thereby leaving their own church society without any church edifice or other place within which to worship, and where the result of the transaction makes it practically a gift of the property from one denomination to another, leaving the grantor organization with nothing for its members to do but to go into the other denomination, disperse, or again raise money with which to rent or buy another edifice within which to carry on its worship. In other words, can a majority only of those present at a meeting (al-

though called for that purpose) of a church organization of one denomination turn its temporalities over to another denomination for the use and benefit of the latter denomination as here attempted? The trial court was of opinion that it could not be thus accomplished. We are in accord with this conclusion, <sup>Religious societies—power to convey property.</sup> which is supported by the great weight

of authority. *Marien v. Evangelical Creed Cong. Church*, 132 Wis. 650, 113 N. W. 66; *Roshi's Appeal*, 69 Pa. 463, 8 Am. Rep. 275; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Lindstrom v. Tell*, 181 Minn. 203, 154 N. W. 969; *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488, 30 So. 714; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783; *Rottmann v. Bartling*, 22 Neb. 375, 35 N. W. 126; *Franke v. Mann*, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1014; *Madison Ave. Baptist Church v. Baptist Church*, 46 N. Y. 131; *Everett v. Jennings*, 137 Ga. 253, 73 S. E. 375; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Cape v. Plymouth Cong. Church*, 130 Wis. 174, 109 N. W. 928; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Lemp v. Raven*, 113 Mich. 375, 71 N. W. 627; *Krecker v. Shirey*, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; *Brundage v. Deardorf* (C. C.) 55 Fed. 839; *Berry v. Second Baptist Church*, 37 Okla. 117, 130 Pac. 585, 34 Cyc. 1167, 1169; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82.

While it is true that the language in the deeds from the original grantors to the defendant in error for the lots in controversy does not contain a declaration pertaining to the use or the purposes for which they were secured, it is clearly shown that they were secured for these uses, and were being used <sup>Evidence—purpose of deed.</sup> for these purposes, and not otherwise. In such cases the weight of author-

ity is that, when not set out in the deed, the purposes for which they were secured and being used can be otherwise shown to exist. *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783; *Lindstrom v. Tell*, 131 Minn. 203, 154 N. W. 969; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Franke v. Mann*, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1014; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82.

The plaintiff in error cites numer-

ous cases disclosing contentions between majority and minority stockholders of private corporations to sustain its position. They have no application to cases of this kind where the denominational character of the churches or societies must, of necessity, enter into the controversy. Any argument which seeks to evade or get around this fact is not applicable to this controversy. The judgment is affirmed.

*Bailey and Allen, JJ., concur.*

### ANNOTATION.

#### Determination by the civil courts of property rights between contending factions of an independent or congregational church.

- I. In general, 105.
- II. Property subject to express trust, 106.
- III. General rule of majority control, 108.
- IV. Necessity of formal action, 110.
- V. Decision of council, 110.
- VI. Diversion of property from implied trust:
  - a. Generally, 111.

##### *I. In general.*

This note, as indicated by its title, is confined to cases where a schism or division has arisen within an independent religious society as a result of which the title to, or control of, the property of the society has become involved in litigation in the civil courts.

It is to be observed at the outset, as said in *Stallings v. Finney* (1919) 287 Ill. 145, 122 N. E. 369, and in substance in many other cases, both within and without the scope of this annotation, that "courts have no power to pass upon questions of differences between contending factions of a church society unless civil or property rights are involved. They will not interfere to control the exercise of ecclesiastical authority not violative of a civil or property right."

The following quotation from the opinion in *Mendelsohn v. Gordon* (1913) — Tex. Civ. App. —, 156 S. W. 1149, represents a common formulation of the principle: "In disputes between factions of religious societies

##### VI.—continued.

- b. Change of denominational relations or fundamental doctrines, 113.
- VII. Withdrawal from a voluntary ecclesiastical connection, 123.
- VIII. Adhering to voluntary ecclesiastical connection, 129.
- IX. Effect of incorporation, 130.
- X. Divided use, 132.

the only questions which the civil courts are authorized to determine are those affecting property rights. In such controversies, ecclesiastical or doctrinal questions will only be inquired into so far as may be necessary to determine the property rights of the parties."

The principle is, of course, applicable whether the society involved is independent in government or is but part of a general ecclesiastical body. A concrete illustration of the kind of questions which the principle excludes from the jurisdiction of the civil courts is afforded by *Carter v. Papineau* (1916) 222 Mass. 464, L.R.A. 1916D, 371, 111 N. E. 358, Ann. Cas. 1918C, 620, an action arising out of the exclusion of a member of the Protestant Episcopal Church from the communion table. The court said that in Massachusetts the rights of plaintiff as a communicant are not enforceable in the civil courts; and that it was unnecessary to determine whether, at common law, a member of

the Church of England could sue if unjustifiably denied participation in the communion.

That the principle may in its operation withhold the hand of the civil court, even in case of flagrant violation of the law of the church, if no property right is involved, is well illustrated by the recent case of *Gibson v. Singleton* (1919) — Ga. —, 101 S. E. 178, where the Georgia supreme court declared that "a court of equity will not interfere with the internal affairs of a religious organization, when no property rights are involved, for the reason that civil courts have no jurisdiction of such matters, and cannot take jurisdiction of them, whether they had been adjudicated by the ecclesiastical courts or not;" and applied that principle by sustaining a demurrer to a petition to enjoin the pastor of an incorporated church from prescribing the payment of \$1 as a condition of a right to vote for trustees, notwithstanding that the discipline of the church provided that every member twenty-one years of age and in full communion should have the right to vote, and notwithstanding the allegations of the petition to the effect that if the pastor were allowed to enforce the condition, he would effectually prevent from voting a large number of the members of the church. And the court added that allegations that the enforcement of such announcement of the pastor would result in an illegal and fraudulent election and be violative of the rules of the church and permit the pastor to enforce his own arbitrary will upon the members of the church for his own private and personal purposes would not confer jurisdiction.

Schisms or divisions within religious societies, however, frequently give rise to questions affecting property rights of which the civil courts do have jurisdiction.

In *Watson v. Jones* (1872) 13 Wall. (U. S.) 679, 20 L. ed. 666, generally accepted as the leading case on the subject, the court thus classifies the questions which come before the civil courts concerning the rights of property held by ecclesiastical bodies: "1.

The first of these is when the property which is the subject of controversy has been, by deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization."

The present annotation is not concerned with the third class, which was in fact the class involved in the *Watson Case*; nor with the first class, except so far as it includes cases which are also within the second class. (It will be observed that the first and second classes and the first and third classes are not mutually exclusive.)

## *II. Property subject to express trust.*

As regards the first class, i. e., express trusts, the court in the *Watson Case* said: "In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine."

This principle, with reference to property held by a congregational or independent society subject to an express and specific trust, is very generally conceded. For example, *Lurton, J.*, in *Nance v. Busby* (1892) 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874, said: "In the case of a definite trust for the

maintenance of a particular faith or form of worship the court will even go so far as to prevent the diversion of the property by the action of the majority of the beneficiaries, and if there be a minority who adhere to the original principles, such minority will be held to comprise the exclusive beneficiaries, and entitled to the control and enjoyment of the property without interference by the unfaithful majority." Hence, if the property is held subject to an express and specific trust for the benefit of any particular denomination and for the support and propagation of any particular set of doctrines or tenets, the civil courts will prevent its diversion to any other denomination or any other set of doctrines or tenets, upon the complaint of a minority faction which remains true to the original purposes of the trust. See, in this connection, *Sarver's Appeal* (1874) 81 Pa. 183, *infra*, VII., and *Rodgers v. Burnett* (1901) 108 Tenn. 173, 65 S. W. 408, *infra*, VII.

The principle, of course, does not apply in case of an independent society if it is found that the majority faction—assuming that by the law of the society the majority rule prevails—has not departed from the doctrines or tenets protected by the trust.

Thus, in *Bennett v. Morgan* (1902) 112 Ky. 512, 16 S. W. 287, where the site of the church building was conveyed to commissioners of a primitive Baptist church and their successors, "holding forth the apostolic doctrine, to wit, personal election, predestination, baptism by immersion, etc.," a decree enjoining a minority faction, which believed in "absolute predestination," from interfering with the exclusive use of the church property by the majority, which believed in "limited predestination," was affirmed, upon the ground that by the weight of testimony both doctrines were taught in substance in churches in good standing in the associations of the Primitive Baptist Church, and there was no such unanimity of authority upon the subject as would justify the court in holding that there had been either by the majority or minority a departure from the faith as under-

stood at the time the church property was conveyed for the purposes named in the deed. A Kentucky statute, which contemplates a division of the property in certain circumstances, was held inapplicable for reasons not within the scope of this annotation.

Even when there has been a perversion of an express trust by the persons in control of an independent society, the suit for relief may fail because the complainants do not have the status necessary to enable them to vindicate and protect the trust.

Thus, in *Nance v. Busby* (Tenn.) *supra*, it was held that excommunicated members of a purely congregational and independent church could not stand for and represent the members of the church in an action to prevent the diversion of the church property from its lawful uses under a conveyance of the property to the "Regular Primitive Baptist Church, at Nashville, of the old school, of which Elder Phillip Ball is the present pastor or minister, and their successors of the same faith and order, forever." And it was further held that the result was not affected by the fact that, under an erroneous construction of the usage and practice of the church, the excommunication was by a vote of the majority without notice to the accused of the charges against them or opportunity to vindicate themselves, the court taking the view that the excommunication was an act of the church which could not be reviewed or interfered with by the civil court. This decision was upon the assumption that, prior at least to the expulsion of the minority faction by majority faction, there had been no abandonment of the original faith and practice by the majority.

So, in *Shannon v. Frost* (1842) 3 B. Mon. (Ky.) 253, it was held that excommunicated members of a Baptist church have no such interest therein as will authorize them to maintain a suit in relation to the church property.

In this connection, however, though the case is not within the scope of the note, since no schism was involved, attention is called to *Hendryx v. Peo-*



ple's United Church (1906) 42 Wash. 336, 4 L.R.A. (N.S.) 1154, 84 Pac. 1123, 7 Ann. Cas. 764, holding that equity would aid a member of a church who had been expelled for the fraudulent purpose of devoting the church property to purposes entirely foreign to that of the church organization, to preserve the trust property, notwithstanding the rules of the organization permit the expulsion of members without formal trial.

In *Predestinarian Baptist Church v. United States Baptist Church* (1910) 139 Ky. 110, 129 S. W. 546, where the deed to the church property expressed a trust for the support of the "doctrine of predestination, particular redemption, total depravity, effectual calling, the certain perseverance of the saints, and believers in baptism by immersion," the court, without going into the question whether the majority faction had departed from the doctrines thus declared, refused relief to the successors of the minority faction upon the ground of laches, the suit not having been brought until nineteen years after the separation and withdrawal of the minority faction, none of whom was living at the time of the suit.

In *Turpin v. Bagby* (1897) 138 Mo. 7, 39 S. W. 455, where property was conveyed in trust while the church should be governed by the "rules, usages, and faith of the Missionary Baptist churches of the state of Missouri," it was held that the legal title to the property was vested in the trustees regularly appointed, and could not be divested by the vote of a small minority, acting independently, although they may alone of the entire membership truly represent and be governed by the "rules, usages, and faith of the Missionary Baptist churches of the state of Missouri," and notwithstanding that in consequence of the departure by the majority from such rules and faith the property may be diverted from the trust impressed upon it under the grant. Under this decision it is not apparent how the express trust to which the property was subject could be vindicated as against the action of the heretical majority.

### *III. General rule of majority control.*

In the absence of a breach of trust, express or implied, the majority rule prevails in independent or congregational societies, so that in societies like those of the Congregational or Baptist denominations, which have no organic connection with any external ecclesiastical body, the will of the majority, when duly and regularly expressed through the appointed channels of the society, ordinarily prevails, not only when its effects are confined to the domain of purely religious, spiritual, or ecclesiastical concerns over which the civil courts have no jurisdiction, but also when its action or decision directly or indirectly affects civil or property rights over which the civil courts do have jurisdiction.

*United States.*—*Watson v. Jones* (1872) 13 Wall. 679, 20 L. ed. 666; *Bouldin v. Alexander* (1873) 15 Wall. 131, 21 L. ed. 69.

*Alabama.*—*Barton v. Fitzpatrick* (1914) 187 Ala. 273, 65 So. 390; *Gewin v. Mt. Pilgrim Baptist Church* (1910) 166 Ala. 345, 139 Am. St. Rep. 41, 51 So. 947; *Tucker v. Denson* (1918) — Ala. —, 80 So. 373; *Manning v. Yeager* (1919) — Ala. —, 82 So. 435.

*Arkansas.*—*Monk v. Little* (1916) 122 Ark. 7, 182 S. W. 511.

*Georgia.*—*Bates v. Houston* (1880) 66 Ga. 198; *Tucker v. Paulk* (1918) 148 Ga. 228, 96 S. E. 339; *Mack v. Kime* (1907) 129 Ga. 1, 24 L.R.A. (N.S.) 675, 58 S. E. 184.

*Illinois.*—*German E. L. Trinity Cong. v. Deutsche Evangelisch Lutherische Dreieinigkeits Gemeinde* (1910) 246 Ill. 328, 92 N. W. 868, 20 Ann. Cas. 404.

*Kentucky.*—*Shanon v. Frost* (1842) 3 B. Mon. 253; *Hadden v. Chorn* (1847) 8 B. Mon. 70; *Poynter v. Phelps* (1908) 129 Ky. 381, 24 L.R.A. (N.S.) 729, 111 S. W. 699.

*Louisiana.*—*LeBlanc v. Lemaire* (1901) 105 La. 539, 30 So. 135.

*Massachusetts.*—*Enos v. Church of St. John the Baptist* (1905) 187 Mass. 40, 72 N. E. 253.

*Nebraska.*—*KENESAW FREE BAPTIST CHURCH v. LATTIMER* (reported herewith), ante, 98.

*Pennsylvania.* — *Landis's Appeal*

(1883) 102 Pa. 467; *Fernstler v. Seibert* (1886) 114 Pa. 196, 6 Atl. 165.

**Texas.** — *First Baptist Church v. Fort* (1899) 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; *Gibson v. Morris* (1903) 81 Tex. Civ. App. 645, 73 S. W. 85; *Stogner v. Laird* (1912) — Tex. Civ. App. —, 145 S. W. 645.

**Wisconsin.**—*Lutheran Trifoldhged Cong. v. St. Paul's English E. L. Cong.* (1914) 159 Wis. 56, 150 N. W. 190.

The principle is well formulated in the first syllabus by the court in *KENESAW FREE BAPTIST CHURCH v. LATTIMER* (reported herewith), though the opinion includes a clearer recognition that the principle is subject to the limitation that the action does not amount to an abandonment of the original purpose of the society.

The principle is recognized, expressly or impliedly, by most of the cases cited in this annotation, even by those which, like *BAPTIST CITY MISSION SOC. v. PEOPLE'S TABERNACLE CONG. CHURCH* (reported herewith) ante, 98, actually applied an exception. Doubtless, in the absence of facts upon which to base a charge that the majority have attempted to carry over the property to another denomination or otherwise to divert it from the support of the fundamental and characteristic doctrines or polity of the society, the principle is commonly acquiesced in without litigation. Hence, its potency for the settlement of the ordinary disputes and contentions among the members of independent societies is not adequately reflected in the cases cited in the annotation, which, for the most part, presented some color at least for the contention that the action of the majority was so heretical or revolutionary as to form an exception to the rule.

The application of the general principle by which the civil courts, in the absence of statute to the contrary, without inquiring into the merits of the controversy between the respective factions, accept and abide by the action of the majority when regularly taken, if there is no contention that such action involves a departure from fundamental doctrines of faith or practice, although property or civil

rights are involved of which the civil courts have jurisdiction, is well illustrated by *German E. L. Trinity Cong. v. Deutsche Evangelisch Lutherische Dreieinigkeits Gemeinde* (1910) 246 Ill. 328, 92 N. W. 868, 20 Ann. Cas. 404, where the division grew out of the action of a majority in voting for the removal of the church building to a new site. The supreme court held that the meeting at which the vote was taken having been held and conducted in conformity with the provisions of the Constitution, a court of equity should not decree a partition of the property at the instance of the minority faction desiring to remain at the old site. And see for a similar case *Le Blanc v. Lemaire* (1901) 105 La. 539, 30 So. 135, *supra*.

So, in *Lutheran Trifoldhged Cong. v. St. Paul's English E. L. Cong.* (1914) 159 Wis. 56, 150 N. W. 190, the court upheld a sale of the church property by a majority faction against the protest of the minority, the sale having been authorized and ratified at meetings of which the members had actual notice, although the formal notice by the clergyman, contemplated by the rules of the society, was not given because he refused to read such a notice. In this instance, the constitution contained an express provision that in the event of a division the majority shall be considered as the proper congregation and shall keep the property unless the majority fails to remain true to the Lutheran faith, in which case the minority, provided that it remains true, shall be considered the proper congregation and keep the property. The court observed that both factions had remained true.

The applicability of the principle after the elimination of the exception is also illustrated by *Tucker v. Paulk* (1918) 148 Ga. 228, 96 S. E. 339, where the supreme court said in effect that, the trial court having found as a matter of fact and law that the majority faction of a Primitive Baptist church (an independent church) had not departed from the organization and doctrine of the church, it was beyond its power to inquire into or pass upon and control the decision of the majority re-

specting the moral and legal qualifications of the minister.

So, in *Gewin v. Mt. Pilgrim Baptist Church* (1909) 166 Ala. 345, 139 Am. St. Rep. 41, 51 So. 947, the decision was in favor of a majority faction of a Baptist church, congregational in polity, the division not having been on any question of religious doctrine or denominational practice. And in *Tucker v. Denson* (1918) — Ala. —, 80 So. 373, the court, without discussing the cause or nature of the division, decided in favor of the majority faction of a Baptist church.

So, in *Mokn v. Little* (1916) 122 Ark. 7, 182 S. W. 511, where the division in a Primitive Baptist church grew out of a controversy over the reinstatement of a former member who had been expelled, the decision was in favor of the majority faction, notwithstanding that a council of members of the denomination, upon which the two factions of the local church had called for advice, had decided that the merits of the original controversy were on the side of the minority faction. The court said, in effect, that the council, not being a judicial body, its action was not conclusive of any rights.

In *Smith v. Charles* (1899) — Miss. —, 24 So. 968, where the complaint filed by one faction of a Baptist church alleged that one of the defendants had been illegally elected pastor, and that the defendants in their attempt to foist him upon the church as its pastor had "abandoned the laws, faith, usages, and customs" of the church, and prayed that the defendants be enjoined from the use of the property until they shall have returned to the laws, faith, usages, and customs of the church, the supreme court merely declared that it concurred with the chancellor in dismissing the bill for want of jurisdiction.

#### IV. Necessity of formal action.

The general principle, previously stated, that the civil courts will abide by and give effect to the action or decision of the majority faction of an independent society so far as civil or property rights are concerned, doubtless presupposes some formal vote or action at a meeting called in substan-

tial compliance with the rules of the society, or at least one which affords an opportunity for the membership of the society to be represented. None of the cases cited in this note appears to have determined the majority by a mere count of adherents of the respective factions as they are aligned in the action, without reference to some previous meeting of a more or less formal character. In *Barton v. Fitzpatrick* (1914) 187 Ala. 273, 65 So. 390, the court, speaking of an independent church, said: "Nor can the court have regard for the wishes of the majority unless expressed in valid form, and that a paper circulated among the members of the congregation, however numerous signed by them, cannot supply the place of a decision by the congregation acting as an organized body in conformity with the law and practice of the church." In that case, the meeting upon which defendants relied, at which it was assumed to elect two new officials, was found by the court not to have been so authorized or held as to afford the membership an opportunity to express their wishes.

The decision in *Stogner v. Laird* (1912) — Tex. Civ. App. —, 145 S. W. 645, in favor of the faction of a Baptist church represented by the defendant, was upon the ground that resolutions upon which the plaintiff faction based its right, even though they were adopted by a majority vote of the members then present, did not have the effect to divide the membership into two separate and distinct organizations, each claiming to be the church, and consequently the action subsequently taken by the defendant faction in rescinding the previous resolutions was the action of the church and binding upon the plaintiff faction.

#### V. Decision of council.

The decision of the ruling body of an association, whatever its name, with which an independent society is voluntarily, and not organically, connected, is advisory only, and not conclusive or binding upon the civil courts in the determination of property rights. *Bouldin v. Alexander* (1873) 15 Wall. 131, 21 L. ed. 69; *Monk v. Little* (1916)

122 Ark. 7, 182 S. W. 511; Smith v. Pedigo (1893) 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Ingleheart v. Rowe (1898) 20 Ky. L. Rep. 821, 47 S. W. 575; Pulis v. Iserman (1904) 71 N. J. L. 408, 58 Atl. 554; Gudmundson v. Thingvalla Lutheran Church (1915) 29 N. D. 291, 150 N. W. 750; Jarrell v. Sproles (1899) 20 Tex. Civ. App. 387, 49 S. W. 904, *infra*, VI. b.

In the Gudmundson Case, the majority were of the opinion that the ruling was of no effect and could not even be regarded as supporting the finding of the trial court to the effect that plenary inspiration of the Bible was a fundamental and characteristic doctrine of the denomination and the local society.

In Smith v. Pedigo (1893) 145 Ind. 361, 19 L.R.A. 433, 33 N. E. 777, the court was apparently inclined to the view that the decision of an association of Baptist churches to which both factions of a local church belonging to the association had submitted their claims was conclusive in the determination of property rights; but held that even if merely advisory, it was entitled to great weight with the courts on the question of religious doctrine, discipline, faith, and practice. On rehearing ((1893) 145 Ind. 361, 32 L.R.A. 838, 44 N. E. 363) the court conceded that the decisions of these ecclesiastical tribunals were not conclusive on the parties, according to the governmental polity of the church; but were nevertheless persuasive evidence on the question of doctrine out of which the schism arose. And to the same effect are Bouldin v. Alexander (U. S.) *supra*, and the Mt. Zion Baptist Church v. Whitmore (Iowa) *infra*, VI. b.

In Windham v. Ulmer (1912) 102 Miss. 491, 59 So. 810, however, involving a dispute over the church property between two factions of the "Union Seminary Baptist Church in Jasper County," a decision as to the use and occupancy of the church, made in regular conference assembled, by the "Union Seminary Baptist Church," having, as the court said, full authority under the Baptist polity, was held

conclusive. If, as is apparently the case, the latter body was an association or conference of churches, the decision that its ruling would be binding upon the local church is opposed to the general view.

#### VI. *Diversion of property from implied trust.*

##### *a. Generally.*

The United States Supreme Court in the Watson Case (U. S.) *supra*, I. thus declares the principle which should govern the civil courts in the determination of property rights not subject to an express trust between contending factions of an independent or congregational church: "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members, or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.

"In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This rul-

ing admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth."

While the principles above quoted from the *Watson Case* undoubtedly furnish the general rules for the guidance of the civil courts in the determination of questions in relation to civil or property rights arising out of schisms or divisions within independent or congregational societies when no express trust is involved, they appear, when viewed in the light of actual decisions, to have been stated too broadly and without proper qualification, in that they do not make proper allowance for the possibility that the action of the majority—assuming that by the law of the society the majority rule prevails—may involve so wide a departure from the fundamental and characteristic beliefs or polity of the society that to give it effect as to property rights would involve a perversion of the property from the implied trust to which it is subject, and because they fail to recognize that in such case the real identity of the society is no longer lodged with the majority faction, but resides with the minority faction, which remains faithful to the fundamental and distinctive beliefs and polity of the society.

This limitation of the sweeping principles declared in the *Watson Case* is sanctioned not only by cases falling within the present note, but also by cases belonging to the third of the classes enumerated in that case, and so beyond the scope of the note. A notable instance is the decision by the House of Lords in *General Assembly v. Overtoun* [1904] A. C. (Eng.) 515,

91 L. T. N. S. 395, 20 Times L. R. 730, involving the union between the Free Church of Scotland and the United Presbyterian Church.

It may be observed here that the right of the civil court to interfere in the circumstances above outlined involves, theoretically at least, no invasion of freedom of worship, since, however wide and clear the departure from fundamental beliefs or polity may be, the courts only interfere when, and to the extent that, civil or property rights are involved, and neither faction, whether in the majority or in the minority, will be disturbed by the civil courts so long as the dispute is confined in its effects to religious or ecclesiastical matters, and does not affect property or civil rights.

For example, in *Mt. Zion Baptist Church v. Whitmore* (1891) 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81, where, as subsequently shown, the decision was in favor of a minority faction as against a majority faction, which was found to have departed from the fundamental doctrines of the church, the court said: "Let it be understood at the outset that we are not adjudicating the right of any person to a religious belief or practice, nor are we to determine the truth or falsity of the doctrine of 'sanctification,' or 'sinless perfection.'" So, in *Park v. Chaplin* (1895) 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674, the court, having decided in favor of the minority as against the majority faction of a Free Will Baptist church, observed: "Nothing we have said is to be construed to affect any right the defendant church has to withdraw, as a church, from the Free Baptist and to unite with the Baptist denomination; but the withdrawal, if carried out, must be so effected as not to change or cloud the title to the property in controversy."

When there is no avowed change of denominational relations, but a mere difference as to doctrine or polity, the question whether the general principle as laid down in the *Watson Case*, or the limitation above suggested, is to prevail, is often a difficult and delicate one. There is less difficulty when

there is an avowed purpose on the part of the majority, or other governing body, of an independent or congregational society to divert the property to another denomination, or to the support of a system of doctrine radically opposed to the characteristic and distinctive doctrines of the original society. Though the case involved a society of the Presbyterian type and is therefore beyond the scope of the note, the following quotation from the opinion of Cobb, P. J., in *Mack v. Kime* (1907) 129 Ga. 1, 24 L.R.A. (N.S.) 688, 58 S. E. 184, suggests, perhaps, as clearly as it is possible to do in general language, the dividing line between cases where the action of the majority of the society is binding on the civil courts and cases where the civil courts will interfere to prevent the diversion of property from implied trusts: "If property is acquired by a Baptist church which, at the time of its organization, is teaching the doctrines of the Baptist faith as it is ordinarily understood, and thereafter a majority of the congregation should determine to dissolve the organization and unite with an ecclesiastical body which is teaching doctrines utterly antagonistic to what are commonly understood as the doctrines of the Baptist church, the civil courts would protect the minority, who adhere to the doctrines of the original organization, in their right to hold the property, even though such minority consisted of only one person. But if the question should arise in a Baptist congregation as to what is the doctrine of the Baptist church, and the difference should be such as that it was manifest that there could be, in the light of the history of the particular church and other churches of similar faith, doubt as to what was the true rule to be followed by a Baptist church, and the church tribunal, constituted according to the customs and usages of Baptist churches, should decide these differences, the civil courts would not attempt to interfere with the judgment of this tribunal determining the doctrinal differences between the members of the congregation."

*b. Change of denominational relations or fundamental doctrines.*

In harmony with the first part of the above quotation from the *Mack Case*, supra, VI. a, it is established by the weight of authority that the majority faction of an independent or congregational society, however regular its action or procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination or to the support of doctrines radically and fundamentally opposed to the characteristic doctrines of the society, even though the property is subject to no express and specific trust.

**Colorado.**—*BAPTIST CITY MISSION SOC. v. PEOPLE'S TABERNACLE CONG. CHURCH* (reported herewith) ante, 102.

**Georgia.**—*Everett v. Jennings* (1911) 137 Ga. 253, 73 S. E. 375.

**Illinois.**—*Christian Church v. Church of Christ* (1906) 219 Ill. 503, 76 N. E. 703 (obiter); *German E. L. Trinity Cong. v. Deutsche Evangelisch Lutherische Dreieinigkeits Gemeinde* (1910) 246 Ill. 328, 92 N. E. 868, 20 Ann. Cas. 404 (obiter); *Stallings v. Finney* (1919) 287 Ill. 145, 122 N. E. 369.

**Indiana.**—*Smith v. Pedigo* (1893) 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 35 N. E. 777, 44 N. E. 363.

**Iowa.**—*Mt. Zion Baptist Church v. Whitmore* (1891) 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; *Park v. Chaplin* (1895) 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674; *Re Stuart* (1918) — Iowa, —, 168 N. W. 779 (obiter).

**Kansas.**—*Immanuel's Gemeinde v. Keil* (1899) 61 Kan. 65, 58 Pac. 973 (implied).

**Kentucky.**—*Brook v. Yadon* (1893) 14 Ky. L. Rep. 863; *Bennett v. Morgan* (1902) 112 Ky. 512, 66 S. W. 287.

**Minnesota.**—*Schradi v. Dornfeld* (1893) 52 Minn. 465, 55 N. W. 49 (obiter); *Lindstrom v. Tell* (1915) 131 Minn. 203, 154 N. W. 969.

**Mississippi.**—*Mt. Helm Baptist Church v. Jones* (1901) 79 Miss. 488, 30 So. 714.

**New Hampshire.**—*Hale v. Everett* (1868) 53 N. H. 9, 16 Am. Rep. 82.

**New York.**—*Kniskern v. St. John's & St. Peter's Lutheran Churches* (1844) 1 Sandf. Ch. 439.

**North Dakota.**—*Bendewald v. Ley* (1918) — N. D. —, 168 N. W. 693 (obiter).

**Pennsylvania.**—*Suter v. Spangler* (1861) 4 Phila. 331.

**Texas.**—*Peace v. First Christian Church* (1898) 20 Tex. Civ. App. 85, 48 S. W. 534.

The principle is also supported by *Atty. Gen. ex rel. Mander v. Pearson* 3 Meriv. 409, 36 Eng. Reprint, 153, 17 Revised Rep. 100, though the facts of the case do not bring it within the scope of the note.

[While the rule above stated is but a specific application to independent societies of an exception—applicable also, when the necessity arises, to societies belonging to an ecclesiastical system—to the general principle which makes adherence to or sanction by the governing body of the church the criterion of property rights between contending factions, it is to be observed that in case of a local society organically connected with an ecclesiastical system, as in *First Constitutional Presby. Church v. Congregational Soc.* (1867) 23 Iowa, 567, for example, a decision in favor of a minority faction which adheres to the highest judiciary of that system and to the fundamental characteristic doctrines of the denomination lends no additional support to the rule above stated with regard to independent societies, since the result which in the latter case can only be reached by the aid of an exception to the general principle in the former case is but a specific application of the general principle itself. It is only when the court, upon the ground that the supreme governing body of a church of the Episcopal or Presbyterian type has itself departed from the fundamental doctrines or polity of the church, decides against a faction, whether in the majority or minority, of a local society, which adheres to or is sanctioned by that body, and in favor of a faction which is not recognized or sanctioned by it, that the decision can be legitimately invoked as an authority by a minority faction of

an independent society. See further, as to the distinction, the opinion of the vice chancellor in *Karoly v. Hungarian Reformed Church* (1914) 83 N. J. Eq. 514, 91 Atl. 808, affirmed in (1915) 84 N. J. Eq. 203, 93 Atl. 1085.]

The principle that the civil court will, even in the absence of an express trust, recognize an implied trust arising from and coextensive with the fundamental and characteristic doctrines of the church as held at the time the property was acquired, and will exercise its jurisdiction, at the instance of the faction of the society, however small, which remains loyal to those doctrines, to prevent the diversion of the property from such trust by the majority, and to that end will determine upon the evidence offered the original and characteristic doctrines of the society, is well formulated in the following quotation from the conclusions of law by the trial judge, which were approved by the appellate court in *Peace v. First Christian Church* (1898) 20 Tex. Civ. App. 85, 48 S. W. 534: "The courts of this country have no power to determine for religious bodies ecclesiastical or doctrinal questions, and they have never evinced a disposition to invade that domain, and will only inquire into such questions when property rights become involved, and are the subject of litigation, and then only so far as to determine those rights. It is a rule of law that when property had become dedicated to the support of some specific form of religious doctrine, it becomes a trust, and the courts will hear evidence and determine what that doctrine is, regardless of its ecclesiastical, sectarian, or denominational bearing, in order to ascertain the trust, and, having so found, will enforce the trust, and not permit it to be diverted to other and different doctrinal uses; and it is the duty of the court to decide in favor of those, whether a majority or minority of the congregation, who are adhering to the doctrines professed by the congregation and form of worship in practice at the time the trust became fixed." That the civil court, when property or civil rights are involved, will, if nec-

essary in order to determine the nature and extent of the implied trust, investigate and determine fine points of doctrine, is illustrated by this case, where one of the vital points of controversy between the two factions was with respect to the nature and efficacy of baptism. The case also emphasizes the refusal of the civil courts to permit the diversion of the church property from the support of the fundamental and characteristic doctrines of the church, as the decision was against a faction, though a large majority, which was found to have departed from the original fundamental doctrines of the church.

In *Bouldin v. Alexander* (1873) 15 Wall. (U. S.) 131, 16 L. ed. 69, the court said that it might be conceded that withdrawal from a church and uniting with another church or denomination are a relinquishment of all rights in the church abandoned, but that in the case at bar there was no sufficient evidence that any new congregation was formed or that there was any withdrawal from the church by the majority.

So, in *Baker v. Fales* (1820) 16 Mass. 487, where the original grant of the church property was to the "church in Dedham," it was held that the members of the church, though in a minority, who continued connected with the parish after a majority of the members of the church had separated themselves therefrom, were entitled to the property.

In *Baker v. Ducker* (1889) 79 Cal. 365, 71 Pac. 764, declaring that a majority of the members of a religious society have no right and no power to divert property to another and different church corporation, it does not appear whether or not the society was an independent one.

In *Christian Church v. Church of Christ* (1906) 219 Ill. 503, 76 N. E. 703, supra, the court, speaking of an independent or congregational church, declared the broad principle that when the members of a religious congregation divide, and one faction breaks away from the congregation and forms a new congregation, the title to the property of the congregation will re-

main in that part of it which adheres to the tenets and doctrines originally taught to the congregation to whose use the property was originally dedicated. While the decision in that case was in favor of the majority faction, it having been found that that faction adhered to the original tenets and doctrines of the church, it is clear that the decision would have been in favor of the minority if it had been found that that faction rather than the majority faction adhered to the original doctrine.

In *Smith v. Pedigo* (1893) 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363, supra, the court decided in favor of the minority faction of a Baptist church which adhered to the doctrine that sinners are regenerated by personal contact with the Holy Spirit without means or any instrumentality whatever, as against the majority, which had become known as the "means" party and believed in the use of "means" for purposes of regeneration. The bearing of this case on the effect of a decision of a church council is shown in supra, V.

In *Mt. Zion Baptist Church v. Whitmore* (1891) 83 Iowa, 138, 18 L.R.A. 198, 49 N. W. 81, supra, it appeared that at the time the church acquired its property it was under a profession of faith and practice limited by the "articles of faith and church government published in the minutes of the Des Moines Baptist Association of the year 1848," which, the court understood, was in accord with the teachings of the Baptist denomination; and the decision was against the majority upon the ground that they were attempting to divert the property from the trust thus implied. In this case, a Baptist council convened on the joint call of both factions of the local church, which agreed to accept its decision as final, had decided that the doctrines taught by the majority faction were not in harmony with the teaching of the denomination; and it was held that that decision might be adopted by the court as the basis of its action in giving the control of the church property to the minority faction. The court said: "The power of



the majority to govern is derivative, and the source of derivation limits the power. The organization gave birth to the church, and a power to govern the church. The church is Baptist because of the faith and covenants that make it so. It is not the faith and covenants that need or are to be governed, but the members in the enjoyment and fulfilment of the same. The power to govern the church gives no power to change the church or the faith and covenants that fix its character. The property of this church is the common property of all its members, and each has such an interest therein that he may insist that it shall be devoted to the religious faith for which it was given. The manner of the application is delegated to the judgment of a majority of the members of the church, but there is no delegation of authority to the majority to apply it to the advancement of a church of another faith by a direct transfer, or by changing the faith of a majority of the members of the church. It is when such an attempt is made that a court of equity will interfere to protect the rights of a minority in having the trust property applied in accord with the original intent."

In *Park v. Chaplin* (1895) 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674, supra, it was held that a majority of the members of a Free Will Baptist church could not, against the will of the minority, transfer property obtained for the use and benefit of that denomination which holds the doctrines of Arminius, to the Baptist denomination, which is Calvinistic, notwithstanding a provision in the manual of church government of the Free Baptist denomination to the effect that a church in good standing may have a letter of dismission and recommendation to another evangelical denomination, as this appears to refer to the church as an ecclesiastical, rather than as a purely legal, body. The court said: "It is not any part of our duty to decide whether the difference between the respective articles of faith, covenants, and practice of the two denominations is substan-

tial. It may be true that changes in such matters are constantly going on, and that it is beyond human power to prevent them; that in those things which make for worldly prosperity, as popularity, wealth, and numbers, the defendant church would be greatly benefited by its union with the Baptist denomination as proposed; but considerations of that kind have nothing to do with the legal rights of the parties to this action, and cannot be given weight in determining the questions of which we have jurisdiction. It is enough for the purpose of this case that the two denominations are now separate and distinct; that the property in controversy was acquired by the defendant church for the special benefit of one of them; and that the plaintiffs, being members of that church and of that denomination, object to the proposed change and insist that it shall not be made."

In *Mt. Helm Baptist Church v. Jones* (1901) 79 Miss. 488, 30 So. 714, supra, a faction of the "Mt. Helm" Baptist Church had by their declaration, made on the minutes of the church, declared that they repudiated the name of "Baptist" and adopted in its stead the name "Church of God," and had repudiated the name "Mt. Helm" and adopted in its stead "Tabernacle of Christ," and had repudiated all creeds and denominations as man-made devices. The court said that by such declaration it was relieved of all difficulty as to what the Baptist creed or faith is; that it was clear that the original donor of the property constituting the Mt. Helm Baptist Church edifice and grounds donated it for use as a Baptist church, and more specifically the particular Baptist church known as the "Mt. Helm Baptist Church;" and that its dedication to that use could not be altered by those openly proclaiming that they are not Baptists, although they may constitute a majority in number of the old church.

In *Lindstrom v. Tell* (1915) 131 Minn. 203, 154 N. W. 969, supra, the court affirmed a judgment in favor of a faction of a Lutheran church remaining faithful to the doctrines

of that church as against a faction which adhered to the society of Mission Friends, which rejected many of the orthodox doctrines of the Lutheran Church, the latter faction (defendants) having wrongfully excluded from the church a regularly called pastor of the Lutheran faith and those who desired to hear him. The court, after referring to the fact that the defendants had placed in the pulpit as its regular pastor a minister of the denomination of Mission Friends who rejected the teachings and ceremonials of the Lutheran Church, said: "These defendants had no such authority. It would be useless here to enter into any dissertation as to the importance of questions of doctrinal belief. The members of this church deem them of importance. They have a right to worship in their own manner, and if they choose to establish a church which gives importance to matters of doctrine, and which requires that services and ceremonials be conducted in accordance with established form, that is their right, and that right is invaded when part of the congregation, without authority, place in the pulpit ministers of other beliefs, and who conduct the services of the church in a manner not according to the established rules and practices of their denomination. Any such use of the church edifice by even a majority, if less than all the congregation, is an unwarranted diversion of the church property. . . . True, the deed by which the church property was acquired did not in terms impress it with a trust for the carrying out of any particular religious purpose. But this was not necessary. The church corporation was formed for certain well-defined purposes. It is the law of all corporations that a mere majority of its members cannot divert the corporate property to uses foreign to the purposes for which the corporation was formed. There is no difference between church and other corporations in this regard. Where a church corporation is formed for the purpose of promoting certain defined doctrines of religious faith, which are set forth in its articles of incorporation, any

church property which it acquires is impressed with a trust to carry out such purpose, and a majority of the congregation cannot divert the property to other inconsistent religious uses against the protest of a minority, however small. The manner of use of the property of the church corporation, within the range of its corporate powers, may be determined by the majority of the congregation, but no majority, even though it embrace all members but one, can use the corporate property for the advancement of a faith antagonistic to that for which the church was established and the corporation formed."

In *Stallings v. Finney* (1919) 287 Ill. 145, 122 N. E. 369, the majority of a congregational society known as the "Apostolic Faith Assembly," after having withdrawn to become members of a society known as the "Church of God," held a meeting, and the decision to go into the Church of God was announced, and they took possession of the church property for the new church to the exclusion of the members of the original society. The decision was in favor of the minority, who adhered to the original society, notwithstanding the contention that the majority had merely voted to change its name and practices and that there was no secession from the original organization. The court said that it was apparent from the record that the action of the majority was taken after those participating were no longer members of the Apostolic Faith Assembly, and hence could not affect the property rights of that society nor its identity if there still remains any membership of that society adhering to and teaching its doctrines and practices.

In *Kicinko v. Petruska* (1917) 259 Pa. 1, 102 Atl. 286, where the charter expressed the purpose to support a church in accord with the "faith, doctrine, discipline, government, and forms of the United Greek Catholic Church," which title, the opinion said, signified an ecclesiastical body in union with the Roman Catholic Church and acknowledging the supremacy of the Pope, the court affirmed a decree

which, in effect, enjoined a faction—whether a majority or not does not appear—from diverting the property to the support of the “Orthodox” Church. The court quoted with approval the statement in the opinion below that the congregation was self-governing in temporal affairs, but that whether or not it was wholly independent was not decisive of the question at issue.

In *Hale v. Everett* (1868) 53 N. H. 9, 16 Am. Rep. 82, *supra*, the decision was in favor of a faction, though in the minority, of a Unitarian society, which was opposed to the continuation of a pastor who had renounced both the name of Unitarian and Christian, and against the majority faction, which was in favor of continuing him in his position. The majority opinion lays down the general principle that where a conveyance is made or trust created for the benefit or use of a religious society by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support, the denominational name may be a sufficient guide to the nature of the trust, so far as respects doctrines which are fundamental, and that in such case those having control of the property hold in trust for the benefit of such religious society, and may be restrained from applying the same or the use of it to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination at the time and immediately after such trust was created. The real ground of decision in this case, however, was that the majority faction had abandoned and intentionally seceded from the original society, although they claimed on the trial, and attempted to make it appear, that they had not seceded, but were claiming to represent and to be the original society. The report of this case is very extended and contains a long and elaborate dissenting as well as prevailing opinion. The majority opinion is of great value for its vindication of the right and duty of the civil courts

to interfere when property rights are concerned, even when it involves an inquiry into questions of doctrine or polity which in any circumstances the civil courts are reluctant to undertake and which they absolutely decline when civil or property rights are not involved; and for its exposition of the conditions and limitations of the exception to the general principle that the action or decision of the majority is binding upon the civil courts. The court said: “Now, suppose such a society should, in the course of time, become equally divided; just half of its members should secede from the faith and doctrines of the sect which formed the society, and the other half should adhere to such faith and doctrines, and each half should separately undertake to control the use of the house according to its own religious views, and the views of the two divisions were antagonistic, and the court were called on to enforce the trust,—Can there be a doubt that equity would require that the control of the house should be given to the division which adhered to the original faith? Would not that be carrying out the wishes and intentions of the original founders of the trust? But suppose that the party which had seceded from the faith of the denomination should outnumber the other by one or more, could that change the reason of the case or its controlling equities? Would it not be the duty of a court of equity to look beyond the mere form of the thing to its material substance, and to say, in such a case, that the portion of the religious society who adhered to the faith of the sect that founded the society were entitled to control the use of the house, rather than the portion who, being still members of the society in form, had renounced the faith of the sect which formed, and whose fundamental doctrines had given name to, the society?”

“We do not deny the right of individuals to change their religious faith, nor the right of members of religious societies to do the same, nor the right of whole societies as a body to apostatize from their original faith, and

adopt a new one antagonistic to the first. This is but exercising those very rights of conscience which are asserted in art. V. of the Bill of Rights as the inalienable birthright of every inhabitant of the state. Nor is it the province of the court to decide or to inquire which faith is most consistent, or what doctrines are true or what are false; and it seldom becomes necessary for the court to turn its attention to theological studies in order to decide questions of law, except in cases like the present, where they are called upon to see that a trust is administered according to the intention of the original founders of such trust. If a trust is created or a charity given for the benefit or use of a sectarian society by its sectarian and denominational name, it is to be presumed that it was intended to be used to advance the peculiar doctrines of that sect; and if a meetinghouse is conveyed in trust for certain persons, to be under the control of a society of Christians, it would be the duty of the court, upon proper application and proofs, to see that the house was controlled by a society of Christians, and not by Mohammedans, pagans, or infidels, even though a majority of the original society have apostatized from the faith of the sect which formed the society."

Later in the opinion the court said: "It would seem, then, that the proper principles to be applied in this case upon the weight of authority (not taking into consideration those authorities which are based upon the peculiar provisions of the statute of New York, and which can, therefore, have no application here) are, in substance, as follows: That the denominational name of a religious society to which or to whose use a donation or grant is made, and the doctrines actually taught therein at the time of the gift or grant and immediately after, and the length of time they continue to be thus taught without interruption, may be resorted to, to limit and define the trust in respect to doctrines deemed fundamental; that where the conveyance is merely to the religious corporation by name, with no other designation of its pur-

poses or trusts (as in this case), the denominational name, in connection with the contemporaneous acts of the incorporators, may be a sufficient guide as to the nature of the trust; that where there is no specific designation in the deed as to the particular religious tenets or doctrines which it is to be used to advance or support, the denominational name may indicate the nature of the trust, so far as respects doctrines admitted to be fundamental; and that, if a society of one religious sect or denomination becomes incorporated with a strict denominational name, descriptive of the fundamental doctrines of the sect to which it belongs, it will be presumed that it was constituted for the purpose of advancing the vital doctrines of such sect or denomination, and that the society, or those having control of property held in trust for the benefit of such religious society, should be restrained from applying the property or the use of it to the promotion of tenets or doctrines clearly opposed and adverse to the fundamental principles of the faith and doctrines of such sect or denomination at the time and immediately after the trust was created."

It is interesting to contrast the argument of the opinion and the conclusion reached in the Hale Case with the opinion in *Atty. Gen. ex rel. Abbot v. Dublin* (1859) 38 N. H. 459, which was written by Perley, Ch. J., who concurred with the general conclusions and results reached in the majority opinion in the Hale Case. Much of his opinion in the Dublin Case is devoted to the vindication of the proposition that the distinctive and characteristic feature of congregationalism is polity or form of government, and not doctrine or creed. The decision on its facts, however, seems to be reconcilable with the decision in the Hale Case, although the dissenter in the latter case makes frequent reference to the Dublin Case in support of his position. The Dublin Case involved a controversy over the income of a fund which the minister of a Congregational church in the town of Dublin, who died in 1817,

by his will executed in that year, gave to the town of Dublin "to be kept at interest by said town forever, for the sole purpose of supporting the Christian religion in the Congregational Society, so-called, in said town; the interest thereof to be paid quarterly to the minister of the Congregational persuasion who shall be regularly ordained and statedly preach in said society." In 1819, certain inhabitants of the town, a part or all of whom had been members of the church or congregation to which the testator had ministered, associated themselves into an incorporated society under the name, "First Congregational Society in Dublin." In 1827, a number of persons, some of whom had been members of the church and congregation during the testator's ministry, on account of the doctrinal opinions of the minister then in charge, withdrew from the congregation and organized a new church, which was at first known as the "Second Congregational Society of Dublin," but afterwards as the "Trinitarian Congregational Society in Dublin." The decision was to the effect that the minister of the old organization, which was in general Unitarian in doctrine, was entitled to the fund as against the minister of the other organization, which adhered to the orthodox Trinitarian position. The view of the court that the terms of the trust "minister of the Congregational persuasion" were broad enough to embrace both Unitarians and Trinitarians was aided by the fact that differences in doctrine represented by the Unitarians and the Trinitarians had become known and recognized by 1817 (the date of the will and testator's death), and by the further fact that the Trinitarian party seems to have been treated as seceders from the original society. The court was of the opinion that evidence as to the doctrinal opinions of the testator was not admissible, but intimated that the evidence offered in that regard, viewed in the light of the history of congregationalism and the controversy between the Unitarians and Trinitarians, would not warrant the inference that the

testator intended to limit his bounty to the support of the Trinitarian doctrine. The opinion contains an exceedingly interesting account of the origin and history of congregationalism in New England, and a very clear exposition of the view that the distinctive feature of congregationalism was in polity or form of government, and not in doctrine or creed. That the writer of the opinion, however, did not regard this view as absolute and without limitations is apparent from his concurrence with the majority opinion in the Hale Case.

The fundamental question involved in *Atty. Gen. ex rel. Mander v. Pearson* (1817) 3 Meriv. 353, 36 Eng. Reprint, 135, 17 Revised Rep. 100, was quite similar to that in the *Dublin Case*, the question being whether the teaching of Unitarian doctrines was a diversion from the purpose declared in a trust deed of a meetinghouse "for the worship and service of God," it being contended by the plaintiff and relators that the intention was to promote the doctrine of the Holy Trinity, and the defendants insisting that the intention was as general as the purpose expressed and had no regard to any particular tenets. The case was referred to the master to inquire, *inter alia*, with respect to the worship and doctrine for which the trust was created, to the end of preventing a diversion of the property from the trust if the plaintiff's contention as regards the trust was well founded.

In *Kniskern v. St. Johns's & St. Peter's Lutheran Churches* (1844) 1 Sandf. Ch. (N. Y.) 439, *supra*, the minority faction of a local Lutheran church, which adhered to the Augsburg confession, that being the standard of the faith of the church at the time the property was acquired, and continued their connection with the synod with which the church was previously connected, were held entitled to the control of the property as against the faction which dissolved their connection with that synod, and united with other churches in forming a new synod, which adopted a declaration of faith essentially different from the Augsburg confession. There was

no trust in this case other than that implied from the fact that the grant was to the trustees of an Evangelical Lutheran congregation for the common use and benefit of said Lutheran congregation forever. This case is to be distinguished from those subsequently cited (*infra*, VII.) upholding the right of a majority faction of an Evangelical Lutheran church to sever its synodical relation, by the fact that in this case there was not merely a severance of synodical relations, but a departure from fundamental doctrines.

In *Madison Ave. Baptist Church v. Baptist Church* (1871) 46 N. Y. 131, it was held that the supreme court had no jurisdiction to authorize a conveyance of church property by one Baptist church society to another pursuant to a scheme to effect a union of the two churches by which the grantee was to absorb all the grantor's property, assume its debts, and take its corporate name, and all its corporations and the congregation worshipping in its church; no price having been agreed upon as the value of the property which the grantor was to pay, and it being a part of the plan that the grantor was to be dissolved as a corporation. The decision was upon the ground that by the common law then in force in New York religious corporations were restrained from alienating their real estate, and that when the conveyance in question was made they could alienate their real estate only when authorized by the court under § 11 of the act "to Provide for the Incorporation of Religious Societies," passed April 5, 1813, or when authorized by some other act of the legislature, and that the facts did not show a sale within the meaning of § 11. The court adhered to this position on a second appeal (1878) 73 N. Y. 82, the opinion on that appeal being concerned merely with the terms on which relief should be granted to the church which made the conveyance.

There are a few cases that apparently lend some support to the extreme view apparently sanctioned by the *Watson Case* (see *supra*, VI. a), which

admits of no inquiry by the civil courts as to the existence of an implied trust from which the majority will not be permitted to divert the property.

Thus, in *First Baptist Church v. Fort* (1899) 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892, it was held that, even conceding that the majority of a Baptist church had abandoned the confession of faith to which the church subscribed at the time the property was acquired, yet the majority should control, as the property was not subject to an express trust, and no implied trust arose from the conveyance of the site of the church to trustees "for the sole and exclusive use and benefit of the said Paris Baptist Church," or from the contributions made for the purpose of erecting the church structure. The court said: "It is not within the province of courts to determine which of two factions is right from a biblical or theological point of view, nor which conforms to the faith originally adopted by the church, except when that is, in explicit terms, made a condition of the donation. Granting that the defendants have abandoned the New Hampshire confession of faith, the rules of that church prescribe that a majority should control. The minority took membership with those rules in force, and must abide the result." Assuming that the tenets and doctrines which the majority had repudiated were fundamental and characteristic of the denomination to which the church belonged, the decision in this case seems to be opposed to the weight of authority. See also *Wehmer v. Fokenga* (1899) 57 Neb. 510, 78 N. W. 28, subsequently set out.

In *Jarrell v. Sproles* (1899) 20 Tex. Civ. App. 387, 49 S. W. 904, where the decision was in favor of the majority faction of a Baptist church which, the minority charged, had adopted the heresy known as "Martinism," the trial court found that there had been no adoption of "Martinism" by the majority faction; and the court of appeals said that, even if it were conceded that the majority had adopted the doctrines or dogmas implied by

that name, there was no evidence to show that they amounted to divergence from the true doctrine of the church, and that court could not assume that they did, even though the Baptist General Convention, whose action was necessarily merely advisory, had denied recognition to anyone who believed in Martinism. The court said that it was not called upon to determine whether, in a case like that at bar, where the deed under which the property was held did not specify any particular creed or form of belief to be observed or taught in the church, but merely named the denomination, a court of equity should examine into the professed belief, doctrines, or practices of those controlling the property, for the purpose of ascertaining whether or not they are in accord with the essential doctrines, beliefs, and practices prevailing among churches of such denominations, and thereupon wrest from the majority, and vest in the minority, control of such property.

In *Gipson v. Morris* (1903) 31 Tex. Civ. App. 645, 73 S. W. 85, asserting and applying the principle that when a division occurs in an independent society (a Baptist church) during a regular meeting of the organization, which leads to a separation into distinct and conflicting bodies, the rights of such bodies must depend upon which of the two had a majority of the members of the original organization at the time of the division, unless by the rules governing the method of transacting business adopted by the organization, the majority failed to assert its right to control the meeting in the proper manner or at the proper time,—there was no attempt to change the denominational character or doctrinal standards of the society, but a mere dispute as to the result of a vote on a motion to adjourn a meeting of the society, which gave rise to a question as to which of two factions represented the society and was entitled to control its property.

In *Mendelsohn v. Gordon* (1913) — Tex. Civ. App. —, 156 S. W. 1150, the court merely affirmed an order modifying a temporary injunction granted to

preserve the status quo pending a suit over the control of the synagogue and other property of a religious corporation, it being charged that the defendants, the majority faction, had departed from fundamental doctrines.

In *Swedish Evangelical Lutheran Church v. Shivers* (1863) 16 N. J. Eq. 453, the court, apparently in answer to the contention of counsel that, a Lutheran church having merged in or affiliated with the Episcopal Church, there had been a diversion from the trust, said that a change in the ecclesiastical relation of the church did not necessarily involve any perversion of the trust. Whether or not this was upon the assumption that there was a minority faction does not appear. The action was by the church with reference to certain ground rents; and it was held that in any event the defendant could not raise the question, it being one in which the cestuis que trust were alone concerned.

In *Keyser v. Stansifer* (1834) 6 Ohio 364, it appeared that a Baptist society, at a regular meeting, by unanimous action abrogated the declaration of faith under which it was organized and adopted a new declaration before a conveyance of property to the trustees of the "First Baptist Church of Dayton," and after such conveyance the majority faction abolished all former creeds, and declared the New Testament to be the only rule of faith and practice. It was held that the majority faction could not be deprived of the right to control the property at the instance of the minority upon the theory that the majority had lost its identity as the church. The court said: "It does not follow that they (the majority faction) lose their property by ceasing to entertain certain opinions. The declaration of faith under which they were organized, contains no attempt to bind them to abide in the same belief. It is shown in proof that each Baptist church is in itself a whole, separate, and independent—at liberty to form its own creed, and looking to others for counsel and social intercourse only. The opinions of such a

body cannot but change. . . . It (the church) was organized under the predominance of opinions which the complainant would now repudiate as heretical. They, the minority, at best, can have no right to divert it from the uses to which it is devoted, by the expressed will of the corporation, upon account of any supposed errors of doctrine or of faith."

So, in *Louisville & N. R. Co. v. McCoy* (1917) 177 Ky. 415, 197 S. W. 801, one of the reasons for holding that the petition of one of the factions of a Baptist church for the recovery of church property was bad was that it did not appear that the complainant's faction constituted a majority, although the petition alleged that the division arose out of a departure of some of the members, presumably intending the defendants, from the articles of faith and doctrine peculiar to the church. There were, however, other grounds for the decision.

A novel point was made by the holding in *Hall v. Hall* (1917) 177 Ky. 430, 197 S. W. 799, that the petition in a suit by a faction of a Baptist church for the recovery of the church property and records was insufficient because it did not aver that the complainants and those whom they represented were members of the church at the time of the divisions, and if, as must be inferred, they became members after that time, they were estopped to sue for the recovery of the property upon the ground that the faith and doctrine adhered to by the defendants were a departure from that to which the church was committed at the time of its organization, it being admitted that the defendants and those affiliated with them had been continuously in possession of the church property and in control of its affairs since the division so that without their action the complainants could not have become members.

**VII. *Withdrawal from a voluntary ecclesiastical connection.***

It is to be observed that the rule, stated and exemplified in *supra*, VI., that the majority faction of an independent or congregational society may

not divert the property from the denomination to which the society belongs or from the fundamental and distinctive doctrines or tenets to which it originally subscribed, does not prevent the majority faction of such a society, over the objection of the minority faction, from severing a voluntary ecclesiastical connection of the society with another body. Thus, in a number of cases the right of the majority faction of a local Lutheran church to sever its synodical relations, or at least to call a pastor from another synod, has been upheld upon the assumption or finding by the court that according to the Evangelical Lutheran polity the church is independent in government and does not lose its character as such by voluntarily coming for a time in association with a synod.

**Connecticut.** — *Duessel v. Proch* (1905) 78 Conn. 343, 3 L.R.A. (N.S.) 854, 62 Atl. 152.

**Illinois.** — *Lawson v. Kolbenon* (1871) 61 Ill. 405.

**Minnesota.** — *Schradi v. Dornfeld* (1893) 52 Minn. 465, 55 N. W. 59.

**Nebraska.** — *Wehmer v. Fokenga* (1899) 57 Neb. 510, 78 N. W. 28.

**North Carolina.** — *Organ Meeting House v. Seaford* (1830) 16 N. C. (1 Dev. Eq.) 453.

**North Dakota.** — *Gudmundson v. Thingvalla Lutheran Church* (1914) 29 N. D. 291, 150 N. W. 750; *Bendewald v. Ley* (1917) — N. D. —, 168 N. W. 693.

**Ohio.** — *Heckman v. Mees* (1847) 16 Ohio, 583.

**Pennsylvania.** — *Lutheran Congregation v. St. Michael's Evangelical Church* (1864) 48 Pa. 20; *Ehrenfeldt's Appeal* (1882) 101 Pa. 186.

**Wisconsin.** — *Fadness v. Braunborg* (1888) 73 Wis. 257, 41 N. W. 84.

But see *Stein v. Hauser* (1913) 6 Sask. L. R. 383, 15 D. L. R. 223, *infra*.

In *Bartholomew v. Lutheran Congregation* (1880) 35 Ohio St. 567, upholding the right of a local Evangelical Lutheran society to change its synodical relation, the resolution to that end was unanimously adopted, although there was a subsequent attempt by a faction to reorganize the



society and maintain the former synodical relation.

In *Gudmundson v. Thingvalla Lutheran Church* (N. D.) *supra*, it was held that a resolution adopted by the synod, at the instance of the minority faction, and without notice to the majority faction, recognizing the minority faction, and declaring that the majority faction had violated the constitution of the society and of the synod, was of no effect. The court in this connection notes the distinction between a society like the one in question, which was independent of government and voluntarily associated with the synod, and one which is organically connected with a superior ecclesiastical body.

But in *Moseman v. Heitshusen* (1897) 50 Neb. 420, 69 N. W. 957, the court reversed a decree restraining the defendants from interfering with the exclusive rights claimed by the plaintiffs in the church property, the real purpose of the plaintiffs being to prevent the defendants from turning over the church property to the control of the Missouri synod, the plaintiffs desiring to join the general synod. The deed to the property in this case provided that "if the said Lutheran Church shall be dissolved, or if some other religious society shall occupy said church property," then a part of the property should revert to the grantors. The court said that if the action were brought by the grantors to enforce the conditions of their deed, there might be good reason for determining whether or not the donation had been diverted to an improper or unauthorized use, but the real question in the case being one of mere doctrine, the civil courts were not equipped to inquire into it. From the allegations of the petition it would seem that the plaintiffs represented the majority faction. If so, it is not apparent why the court should have refused to vindicate their control over the property.

In *Stein v. Hauser* (Sask.) *supra*, deciding in favor of a minority faction of a congregation of the Evangelical Lutheran Church, which adhered to the Missouri synod, and against the

majority faction, which adopted the doctrines of the general council, and, later, of the Ohio synod, the court found from the evidence that the doctrine of the Missouri synod was different from that of the Ohio synod, and that by the law of the church a congregation organized, as the one in question was found to be, by the Missouri synod, could leave that synod only by unanimous action. The court added that the result was not affected by the fact that a considerable part of the debt of the church was paid after the trouble arose, it having all been paid before the congregation joined the Ohio synod. It will be observed that the difference in results between this case and those previously cited in this subdivision is due, not to a difference in legal principles, but to a difference in the findings or assumptions of fact respecting the law of the church as regards the right of a local congregation to change its synodical relations. In view of the finding of the court in this regard the case was governed by the principles applicable to a local society organically connected with an ecclesiastical system; and the court cites a case of that type in support of its decision (*General Assembly v. Overtoun* [1904] A. C. (Eng.) 515, 91 L. T. N. S. 395, 20 Times L. R. 730). The opinion does not disclose whether the differences found to exist between the doctrines of the Missouri and Ohio synods respectively were fundamental and characteristic. If they were there would seem to have been an independent ground for the decision under the principle or exception stated and exemplified *supra*, VI. b.

The right, in the absence of a violation of an express trust, to withdraw from a voluntary ecclesiastical connection, assuming that there is no departure from fundamental and characteristic doctrines of the society, is also upheld in *Miller v. Gable* (1845) 2 Denio (N. Y.) 492, reversing (1844) 10 Paige, 627. In that case a church organized as a German Reformed church, and not originally in connection with any other ecclesiastical body, subsequently came under the

jurisdiction of the Dutch Reformed Church. The court of errors, contrary to the opinion of Chancellor Walworth, held that no perversion of the property from an implied trust was involved in the action of a portion of the trustees of the church, which had become incorporated, in attempting to sever the ecclesiastical connection with the Dutch Reformed Church and employing Lutheran pastors. The various opinions, including those of the chancellor (10 Paige, 628) and the vice chancellor (2 Denio, 492),—whose decision was reversed by the chancellor and upheld by the court of errors,—and the different members of the latter court, contain learned and interesting discussions of the subject. Gardiner, President, said: "If a society incorporated by the name of Unitarian has for its pastor a Unitarian minister, we could with safety infer that it was not the intention of the founders that their bounty should be applied to the dissemination of Trinitarian doctrines. But beyond this, in all matters not deemed indispensable, a discretion would be vested in the congregation and their trustees as the representatives of the donors. . . . I do most cordially agree with him (Chancellor Walworth) in opinion that it must be a plain and palpable abuse of trust which will induce a court of equity to interfere respecting a controversy growing out of a difference in religious and sectarian tenets. Between that extreme which confers all power upon the congregation or the trustees, and the doctrine which subjects the property to forfeiture for departures from doctrine or forms of government, in matters not indispensable to the great ends to be obtained by religious organization, there is a wide interval where we may take our stand, sustained by the law and by a sober and enlightened public sentiment." The chancellor's decision was predicated, not only upon the severance of the relations with the Dutch Reformed Church, but also on the existence of irreconcilable differences in the fundamental doctrines held by the Dutch Reformed Church and the Lutheran

body, respectively. Apparently the majority of the court of errors were of the opinion that the differences in doctrine were not so fundamental as to require the interference of a civil court.

So, in *Manning v. Yeager* (1919) — Ala. —, 82 So. 435, it was held that unless the new association held to a faith essentially different from a Missionary Baptist denomination, the majority of a local society of that denomination might, without forfeiting the control of its property, sever the existing relation with an association of churches and unite with other churches in forming a new association. The court said that, even assuming the truth of the allegations of the complaint by the minority faction, that the pastor of the church, who took the part of the majority, and through them dominated the church, was opposed to foreign missions and an educated ministry, it could not hold that thereby the pastor and his majority congregation had put themselves without the Baptist pale, or that by using the church property in the service of these beliefs they have diverted it to a use fundamentally different from that contemplated in its acquisition. Referring to the fact that the pastor had on divers occasions indulged in ribald, coarse, and scurrilous language with reference to the foreign missionary board, the court said that that involved no question of diversion of property, but was rather a matter of taste and decency, to be judged by the church.

In *Pulis v. Iserman* (1904) 71 N. J. L. 408, 58 Atl. 554, holding that a local society might withdraw from the "classis" of the True Reformed Church without loss of its identity, the decision to withdraw was by the unanimous vote of those present at the meeting. Subsequently, under the sanction of the "classis," certain persons who at one time had been members or adherents of the congregation assumed to choose a new set of officers. The court denied the latter leave to file an information requiring the old officers to show by what au-

thority they exercised the franchises of the corporation.

In *Aiken's Estate* (1893) 158 Pa. 541, 27 Atl. 1102, the question was as to the identity of the beneficiary described in a will as "The New Jerusalem Society of Pittsburgh and its Vicinity." A society of that name, which seems originally not to have been in connection with any other body, later connected itself with the General (Swedenborgian) Church of Pennsylvania, and subsequently, by a vote of the majority of its members, severed its connection with that body. A minority, desiring to maintain its relation with the general body, organized a church under another name. It was held in effect that the faction which severed its connection with the General Church was the proper and legal representative of the original church and as such entitled to the legacy.

In *Wehmer v. Fokenga* (1899) 57 Neb. 510, 78 N. W. 28, supra, deciding in favor of the majority faction of a German Evangelical Lutheran church which called a minister from the Iowa synod of the denomination, the church having been previously in connection with the general synod, the court said: "Whether the religious teachings, faith, and church polity of these synods differed in essential particulars was and is a question for the ecclesiastical tribunals, not the civil courts. It is neither pleaded nor proved that an ecclesiastical tribunal having final jurisdiction to decide this question has determined it in favor of the contention of the appellees; nor is it shown that no such an ecclesiastical tribunal exists, having jurisdiction to decide the question. Until such tribunal—if one exists—shall decide the question, the civil courts will not assume to do so. When some ecclesiastical tribunal having jurisdiction in the premises shall determine that, according to the organic law of the church, this congregation may or may not subject itself to the jurisdiction of the Iowa synod and select for its pastor a minister of that synod, then the civil courts will recognize this judgment and, if called upon, en-

force it. . . . But it would be an unseemly thing for the secular courts to assume to themselves the right to decide in the first instance whether a certain doctrine or tenet of faith possessed and practised by one religious organization was contrary to the organic and fundamental doctrines and creed of another religious organization."

In *North Carolina Christian Conference v. Allen* (1911) 156 N. C. 524, 72 S. E. 617, the rule that a voluntary association with which an independent church is affiliated has no control over it was applied by holding that a "conference" had no right or interest in the church property and was not a proper party to a suit involving the control of the church property, which grew out of the refusal of the majority of the local body to accept a pastor sent by the "conference." The decision on the merits was in favor of the majority faction.

In *Martin v. German Reformed Church* (1912) 149 Wis. 19, 134 N. W. 1125, where the defendants, in whose favor the appellate court decided, seem to have been in the majority, the decision was upon the ground that the church continued to be an independent religious organization, and never became legally affiliated with the "classis" of the Reformed Church, although the pastor had joined the classis, and the congregation had used the ritual and service books of the Reformed Church.

In *KENESAW FREE BAPTIST CHURCH v. LATTIMER* (reported herewith) ante, 98, affirming a decree quieting the title to the church property in a local Baptist church, notwithstanding the severance of its relations with a "yearly meeting" with which it had been previously associated, and its adherence to a plan of union adopted by a "general conference," which the yearly meeting had disapproved, it is stated that the plaintiff (the local society) represented every member of the present congregation, so that the individual rights of members of that society were not involved. The defendants seem to have represented the yearly meeting, which had refused to

recognize delegates from the plaintiff church on the ground that it had taken itself out of the denomination, and had refused to deed the church property to the plaintiff,—the title having been vested in the executive committee of the yearly meeting in trust “for the Free Will Baptist Church of Kenesaw,”—and was claiming the right, if it deemed proper, to hold the property for the use of another congregation conforming to the present views of the yearly meeting. The decision is upon the assumption that the property was subject to no trust other than that it was for the use of the local church, and that there were no such differences of belief between the old organization and the union as to show an intention on the part of the governing body of the local church to violate such implied trust and abandon the purposes for which the church was organized.

Though the contrary is suggested by the quotation previously made from *Wehmer v. Fokenga* (Neb.) *supra*, it would seem that the right of an independent society to withdraw from a voluntary association, or at least its right to the continued control of the property of the local society, presupposes that it has not by such withdrawal or otherwise departed from the fundamental and distinctive doctrinal beliefs of the society. This is clearly recognized in *Gudmundson v. Thingvalla Lutheran Church* (1914) 29 N. D. 291, 150 N. W. 750, *supra*. The decision in that case in favor of the majority faction, which had withdrawn from the synod, being based not only upon the right of the majority to determine the synodical relations of the church, but also upon the conclusion reached after a somewhat elaborate examination of the evidence, that there was no competent evidence supporting the claim of the minority faction, and the finding of the trial court that the doctrine of plenary inspiration of the Bible—the acceptance of that doctrine by a resolution of the synod being the cause of the withdrawal by the majority faction—was a presupposed and accepted fundamental doctrinal belief of the Ice-

landic Lutheran Church, and as such presupposed by the church constitution and its confessional documents. In other words there was in the view of the majority of the court no competent evidence that the majority faction had departed from the fundamental and characteristic doctrines of the church. See also in this connection *KENESAW FREE BAPTIST CHURCH v. LATTIMER* (reported herewith) ante, 98, *Manning v. Yeager* (1919) — Ala. —, 82 So. 435, and *Stein v. Hauser* (1913) 6 Sask. L. R. 353, 15 D. L. R. 223, *supra*.

In *Bendewald v. Ley* (1917) — N. D. —, 168 N. W. 693, the majority of the court conceded in effect that a majority faction of an independent church could not, as against the protest of a minority faction, divert the property from the support of the fundamental and characteristic doctrines of the society; but held that the civil courts, even when property rights are involved, should not undertake to pass upon doctrinal questions, as that is the exclusive privilege of the ecclesiastical authorities; in other words, “the proper rule in such case as the one at bar, we are fully convinced, is for the civil courts to confine their jurisdiction exclusively to the one question of property rights, and to determine such property rights only after all doctrinal questions, or questions relating to faith, practice, and teachings of the particular religious denomination involved, have been disposed of by ecclesiastical authority vested in such religious organization.” In accordance with the principle thus announced the majority held that a complaint in a suit by a minority faction of a Lutheran church, which adhered to the “Missouri synod” with which the local church had previously been associated, for the control of the church property against the majority faction, which had affiliated with the Iowa synod, was demurrable, notwithstanding the allegations of fundamental and essential differences in doctrines and belief and in spite of the allegation that the plaintiffs (minority faction) had been recognized and adjudged by the Missouri synod

as remaining true to the original confession, for the reason that the complaint did not allege that the doctrinal questions in controversy had been submitted to or decided by any ecclesiastical tribunal.

It is to be observed that the rule as regards the severance by the majority of an independent or congregational society of a voluntary connection with an external association is quite different from the rule that applies to an attempt by a majority of a society of the Presbyterian or Episcopal type to sever its organic connection with the general ecclesiastical body. So, if a society, though originally organized as an independent church, or, at least, not originally in connection with any other ecclesiastical body, has lost its character as an independent church by coming under the jurisdiction of another ecclesiastical organization, that relation cannot be severed by the majority faction so far as property rights are concerned. Thus, in *Winebrenner v. Colder* (1862) 43 Pa. 244, where a congregation of the denomination calling itself the "Church of God," which was originally organized with an independent government, or was, at least, not originally in connection with any other ecclesiastical body, subsequently came in connection with an "eldership" and a "general eldership," so-called, formed by the different churches of the denomination; and a schism or division arose because of the refusal of the majority of the local congregation to accept the appointee of the eldership, and their adherence to their former minister, who had been expelled from the church or denomination, it was held that the minority faction, which adhered to the eldership, was entitled to the property of the church. The real question in this case appears to have been whether the local church had lost its original character as an independent church; and the decision seems to rest upon an affirmative answer to that question.

Assuming that there may be a difference of opinion whether the connection is organic or merely volun-

tary, the result in a particular case may be affected by the showing or assumption by the court in that regard. This is illustrated by *Dochkus v. Lithuanian Ben. Soc.* 206 Pa. 25, 55 Atl. 779, reversing a decree requiring the trustee to convey the church property to the archbishop. The supreme court said that the error of the trial court in assuming that because a local congregation was a Roman Catholic congregation it was therefore subject to the authority of the Roman Catholic Church, affected the entire proceedings, observing that that question was one of fact to be determined by the evidence, and referring to the testimony of the archbishop that congregations may hold Catholic doctrines and yet ecclesiastically and in the sight of the Roman Catholic Church have no existence.

See also *Stein v. Hauser* (Sask.) *supra*, where the decision was rendered upon a different finding or assumption as regards the independence of local Lutheran congregations from that found or assumed in most of the cases dealing with that denomination.

In *App v. United Lutheran & German Reformed Cong.* (1847) 6 Pa. 201, a minority of a Lutheran church, which had kept possession of the church and adhered to the original faith and synodical relation, was held entitled to the benefit of a fund bequeathed, prior to the division, to the "Lutheran congregation in Selinsgrove," the majority faction having left the church and erected a new church building and changed the synodical relation. The court declared generally that it is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship, and are also in favor of the government of the church in operation, with which it was connected at the time the trust was declared. There is no reference in the opinion to the point whether or not the connection of the church with the synod was voluntary.

It is further to be observed that the right of the majority faction of an in-

dependent society to sever its voluntary relation with another ecclesiastical body is, so far as property rights are concerned, dependent upon the absence of any express trust, or special circumstances raising any implied trust, by which the continuance of the connection is made a condition of the use of the property.

Thus, the refusal of the court in *Sarver's Appeal* (1874) 81 Pa. 183, to accept as conclusive in the determination of property rights the action of a majority faction of a Lutheran church in continuing as pastor one who had dissolved his relation with a certain synod, was upon the ground that it was expressly provided by the charter of the society that the pastor should be a member of the synod.

So, in *Rodgers v. Burnett* (1901) 108 Tenn. 173, 65 S. W. 408, the bill of the complainant faction—whether a majority or not does not appear—of a Lutheran church, for the control of the church property, was dismissed upon the ground that the withdrawal of that faction from the synod violated the condition in the deed of the property “for the only use as a church, and controlled by the Evangelical Lutheran Church of the Holston Synod.”

So, while the court in *Suter v. Spangler* (1861) 4 Phila. (Pa.) 381, held, contrary to the contention of the complainants, that the local society, which was originally not in connection with any other ecclesiastical organization, did not, by its subsequent union with the Synod of the Reformed Dutch Church, become indissolubly connected with, and permanently subject to the jurisdiction of, the synod, it nevertheless granted an injunction in their favor to prevent one who did not receive the Calvinistic theology from officiating as clergyman, the church having been founded as a Calvinistic church.

A civil court may, of course, refuse to give effect, so far as property is concerned, to an attempted change of voluntary relations, if the action to that end was not taken in substantial compliance with the laws of the society.

Thus the decision in *Rottmann v.*

*Barthling* (1887) 22 Neb. 375, 85 N. W. 126, against a faction of an Evangelical Lutheran church which had undertaken to change its synodical relations, was upon the ground that the action was taken without giving the notice required by the constitution and without complying with its terms in other respects. The court observed that in determining the question of the legitimate succession of a religious society where a separation has taken place, the court will adopt the rules of such society and enforce its polity in the spirit and to the effect for which it was designed.

#### *VIII. Adhering to voluntary ecclesiastical connection.*

As a majority faction of an independent society may sever a voluntary connection with another body (*supra*, VII.), so it may adhere to a voluntary connection against the wishes of the minority, who desire to sever it, at least where the continuance of that connection involves no repudiation of the fundamental doctrine or tenets of the society. Thus, in *Dressen v. Brameier* (1881) 56 Iowa, 756, 9 N. W. 193, the decision in favor of a majority faction which had decided to adhere to the Iowa synod under whose jurisdiction the church had voluntarily placed itself and against the minority who had voted to withdraw from that synod and join the Missouri synod, notwithstanding the allegation that the Iowa synod had departed from the Lutheran faith and doctrine. The court said that, conceding that it was its province to determine whether or not the Iowa synod conformed to the Lutheran faith and doctrine, it would conclude from the evidence, though with some doubt, that that synod had not departed from such faith and doctrine.

In *Windley v. McCliney* (1913) 161 N. C. 318, 77 S. E. 226, where the deed was made to “Trustees of the Free Will Baptist Church of Pantego,” the congregation afterwards united with other churches and changed its designation to the “United American Free Will Baptist Church.” Subsequently a minority of the local church objected to a revision of the discipline for

which the delegate of the local church had voted, his action being indorsed by a majority of the members. The minority, styling themselves simply the "Free Will Baptist Church," claimed control because that was the original designation of the church at the time the deed was made. The court, after an examination of the discipline, having found that it did not change in any way the identity of the local church, affirmed a judgment which excluded neither faction from the use of the building, but recognized the ownership and control of the property as being in the whole membership "and that their will must be controlled by the majority." The court observed in effect that the local church did not lose its independence or its identity as the "Free Will Baptist Church of Pantego" by joining the association.

So, in *Landis's Appeal* (1883) 102 Pa. 467, the decision was in favor of the majority faction of a Mennonite congregation, independent in government, which adhered to a general conference, and against the minority faction which gave their adherence to a new conference. In this case, however, the minority were professedly dissenters from the Mennonite doctrines and seem to have had no color of right except that they had been permitted by the majority faction to use the church property on alternate Sabbaths for a number of years.

The report of *Hadden v. Chorn* (1847) 8 B. Mon. (Ky.) 70, involving a controversy between rival factions of a Baptist church over the church property, is not very clear as to the nature or cause of the schism; but the main decision was against a faction, found to be in the minority, that had assumed to dissolve the relations of the church with the North District Association. The court was also of the opinion that, independently of the complainants being the majority faction, they should be regarded as the church, they, unlike the defendants (minority faction), not having altered the meeting days, or professed to "come out" from the church, or having had any new organization or conven-

tion. There was also a question in the case under the Kentucky statute providing for a divided use of the church property in certain circumstances, which is not within the scope of this note.

#### IX. *Effect of incorporation.*

When a religious society or congregation becomes incorporated, the temporalities, agreeably to the terms of the statute, become subject to the control of the trustees of the corporate body, which is to be distinguished from the church as such. So long as they act within the powers conferred upon them by the statute under which the corporation is created, and do not divert the property from the express or implied trusts to which it is subject, these trustees are entitled to the management and control of the property even if their acts and policy are opposed to the wishes of the members of the church as such. Thus, in *Baptist Congregation v. Scannel*, 3 Grant, Cas. (Pa.) 48, the court, at the instance of the trustees of an incorporated Baptist society, elected by the members of the incorporated society, enjoined interference with their control of the church property by defendants who were acting under a resolution of a regular church meeting, that is, a meeting of the communing members of the church. The court observed that a meeting of the church members as such is not a meeting of the incorporated society, and cannot instruct the trustees in their duties or assume any power over them. It does not appear in this case that there was any claim on the part of the defendants that the trustees were recreant to any fundamental doctrines, or to the distinctive polity of the Baptist denomination. Some courts, however, have adopted the view that the trustees of the corporation are independent even of restraints imposed by the fundamental religious doctrines or characteristic polity of the denomination to which the church belongs; in other words, that the corporation bears no ecclesiastical or denominational character at all. In *First Baptist Church v. Witherall* (1832) 3 Paige (N. Y.) 296, 24 Am. Dec.

228, Chancellor Walworth held that the decision of a council of Baptist churches in favor of the minority faction of a local society upon questions of faith and practice was not binding upon the trustees elected by the majority of the society or congregation, which became incorporated after such decision, even if they had been rightfully excluded from the communion and fellowship of the church. The decision depended upon a distinction which the chancellor made between the congregation, which was the incorporated body, and the church, strictly so called. He observed that the church members had no greater right than the other members of the society who statedly attended with them for the purposes of divine worship so far as the management of the incorporated society and its property was concerned. The allegations of the bill filed by the minority faction in this case were not sufficient to show that there had been a diversion of the property by the trustees from the implied trust in respect of fundamental doctrines of the denomination. The chancellor, however, confessed that he had always entertained serious doubts whether any civil tribunal in the state could interfere to prevent a majority of the corporators in a religious society from introducing such changes in the doctrines or modes of worship in their churches as they might deem fit, and which they could introduce through their trustees elected in the manner prescribed by law. In harmony with this intimation a doctrine at one time prevailed in New York which in effect put it within the power of the majority of an incorporated society, acting through the trustees of the corporation, elected by them, to determine the ecclesiastical connections and religious doctrines to the support and maintenance of which the property of the society, not subject to express conditions subsequent, should be devoted. In other words, the temporalities of the church, in the absence of an express trust, were subject to the absolute control of the trustees of the legal corporation, which bore no denominational character.

This doctrine was applied in *Petty v. Tooker* (1860) 21 N. Y. 267, by holding that the trustees of the corporation, representing a majority faction of a church organized as a Congregational church, could apply the property to the support of the majority faction, which had been received in connection with the Presbyterian Church, against the minority faction, which desired to adhere to the original congregational polity. The court said that the change in the character of the congregation of which the plaintiff complained had been brought about, not by the proceedings of the presbytery or the resolutions of the society, but by the action of the trustees in employing a Presbyterian clergyman, and opening the meeting-house to his ministrations, and that this they had the right to do. This doctrine, while in force, was applied in other cases in New York, which are not within the scope of this note because they did not involve independent or congregational societies. It, however, never met with general approval outside of New York. Thus, in *Hale v. Everett* (1868) 53 N. H. 9, 16 Am. Rep. 82, the court said that it saw very little evidence of any disposition by the courts of any other state to follow the decisions made by the New York court in *Petty v. Tooker* (N. Y.) *supra*, and similar cases in that state, unless it may be in some that have statutes similar to that of New York. The doctrine was abrogated in New York, at least as to churches of a denominational character, by a statute passed in 1875, providing, *inter alia*, that the trustees of a religious corporation should administer the temporalities of the church, and hold and apply the estate and property for the benefit of such corporation, "according to the discipline, rules, and usages of the denomination to which the church members of the corporation belong," and that it should not be lawful for them to divert such property or estate to other purposes.

The general scope and effect of that statute are beyond the scope of the note; but in this connection attention is called to a recent decision of the



supreme court at special term, in *Re Lloyd's Memorial Cong. Church* (1919) 178 N. Y. Supp. 104, denying an application for a change of a corporate name from "Lloyd's Memorial Congregational Church" to Lloyd's Memorial Colored Methodist Episcopal Church," it being admitted that the requested change was an incident of an attempt by the majority against the opposition of the minority faction to affiliate the church with the Colored Methodist Episcopal Church. The court held that the church in question, being organized as a Congregational church, was plainly within the statutory provision above quoted. It, however, was of the opinion that the Religious Corporations Law recognizes a distinction between a "Congregational Church" and an "independent church," and there is, perhaps, an indication that an "independent church," strictly speaking, that is, a church not belonging to any denomination, would not be within the operation of the provision.

#### *X. Divided use.*

In Kentucky provision has been made by statute for a divided use of the church property in case of a division within the society; and that statute was applied in *Poynter v. Phelps* (1908) 129 Ky. 381, 24 L.R.A.(N.S.) 729, 111 S. W. 699, involving a division in an independent religious society. However, as the construction and operation of this statute have involved somewhat intricate and technical points not peculiar to independent societies, no attempt has been made here to deal with it.

In a few instances, apart from statute, the civil courts have considered the question whether the property should be divided or a divided use should be permitted to the rival factions of an independent church.

Thus, in *Immanuel's Gemeinde v. Keil* (1899) 61 Kan. 65, 58 Pac. 973, it was held not error for a court of equity to decree a sale of the property of a Lutheran church and divide the proceeds among the members who were nearly equally divided by irreconcilable differences in matters of faith and doctrine regarded as vitally

essential by each, neither having forfeited any rights to the property under the constitution of the church. Though the church in this case was an independent one, subject to no ecclesiastical superior, the division in the organization was due to the adherence by the respective factions to different synods of the denomination which held vitally different doctrines. The court observed that if the plaintiffs below, among whom were the donors of the land on which the church was built, were asserting that the use of the property should be devoted to the dissemination only of the faith held by the synod to which they adhered, the court would be inclined to sustain their claim under the findings that at the time of the donation of the land on which the church was built, the donors were adherents of that synod, and the minister in charge, at whose solicitation funds were contributed for the erection of the building, was teaching the same belief. The decree for the sale and division of the property, however, was asked for by those plaintiffs, so that they had no cause of complaint.

In *Wicks v. Nedrow* (1889) 28 Neb. 386, 44 N. W. 457, where a division arose among the members of a Baptist church in regard to matters of discipline, and resulted in a conveyance to the trustees of one faction of an undivided one half of the church property which had been originally conveyed to the trustees of the "German Baptist Church," and thereafter the respective factions occupied the church on alternate Sundays, that arrangement having been continued for four years, the court refused to disturb the arrangement or to cancel the conveyance.

In *Huffins v. Sheriff* (1916) — Okla. —, 162 Pac. 491, declaring, according to the syllabus by the court, that where irreconcilable conflict has arisen between members of a church (a Baptist church), due to personal differences, and not upon any question of faith or doctrine, a judgment apportioning the use of property is proper. The decision is rendered upon the finding and assumption that

the original society had been dissolved so that neither faction represented the society as it existed before the division. It will be observed that upon that hypothesis there was no scope for the principle recognized by the court that if either party voluntarily withdraws from the organization it forfeits and the other party is entitled to, all the property.

In *Le Blanc v. Lemaire* (1901) 105 La. 539, 50 So. 135, it was held that a small minority of a Baptist church which had seceded from the majority, not on doctrinal grounds or questions of religious faith or worship, but on differences of church government, refusing to acquiesce in the will of the majority, was not entitled to a partition of the property. See also *German E. L. Trinity Cong. v. Deutsche Evangelisch Lutherische Dreieinigkeits Gemeinde* (1910) 246 Ill. 328, 92 N. E. 868, 20 Ann. Cas. 404, supra, denying a partition between the contending factions.

In *Bottom v. Tinsley* (1911) — Tex. Civ. App. —, 184 S. W. 833, a suit to enforce specific performance of an agreement by which one faction of a Baptist church was for a consideration, to convey the church property to the other and withdraw, it was held that a good defense was set up by a special answer which, in effect, alleged that a majority had rescinded the previous action, looking to a division.

In a few instances the charter or by-laws of a society has contained an express provision on the subject.

Thus, in *Wiswell v. First Cong. Church* (1862) 14 Ohio St. 31, the court, while recognizing that members who secede from a church organization thereby forfeit all right to any part of the church property, nevertheless held that a decision by the

majority of an incorporated Congregational church, that the interests of the church would be promoted by a division of the membership into two ecclesiastical bodies and an equitable division of the church property, involved no breach of trust, in view of the provision of the charter giving the church the power, with the consent of a majority of its members, to dispose of the property "for the purpose of promoting the interests of their church."

In *Peterson v. Christianson* (1904) 18 S. D. 470, 101 So. 40, affirming a decree which protected the Swedish faction of an incorporated Lutheran church in the use of the church property part of the time, the by-laws expressly provided that if the two nationalities, Swedes and Norwegians, of which the corporation was composed, should wish to call a minister separately, the church should be used every Sunday and service day in turn.

In *Nelson v. Benson* (1873) 69 Ill. 27, it was held that the schism contemplated by the constitution of an Evangelical Lutheran church, providing for the partition of property in case of schism, was a division or separation of the church into two religious bodies, and that such a schism did not result where the defendants,—pretending, contrary to the fact, that three of the four trustees who had been previously elected such, and whose terms of office had not expired, had resigned and refused to act,—held a meeting and unlawfully elected three other trustees without the knowledge or consent of the complainants, and thereafter defendants took possession of all the common property of the congregation and excluded complainants therefrom. G. H. P.

PAUL GENGO, Admr., etc., of John Butera, Deceased, Appt.,  
v.  
JOHN C. MARDIS.

*Nebraska Supreme Court — February 1, 1919.*

(— Neb. —, 170 N. W. 841.)

**Limitation of actions — effect of general limitation statute.**

1. The limitation imposed in § 1429, creating a right of action for death, is independent of the Statute of Limitations as found in § 7577, Rev. Stat. 1913.

[See note on this question beginning on page 145.]

**— death — time.**

2. Section 1429, Rev. Stat. 1913, creates a right of action which did not exist at common law. It is a condition precedent to the right of recovery

granted in this section that the action be brought within two years after the cause of action accrues.

[See 8 E. C. L. 801.]

Headnotes by ALDRICH, J.

(Sedgwick, J., dissents.)

**APPEAL** by plaintiff from a judgment of the District Court for Douglas County (Troup, J.) sustaining a demurrer to the amended petition in an action brought to recover damages for alleged wrongful death of plaintiff's decedent. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gurley, Fitch, West, & Hickman, for appellant:

Except where it has been otherwise provided by statute an action is deemed commenced so far as the parties to it are concerned, from the time that the writ of summons is sued out.

1 Cyc. 747; 1 R. C. L. ¶ 20, p. 338.

Messrs. Brogan & Ellick, for appellee:

The limitation of two years contained in Rev. Stat. § 1428, is absolute, and is not extended by the absence of the defendant from the state.

25 Cyc. 1021, 1233; Rodman v. Missouri P. R. Co. 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; Kavanagh v. Folsom, 181 Fed. 401; Anthony v. St. Louis, I. M. & S. R. Co. 108 Ark. 219, 157 S. W. 394; Bretthauer v. Jacobson, 79 N. J. L. 223, 75 Atl. 560; Beebe v. Doster, 36 Kan. 666, 14 Pac. 150; Cushing v. Winterset, 144 Iowa, 260, 122 N. W. 915.

The petition filed by the plaintiff against "J. C. Mardis," without alleging that the first real name of the defendant was unknown to the plaintiff and without the affidavit required

by the statute, was void, and did not give the court jurisdiction to proceed.

Gillian v. McDowall, 66 Neb. 814, 92 N. W. 991; Herbage v. McKee, 82 Neb. 354, 117 N. W. 706; Stratton v. McDermott, 89 Neb. 622, 131 N. W. 949, Ann. Cas. 1912C, 616.

The filing of the petition against a defendant who did not reside within the county, and was not in the county at the time of the filing of the petition, gave the court no jurisdiction over the case, unless a valid attachment was secured against the defendant's property.

Mosher v. Huwaldt, 86 Neb. 686, 126 N. W. 143; Coffman v. Brandhoeffler, 33 Neb. 279, 50 N. W. 6; Hoagland v. Wilcox, 42 Neb. 138, 60 N. W. 376; Davis v. Ballard, 38 Neb. 830, 57 N. W. 527; Lamb v. Finch, 87 Neb. 565, 127 N. W. 903.

The pretended attachment in this case was void and conferred no jurisdiction on the court, for the reason that no defendant was named.

Gillian v. McDowall; Herbage v. McKee; and Stratton v. McDermott, supra.

The rule that, in order to suspend

the running of the statute, an action shall be deemed commenced at the date of the summons which is served upon the defendant, or at the first publication, applies as well to an action under Rev. Stat. § 1428, as to any other action.

*Burlingim v. Cooper*, 86 Neb. 78, 53 N. W. 1025; *Reliance Trust Co. v. Atherton*, 67 Neb. 305, 98 N. W. 150, 96 N. W. 218; *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568, 98 N. W. 922.

The appearance of the defendant to the amended petition filed after the statute had run did not relate back to the attempted commencement within the two years.

*Hotchkiss v. Aukerman*, 65 Neb. 177, 90 N. W. 949; *Reliance Trust Co. v. Atherton*, 67 Neb. 305, 98 N. W. 150, 96 N. W. 218.

The petition does not state a cause of action, as it does not show that the plaintiff is entitled to recover the damages alleged to have been sustained.

*Butera v. J. C. Mardis Co.* 99 Neb. 815, 157 N. W. 1024.

*Aldrich, J.*, delivered the opinion of the court:

On the 15th day of November, 1911, one John Butera came to his death at Omaha, while employed as a workman on what is known as the Flatiron Building. Afterwards, one Paul Gengo became administrator de bonis non of the estate of the said John Butera, deceased, and as such administrator, on December 5, 1913, filed an amended petition against the said John C. Mardis, doing business as the J. C. Mardis Company, charging them with the wrongful death of the decedent. This action was commenced under and by virtue of the provisions of § 1429, art. 8, chap. 17, Rev. Stat. 1913: "Actions by or against executors." A demurrer was filed to this petition, and, after submission and argument, was sustained; the decision being that the petition did not state a cause of action, as more than two years had elapsed from the accruing of said cause to the beginning of the action. The purpose of said § 1429, commonly known as Lord Campbell's Act, was to prescribe limitations and a remedy for

a cause of action which did not exist at common law, for at common law the cause of action died with the death of the claimant. This statute was enacted to provide a remedy and to entitle representatives of the deceased person to begin a cause of action because of wrongful death of the deceased, and that it should be commenced by an administrator, duly qualifying and acting; so that said injured relative might obtain a pecuniary benefit resulting from said wrongful injury, or death.

It is also provided in said act that every such action shall be commenced within two years after the death of said person. This provision is contrary to the general statutory provision with respect to limitations, for that section of said general statute provides that when the party wanted places himself without the jurisdiction of the court, absconds, or stays in hiding so that service cannot be had upon him, then in that case the statute shall cease to operate; while, in the case at bar, the section of the statute under which this action is brought has its provisions checked and hemmed in as hereinbefore stated, and every action brought under it must be commenced within two years. Then the proposition is: As this action was not commenced for more than two years, does the petition state a cause of action? We are met with the proposition that we should construe the Statute of Limitations as provided for in § 1429, together with § 7577, Rev. Stat. 1913, and the toll for the time which defendant stayed away from the jurisdiction of the court should be allowed, and, if this was done, then the petition states a cause of action. We are deciding the proposition and construing § 1429 for the purpose of ascertaining whether the limitations provided in said section should be construed so as to give it effect, or whether it should be construed so as to modify and limit its provisions so as to bring it under the general Statute of Limitations in § 7577. While it is true that § 7577 provides

that the Statute of Limitations will not run during the time the defendant is absent from the state, absconds, or keeps himself from the jurisdiction of the court, it is also true that in square contradiction to this, and against it, is the section on the Statute of Limitations provided in § 1429. The question is: Which shall prevail? This is an important case, because it contains a proposition that is decisive of this question and determines the issue.

It is our opinion that as § 1429 is a mere paragraph that comprises an

Limitation of actions—effect of general limitation statute.

entire act beginning with 1420, and was made with reference to this principal act and independent of any other, it was made to control and provide absolutely a time within which an action shall be commenced. If it were not so, then it would have been very easy for the legislature to have the same saving clause that is found under § 7577, but inasmuch as it does not contain any exception, or any such provision, and no saving clause whatever, it is evident that it means just what it says; and, if it does, then the demurrer in this case was rightly sustained, and the action properly dismissed. If there was any saving clause provided for in this § 1429, why was it not placed there? If it intended to provide a condition which modifies and stops the Statute of Limitations, then why did it not say so? The answer is: It was never intended to be any other way than the way that we find it. This statute is not alone peculiar to Nebraska in this provision, but is a provision that has been enacted in many other states of the Union. Lord Campbell's Act is in force today, and has been for many years in the states of New York, Arkansas, and Kansas, and we have interpretations given by the supreme courts of each of these states with reference to the particular matter in hand. See *Kavanagh v. Folsom* (C. C.) 181 Fed. 401. Also it may be stated that both by prin-

ciple and analogy the legislature meant to put in this statute the limitation which it did, and which has been interpreted as above stated by the courts. Whenever the legislature makes a law to meet a situation not met by the common law, the legislature has the inherent right to provide whatever it may deem proper and essential to meet a particular situation not heretofore met. For instance, the Nebraska legislature has enacted statutes fixing the limitation thereto different from the general Statutes of Limitations. For instance, the common law did not provide a remedy for one receiving an injury while traveling over a county bridge, and to meet this demand the legislature passed an act, § 2995, Rev. Stat. 1913 (Laws 1889, chap. 7), for the purpose of making counties liable for damage to person or property. Section 2995 reads in part: "Provided, however, that such action is commenced within thirty days of the time of the injury or damage occurring."

Then here in this statute is another statute with reference to the county's liability in an action growing out of defective bridges that makes a Statute of Limitations peculiar to and especially provides for the very act itself. Then when the legislature passed Lord Campbell's Act, and gave it a Statute of Limitations peculiar to itself, it simply was doing what it had heretofore done, and so has been, and is, recognized as peculiar to the inherent power of the legislature itself. This act, with this special provision of the statute of thirty days' limitation, has been held by this court to be constitutional. If then it is constitutional to enact a Statute of Limitation limiting liability to within thirty days, why is it not constitutional and proper to pass a statute limiting an act to twenty-four months? The same authority, or body of lawmakers that enacted § 2995, enacted § 1429, and each law-making body operated and worked and passed this law under the same

Constitution, and if, as has been held, it was constitutional to do the one, under the same, or similar circumstances, it would be constitutional to do the other under a like situation. In the case of *South Omaha v. McGavock*, 72 Neb. 382, 100 N. W. 805, it is held: "Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations."

Now by analogy this case is absolutely pat, and on the proposition that the legislature in making a special act has a right to attach to this provision a Statute of Limitations that will provide for a different time than the time provided for in the general statute, and this court has sustained that proposition and the constitutionality of such law. Then the plaintiff in this action, it follows, is bound in seeking his remedy to bring himself strictly within the limitations provided in Lord Campbell's Act. See *Swaney v. Gage County*, 64 Neb. 627, 90 N. W. 542. In the case of *Ellis v. Kearney*, 80 Neb. 51, 113 N. W. 803, we have by analogy a case absolutely in point. We have in that case the situation where plaintiff was physically incapacitated to perform a duty enjoined by law; that is, in bringing the action within a certain time. This court held that the law does not excuse nonperformance, and that such a situation is not available to extend the time, or offer an opportunity to fix statutory liability upon another, and in support of this proposition cites *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830. In that case, which by analogy is the precise situation we have here, we find this court following the same and approving it. In this case (*Ellis v. Kearney*, supra) the court says:

"The plaintiff asks this court to hold that the oral notice would suffice. To do so would be to nullify the statute. It is not the province of the courts to make the law, or read into it exceptions not intended by the lawmakers."

Where is there a scintilla of an excuse to read something into Lord Campbell's Act that was not intended by the lawmakers? Nor is there, directly or indirectly, any intention to do the thing which they did not do. To do so would be to nullify the statute and place a construction and meaning that was never intended by the legislature. In *Madden v. Lancaster County*, 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188, we have a case that went to the Federal court on the question of the Statute of Limitations in the special statute in the Special Road Act, which provided that an action must be "brought within thirty days after the injury." The court held: It "does not violate the Constitution of that state, either by granting to counties a special immunity, or by amending the general Statute of Limitations without containing or repealing the section amended, since, before the passage of said act, counties were not liable to suit, and the act imposed a new liability, which might be limited in any way the legislature saw fit."

That is the precise situation in the case at bar. Before the passage of the Lord Campbell Act, there was no provision for damages growing out of injury by death, and this act meets that situation. Therefore the legislature had the right to limit it in any way it saw fit. It always follows that where a statute creates a new right of action, as Lord Campbell's Act does, a provision and limitation of time within which an action must be brought, an objection cannot be made that the time is unreasonably short and cannot be entertained. Thus in said action of *Madden v. Lancaster County*, supra, we find a very learned discussion and the statute upheld, in an opinion handed down by Judge Sanborn.

It has also been held by this court, in the case of *Woods v. Colfax County*, 10 Neb. 552, 7 N. W. 269, that a county is not liable for an action, or negligence of action by its officers, unless made so by legislative enactment, and sustain the action under the act of 1889 making counties liable. Then the proposition looks, both from the standpoint of principle and analogy, that these decisions settle the question at bar, and it cannot be denied that the legislature has the right to fix any time it pleases in the matter of limitations to any special act passed by it.

In the case of *Anthony v. St. Louis, I. M. & S. R. Co.* 108 Ark. 219, 157 S. W. 394, it was held: "In an action against a railway company for damages for the wrongful killing of plaintiff's father, when the complaint shows on its face that the action was not brought within the two years required by the statute, . . . the defendant may avail himself of the objection by demurrer."

Now this is a case in which the Statute of Limitations requires the action to be brought within two years, and if in that case, under a statute similar to our own, a defendant may avail himself of the objection by a demurrer, why can he not do it in this case? In the Arkansas case the court also held: "In actions for wrongful death, such actions shall be commenced within two years after the death of such person, since the two statutes relate to different subjects, and there is no necessary repugnance between their provisions."

Then we have a case here that is the same, or similar, with respect to statutes of limitations, that we find in the case at bar, wherein, in the state of Arkansas, we have a general Statute of Limitations providing for a longer and different time than under Lord Campbell's Act. We find the Arkansas supreme court upheld absolutely the limitation of two years as provided for in Lord Campbell's Act.

In the case of *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642, we have the same situation, the same question that we have in the case at bar, and that is: What are the limitations of actions growing out of death by wrongful act? In § 422 of the Code of Civil Procedure (Kan. Gen. Stat. 1901, § 4871), we have what is known as the Lord Campbell's Act, providing for damage growing out of death by wrongful act which did not exist at common law. Therefore it is interesting to note what the Kansas supreme court holds upon that point. This Kansas court says: "The limitation of two years prescribed in the act in which such action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action, as provided in § 23 of the Code."

Thus these courts hold, wherever Lord Campbell's Act has been interpreted, that the right conferred in such statute is a conditional one, and that plaintiffs in such actions must bring themselves clearly within the prescribed conditions necessary to conferring the right of action. So the plaintiff in this case, in seeking remedy under the provisions of Lord Campbell's Act, had to bring himself clearly within the prescribed conditions necessary to conferring the right of action. In support of these views, see *Bretthauer v. Jacobson*, 79 N. J. L. 223, 75 Atl. 560; *Anthony v. St. Louis, I. M. & S. R. Co.* supra; and *Beebe v. Doster*, 36 Kan. 666, 14 Pac. 150. Therefore both from fact and analogy, and from the plain provisions of Lord Campbell's Act, we conclude that as the plaintiff, John Butera, was killed on November 15, 1911, and this action was instituted on December 5, 1913, that more than two years have elapsed from the death to the filing of the petition, and the issuance of the summons.

Lord Campbell's Act is denominated by the New Jersey supreme court as the "death act," and, con-

tinuing, that court says: "But this provision of the death act is not an ordinary Statute of Limitations. It operates, not only as a limitation of the remedy given the plaintiff, but also as a limitation of the liability which it creates against defendants."

See *Bretthauer v. Jacobson*, 79 N. J. L. 225, 75 Atl. 562.

This is the real tenor of this act, and this interpretation is put upon it by all the courts speaking with respect to the provisions of the act. New York, Kansas, and Arkansas, without qualification, have held, in cases precisely like the one at bar, that the Statute of Limitations, here involved, fixed not only the limitation of the liability, but the time in which cases may be brought, and by analogy, in a state having a special limitation, this court has held the same thing.

Then, in view of this discussion herein submitted, we conclude that § 1429, Rev. Stat. 1913, creates a right of action for damages by death by wrongful act, which did not exist at common law. The enactment of Lord Campbell's Act provides a rule

—death—time. for the Statute of Limitations which must operate as a condition precedent to a right of action; the time the statute fixes is two years, and the provision is absolute; as it has no saving clause, it must be strictly adhered to.

The finding of the trial judge is in accordance with law and must be affirmed.

Rose, J., took no part in the decision.

**Sedgwick, J., dissenting:**

Ancient rules for construing statutes were more or less arbitrary, but formerly they were pretty strictly followed by some courts. In some cases those rules resulted in giving to statutes a meaning that clearly the lawmakers never intended. In modern times the courts, at least some of them, are more careful to ascertain the real intention and meaning of legislation. If,

from the purpose of the statute, that is the defect in the law that it was proposed to remedy, in view of existing conditions that are known by everybody, and the form and language of the statute itself, the real intention and meaning of the legislature can be ascertained, that intention and meaning should control the courts.

Under the present decision, a defendant who has laid himself liable for damages under the statute construed can defeat the claim for damages and relieve himself from all liability by absconding or concealing himself until the limitation named in the statute has expired. No other Statute of Limitations is construed to permit this result. Did the legislature intend such a result? They reduced the limitation for ordinary actions for which there is no specific limitation provided in the general Code, from four to two years, which is a longer period than is provided for various actions particularly specified. They gave the injured party a new right of action, a remedy which he did not have before, and we all agree that he must accept the limitation which the legislature saw fit to place upon that remedy. Did the lawmakers intend to make that remedy depend upon a contingency that might be under the control of the very party against whom the remedy is given? There is a general provision of the Code: "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed." Rev. Stat. 1913, § 7577.

The act we are construing has a special limitation, which is in positive language, "Every such action shall be commenced within two years after the death of such person" (Rev. Stat. 1913, § 1429), and will not admit of an exception or qualification. This is an established rule of construction and has been



frequently applied in this state, and in fact the plaintiff concedes in his brief that this rule applies in this case; but the majority opinion is entirely devoted to its discussion. Conceding then that such actions "must be commenced within two years," what shall we say as to the intention of the legislature as to when such action shall be deemed to be commenced? There is a general provision of the Code that "an action shall be deemed commenced, within the meaning of this chapter, as to the defendant, at the date of the summons which is served upon him." Rev. Stat. 1913, § 7580.

This is in derogation of the common law. The general rule is that an action is deemed commenced, within the meaning of the limitation statutes, when the pleadings are filed in court and summons issued, and a good-faith attempt to get service is made. 1 Cyc. 747; 1 R. C. L. p. 338, § 20. In enacting the statute we are construing, did the legislature intend that this special statute should apply to the new act, or was the act made complete in itself as to this as well as the other special provisions of the Code, relying upon the common-law rule? This is the question discussed and relied upon by the plaintiff in his brief, but ignored in the majority opinion, which discusses at large, and with some repetition, the point which is conceded. The statute expressly names and fixes the period of limitation, and, although so much depends upon the meaning which it was intended to give to the words, "shall be commenced," there is no express explanation or provision upon that point in the act. The defendant properly urged this fact as indicating that it was intended that the special provision of the Code as to when an action is deemed to be commenced shall apply to this act. But this suggestion is not, as it seems to me, sufficient to determine the matter. Section 7580 expressly limits its application to the actions specified in the chapter of which it is a part, "An action shall be deemed

commenced within the meaning of this chapter," thereby expressly limiting its application to statutes under which the limitation is not allowed to run while the defendant conceals himself and cannot be served. Since, in this act, the two years' limitation is absolute whether service can or cannot be made, it begins to run when the action is commenced. As to when an action should be deemed commenced, a peculiar provision, not one generally recognized, expressly made applicable to a particular chapter of the Code, would not necessarily be thought to apply to a separate and distinct act which disregarded other important provisions of the general Code. If the thought had occurred to the lawmakers that the courts might technically apply some ancient rules of construction and hold that one special provision of the general Code had been rejected and another retained, and so their remedy would be rendered nugatory whenever the defendant could evade service, they would have declared more definitely the intention of the statute. When we consider the defect in the law which this statute was intended to remedy, the conditions then existing which are well known by all, and the statutes then existing, we must conclude from a consideration of this statute itself, that the intention of the legislature was that under this statute an action is deemed commenced as the common law declares. In this case the plaintiff acted in good faith and commenced an action before the two years expired, had summons issued, and had a summons in garnishment also issued. The garnishment summons was properly served, and the garnishee appeared specially and made some objections to the form of the petition, and a new garnishment summons was issued, so that, if Lord Campbell's Act is complete in itself and an action is deemed to be commenced as at common law and without reference to the special provisions of the Code, the action was in time.

The legislature never intended that a just cause of action could be defeated as this action is now defeated.

**NOTE.**

The applicability to the limitation prescribed by a statute which creates

a cause of action for death, of exceptions, express or implied, which attach to general Statutes of Limitation, is the subject of the annotation following *KERLEY v. HOEHMAN*, post, 145, the exception as to nonresidence being specifically treated in subdivision IV. of that note.

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W. W. KERLEY, Plff. in Err.,  
v.  
ARTHUR P. HOEHMAN et al.

*Oklahoma Supreme Court — July 25, 1916.*

(— Okla. —, 188 Pac. 980.)

**Limitation of action — action for death — time as condition — effect of general statute.**

1. The time fixed for the commencement of an action unknown to the common law, by statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitation. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition to the liability and of the action which it permits.

[See note on this question beginning on page 145.]

**Death — concealment of cause — extension of time for action.**

2. Section 5281, Rev. Laws 1910 (§ 4313, Stat. 1893), creates a right of action for damages for death by wrongful act which did not exist at common law, and which does not obtain in the absence of such act. The

limitation of two years prescribed in the act, in which such action must be commenced, is a condition imposed upon the exercise of the right of action granted, and this time is not extended by reason of the fraudulent concealment of the cause of death.

[See 8 R. C. L. 801, 805.]

Headnotes by EDWARDS, C.

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**ERROR** to the District Court for Caddo County (Linn, J.) to review a judgment in favor of plaintiffs in an action brought to recover damages for the death of their child, alleged to have been caused by defendant's wrongful act. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. A. J. Morris, for plaintiff in error:

The limitation of time in which the action must be commenced is an indispensable condition of the liability and of the action which it permits; and if the action is not commenced within the time specified by statute, the right of action ceases to exist; and no excuse, no matter what it may be, for the delay in bringing the action, will avail.

Tiffany, Death by Wrongful Act,

§ 122, p. 263; *Hanna v. Jeffersonville R. Co.* 82 Ind. 118; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 280, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; *Kennedy v. Burrier*, 36 Mo. 128; *Partee v. St. Louis & S. F. R. Co.* 51 L.R.A. (N.S.) 721, 123 C. C. A. 292, 204 Fed. 970; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Louisville & N. R. Co. v. Chamblee*, 171 Ala. 188, 54 So. 681, Ann. Cas. 1913A, 977; 8 Am. & Eng. Enc. Law, 2d ed. 875; *Lambert v. Ensign Mfg. Co.* 42

W. Va. 813, 26 S. E. 431; *Taylor v. Cranberry Iron & Coal Co.* 94 N. C. 525; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280; *Williams v. Quebec S. S. Co.* 126 Fed. 591; *Western Coal & Min. Co. v. Hise*, 132 C. C. A. 482, 216 Fed. 338; *Anthony v. St. Louis, I. M. & S. R. Co.* 108 Ark. 219, 157 S. W. 394; *Gulledge v. Seaboard Air Line R. Co.* 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 164, 55 Atl. 891.

Messrs. Bond, Melton, & Melton, for defendants in error:

The cause of action does not accrue until the appointment of the executor or administrator.

13 Cyc. 340; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563; *Barnes v. Brooklyn*, 22 App. Div. 520, 48 N. Y. Supp. 36.

The right of action does not accrue until the parties entitled to bring the action have obtained knowledge that such right exists.

*First Massachusetts Turnp. Co. v. Field*, 3 Mass. 201, 3 Am. Dec. 124; *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636; *Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; *State ex rel. Barringer v. Hawkins*, 103 Mo. App. 251, 77 S. W. 98; *McMullen v. Winfield Bldg. & L. Asso.* 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892; *Waugh v. Guthrie Gaslight Fuel & Improv. Co.* 37 Okla. 239, L.R.A. 1917B, 1253, 131 Pac. 174; *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* — Kan. —, 70 Pac. 933.

Edwards, C., filed the following opinion:

For convenience the parties will be referred to as plaintiffs and defendant, according to their position in the lower court.

The record discloses: That the plaintiffs are husband and wife and parents of Robert Hoehman, deceased. That defendant is a practising physician and was the attending physician at the birth of said Robert Hoehman, a normal, healthy child, born July 6, 1911. That a few days after the birth of said Robert Hoehman the defendant, as a physician, had prescribed for one Hoops, a cousin of the plaintiff Arthur P. Hoehman. The said Hoops was a young man, about grown, who lived near and on the

same farm as the plaintiffs. That on the 20th day of July, the plaintiff Arthur P. Hoehman went to the office of the defendant, paid him for his services as attending physician at the birth of said Robert Hoehman, and the defendant then inquired about the boy, meaning the cousin, Hoops, the inquiry, however, being understood by the plaintiff Hoehman as referring to his infant son, Robert Hoehman, and the plaintiff Arthur P. Hoehman thereupon answered in substance that the boy was suffering from stomach trouble, and asked the defendant to give him something for the trouble, and thereupon the defendant wrote and gave to the plaintiff Arthur P. Hoehman a prescription, believing that the same was intended for the cousin, Hoops. The plaintiff had the prescription filled at a drug store, returned home, and some time in the afternoon was about to administer a dose of the medicine to the infant; but, the medicine appearing to him to be laudanum, before administering same he called up the defendant by telephone and inquired if it would be all right to give the medicine, as it looked like laudanum. The defendant answered, in substance, that if the prescription was filled as given by him it would be all right. The plaintiff then gave the infant a dose of the medicine, and later, observing that the child appeared to be turning purple in color and was very ill, again called up the defendant and requested his presence. The defendant went to the farm occupied by the plaintiffs, but, on arriving there, first went to the house of Hoops, still believing that he was the person for whom he had been called upon to prescribe. There, finding Hoops apparently well, he inquired who had called him, and was then directed to the house of the plaintiffs. Upon reaching the house of plaintiffs, he found the infant child very ill from the effects of the medicine prescribed, and from the effects of which it died during the night following. There

is some controversy as to exactly what occurred when the defendant arrived at the house and during his attendance there; but it is uncontroverted that he poured out the medicine which had been prescribed and used the bottle as a container or measure for other medicines then administered by him. On the following morning, the defendant went to the druggist who had filled the prescription and substituted another prescription for the one which he had given plaintiff the day before, and the former prescription was withdrawn from the files but retained at the drug store. After the death of the child, the plaintiff Arthur P. Hoehman called at the drug store for a copy of the prescription, and was given a copy of the one which had been substituted by the defendant. This substitute prescription plaintiff had filled and later analyzed, and from the analysis believed that the prescription was not, within itself, dangerous, but had been incorrectly compounded. The evidence is somewhat controverted, yet it appears that it was some eighteen months later before he learned the real facts as to the change in prescription. It was considerably more than two years from the death of the child until this suit was instituted.

The amended petition sets out the circumstances substantially as stated, and alleges that no administrator has been appointed, and sets out the concealment of the cause of the death as a reason for bringing the suit after two years. Damages in the sum of \$20,000 are prayed. A demurrer was filed by the defendant, overruled, and exceptions saved, and an answer by way of general denial then filed. The evidence supports the allegations of the petition as to the manner and cause of death. It is also admitted by the defendant that the death of the infant child was caused from administering the medicine as prescribed. Judgment was for the plaintiff in the sum of \$1,000. Motion for a new trial was filed, overruled, and exceptions

saved, and in due time the defendant prosecutes his appeal to this court.

The question to determine, then, is whether or not this action, being an action for wrongful death, instituted more than two years after the cause of action accrued, can be maintained. The action is based upon § 5281 of the Revised Laws of 1910, which is as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Under this section of the law the defendant contends that the limitation, being contained in that section of the law which gives the right of action, is not the usual statute of limitations which operates against the remedy, but is a limitation upon the very right itself, and that no excuse for delay in commencement of the action for more than two years will avail.

The plaintiff, on the contrary, contends that the right of action is given by § 7, art. 23, of the Constitution, which reads: "The right of action to recover damages for injuries resulting in death shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation," and that the sentence in § 5281, supra, which provides that the action must be commenced within two years, is nothing more than a statutory limitation, and is no part of the right of action, and such fixing of the time can only be construed as a statute of limitation.

From an examination of the Constitution and statutes, we believe it is clear that the Constitution does

not create the right of action, but merely continues the right which had, before the adoption of the Constitution, been created by statute, and was, at the time of the adoption of the Constitution, a part of the statute law.

Upon the question of whether or not the limitation expressed in this section of the statute is a limitation upon the right to maintain the action, as contended by defendant, or

is the usual statutory limitation, we find the authorities to uniformly hold that it is a limitation upon the very right itself. The general rule upon this subject is expressed as follows:

"Inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself." *Tiffany on Death by Wrongful Act*, 2d ed. § 121.

"It seems that provisions in the statutes authorizing actions for wrongful death which limit the time within which the actions shall be brought are not properly statutes of limitation as that term is generally used. They are qualifications restricting the rights granted by the statutes, and must be strictly complied with. As the statutes confer a new right of action, no explanations as to why the suit was not brought within the specified time will avail unless the statutes themselves provide a saving clause." 6 Am. & Eng. Enc. Law, 2d ed. 875.

"Where the statute, giving a right of action for death by wrongful act, limits the time within which such action must be brought to a certain designated period, and contains no saving clause, an action sought to be brought after the expiration of such period, is barred, and no excuse will be recognized for such delay." 13 Cyc. 339.

This statute was adopted from Kansas, and has several times been before the supreme court of that state. In the case of *Rodman v.*

*Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642, the court holds: "Section 422 of the Civil Code . . . creates a right of action for damages for death by wrongful act which did not exist at common law, and which does not obtain in the absence of such act. The limitation of two years prescribed in the act in which such action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action, as provided in § 23 of the Code."

The courts of other states having a statute in substance the same as the section under consideration, except generally for a difference in the time within which the suit is to be brought, likewise hold that the limitation is upon the right to maintain the action, and that no excuse for not bringing the action within the time fixed by the statute will avail.

In *Louisville & N. R. Co. v. Chamblee*, 171 Ala. 188, 54 So. 681, Ann. Cas. 1913A, 977, it is said: "This period of two years is of the essence of the newly, by the statute, conferred right of action, and the plaintiff has the burden of affirmatively showing that his action was commenced within the period provided. It is not a limitation against the exercise of the remedy only."

In *Taylor v. Cranberry Iron & Coal Co.* 94 N. C. 525, the court holds: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

In *Lambert v. Ensing Mfg. Co.* 42

W. Va. 813, 26 S. E. 431, the court says: "But here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation."

To the same general effect are the following cases: *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280; *Williams v. Quebec S. S. Co.* (D. C.) 126 Fed. 591; *Western Coal & Min. Co. v. Hise*, 132 C. C. A. 482, 216 Fed. 338; *Anthony v. St. Louis, I. M. & S. R. Co.* 108 Ark. 219, 157 S. W. 394; *Gulledge v. Seaboard Air Line R. Co.* 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 164, 55 Atl. 891; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

In *Partee v. St. Louis & S. F. R. Co.* 51 L.R.A.(N.S.) 721, 123 C. C. A. 292, 204 Fed. 970, a case appealed to the circuit court of appeals from the eastern district of Oklahoma, involving a construction of § 5945 of the Compiled Laws of 1909, being the same as § 5281 of the Revised Laws of 1910, except for omitting the limitation upon the amount of the recovery as contained in the Laws of 1909, the circuit court of appeals construes this particular section, cites many authorities in

support thereof, and holds (syllabus):

"The time fixed for the commencement of an action unknown to the common law, by act of Congress or statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitations.

Limitation of action—action for death—time as condition—effect of general statute.

"A special statute upon a particular subject and a general law must stand together, the one as the law of the specific subject and the other as the general rule, unless it clearly appears that it was the intention of the legislature to modify or repeal one or the other."

The cause of action accrues at the death for which the recovery is sought. *Tiffany*, Death by Wrongful Act, § 122, note; *Kennedy v. Burrier*, 36 Mo. 128. There would seem, then, to be no question but that the limitation imposed by § 5281, supra, is absolute; that the right of action is tendered on the condition that suit be commenced within two years; that no excuse for failure to bring the suit within that time will avail.

It follows that the action must be reversed and remanded, with directions to the lower court to sustain the demurrer to the petition and dismiss the action.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied June 19, 1917. Second petition for rehearing denied September 23, 1919.

## ANNOTATION.

**Applicability to limitation prescribed by statute which creates cause of action for death of exceptions, express or implied, which attach to general statute of limitations.**

- I. Introductory, 146.
- II. Appointment of representative, 146.
- III. New action after prior failure, 148.
- IV. Nonresidence:
  - a. Infancy, 150.
  - 8 A.L.R.—10.

IV.—continued.

- b. Concealment of right of action, 151.
- c. Under New York statute, 151.
- d. Under North Carolina statute, 153.
- e. Under Oklahoma statute, 154.

### *I. Introductory.*

This note deals with the question whether a limitation period specifically prescribed in a statute creating a right of action for death is affected by the express or implied exceptions to the running of the general Statute of Limitations. Those cases are not included which involve a statute in which no period of limitation is provided, except where the statute which is the basis of the action is considered as impliedly limited by a period prescribed in another similar statute. No consideration is taken of cases wherein it appears that the period of limitation for the bringing of an action for death by wrongful act has been included in the general Statute of Limitations.

### *II. Appointment of representative.*

It has been held in some jurisdictions, in accordance with the general rule, applicable to the Statute of Limitations, that a limitation period prescribed in a statute creating a cause of action for wrongful death, etc., does not begin to run until a representative has been appointed for the decedent. *American R. Co. v. Coronas* (1916) L.R.A.1916E, 1095, 144 C. C. A. 599, 230 Fed. 545, 12 N. C. C. A. 49; *Bird v. Ft. Worth & R. G. R. Co.* (1918) — Tex. —, 207 S. W. 518.

*American R. Co. v. Coronas* (Fed.) supra, was an action brought by an administrator to recover for the death of his intestate from injuries incurred while employed by the defendant. The death occurred in December, 1908, letters of administration were granted to the plaintiff in May, 1914, and this action was commenced in December of the same year. The Federal Employers' Liability Act (35 Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208), under which the suit was brought, provided that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," and the question arose whether the cause of action was to be considered as accruing at the death of the intestate, or at the time of the appointment of an ad-

ministrator. The court called attention to the fact that ordinarily a statute of limitations was considered as running from the appointment of an administrator where the cause of action arose after death and no one else was capable of suing, and said: "In view of the well-recognized rule heretofore pointed out as to when a right of action accrues,—which Congress must have had in mind when enacting the present law,—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

In *Bird v. Ft. Worth & R. G. R. Co.* (Tex.) supra, it appeared that the plaintiff's husband was killed on October 11, 1911, that suit was instituted March 21, 1913, and that an amended petition was filed thereto on April 17, 1915, after the plaintiff's appointment as administratrix on June 3, 1914. The court held that, under the Federal Employers' Liability Act, the basis of this action, the cause of action did "not accrue until the appointment of a personal representative of the deceased," and that consequently the suit was brought within the limitation period of two years, as prescribed by that act.

Some jurisdictions hold that when a statute prescribes a period of limitation for the commencement of an action for death by wrongful act, this period begins to run at the death of the intestate, and not on the appointment of his representative, although the rule governing the running of the general Statute of Limitations may be otherwise. *Radezky v. Sargent & Co.* (1904) 77 Conn. 110, 58 Atl. 709. Compare *Andrews v. Hartford & N. H. R. Co.* (1867) 34 Conn. 57; *Lake Shore*

& *M. S. R. Co. v. Dylinski* (1896) 67 Ill. App. 114. See also *Staunton Coal Co. v. Fischer* (1905) 119 Ill. App. 284; *Hanna v. Jeffersonville R. Co.* (1869) 32 Ind. 113; *Rugland v. Anderson* (1883) 30 Minn. 386, 15 N. W. 676; *George v. Chicago, M. & St. P. R. Co.* (1881) 51 Wis. 603, 8 N. W. 874.

In *Andrews v. Hartford & N. H. R. Co.* (1867) 34 Conn. 57, an administrator brought an action to recover for the death of his intestate, due to the alleged negligence of the defendants. The statute which was the basis of the right of the action prescribed a period of "one year after the cause of action arises" as the time within which such a suit must be brought. The present action was brought within one year from the appointment of the administrator, but not one year after the death of his intestate. The court held that the action would have been barred if there had been an executor, but applied the general exception to the Statute of Limitation, "that a cause of action accruing to an administrator after the death of the intestate is not complete and does not arise and exist so that the Statute of Limitations can begin to run upon it until an administrator is appointed who can bring suit," and decided consequently that the action was not barred. The cause of action, it was pointed out, could not "arise and exist in favor of an administrator until he comes into existence as such."

But in *Radezky v. Sargent & Co.* (1904) 77 Conn. 110, 28 Atl. 709, an action was brought to recover for the death of the plaintiff's intestate, due, it was alleged, to the defendant's negligence. The action was brought within a year of the appointment of the administrator, but about thirteen months after the death of his intestate. It was held that the action based on the statute must be commenced within one year from the time of the death of the person on whose account it is sought to recover, and that the limitation period could not be measured from the appointment of an administrator; the holding being said to be a result of the legislative action taken following the decision in the

case of *Andrews v. Hartford & N. H. R. Co.* (Conn.) supra.

In *Lake Shore & M. S. R. Co. v. Dylinski* (1896) 67 Ill. App. 114, an action brought for the recovery of damages for the death of plaintiff's intestate, caused by wrongful act, the court decided that the statute providing for the extension of the period of limitation where certain actions were brought by the representative of a decedent was not applicable, since "the deceased never had any cause of action."

In *Hanna v. Jeffersonville R. Co.* (1869) 32 Ind. 113, an administrator sought to recover, under the statute, for the death of his intestate, which was due to the carelessness of the servants of the defendant. The plaintiff's intestate died in April, 1864, administration was granted in August, 1867, and suit was commenced February, 1868. The statute under which this action was brought prescribed a period of two years within which the suit must be commenced. The court held that the specified period began to run from the death of the decedent, and not from the appointment of an administrator, and it was pointed out that to adopt the latter view would defeat the purpose of the imposition of the limitation period, viz., the requirement that suit be brought in such cases while the constantly changing staff of corporation servants might be in a position to discover the facts thereof; for the appointment of an administrator might be postponed indefinitely.

In *Rugland v. Anderson* (1883) 30 Minn. 386, 15 N. W. 676, the defendant, on account of his alleged wrongful acts, was sought to be charged with liability for the death of the plaintiff's intestate, who died as the result of injuries on August 5, 1880. The plaintiff was appointed administrator on September 18, 1882, and the action was instituted August 30, 1882. It was provided in the statute on which the suit was based that the action must be commenced within two years after the act or omission causing death, and the court construed this strictly, holding that the time be-



tween the death of the intestate and the appointment of his administrator must be included in the computation of the period of limitation.

In *George v. Chicago, M. & St. P. R. Co.* (1881) 51 Wlu. 603, 8 N. W. 374, an action brought to recover for the death of the plaintiff's intestate, it appeared that the plaintiff had not been appointed as administrator until more than four years after the death of his intestate, and the action was held to be barred by the provision in the statute creating the right of action, which limited the time for bringing suit thereon to two years from the death of the decedent.

### *III. New action after prior failure.*

Where an action to recover for the death of another, based on a statute creating the cause of action, is commenced within the period prescribed in the statute therefor, and fails otherwise than on the merits, it has been held that the rule in such a case, tolling the general Statute of Limitations, applies, and that suit may be instituted anew within a specified time, though the limitation period prescribed for the bringing of the action has expired. *Wall v. Chesapeake & O. R. Co.* (1914) 189 Ill. App. 234 (construing Ohio statute); *Meisse v. McCoy* (1867) 17 Ohio St. 225.

In *Meisse v. McCoy* (Ohio) *supra*, an action seeking compensation for causing the death of the plaintiff's intestate, it appeared that the plaintiff, as administrator, had brought an action on the same ground within two years of the death of his intestate, and failing therein, otherwise than on the merits, had instituted the present suit within a year thereafter, but more than two years after the accident complained of. The statute creating a cause of action for death by wrongful act, etc., provided that suit thereon shall be commenced within two years after the death of the person for whose loss compensation is sought; but the court construed this provision together with the section of the Code saving a right of action to those commencing suit within a statutory period, and bringing a new action within one year of the failure

thereof, and held in consequence that the plaintiff was not barred in the present case.

In *Wall v. Chesapeake & O. R. Co.* (Ill.) *supra*, it was sought to recover for the death of the plaintiff's intestate, alleged to be due to the negligence of the defendant. The action was brought under the Ohio statute creating a right of action in such a case, the accident having occurred in that state, and it was contended by the defendant that the period of two years, prescribed by such statute for the bringing of the action, was not subject to the exception made in that state to the running of the general Statute of Limitations, whereby one bringing an action within a statutory period, and meeting with failure therein, otherwise than upon the merits, may bring a new action within one year thereafter. The court followed the Ohio case of *Meisse v. McCoy*, *supra*.

Where a statute creating a cause of action for death prescribes a limitation period for the institution of such an action, a suit so commenced, and failing otherwise than on the merits, in some jurisdictions, may not be brought anew beyond the statutory period, though the general Statute of Limitations would be tolled in such circumstances. *Western Coal & Min. Co. v. Hise* (1914) 132 C. C. A. 482, 216 Fed. 338, writ of certiorari denied in (1916) 241 U. S. 666, 40 L. ed. 1228, 36 Sup. Ct. Rep. 551 (construing Arkansas statute); *Lake Shore & M. S. R. Co. v. Dylinski* (1896) 67 Ill. App. 114; *Rodman v. Missouri P. R. Co.* (1902) 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642. Compare *Swift & Co. v. Hoblawetz* (1900) 10 Kan. App. 48, 61 Pac. 969; *Cavanagh v. Ocean Steam Nav. Co.* (1890) 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540 (construing act of Parliament).

In *Western Coal & Min. Co. v. Hise* (Fed.) *supra*, an action brought by a widow and child to recover for the death of the husband and father, by reason of the negligence of the defendants, it appeared that a prior suit on the same cause of action had been instituted within the period prescribed

by the statute, and later terminated by a voluntary nonsuit, the present action having been brought more than two years after the death of the husband, but within six months of the voluntary nonsuit. A statute of the state (Arkansas) provided that actions brought within the period of limitations might be recommenced within one year from the time of any "nonsuit suffered or judgment arrested or reversed." The statute creating the cause of action for wrongful death, on which the claim of the plaintiff was founded, provided that such actions should "be commenced within two years after the death of such person." It was held that this statute created a new liability, and that the provision as to the time within which an action might be brought was "not a statute of limitations," but "an indispensable condition to the liability." Consequently the exception made by the statute concerning limitations did not apply in this case.

*Lake Shore & M. S. R. Co. v. Dy-linski* (1896) 67 Ill. App. 114, was an action brought to recover for the death of the plaintiff's intestate, as a result of an accident on the defendant's road. The statute creating a right of action for death caused by wrongful act provided that any suit based thereon must be commenced within two years after the death of the decedent. The court held that this "time was not extended by a nonsuit in a previous action." The statute providing for the extension of the period of limitation, in event of nonsuit, did not include actions brought under the statute providing for recovery in case of death by wrongful act.

In *Rodman v. Missouri P. R. Co.* (1902) 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642, it appeared that an administratrix, who sought in this case to recover for the death of her intestate, due to the alleged wrongful act of the defendant, as the widow of the decedent, had instituted a prior suit, based on the same cause of action, and had removed the same from the state court to the United States circuit court, wherein it was dismissed by the plaintiff "without prejudice to

the bringing of a future action." The statute under which both actions were brought provided that "action must be commenced within two years," and the former suit was so brought; the dismissal from the circuit court, however, occurred more than two years after the death of the decedent, and the present action was instituted a few weeks later. The plaintiff, however, relied on the section of the Code which provided that those commencing an action in due time, and failing therein, otherwise than on the merits, might begin a new action within one year thereafter, if the statutory period had expired; but the court held that the period of limitation here imposed was part of the right of action created by the statute, and was not subject to the exception to the general Statute of Limitation specified in the Code.

In *Cavanagh v. Ocean Steam Nav. Co.* (1890) 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540, an action to recover for the death of the plaintiff's intestate, it appeared that a former action on the same cause had been brought within one year of the death of the decedent, and, having been dismissed for want of jurisdiction, was followed by the present suit, instituted within a year after the said dismissal, in accordance with § 405 of the Code, which saves a cause of action from the bar of the general Statute of Limitations in such a case. But the death of the intestate occurred on a British ship on the high seas, and the cause of action arose by virtue of Lord Campbell's Act, in which Parliament had included a limitation period of one year, and the court held that this limitation, inherent in the right itself, was not subject to the above-mentioned provision of the Code, which had been invoked by the plaintiff as the law of the forum.

#### IV. Nonresidence.

The limitation period prescribed in a statute creating a cause of action for death, in some jurisdictions, is not considered to be subject to the rule tolling the general Statute of Limitations in case of nonresidence, etc., of the parties. *Stern v. La Compagnie Générale Transatlantique* (1901) 110

**Fed. 996** (construing New Jersey statute); **GENGO v. MARDIS** (reported herewith) ante, 134.

In **Stern v. La Compagnie Générale Transatlantique** (**Fed.**) supra, it was sought to recover for the death of one Poussa, due, it was alleged, to the wrongful act of the defendant. The action was based on the New Jersey statute which provided that suit should be commenced within twelve months after the death of the decedent. This action was not commenced until some twenty-two months after the drowning of Poussa, but it was urged by the plaintiff that the action was nevertheless well brought, it being contended that the limitation period prescribed did not run because the defendant was a nonresident of New Jersey, whose general Statute of Limitations provided that the time of nonresidence of a party in the state should be computed as part of the period of limitation. The court pointed out that if such were the case, "the period of limitations would be according to the law of the forum where the suit was brought," and that consequently many means might be resorted to to defeat the provisions of the New Jersey statute on which the action was based. It was said: "The language of the act seems intended to exclude any such indefinite liability, whether the defendant is a resident or a nonresident, an individual or a corporation. The proviso, it has been held, is attached as a condition of the right of action itself, and not merely as a designation of the ordinary period of limitation for such actions, operating merely as a part of the New Jersey Statute of Limitations on the remedy alone. If the latter were the proper construction, it might be subject to the extension provided by the general Statute of Limitation of New Jersey; but the one-year proviso would in that case be operative *ex proprio vigore* in that state alone. On the contrary, however, the proviso must be held to be attached to the right of action itself; and it must, therefore, run with the statute into every forum wherein any action under the statute may be instituted."

In **GENGO v. MARDIS** (reported herewith) ante, 134, it was sought to recover for the death of the plaintiff's intestate, which resulted from the alleged wrongful act of the defendant. The death of the decedent occurred November 15, 1911, and this action was commenced December 5, 1913. The statute creating the right of action prescribed a limitation period of two years for the institution of suit. The court held that an action brought under this statute was subject to the control of the limitation prescribed therein, and was not to be considered within the saving provisions of the statute which tolled the general Statute of Limitations in a case where the party wanted places himself without the jurisdiction of the court, absconds, etc. The limitation prescribed by the act "must operate as a condition precedent to the right of action."

*a. Infancy.*

Infancy, recognized, expressly or impliedly, as tolling the general Statute of Limitations, is no exception to the running of a limitation period prescribed by a statute creating a cause of action for death. **Anthony v. St. Louis, I. M. & S. R. Co.** (1913) 108 Ark. 219, 157 S. W. 394; **Elliott v. Brazil Block Coal Co.** (1900) 25 Ind. App. 592, 58 N. E. 736; **Goodwin v. Bodcaw Lumber Co.** (1902) 109 La. 1050, 34 So. 74; **Foster v. Yazoo & M. Valley R. Co.** (1895) 72 Miss. 886, 18 So. 380.

In **Anthony v. St. Louis, I. M. & S. R. Co.** (**Ark.**) supra, wherein a daughter brought suit to recover for the death of her father, as a result of the alleged negligence of the defendant, it was shown that the action was not commenced within two years after the death of the decedent, as prescribed by the statute on which the suit was based. The plaintiff relied on another statute, which provided that minors entitled to bring an action might proceed thereon at any time within three years after attaining their majority. The court, however, found that the limitation stated in the statute under which the action was brought was not merely of the remedy, but was of the right of action

itself; and no intention on the part of the legislature to repeal that limitation was found by the adoption of the disability provision. The court said: "The two statutes relate to different subjects, and there is no necessary repugnancy between their provisions."

In *Elliott v. Brazil Block Coal Co.* (1900) 25 Ind. App. 592, 58 N. E. 736, an action for the death of a father, brought by a child who had just attained his majority, it appeared that the accident occurred more than three years prior thereto. Construing the Coal Mining Act under which the action was brought, together with the other statutes granting a cause of action in case of death by wrongful act, the court determined that "the action must be commenced within two years," and that "infants as well as adults" were bound thereby. The court said: "In this case, the action being purely statutory, it must be brought within the time fixed by the statute, and the infancy of appellants can make no exception."

In *Goodwin v. Bodcaw Lumber Co.* (1902) 109 La. 1050, 34 So. 74, the plaintiff, a widow, sought to recover for herself and as guardian of her three minor children for the death of her husband, due to the alleged fault of the defendant. The statute on which the action was based stated that the right of action is given "for the space of one year from the death." This action had been begun more than a year after the death of the decedent. A provision in the Code that minors might not be prescribed "except in the cases provided by law" did not save the right of action to the plaintiff in this case, as the court held that here "the right of action itself is conditioned upon its being exercised within a year from the time of death."

In *Foster v. Yazoo & M. Valley R. Co.* (1895) 72 Miss. 886, 18 So. 380, an action brought by an infant, by his next friend, to recover for the death of his father, resulting from the alleged wrongful act of the defendant, it was contended by the defendant that the suit was barred by the expiration of the two-year period of limi-

tation, prescribed in the act creating the right of action. The plaintiff claimed the protection of a general statute saving a right of action to those under the disability of infancy, but the court held that the plaintiff was barred, since the statute giving the cause of action provided its own special statute of limitations containing no exception in favor of minors, and the statute tolling the Statute of Limitations in personal actions was not applicable.

*b. Concealment of right of action.*

In *KERLEY v. HOEHMAN* (reported herewith) ante, 141, it appeared that a statute creating a cause of action for death caused by a "wrongful act or omission" provided that the action must be commenced within two years, and the court held that this period ran from the death of the decedent in spite of the concealment of the right of action by the defendant. The court considers the period not as a statutory limitation, but holds that "the right of action is tendered on the condition that suit be commenced within two years; that no excuse for failure to bring the suit within that time will avail."

*c. Under New York statute.*

In *Kavanagh v. Folsom* (1910) 181 Fed. 401 (construing New York statute), wherein it appeared that the action, brought to recover for the death of the plaintiff's intestate under the New York statute providing therefor, had not been commenced within the limitation period of two years, specified in the statute, the court said: "When a statute, like the one upon which the complaint is based, creates a liability, provided the suit for its enforcement is brought within a prescribed time, the time fixed operates as a limitation of the liability itself, and not of the remedy alone. A condition of the right to sue at all is that the action be brought within the stated time. The statutory provision is not a mere statute of limitation, and consequently the provisions of other New York statute suspending the operation of statutes of limitation are inapplicable." But see *Sharrow v. In-*

land Lines (1915) 214 N. Y. 101, L.R.A. 1915E, 1192, 108 N. E. 217, Ann. Cas. 1916D, 1236.

The New York "death statute" grants a right of action provided the suit is commenced within two years from the death of the decedent, and in the only decision directly on the point it was held by a Federal court, construing the statute, that the limitation period begins to run at the death of the decedent, and not from the time of the appointment of his representative. *Williams v. Quebec S. S. Co.* (1903) 126 Fed. 591 (construing the New York statute).

There is a statement to the same effect in *Barnes v. Brooklyn* (1897) 22 App. Div. 520, 48 N. Y. Supp. 36, wherein the court, considering the limitation period of the "death statute," said: "The time thus limited for the commencement of an action is not open to any question. It terminates within two years after the death complained of." This case and the later case of *Crapo v. Syracuse* (1906) 183 N. Y. 395, 76 N. E. 465, 19 Am. Neg. Rep. 429, have been cited as holding to the contrary. These two cases did decide that under a statute requiring that notice be given within a certain period after a cause of action accrues, where damages are sought to be recovered from a city for the death of a person, the cause of action must be considered as accruing at the time of the appointment of a representative of the decedent, and not at the time of his death. This statute, however, is not the one creating the right of action for wrongful death, etc., so that the decisions of these two cases have no direct bearing on the question under consideration.

In *Williams v. Quebec S. S. Co.* (1903) 126 Fed. 591 (construing the New York statute), it was sought to recover for the death of plaintiff's intestate, alleged to have resulted from the negligence of the defendant. The statute creating the cause of action provided that such actions "must be commenced within two years after the decedent's death." The court declared the language of the statute to be plain and clear, and consequently

decided that the action brought in 1903, based on the death of the intestate in 1899, must fail, and they rejected the contention of the plaintiff that the cause of action did not accrue until the grant of letters testamentary, from which time the statutory period should be computed.

Under the New York Code the courts of that state have held that an action under the death statute, commenced within the period of limitation prescribed therefor, failing otherwise than on the merits, may be brought anew within the period specified by the section of the Code relative thereto, which is considered applicable to this special limitation period as well as to the general Statute of Limitations. *Hoffman v. Delaware & H. Co.* (1914) 163 App. Div. 50, 148 N. Y. Supp. 509, affirming (1914) 85 Misc. 535, 147 N. Y. Supp. 475; *Boffee v. Consolidated Teleg. & Electrical Subway Co.* (1916) 171 App. Div. 392, 157 N. Y. Supp. 318.

In *Hoffman v. Delaware & H. Co.* (N. Y.) *supra*, it appeared that a former action had been brought to recover for the death of the decedent, and that action, instituted within the prescribed period of two years, had been dismissed without an award of a new trial, whereupon the present suit was commenced within one year thereafter, in accord with the saving provisions of § 405 of the Code. The so-called "death statute" provided a limitation period of two years for the bringing of an action, but it was held that, since the statute had been incorporated in the Code, the general exceptions to limitations, provided by the Code, might be applied thereto. The court said: "The death statute prescribes a limitation of two years, but does not purport to be an entire statute of limitations upon the subject, and does not indicate an intent to exclude the provisions of the Statute of Limitations which prescribe disabilities and circumstances under which, in given cases, the Statute of Limitations is suspended. Bringing the death statute into the Code shows an intent that it shall be governed by the general provisions of the Code

which are not inconsistent with it." Consequently the saving provisions of § 405 of the Code were held to be applicable to this case.

In *Boffee v. Consolidated Teleg. & Electrical Subway Co.* (N. Y.) *supra*, it appeared that an action had been commenced to recover for the death of the decedent, due to the alleged negligence of the defendant, before letters of administration had been granted to the plaintiff. On judgment rendered for the plaintiff in that action, the defendant appealed, and the court, holding that an action to recover for the death of another must be brought by his personal representative, as provided by the statute, dismissed the action, but pointed out that since the dismissal was not on the merits, another action might be brought within a year thereafter, in accordance with § 405 of the Code, which was considered applicable to actions brought under § 1902, "the death statute."

In *Londrigan v. New York, N. H. & H. R. Co.* (1902) 5 N. Y. Civ. Proc. Rep. 76, 12 Abb. N. C. 273, 17 Jones & S. 526, an action arising under the section of the Code (1902) creating liability for death caused by wrongful act, etc., the court was called on to decide whether § 401 of the Code was applicable to the limitation period prescribed in the former section,—whether that period was tolled by the absence from the state or nonresidence of the defendant. It was held that § 414 of the Code governed the interpretation of the case, and by specifying that the provisions of the chapter were applicable except "where a different limitation was specifically prescribed by law," eliminated the applicability of § 401 to § 1902. And even construing the "provisions of this chapter" to refer to "the times especially declared within which actions might be begun,—e. g., twenty years for ejectment, six years for contracts not under seal, etc.," the enlargement of time given by § 401 is necessarily included therein, since it "is in an exact sense a limitation of time."

*d. Under North Carolina statute.*

In *Taylor v. Cranberry Iron & Coal Co.* (1886) 94 N. C. 525, it appeared that the plaintiff's action to recover for the death of her husband, due to the alleged wrongful act of the defendant, had not been brought within a year after the death of the decedent, as provided by the statute creating the right of action under which the suit was brought. The court said: "Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

*Gulledge v. Seaboard Air Line R. Co.* (1908) 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1184, was an action brought by the plaintiff as administrator to recover for the death of his intestate, and commenced in January, 1906, although the death upon which the action was founded occurred in April, 1902. It was contended by the plaintiff that a contest over the administration of the estate of the intestate had extended from a few months after the death of the intestate to June, 1905, and that this time was expressly excepted from the limitation period by a section of the Code (Revisal, § 369), tolling the Statute of Limitation in such an event. The court, pointing out that a collector might have been appointed to bring the action in such a contingency, held that the limitation period of one year was not a statute of limitations, and had not been complied with.

An action brought to recover for death due to wrongful act, etc., of another, must be commenced within a year after the death of the decedent in order to comply with the limitation period of the statute, and an attempt to bring an action beyond that time, but within a year of the appointment of an administrator, will be of no avail. The rule tolling the general Statute of Limitations in that respect is not applicable to this special limitation. *Best v. Kinston* (1890) 106 N. C. 205, 10 S. E. 997; *Hall v. Southern R. Co.* (1908) 149 N. C. 108, 62 S. E. 899.

An action brought under the North Carolina statute, to recover for the death of a person, and commenced within the period prescribed by the statute therefor, may, on its failure otherwise than on the merits, be instituted anew in accordance with the section of the Code tolling the general Statute of Limitations in that respect. *Meekins v. Norfolk & S. R. Co.* (1902) 131 N. C. 1, 42 S. E. 383; *Trull v. Seaboard Air Line R. Co.* (1909) 151 N. C. 545, 66 S. E. 586.

*c. Under Oklahoma statute.*

In *Partee v. St. Louis & S. F. R. Co.* (1913) 51 L.R.A.(N.S.) 721, 123 C. C. A. 292, 204 Fed. 970 (construing Oklahoma statute), the plaintiff sought to recover for the death of one McCain, alleged to have been due to the wrongful act of the defendant. This action was not brought within two years of the act or death complained of, but an action on this ground had been begun within the period of two years therefrom, and on the failure thereof, not, however, upon its merits, the present action was commenced within one year after the failure. The statutes of Oklahoma provided, *inter alia*, that actions for the wrongful act of another, resulting in death, must be commenced within two years, that statutes providing a peculiar limitation for special cases must govern those cases, and that an action commenced in due time, and failing otherwise than upon the merits, may be started anew within one year thereafter. The court held that the last-mentioned provision was obviously intended to apply to cases involving the general Statute of Limitations, and, indeed, under the second provision above mentioned, was specifically made inapplicable to special cases for which a peculiar limitation had been prescribed by statute. As a consequence the present action, brought

more than two years after the death of the decedent, was not aided by the exception applicable to the general Statute of Limitations, and the commencement of a new suit within a year after the failure of one properly brought was of no avail. It was said: "A statute which, in itself, creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits."

In *Casey v. American Bridge Co.* (1912) 116 Minn. 461, 88 L.R.A.(N.S.) 521, 134 N. W. 111 (construing Oklahoma statute), the plaintiff sought to recover for the death of her intestate, which occurred in Oklahoma, March 17, 1901, and was due to the defendant's negligence. This action was brought in January, 1911, although the Oklahoma statute creating the right of action specified that suit must be commenced in two years; another section of the Oklahoma Code provided that the general Statute of Limitations should not run until an absentee, against whom a cause of action had accrued, had returned to the territory, etc. The court decided that the exception specified in the latter section was applicable to the construction of the limitation period prescribed in the section creating the right of action, and that the two sections must be construed together; and this in spite of the fact that a third section of the same Code provided that "where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation;" which provision, the court said, had no reference to the tolling section in question. R. S.

NORFOLK & WESTERN RAILWAY COMPANY  
v.  
PUBLIC SERVICE COMMISSION.

*West Virginia Supreme Court of Appeals — May 7, 1918.*

(82 W. Va. 408, 96 S. E. 62.)

**Carrier — duty to furnish facilities — effect of war.**

1. A common carrier will not be excused from its duty of furnishing shipping facilities to one offering commerce to it, upon the ground that all of its energies are required to meet government needs, brought about by the present state of war, where it does not appear that the granting of such facilities would divert any of the carrier's energies, or require of it service which would make it less able to perform its public duty.

[See note on this question beginning on page 162.]

**Commerce — power of Commission — intrastate shipments.**

2. The act of Congress to regulate commerce, as amended (Feb. 4, 1887) conferring upon the Interstate Commerce Commission authority to compel railroads engaged in interstate commerce to provide shipping facilities for shippers tendering interstate shipments sufficient to justify the construction and maintenance of the same, does not deprive the Public Service Commission of jurisdiction to require such a railroad to provide such facilities to a

shipper offering intrastate commerce in such quantities as warrants the installation of the facilities demanded, even though such facilities, when provided, may be used in the shipment of interstate as well as intrastate commerce.

**Public Service Commission — findings — effect.**

3. Findings of fact by the Public Service Commission based upon evidence to support them will not be reviewed by this court.

Headnotes by RITZ, J.

PETITION by the defendant railway for the setting aside of an order of the Public Service Commission requiring it to furnish shipping facilities to the complainant coal company. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John H. Holt, Lucian H. Coker, Theodore W. Reath, and Joseph I. Doran, for petitioner:

An order for switch connections takes property, and this cannot be done without compensation.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 989; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 583, 56 L. ed. 863, 871, 32 Sup. Ct. Rep. 585.

The state Commission is without authority to make the order requiring "a spur constructed from and connected with said branch line."

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822;

Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436.

The traffic of the railway company in coal is in great part interstate. Exclusive jurisdiction to order switch connections for such an interstate highway is with the Interstate Commerce Commission.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304; Houston, E. & W. T. R. Co. v. United States (Shreveport Rate Case) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833.



Lack of steel, labor, and cars due to war conditions, and special duties imposed upon the railways by the war, preclude for the present the ordering of any new facilities such as would spread the carriers' effort.

*Spaulding & Frost v. Boston & M. R. Co.* (N. H.) P.U.R.1918A, 1040 (abstract); *Manchester v. Boston & M. R. Co.* (N. H.) P.U.R.1918B, 353; *St. Louis-San Francisco R. Co. v. State*, — Okla. —, P.U.R.1918C, 596, 170 Pac. 1146; *Baltimore & O. R. Co. v. Public Service Commission*, 81 W. Va. 457, L.R.A.1918D, 268, P.U.R.1918B, 608, 94 S. E. 545.

*Messrs. S. B. Avis and Meek & Renshaw* for respondent.

*Ritz, J.*, delivered the opinion of the court:

The Trace Coal Company made application to the Public Service Commission to compel the Norfolk & Western Railway Company to furnish it shipping facilities for coal mined at its plant in Wayne county. Upon a hearing the Commission entered an order requiring the railway company to make its election, within thirty days, of one of three things which would furnish the facilities desired, and to thereafter permit the complainant to furnish the material and labor required to provide that one of the facilities so selected by the said railway company. The railway company procured a suspension of this order from this court, and seeks to have the same set aside.

It appears that a number of years ago, for the purpose of furnishing facilities for the shipping of coal from several mines, the railway company constructed a spur off its main line at Dingess. This branch was something like a mile in length, and upon it were several small coal operations. After operating a few years, these operations, about the year 1908, ceased to do business, the situation being such that they were unable to operate their mines profitably. From that time until quite recently no use had been made of this branch by the railway company, or by anyone else, and it was allowed to fall into an unusable condition. A short time since a lumber

company established quite a large mill on this branch line at a point some 2,000 feet from its connection with the main line of the railway company. In order to furnish service for this lumber company the branch was rehabilitated and repaired up to the lumber company's plant, and is now being used to that point for the purpose of serving said lumber company. The Trace Company acquired a lease on a tract of land which had theretofore been operated by one of the companies that had gone out of business in 1908, and desired to commence shipping coal from this property. In fact, it has been mining and shipping some coal by hauling the same to the station at Dingess and loading it in cars at that point. This necessitates, however, a haulage of something more than a mile in wagons from the mouth of the mine to the place of loading, and, of course, makes it very expensive for the company to market its product. It appears that it has a tipple at its mine, and it desires this track rehabilitated from the lumber company's plant up to its mine, a distance of some 2,000 feet, and a siding put in, so that it might load coal from its tipple; or that the siding used by the lumber company be extended and it allowed to use the old main line track of the branch to haul coal to the lumber company siding, and there load it into the cars; or else that it be allowed to rehabilitate the main line of the branch and load the cars standing on such main line at its mine. The railway company declined to accede to any of these requests, and refused to allow the Trace Company to provide any facilities for the loading of its coal other than hauling it to its station at Dingess and loading it in cars at that point. The proposal of the Trace Company is to furnish all of the material and do all of the work at its own expense, in such manner as the railway company desires that it be done, and the Commission's order gave the railway company the privilege of choosing which of

the three facilities it would prefer, and after such selection made by it that it allow the Trace Company to provide the facility so selected, to the end that it might load its coal and ship the same without being subjected to the disadvantage of hauling it a long distance from the mouth of its mine to the siding at Dingess station.

The first contention of the railway company is that the Trace Company's freight is not sufficient to justify the expense of the improvement. A large amount of the testimony is directed to this proposition. The railway company contends that the coal in the mine of the Trace Company is of such character that it will be impossible for the Trace Company to mine it and ship it at a profit, and that it will only be a short time until the mine will have to close down. On the other hand, the Trace Company shows that this coal is about 36 inches in thickness, and that it has mined and shipped two carloads thereof at a profit, after being subjected to the expense of hauling it in wagons for a distance of more than a mile. It says further that this is not a question that need concern the railway company, inasmuch as it proposes to bear all of the expense of the improvements desired, and whether it can make a profit or not, or whether it closes down in a short time or not, can in no wise affect the railway company, for if it continues to operate and furnish the railway company the freights, it will receive its charges for hauling the same, whether they are produced by the Trace Company at a profit or at a loss, and should the Trace Company go out of business the railway company will be left with its facilities, so far as the tracks are concerned, in better condition than they are at present. The railway company argues, and there is some testimony to the effect, that the rails on this branch would have to be taken up, and rails of heavier weight substituted therefor, in order to accommodate its equipment. If this were true, it would still place

no burden upon the railway company. But there is a report filed in this case by the Public Service Commission's inspector, who went upon the ground, and in that report it is shown that the rails which the railway company is now using in the main line of this branch, up to the Hutchinson Lumber Company's plant, are of the same size as the rails between that plant and the mines of the defendant, so that it is a little hard for us to conceive why the railway company's equipment would require heavier rails between the lumber company's plant and the mines than it does between its main line and the lumber company's plant. The evidence offered by the Trace Company shows that it has a capacity now to produce one carload of coal a day, and if it is permitted to have these facilities in a very short time it can and will increase this output to five cars a day. It also shows that it can mine this coal at a reasonable profit at the present price, and can even make a reasonable profit thereon when the prices are much less than they are at present, if it can avoid the necessity of hauling its product to the railway line in wagons. The railway company argues that to require it to give the facilities asked would be a taking of its property, and that before this can be done it must be shown that there is a necessity therefor.

It is quite true that where a railway company is required to expend money in furnishing facilities to a shipper, there must be a showing that there is reasonable necessity therefor, and that the returns received by the railway company will be commensurate with the expenditures it is compelled to make. The application of this argument to the case here is a little difficult, however, in view of the fact that the railway company is required to make no initial outlay whatever. It is true the furnishing of these facilities contemplates that cars will be furnished for the shipment of the coal, but only such cars will have to

be furnished as freights are furnished for, and the freight charges made by the railway company are the compensation for the use of its cars for this purpose. Its freight rates are so adjusted as to compensate it for the work it does in placing cars, and in removing them from the place where they are loaded to the point of destination. It is, therefore, quite clear that, however many cars the railway company is required to furnish for the shipment of this coal, it is in a position to demand and receive full compensation for that service at the time it is required to perform it. There is abundant evidence to justify the finding of the Commission that the freight offered of an intrastate character warrants furnishing the facilities desired, and we will not override the Commission's findings of fact where there is evidence upon which to base them. There is, therefore, no merit in the contention that any of the railway company's property will be taken for the purpose of making these facilities without just compensation therefor.

It is contended that the evidence offered does not justify the Commission's conclusion that commerce of an intrastate character is at all involved. It is shown that the intention is to ship the product of this mine to Williamson, West Virginia, Huntington, West Virginia, and to various cities in Ohio. The shipments to Williamson, West Virginia, would be for reshipment to other points, and it is contended that there is no real purpose to make shipments to Huntington, West Virginia, which would be intrastate commerce, because of the fact that natural gas is largely used in that city. We know judicially that Huntington is a city of considerable size, rivaling in manufacturing and commercial importance any city of the state, and we do not think the testimony is unreasonable that a considerable part of the product of this mine would be used for com-

mercial and manufacturing purposes in that city. There is evidence upon which the Commission could base this finding, and, this being true, we will not review the same.

Public Service  
Commission—  
Findings—effect.

The railway company further contends that the Congress of the United States has assumed exclusive jurisdiction over the matter of constructing sidings on railroads engaged in interstate commerce, and that, it having done so, neither the state of West Virginia, nor any agency created by it, has any power or authority to compel or require such a railway company as the petitioner to furnish any siding facilities to any shipper for any purpose whatsoever. Its contention is that even though these sidings may be desired for intrastate shipments exclusively, inasmuch as the said railroad is engaged in interstate commerce the jurisdiction in the Interstate Commerce Commission is exclusive. If the act of Congress to regulate commerce is susceptible of any such construction, it may be doubted whether Congress has power to accomplish such purpose. If the contention of the railway company is sustained that the Congress of the United States has power to deprive the states of any control over a carrier engaged in interstate commerce, then the power of the states to in any way interfere with or control the actions of the railroads of this country is gone. It must be remembered that these railroads are within the states, and operate therein by virtue of authority granted to them by the states. They are granted the sovereign right of eminent domain, and in exchange for this right the states have always been conceded certain regulatory powers over the carrier. If it can be said that Congress has the power to appropriate to itself the exclusive control of such carriers as are engaged in interstate commerce, then the state's right of eminent domain is taken away from it, and is enjoyed by the railroads without

any corresponding obligation or duty upon their part. The exigencies of trade and business would create anomalous situations. It is not an unusual thing for a siding to be desired by some industry for purely intrastate shipments, and under the contention of the railway company such a shipper would be entirely without a remedy. The state Commission would have no authority to compel the railway company to furnish facilities, and the Interstate Commerce Commission would have no authority, because there would be no question of interstate commerce involved. Congress never intended to create such a condition as this. When § 1 of the act of Congress to regulate commerce, as amended (24 Stat. at L. 379, chap. 104, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337), is read together, it seems quite clear to us that what Congress intended to do was to assume control over interstate commerce and every agency connected therewith. Nowhere in this act do we find anything which justifies the assumption that the Interstate Commerce Commission alone has the right to compel the furnishing of facilities for a shipper, unless the shipments offered are of an interstate character. The railway company relies upon the holdings of the Supreme Court of the United States in construing the Safety Appliance Act (27 Stat. at L. 531, chap. 196, Comp. Stat. §§ 8605 et seq., 8 Fed. Stat. Anno. 2d ed. 1155), the Hours of Service Act (34 Stat. at L. 1415, chap. 2939, Comp. Stat. §§ 8677-8680, 8 Fed. Stat. Anno. 2d ed. p. 1383), and in *Houston, E. & W. T. R. Co. v. United States* (Shreveport Rate Case) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, as justifying its contention.

In passing upon the applicability of the Safety Appliance Act to the instrumentalities used by an interstate railway company in intrastate commerce, the court held in *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep.

2, 8 N. C. C. A. 822, that the clear language of the act included every instrumentality used by such a railway. The language of that act itself includes all of the cars, engines, and other instrumentalities used by a railway engaged in interstate commerce, and the court held that it mattered not whether these instrumentalities were being used in interstate commerce, or exclusively in intrastate commerce, they were included within the language of the act. The court upheld the act as constitutional upon the ground that it was necessary to include these agencies used in intrastate commerce in order that the beneficent results sought might be attained. If a railway company was required to equip only such cars as were used in interstate commerce with safety appliances, and might use cars for intrastate commerce not so equipped, the danger to intrastate employees and travelers might be, to some extent, decreased, but the object of the act would not be fully accomplished, and the constitutionality of that act is upheld upon that ground alone. Mr. Justice Van Devanter, speaking for the court in upholding the act upon this ground, 222 U. S. at page 26, of the opinion says: "We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same

railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate, as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge. Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety

of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

In the case of *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160, it was held that Congress had entered upon the field of prescribing hours of service for railroad employees engaged in interstate commerce, and having done so its jurisdiction in that regard was exclusive. It was further held that an employee engaged in train service upon a train carrying both classes of commerce was engaged in interstate commerce, and the Hours of Service Act of Congress applied to him. This decision has no application to this case.

In *Houston, E. & W. T. R. Co. v. United States* (Shreveport Rate Case) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, the court justified the interference of the Interstate Commerce Commission with intrastate rates, not upon the ground that Congress, under the commerce clause of the Constitution, had power to prescribe regulations for intrastate commerce as such, but upon the sole ground that the regulations prescribed by the state for handling intrastate commerce operated so as to cast a burden upon interstate commerce. The whole contention in that case was based upon an attempt of the state of Texas to build up the trade of a competing Texas city at the expense of the city of Shreveport. Such rates were prescribed for the intrastate shipments to the Texas city as made it necessary for the railroad company to require much higher rates for interstate shipments than it was allowed by the order of the Texas Commission to charge for the intrastate shipments, and interference with the intrastate rate was based solely upon the ground that by prescribing this low rate for intrastate shipments an undue burden was placed upon the interstate commerce carrier by the railroad.

It will thus be observed that in these instances the interference of Congress with intrastate commerce is justified, not upon the ground that any power is possessed by Congress to regulate such commerce, but solely for the reason that the proper regulation of interstate commerce required such incidental interference. No such condition exists in this case. The furnishing of these facilities can in no way affect interstate commerce or any regulation thereof, and the only reason for the assumption of the power upon the part of Congress to regulate intrastate commerce is lacking.

The contention here relied upon by the railway company was made in the case of *Washington & O. D. R. Co. v. Royster Guano Co.* 122 Va. 397, P.U.R.1918C, 189, 94 S. E. 763, and that court, in upholding the order of the Corporation Commission of Virginia, requiring the carrier to furnish siding facilities for shipments in intrastate commerce, held that the fact that interstate shipments might also be made over the same siding did not deprive the Corporation Commission of its jurisdiction to require the facilities for the intrastate shipments. In the case of *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, the Minnesota supreme court upheld an order of the Public Service Commission of that state requiring such facilities to be furnished for intrastate commerce, notwithstanding interstate shipments might incidentally be involved. The court in that case also held that, in determining the question of whether the freight offered would give an adequate return to the carrier for the expenditure it was required to make in furnishing the facilities, the Commission might consider not only the intrastate shipments which were offered, but also the interstate shipments, and if all of the shipments which would be offered at the siding, both intrastate and interstate, were sufficient in amount

to warrant the expense, the order would be upheld. This conclusion would seem to be justified upon the ground of common sense, for if the state Commission, in determining the question of the sufficiency of the freight offered to justify the expense, could only consider the intrastate shipments which might be offered, it might be found that they alone would be insufficient for the purpose; and likewise, in the same case, the Interstate Commerce Commission might find that the interstate shipments would be insufficient to warrant the expense, while, consolidating both characters of commerce, there would be ample freight to justify requiring the carrier to furnish the facilities. This would present a case where a shipper had ample commerce to justify giving him the facilities he desired, but he would be unable to get them because he had not sufficient of either class of such commerce.

The decision of the Minnesota supreme court above referred to was affirmed by the Supreme Court of the United States in the case of *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. In the case of *Chicago, R. I. & P. R. Co. v. State*, 53 Okla. 712, L.R.A.1916F, 1281, 157 Pac. 1039, the same question was before the Oklahoma supreme court, and that court overruled the contention made by the railway company that, it being an interstate highway, Congress had exclusive jurisdiction over the matter of providing switch connections. We are of opinion that, where a shipper has commerce of an intrastate character to offer to a carrier, warranting the construction for him of switch connections, the Public Service Commission has jurisdiction to compel the carrier to grant

Commerce—  
power of  
Commission—  
intrastate  
shipments.

such switch connections, notwithstanding the siding, after it is constructed, may also be used for the purpose of making interstate shipments. No doubt, under the act of

Congress, the Interstate Commerce Commission would have jurisdiction to compel the granting of such facilities because of the interstate commerce offered, but this fact does not deprive the state of its right to see that shippers with freight of an intrastate character are given the facilities to which they are entitled.

The argument is further made by the railway company that at this time its energies are fully required to meet the extraordinary demands made upon it because of the present state of war; that all of its resources in the way of steel rails, ties, and switches are needed for this purpose; and that it should not be required to furnish facilities to any shipper other than those already having such facilities, for the reason that to do so might require of it additional equipment, or additional work for its trains or crews, without producing any additional freight. As before stated, the granting of the facilities asked for here does not make any requisition upon the material resources of the railway company. It does not re-

quire the expenditure of 1 cent by it, and it does not show how the granting of the facilities asked for this shipper would increase its work so as to embarrass it in complying with its public duty. In the absence of such a showing we would not be justified in saying that this shipper should not be granted the facilities enjoyed by other shippers of coal. If it should turn out, in the operation of this switch connection for the business of the Trace Company, that an undue burden is imposed upon the railway company, and that its operations are crippled, and it is hindered and delayed in performing its paramount duty to the government, upon representation of such condition to the Director General of Railroads, he has ample power to give the railway company relief, and we do not doubt that, upon a showing of that character being made, such relief will be promptly afforded.

*Carrier—duty to furnish facilities—effect of war.*

We find no reason for disturbing the order of the Public Service Commission made in this case.

### ANNOTATION.

#### **Service of government as excuse for failure of carrier to discharge duty to individual.**

A carrier has been held not liable to an individual who offered goods for shipment, for refusing to receive the same, where its lines were under the military control of the Federal government, and were being operated under control of Federal officers, so that the carrier was not in the free and unrestrained exercise of its franchise. *Illinois C. R. Co. v. Ashmead* (1871) 58 Ill. 487; *Illinois C. R. Co. v. Hornberger* (1875) 77 Ill. 457; *Phelps v. Illinois C. R. Co.* (1880) 94 Ill. 548. But where the carrier accepted grain offered it for shipment, without limiting its liability against acts of the military authorities, it has been held that the carrier is liable for unreasonable delay in delivering it at its destination, although the terminal facili-

ties at the destination were congested because of government service. *Illinois C. R. Co. v. McClellan* (1870) 54 Ill. 58, 5 Am. Rep. 83; *Illinois C. R. Co. v. Cobb* (1872) 64 Ill. 128. In the *McClellan Case*, the military authorities had given permission to transport the grain in question.

The court, in *St. Louis-San Francisco R. Co. v. State* (1918) — Okla. —, P.U.R.1918C, 596, 170 Pac. 1146, suspended the order of a Corporation Commission, requiring the erection of a new depot by a railroad company after the Federal government had taken charge and control of the railroad and was engaged in the management and operation thereof, saying that it knew judicially, as everyone knew, that it would require the ut-

most conservation of the resources and energies of this country and would require vast stores and supplies of materials, such as would be required to comply with the order appealed from, to carry on the prosecution of the war to a successful determination, and that the revenues of the railroads, their rolling stock, and the services of their employees would be taxed to the utmost in the speedy and efficient transportation of troops, munitions, and other supplies, and matters of this kind must and would have precedence over matters of private convenience and local ambitions, which should not be permitted to interfere with the suc-

cessful accomplishment of its aims by the United States government.

In *Lysacht v. Lehigh Valley R. Co.* (1918) 254 Fed. 351, a carrier was held not relieved of liability for injury to goods from the explosion of munitions of war in the course of transportation in interstate and foreign commerce, for use in the war.

For Federal control of public utilities, see note in 4 A.L.R. 1680.

Generally, as to the right of parties to contract, the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, see note in 3 A.L.R. 21. W. A. E.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff.  
in Err.,  
v.

W. T. FORRESTER, Admr., etc., of Mrs. Jane Pitchford, Deceased.

*Oklahoma Supreme Court — November 19, 1918.*

(— Okla. —, 177 Pac. 593.)

**Executor and administrator — effect of removal — revocation of letters.**

1. The removal of an administrator of an estate appointed by the probate court of Arkansas, after his appointment, does not ipso facto vacate or revoke his letters of administration, and an answer which alleges such removal from said state after said appointment, but fails to allege that an order has been made by the court appointing him, vacating and revoking said letters, is insufficient to make an issue on the capacity of said administrator to maintain an action in the courts of this state as such administrator.

[See note on this question beginning on page 175.]

**Judgment — appointing administrator — collateral attack.**

2. An answer which challenges the action of the probate court of Arkansas in making an order appointing an administrator of the estate of a decedent, who was a resident of that state, on the ground that said decedent did not have or possess any personal or real property at the time of his or her death, is a collateral attack on a judgment of another court, and it is not error to sustain a demurrer thereto.

[See 11 R. C. L. 85.]

**Appeal — incompetent evidence — absence of prejudice.**

3. Before this court is warranted in reversing a judgment for error in admitting incompetent evidence or testimony, it must appear from the whole record that on account of the admission of such evidence or testimony there has probably been a miscarriage of justice or a violation of a constitutional or statutory right.

[See 2 R. C. L. 247.]

**Trial — instructions.**

4. Instruction complained of in the instant case examined, and held to



fairly state the law applicable to the evidence and facts on which a recovery was sought.

**Appeal — judgment fixing lien — vacation.**

5. When a court renders a money judgment and attempts to fix a lien on the property of defendant to secure the payment thereof, that part of the judgment which attempts to fix said lien, although erroneous, does not require a reversal of the cause, but that part of the judgment which attempts to fix an unauthorized lien may be vacated, and the cause affirmed.

**On Rehearing.**

**— order of revivor — necessity of motion for new trial.**

6. Refusal of the court before trial to vacate an order reviving a case in the name of the personal representative of plaintiff need not be presented to the court in a motion for new trial to secure a review on appeal.

**Abatement — setting aside order of revivor — effect.**

7. An order setting aside an order to revive an action in the name of the personal representative of plaintiff because of irregularities in procuring it is not a final determination of the right to revive which will prevent further action on the motion.

**Appeal — necessity of motion for new trial.**

8. A motion for new trial of a motion to set aside a revivor of an action is not necessary to present to the appellate court an order granting the motion to set aside.

**— failure to perfect — effect.**

9. Failure to perfect an appeal from an order denying a new trial of a motion to set aside a revivor which has been granted does not abandon the motion to revive so as to prevent subsequent action upon it by the court.

**ERROR** to the District Court for LeFlore County (Brown, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Modified and affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. W. H. Moore, C. O. Blake, R. J. Roberts, J. E. DuMars, and T. T. Varner, for plaintiff in error:

The trial court was without jurisdiction to try the case or render judgment therein, for the reason that the original plaintiff, Mrs. Jane Pitchford, having died, the cause had not been properly revived.

McAdams v. Latham, 21 Okla. 511, 96 Pac. 584.

No sufficient notice was given the defendant of the application to revive.

29 Cyc. 1118; Burden v. Stein, 25 Ala. 455; People v. Frost, 32 Ill. App. 242; Com. v. Fisher, 1 Penr. & W. 462.

The action of the court in sustaining plaintiff's demurrer to defendant's answer was prejudicial error.

Atchison, T. & S. F. R. Co. v. Lambert, 32 Okla. 665, 123 Pac. 428; Cole v. District Bd. 32 Okla. 692, 123 Pac. 426, Ann. Cas. 1914A, 459; Keagy v. Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811; 8 Enc. Pl. & Pr. 206; Dougherty v. Funk, 24 Okla. 312, 103 Pac. 634; Warner v. Warner, 11 Kan. 121.

The court erred in admitting incompetent, irrelevant, and immaterial evidence over the objection of defendant.

Hicks v. Davis, 32 Okla. 195, 120 Pac. 260; Fogel v. San Francisco & S. M. R. Co. 5 Cal. Unrep. 194, 42 Pac. 565; Redfield v. Oakland Consol. Street R. Co. 112 Cal. 220, 43 Pac. 1117; Chicago, R. I. & P. R. Co. v. Clonch, 2 Kan. App. 728, 43 Pac. 1140; Sappenfield v. Main Street & Agri. Park R. Co. 91 Cal. 48, 27 Pac. 590, 13 Am. Neg. Cas. 387; Insley v. Shire, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713; Parker v. Georgia P. R. Co. 83 Ga. 539, 10 S. E. 233; Tillett v. Norfolk & W. R. Co. 118 N. C. 1031, 24 S. E. 111, 6 Am. Neg. Cas. 128; Duer v. Allen, 96 Iowa, 36, 64 N. W. 682; Mantel v. Chicago, M. & St. P. R. Co. 33 Minn. 62, 21 N. W. 853; St. Louis & S. F. R. Co. v. Lee, 37 Okla. 545, 46 L.R.A.(N.S.) 357, 132 Pac. 1072; St. Louis & S. F. R. Co. v. Dobyns, 57 Okla. 643, 157 Pac. 735; St. Louis & S. F. R. Co. v. Fick, 47 Okla. 530, 149 Pac. 1126.

The instructions dealing with the duties of a carrier to a passenger placed upon the defendant a higher degree of care than the law imposed.

St. Louis & S. F. R. Co. v. Fick, supra; St. Louis & S. F. R. Co. v. Dobyns, 57 Okla. 643, 157 Pac. 735.

Mr. Jo Johnson for defendant in error.

Davis, C., filed the following opinion:

This action was begun in the district court of Le Flore county, Oklahoma, by Mrs. Jane Pitchford, against the Chicago, Rock Island, & Pacific Railway Company, to recover a judgment for personal injuries alleged to have been received by plaintiff while a passenger on one of the trains of defendant. The parties will be referred to as they appeared in the trial court; that is, plaintiff in error as defendant, and defendant in error as plaintiff.

The plaintiff took passage on one of defendant's trains at Hartford, Arkansas, on the 5th day of November, 1909, for Howe, Oklahoma. When said train arrived at Howe, Oklahoma, plaintiff was injured in alighting from said train. This action was begun to recover for the injuries thus sustained. A judgment was obtained by plaintiff against defendant, and an appeal prosecuted to this court. The judgment was reversed by this court in an opinion written by Mr. Commissioner Sharp, now Chief Justice of the supreme court, and the cause remanded for a new trial. Chicago, R. I. & P. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146. Before the cause was again called for trial, plaintiff died, and the cause was revived in the name of W. T. Forrester, as administrator of the estate of Mrs. Jane Pitchford, deceased. At the trial of the cause a verdict was rendered in favor of the plaintiff for the sum of \$5,000. Judgment was duly entered in favor of plaintiff for said sum, and an appeal is prosecuted to this court to have the proceedings reviewed.

The first specification of error urged by defendant for a reversal of this cause is as follows: "The trial court was without jurisdiction to try the case or render judgment therein for the reason that, the original plaintiff, Mrs. Jane Pitchford, having died, the cause had not been properly revived."

A large part of the brief filed by the defendant in this court is devoted to a discussion of the action of the trial court in entering an order of revivor in the name of the administrator of the estate of deceased. An examination of the record discloses that there was not included in the motion for a new trial any complaint of the action of the court in reviving this action in the name of the administrator of the estate of deceased. The order of revivor was entered on the 11th day of August, 1916, at Stigler, Oklahoma. On the 17th day of November, 1916, a special appearance motion filed by defendant for the purpose of having set aside the order of revivor made on the 11th day of August, 1916, was heard and overruled. This action was not tried until the 23d day of November, 1916. In order to have review of the action of the court in overruling the special motion of defendant filed for the purpose of having vacated the order of revivor made on the 11th day of August, 1916, it was necessary to have incorporated this alleged error in the motion for a new trial, and a failure to present this question in a motion for a new trial precludes this court from a consideration of this question on appeal. Elsea Bros. v. Killian, 38 Okla. 174, 132 Pac. 686; Ahren-Ott Mfg. Co. v. Condon, 23 Okla. 365, 100 Pac. 556; Stark Bros. v. Glaser, 19 Okla. 502, 91 Pac. 1040.

The second assignment of error is that the court erred in sustaining plaintiff's demurrer to section 3 of defendant's amended answer.

That part of the amended answer to which a demurrer was sustained is as follows: "Defendant further alleges that if the plaintiff was appointed administrator of the estate of Mrs. Jane Pitchford, deceased, as alleged in his amended petition, this defendant is informed and believes and alleges the fact to be that Mrs. Jane Pitchford, deceased, at the time of her death, was not the owner of any personal or real property subject to administration, that said ap-

pointment was made for the sole purpose of enabling plaintiff to maintain this suit, and that under the laws of the state of Arkansas, said court was without authority to make said appointment; and defendant further alleges that since the appointment of plaintiff as such administrator and prior to the order of revivor herein he had moved from the state of Arkansas, and is now a resident of the state of Oklahoma, and a nonresident of the state of Arkansas, and under the laws of the state of Arkansas said plaintiff at the time of said removal forfeited the letters of administration and the power to act thereunder theretofore granted."

It will be seen from the foregoing answer that the jurisdiction of the probate court to appoint an administrator of the estate of Mrs. Jane Pitchford, deceased, is not called in question. It is attempted to call in question the matters adjudicated by the probate court of Arkansas when said appointment was made. If the probate court of Arkansas had jurisdiction to make the appointment, then it had the jurisdiction to determine whether or not the conditions existed that warranted the making of said appointment, and its conclusion and judgment on such matters were final unless appealed from, and could not be retried in the instant case. The death of Mrs. Pitchford, the existence of property subject to administration, and all other matters that were necessary to be determined in order to make said appointment, were concluded by the order making the appointment, and the attempt to call them in question in this action constitutes a collateral

Judgment—  
appointing  
administrator—  
collateral  
attack.

attack upon the judgment of the probate court of Arkansas. There was no error in sustaining a demurrer to such part of the answer as attempted to bring these matters again in question. Evidence thereon could not have been admitted to establish the allegations of the answer, and the trial court

rightfully eliminated them from the case. A collateral attack could not be made on the action of the probate court of Arkansas in this matter either by the laws of Arkansas or Oklahoma. *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, 12 S. W. 703; Ark. Const. art. 7, § 34; *Daugherty v. Feland*, — Okla. —, 157 Pac. 1144; *Blackwell v. McCall*, 54 Okla. 96, 153 Pac. 815.

That part of the answer which alleged that the administrator had since his appointment moved from the state of Arkansas to the state of Oklahoma, and thereby forfeited his letters of administration, did not state a defense, and there was no error in the action of the trial court in sustaining a demurrer thereto. The removal from the state did not eo instanti vacate the letters. It was necessary that an order be entered by the probate court of

Executor and  
administrator—  
effect of  
removal—  
revocation of  
letters.

Arkansas upon a proper motion being filed to revoke said letters. The removal from said state furnished a ground sufficient to warrant the probate court in making an order revoking and vacating said letters, but the removal alone did not operate ipso facto to vacate and revoke said letters. The allegation was fatally defective in that it failed to allege that a motion had been filed in the probate court of Arkansas to revoke said letters of administration and an order entered sustaining said motion. *McCreary v. Taylor*, 38 Ark. 393; *Warren & O. Valley R. Co. v. Waldrop*, 93 Ark. 127, 123 Pac. 792.

The next error urged for a reversal is that the court erred in admitting incompetent, irrelevant, and immaterial testimony offered on the part of plaintiff.

The particular testimony against which this objection is urged is the testimony of Dr. J. R. Wayne and D. E. McDonald.

Dr. Wayne was called as an expert to testify as to the probable effects that the injuries alleged to have been sustained by Mrs. Pitchford would have on a woman such as

Mrs. Pitchford was. While the questions and answers are purely academical, yet it cannot be said that any of them are prejudicial. Drs. Davenport and Routh both appeared as witnesses and testified for plaintiff. They were the physicians who treated Mrs. Pitchford, and the jury was well advised as to the exact nature and extent of the injuries, and we are not inclined to think that the testimony of Dr. Wayne materially added to or detracted from the testimony given by the attending physician.

The witness D. E. McDonald was called as an expert railroad man for the purpose of proving the duty that a common carrier owes to passengers. This testimony is subject to all the criticism urged against it. It was not admissible, and should have been excluded, but from a reading of the entire record we cannot conclude this testimony could have influenced the jury in reaching a verdict. The witness was not present and knew nothing of the facts. There were a number of eyewitnesses who appeared and testified. The testimony of McDonald proves nothing, and in view of the fact that there is ample evidence and testimony to support the verdict and judgment, we are not at liberty to reverse this cause merely for the reason that a witness who knew nothing of the material facts in the case appeared and gave his opinion upon a matter concerning which the jury was the sole and exclusive judge. Before we would be warranted in reversing this cause,

Appeal—  
incompetent  
evidence—  
absence of  
prejudice.

it must appear from the entire record that on account of the admission of such evidence there

has probably been a miscarriage of justice. This we cannot do, nor is any such contention urged by counsel for defendant. *Chicago, R. I. & P. R. Co. v. Austin*, — Okla. —, L.R.A.1917D, 666, 163 Pac. 517.

The next error assigned is that the court erred in giving instructions Nos. 3, 4, and 5 in his general charge to the jury.

The instructions complained of are as follows:

"(3) A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. Therefore, under the law, if you find that Mrs. Pitchford, in alighting from the defendant's passenger train with ordinary care sustained all or any of the injuries mentioned in the petition by reason of the smallest or slightest negligence of the defendant in all or any of the acts alleged as negligence, your verdict should be for the plaintiff.

"(4) As a public carrier of passengers the defendant was not an insurer of the safety of Mrs. Pitchford while a passenger against all hazards and possibilities of injury, but the law holds the defendant, as such public carrier, to have been the insurer of her absolute safety from all or any of the injuries, if any mentioned in the petition, caused by the smallest or slightest negligence, if any, in all or any of the acts charged as negligence in the petition, unless you should find that Mrs. Pitchford was guilty of contributory negligence as hereinafter defined and explained."

"(5) If you find that Mrs. Pitchford, in alighting from the defendant's train with ordinary care, sustained all or any of the injuries mentioned in the petition, this makes a prima facie case of negligence against the defendant, and the law raises the presumption that the plaintiff is entitled to recover. This presumption would not be conclusive, but would shift the burden of proof from the plaintiff to defendant to show by a preponderance of the evidence that the defendant was not guilty of the smallest or slightest negligence in any of the acts charged as negligence in plaintiff's petition; and if defendant should fail to meet this requirement of the law, your verdict should be for the plaintiff."

It is urged that the foregoing instructions place a higher degree of care on the defendant than the law imposed. The case of *St. Louis & S. F. R. Co. v. Fick*, 47 Okla. 530, 149 Pac. 1126, is cited as authority for this contention. An examination of the rule announced in the *Fick* Case discloses that the doctrine announced therein has no application to the facts in this case. The rule in the *Fick* Case has application to the degree of care required in keeping the platform and premises in a suitable and safe condition.

The particular act of negligence urged in the instant case is that, while Mrs. Pitchford was standing on the car steps and in the act of alighting, a brakeman of said train, who was standing directly in front of Mrs. Pitchford, and who was assisting her in alighting, directed the train to start, and when said train started the brakeman caught hold of the hand of Mrs. Pitchford and jerked her from the steps of the passenger car. In the former opinion in this case this was held to be negligence per se. The sudden starting of the train while Mrs. Pitchford was alighting, and jerking her off the steps, are the particular acts of negligence on which this cause was tried. Hence the rule announced in the *Fick* Case, *supra*, has no application here.

We are inclined to the view that the facts in this case bring it within the rule announced in the case of *Chicago, R. I. & P. R. Co. v. Dizney*, — Okla. —, 160 Pac. 880 and the case of *St. Louis & S. F. R. Co. v. Nichols*, 39 Okla. 522, 136 Pac. 159. The negligence which the jury found to be the proximate cause of the injuries was not a defect in the premises or failure to exercise ordinary care in furnishing a means of egress and ingress, but negligence

**Trial—  
Instructions.**

in the operating of the train on which Mrs. Pitchford was a passenger. We are therefore of the opinion that the foregoing instructions are not subject to the criticism offered.

The last assignment of error is that the judgment rendered by the court is erroneous for the reason that it attempted to fix a lien on the property of defendant for the payment of the judgment.

It was ordered and adjudged by the court that plaintiff should have a lien upon the said railroad, its roadbed, buildings, equipment, income, franchise, right of way, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad, as managers, lessees, mortgagees, trustees, and beneficiaries under trust or otherwise and it further provided that, if said judgment was not paid in thirty days, one James Baab should be appointed special commissioner to take charge of and sell so much of the property of said defendant as might be necessary to pay said judgment.

We are inclined to think that the trial court possibly exceeded somewhat its jurisdiction in making the foregoing order. So much of the judgment as attempted to fix a lien in excess of that provided by the laws of Oklahoma should be set aside and vacated.

But this does not require a reversal of this cause. 1 Freeman, Judgm. § 120; *Koepke v. Dyer*, 80 Mich. 311, 45 N. W. 143; 23 Cyc. 697.

We therefore recommend that said judgment be affirmed, and that the cause be remanded to the District Court of Le Flore county, Oklahoma, with directions to modify said judgment in so far as it attempts to fix any lien inconsistent with the lien provided by the laws of Oklahoma.

**Per Curiam:**

Adopted in whole.

A petition for a rehearing having been granted, Rainey, J., on January 13, 1919, handed down the following additional opinion:

On rehearing it is insisted by counsel for defendant that the opin-

**Appeal—  
Judgment fixing  
lien—vacation.**

(— Okla. —, 177 Pac. 593.)

ion in this case, prepared by Commissioner Davis and adopted by the court, erroneously held that "in order to have reviewed the action of the court in overruling the special motion of defendant filed for the purpose of having vacated the order of revivor made on the 11th day of August, 1916, it was necessary to have incorporated this alleged error in the motion for a new trial, and a failure to present this question in a motion for a new trial precludes this court from a consideration of this question on appeal."

While we have frequently held that an error occurring on the trial of a cause will not be reviewed by this court unless presented to the

—order of  
revivor—neces-  
sity of motion  
for new trial.

trial court in a motion for a new trial, the action of the trial court in the instant case in refusing to set aside the revivor was not an error occurring on the trial of the cause; for, as stated in the opinion, the cause was tried on the 23d day of November, 1916, and the motion to vacate was presented and overruled on the 17th day of November, 1916. It was therefore unnecessary to incorporate this alleged ground for reversal in the motion for new trial.

But we think the assignment of error is without merit, and that the trial court did not err in overruling the motion to vacate. The record discloses that Mrs. Pitchford, who was the original plaintiff in the action, died on March 24, 1915, and that W. T. Forrester was appointed administrator of her estate on August 21, 1915. A motion to revive the action was filed on March 4, 1916, and on February 28, 1916, Judge Brown, sitting in chambers at Stigler, Oklahoma, signed an order purporting to revive said action in the name of the administrator. On April 3, 1916, the defendant filed its motion to vacate the order of revivor on account of a number of alleged irregularities in the proceedings to revive, and this motion was sustained on April 13, 1916. On April 15th following plaintiff filed a

motion for a new trial on defendant's motion to set aside the revivor, which was overruled on the same day. Plaintiff excepted to this action, and was given time within which to make and serve case made on appeal, but no appeal was taken. Thereafter plaintiff had served on counsel for defendant, who resided in Oklahoma City, a notice that the motion pending in the cause to revive the action in the name of the administrator would be presented to Judge Brown, in chambers at Stigler, Oklahoma, on Monday, July 31, 1916, "or so soon thereafter as said judge may hear said matter." Thereafter, and on August 11, 1916, Judge Brown, sitting in chambers at Stigler, Oklahoma, entered an order reviving the action as prayed.

Counsel contend that, when the trial court overruled plaintiff's motion for a new trial on the order setting aside the first order of revivor, the motion to revive was finally disposed of, and, as no further motion to revive was filed, the court was without jurisdiction to enter the second order of revivor. We are not favorably impressed with this contention; for it is our view that the action of the trial court in setting aside the order of revivor for certain irregularities in procuring the same was not a final determination of the plaintiff's right to revive, and left the

motion to revive still pending. Moreover, plaintiff's motion for a new trial on the order setting aside the first revivor did not perform any function in the proceedings. A motion for a new trial was unnecessary to present to the supreme court on appeal the action of the court in setting aside the order of revivor, because it did not grow out of a contested question of fact arising upon the pleadings. Powell v. Nichols, 26 Okla. 734, 29 L.R.A.(N.S.) 886, 110 Pac. 762; Boardman Co. v. Atoka County, — Okla. —, 174 Pac. 272.

Abatement—  
setting aside  
order of revivor  
—effect.

Appeal—neces-  
sity of motion  
for new trial.

So, when the plaintiff, pursuant

to said motion to revive, gave the necessary notice that the same would be presented to the trial court, said court still had jurisdiction to hear the matter and to enter the second order of revivor. By failing to perfect the appeal on the order setting aside the first revivor plaintiff, in effect, merely acquiesced in said order, but did not abandon his motion to revive.

Although the last order of revivor was made after notice to the defendant was served on counsel by the deputy sheriff of Oklahoma county, Oklahoma, in ample time to file objections thereto, the objections made in both of defendant's motions to set aside the respective orders of revivor did not go to the merits of plaintiff's right to revive, nor does the defendant contend that the action is one that could not be revived, and it never at any time filed any pleadings resisting plaintiff's grounds for revivor. We find no substantial error in the granting of the second order of revivor, and the

technical objections made in defendant's brief, in our opinion, are not supported by authority or reason.

The other questions urged on rehearing were fully considered by the commissioner, and we concur with his views thereon as expressed in the opinion.

This is the second time this case has been to this court, the plaintiff recovering in both actions, and from an examination of the entire record we believe that substantial justice has been done, and that the judgment of the trial court should be affirmed, as modified in the original opinion.

All the Justices concur, except Turner and Brett, JJ., absent.

#### NOTE.

The general subject, "What effects removal of executor or administrator," is treated in the annotation beginning at page 175, post. The specific point as to the effect of disqualification being discussed in subdivision V. of that annotation.

R. W. JOHNSTON, Admr., etc., of John Bauer, Deceased, Plff. in Err.,  
v.

W. J. SCHWENCK, Admr., etc., of John Bauer, Deceased.

*Ohio Supreme Court — November 26, 1918.*

(— Ohio St. —, 124 N. E. 61.)

#### Executor and administrator — resignation — removal — appointment of successor.

1. The receiving of the resignation of an executor or administrator by the probate court appointing such officer, and the filing of the document by the judge thereof, followed by the appointment of a successor, is a sufficient compliance with the requirements of § 10,627, General Code, and the new appointment, so made, is in all respects a valid one.

[See note on this question beginning on page 175.]

#### — filing of final account — effect.

2. The filing of an account in the probate court by an executor or administrator, denominated "final account,"

does not operate to terminate the trust, as long as there remains assets under his jurisdiction subject to the payment of valid debts of the decedent,

and the failure of the fiduciary to proceed with the administration of the trust, which, under some circumstances, may justify a removal of the officer, does not constitute, ipso facto, an abandonment of the trust.

### Appeal — removal of administrator.

3. A proceeding filed in the probate court to remove an administrator de bonis non for the reason that his predecessor was still rightfully in office is appealable under favor of § 11,206, General Code.

**ERROR** to the Court of Appeals for Crawford County to review a judgment affirming a judgment of the Court of Common Pleas (Babst, J.) in favor of defendant in a proceeding for his removal as administrator of John Bauer. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. R. V. Sears and J. W. McCarron, for plaintiff in error:

The court of appeals was without jurisdiction to hear the case on its merits.

Re Still, 15 Ohio St. 484; Brigel v. Starbuck, 34 Ohio St. 280; Ebersole v. Schiller, 50 Ohio St. 701, 35 N. E. 793; Monger v. Jeffries, 62 Ohio St. 149, 56 N. E. 654; Smith v. Bracey, 13 Ohio C. C. N. S. 529.

Where the probate court has jurisdiction of the subject-matter and the parties, no matter how irregular or erroneous the proceedings may have been, the judgments and orders made by the probate court are conclusively presumed to have been made with full proof of all the facts necessary to authorize it, and cannot be collaterally impeached.

Union Sav. Bank & T. Co. v. Western U. Teleg. Co. 79 Ohio St. 89, 128 Am. St. Rep. 675, 86 N. E. 478; Sheldon v. Newton, 3 Ohio St. 494; Shroyer v. Richmond, 16 Ohio St. 455.

The appointment of Schwenck was illegal.

Scobey v. Gano, 35 Ohio St. 554.

Messrs. Charles F. Schaber and W. J. Schwenck, for defendant in error:

The alleged appointment of the plaintiff in error herein as administrator de bonis non with the will annexed of the estate of John Bauer, deceased, on the 30th day of December, A. D. 1890, was null and void.

Reiter v. State, 51 Ohio St. 74, 23 L.R.A. 681, 36 N. E. 943; Scobey v. Gano, 35 Ohio St. 554; Woerner, Administration, 2d ed. p. 583; Rockel, Ohio Probate Pr. § 214; Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757.

The court of appeals had authority, after overruling the motion, to dismiss the appeal to inquire into the merits of the case.

Jaeger v. Converse, 87 Ohio St. 486, 102 N. E. 1125; Renick-Bonner Farm

Co. v. Schilder, 87 Ohio St. 477, 102 N. E. 1130; Smith v. Roberts, 88 Ohio St. 632, 106 N. E. 1077.

The claimed appointment of Mr. Johnston was void from its inception.

Union Sav. Bank & T. Co. v. Western U. Teleg. Co. 79 Ohio St. 89, 128 Am. St. Rep. 675, 86 N. E. 478.

There was no right of appeal to the court of common pleas.

Schumacher v. McCallip, 69 Ohio St. 500, 69 N. E. 986; Todhunter v. Stewart, 39 Ohio St. 181.

Nichols, Ch. J., delivered the opinion of the court:

John Bauer died testate in October, 1883. His widow, Anna Catherine Bauer, was appointed executrix of his will. On February 28, 1885, she filed a partial account. This account, showing a balance due her of \$3,688, was confirmed. December 17, 1890, she resigned. The resignation was in writing, and in the same document she recommended the appointment of R. W. Johnston as her successor. The resignation and recommendation were duly filed by the probate judge of Crawford county. There is no record to be found of the formal acceptance of this resignation.

December 30, 1890, such probate court issued its letters in due form to R. W. Johnston as administrator d. b. n. with will annexed, who duly qualified. The new officer proceeded with the administration, and in due course sold 80 acres of land and made application of proceeds to the payment of debts.

On April 11, 1914, R. W. Johnston filed an account designated "final account." This account was confirmed, there being, however, no



formal discharge of the administrator by the court. The records of the probate court do not show, nor is it claimed that Johnston ever filed, any written resignation of this trust, nor do they show that he was removed therefrom.

The widow was devised a life estate in all the real estate of the testator. She died intestate in July, 1916, never having divested herself of this estate. Charles F. Schaber was appointed administrator of her estate, and took immediate steps to enforce payment of the balance found due her as executrix of her husband's estate.

On November 17, 1916, W. J. Schwenck was appointed as administrator d. b. n. with will annexed of John Bauer, such appointment having been made without the written waiver or consent of any of the heirs at law or devisees of John Bauer, although quite a number of them were residents of Crawford county; nor is there any claim that notice of the application for appointment was served on these heirs and devisees.

There remains unsold, of the real estate of John Bauer, about 243 acres of land in Crawford county, being an asset under the control of the administrator, if the debts now asserted are found to be genuine. The debts claimed to be still due from the John Bauer estate are in dispute and are in fact in litigation.

It was further agreed, as shown by the record, that R. W. Johnston, administrator, would testify that at the time he filed his so-called final account he then was, and has been at all times since, ready to proceed with any duties that might devolve on him as such administrator. No testimony was offered to dispute this state of facts.

We learn from the record that Johnston, administrator, on December 7, 1916, filed an application, duly verified, seeking the removal of Schwenck, administrator. Johnston alleges in this application that he had neither resigned his trust nor been removed therefrom, and

that he is still the duly appointed administrator, and duly authorized by law to proceed with the duties of the office; that claims to a large amount have been recently asserted against the estate, which it is charged are illegal; and that he is now ready to defend the estate against such claims and to perfect and conserve the estate.

It is further alleged that in certain proceedings in partition pending in common pleas court of Crawford county Schwenck, administrator, has filed cross petition, wherein he asserts the validity of the alleged debts, and asks for a sale of the real estate in order to pay them. Such application was heard in the probate court, and the motion to remove Schwenck was overruled, the court holding that from the facts hereinbefore set forth Johnston's conduct was such as to constitute in law and fact an abandonment of the trust.

The cause was thereupon appealed to the court of common pleas, where it was heard on stipulation of the parties, as to the facts, the finding on the issues thus joined being in favor of Schwenck and against Johnston, administrator. In due course the cause reached the court of appeals, the entry in which court shows that the judgment of the court of common pleas was affirmed on the ground that substantial justice had been done.

We have no official information as to the ground of affirmation, but we do learn, both from briefs and oral statements of counsel for both parties, that it was the holding of the court of appeals that the appointment of Johnston in 1890 was invalid for the reason that there was no record evidence in the probate court of the acceptance of the resignation of Anna Catherine Bauer, the original fiduciary.

On application of Johnston, administrator, the case was admitted to this court for review.

There are three legal questions involved in this case:

(1) Do the undisputed facts of

the case establish in law an abandonment of the trust by Johnston, administrator?

(2) Is it a prerequisite, before the probate court has jurisdiction to appoint a successor in office, to an executrix who has tendered her resignation, that such court shall formally accept the resignation?

(3) Is a proceeding to remove an administrator, or to revoke letters of administration, appealable under the Code?

The probate court based its decision on the finding of the court that the conduct of Johnston with respect to the office amounted to an abandonment of the trust. We are wholly unable to find anything in the facts, hereinbefore fully set forth, to justify any such conclusion. It is true that Johnston filed what was termed his final account, a great many years ago, and in the meantime made no move in the direction of exercising the functions of the office. This conduct is to be considered in the light of the facts and circumstances surrounding the estate. If there was any creditor whose claim remained unsatisfied, it was the widow, to whom there was a balance due of \$3,688, as shown by her final account. She occupied the dual relation of creditor and life tenant. In order to satisfy her claim, it would be necessary to sell the property, of which, all through these intervening years, she had the beneficial enjoyment.

There is a dispute as to the validity of the debt; it being claimed to have been extinguished by agreement of the parties. But, conceding its validity, the failure of the administrator to proceed, it is to be fairly presumed, was with her full acquiescence, if not at her absolute direction.

This situation presents the very best of reasons why the administration should have been suspended until the death of the widow. She alone could complain of delay, and, as we have demonstrated, she was being benefited rather than harmed.

It is the universal holding that

the authority of an executor or administrator to represent the estate continues until the estate is fully settled, unless he is removed, dies, or resigns, and that the filing of what pur-

Executor and administrator—  
filing of final  
account—effect.

ports to be a final account does not extinguish the trust. Indeed, in the case of Weyer v. Watt, 48 Ohio St. 545, 28 N. E. 670, it was held that an order by the court, directing that the administrator be discharged, made at the time of the filing of a final account, does not terminate his authority if assets of the estate remain unadministered.

In the case at bar, the real estate, so far as it may have been necessary to pay any valid indebtedness, was all the while, technically at least, an asset in the hands of the administrator.

The second question in the case is that suggested by the court of appeals in its affirmance of the judgment of the common pleas. Is it necessary upon the filing by the executor of an estate of a resignation of the trust, with a recommendation that a particular person be appointed as successor, for the court, before acquiring jurisdiction to appoint such successor, to accept the resignation by formal entry of such fact upon its journal?

Counsel for Schwenck, administrator, contend that such necessity exists under the law, and cite the case of Reiter v. State, 51 Ohio St. 74, 23 L.R.A. 681, 36 N. E. 943, and § 10,627, General Code, in support of their contention. We are of the contrary opinion, and hold that the filing of the resignation of the executor, followed by the issuing of letters of administration d. b. n. with will annexed to another, is to be considered an acceptance by the court of such resignation.

—resignation—  
removal—  
appointment of  
successor.

A consideration of the case of Reiter v. State, supra, instead of establishing the necessity of formal acceptance, when carefully analyzed, really decides such accept-

ance not indispensable to the authority to fill a vacancy. Especially is this true when the Reiter Case is considered in connection with § 10,627, General Code. It is held in the first proposition of the syllabus in the Reiter Case: "By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

Accepting this syllabus as the accepted law of the state, let us examine the statute on the subject of the resignation of an administrator, and the filling of the vacant trust by the probate court, and determine whether it is "otherwise provided by statute." Let it be understood that this exception, if it does exist, and has been provided for by statute, must, like all exceptions to every general rule, be made clearly to appear. Section 10,627 reads: "The court issuing letters testamentary or appointing an administrator, if it deems fit, upon good cause shown, may receive the resignation of such executor or administrator, and appoint an administrator in his place."

In the first place, let it be noted that the language employed is not that the court may or must accept the resignation, but simply that it may "receive" it, "if it deems fit." That the court, in the case under consideration, did receive the resignation, so far at least as filing with his official signature the document purporting to be such, is an admitted fact, and the original paper, with proper file marks, is to be found in the archives of the court. To take a thing is to "receive" it. Ordinarily, if some further action is to be had by the recipient, the use of the expression "accept" would be

expected, and an investigation of the statutes respectively relating to the resignation of guardians, trustees, and commissioner of insolvents discloses the fact that the term "may accept the resignation" is employed. In this connection we refer to §§ 11,035, 11,147, and 10,938, General Code.

Of course, there is a sense in which the terms "receive" and "accept" are synonymous, and when it is seen by the terms of the statute under consideration that the judge of the probate court is vested with some discretion, in that it is said that he may receive it, "if he deems fit" and upon good cause being shown, it may, with some force of reason, be urged that some further action is implied. What is meant by "if he deems fit" or upon good cause being shown, in such circumstances as these, is not easily understood.

It occurs to us that if one who has been acting as administrator or executor concludes that he does not desire to continue longer in that capacity, whether the cause inducing his decision be good or bad, or whether it be without reason at all, the court could not force him to remain in office against his will. It is supposable that if such officer had been unfaithful to his trust, the court might prefer to remove him rather than permit him to resign, although his own liability for breach of trust, or that of his bondsmen, could not be affected by the manner in which his connection with the trust was terminated.

We are not inclined, however, to decide this question on a mere technicality, or mere nicety as to shade of meaning of terms, although, if we did do so, it would be only opposing technicality to technicality; for surely the questioning of the validity of the appointment of an administrator twenty years after his induction into office, and after he had faithfully discharged important duties in connection with the trust, would be pushing formality and technicality beyond all just

limits, particularly when the sole basis of the attack was that the court making the appointment had failed to enter on its journal an acceptance of the resignation of the predecessor in office. It would be dismal surrender to mere form, and a patent sacrifice of the substance of things, to so hold, especially when we consider that the administrator, then appointed without objection of either creditor, heir, or devisee, performed the functions of his office, selling real estate, paying debts, and rendering proper account of his administration.

We have facts of a most substantial nature that impel us to hold the appointment of Johnston to be valid; for the court, receiving the resignation of the executrix, acted on it and treated it as a completed transaction in that immediately after receiving the same it proceeded to fill the vacancy by the appointment of Johnston, to whom it issued letters of authority under the seal of the court.

We are of the opinion that if an acceptance of the resignation of the executrix is a condition precedent to the power of making the new appointment, then the action of the court in receiving the resignation and thereafter appointing a successor is in law tantamount to an acceptance thereof.

With reference to the third question we hold that a proceeding of the character here under consideration is appealable from the probate court, feeling that the cause is well within the spirit of § 11,206, General Code.

The judgment of the Court of Appeals is accordingly reversed, and the cause is remanded to the Probate Court of Crawford county, with directions to proceed in accordance with the finding of this court.

Wanamaker, Newman, Jones, Matthias, Johnson, and Donahue, JJ., concur.

## ANNOTATION.

### What effects removal of executor or administrator.

- I. Resignation, 175.
- II. Act of court tantamount to removal:
  - a. Generally, 176.
  - b. Annulment of will, 177.
  - c. Probate of will subsequently discovered, 177.
- III. Expiration of statutory period for settling estate, 178.
- IV. Expiration of period of appointment:
  - a. Temporary administration, 179.

#### I. Resignation.

Where a court having power to remove an executor or administrator accepts his resignation, the power of the fiduciary so resigning is thereby terminated. *Jennings v. LeBreton* (1889) 80 Cal. 8, 21 Pac. 1127; *Marsh v. People* (1853) 15 Ill. 284; *Sample v. Adams* (1913) 54 Ind. App. 680, 100 N. E. 573; *Balch v. Hooper* (1884) 32 Minn. 158, 20 N. W. 124; *Tulburt v. Hollar* (1889) 102 N. C. 406, 9 S. E. 430.

- IV. continued.
  - b. Administration during minority of next of kin, 180.
  - c. Administration pendente lite, 180.
- V. Disqualification:
  - a. Generally, 181.
  - b. By marriage, 181.
  - c. By loss of office giving right to administer, 182.
- VI. Completion of administration, 183.

In *Marsh v. People* (1853) 15 Ill. 284, it was held that the resignation of an administrator and its acceptance by the court were equivalent to a revocation of the grant of administration to him, and thereafter his coadministrators were alone liable for maladministration of the estate.

In *Jennings v. Le Breton* (1889) 80 Cal. 8, 21 Pac. 1127, it was held that where an executor had resigned and filed his final account, and the court appointed another person administra-

trix four days thereafter, this was equivalent to an acceptance of the executor's resignation and a revocation of his letters testamentary.

In *Sample v. Adams* (1913) 54 Ind. App. 680, 100 N. E. 573, it appeared that an administratrix had been appointed by the Clinton circuit court to take charge of the estate of Eliza Ramseyer, and duly qualified as such. Within a short time after her appointment, the administratrix filed her final report and resignation. The court approved the report and accepted the resignation, and discharged her from further duties in said estate. Thereafter, another administrator was appointed by the court of Tipton county and an administrator *de bonis non* was appointed by the Clinton county circuit court, and the question was, which was entitled to administration of the estate? Both administrators had been appointed pursuant to the provision of law that the probate court of the county wherein the decedent resided at the time of his death should have jurisdiction. It was held that the acceptance of the resignation of the original administratrix amounted to an annulment of the letters issued to her, but was not an adjudication that the Clinton circuit court did not have jurisdiction of the estate.

In *Balch v. Hooper* (1884) 32 Minn. 158, 20 N. W. 124, it appeared that an administrator with the will annexed asked leave of the court to resign on account of ill health and advanced age, and rendered a final account, whereupon the court entered an order approving his account and accepting his resignation, but did not expressly revoke his letters. It was held that the acceptance of the resignation amounted to a removal of the administrator and a revocation of his letters.

In *Tulburt v. Hollar* (1889) 102 N. C. 406, 9 S. E. 430, it was held that the resignation of an administrator and its acceptance by the probate court and the appointment of a successor had no other practical effect than a removal or a revocation of letters, and therefore no action could be maintained against the administrator.

But in *Flinn v. Chase* (1847) 4

*Denio* (N. Y.) 85, it was held that an administrator was not removed from office by tendering his resignation, which the surrogate accepted, because the administrator was about to remove from the village and would find it inconvenient to act further as administrator, a surrogate not having the authority to accept a resignation except in those cases provided by law for the revocation of letters, and, consequently, that a grant of letters to another as administrator was void as the office was not vacant.

In *Rumrill v. First Nat. Bank* (1881) 28 Minn. 202, 9 N. W. 731, it was held that a resignation by an executor, which had been accepted by an indorsement on it and filed and no other act done in respect to it, was not sufficient to remove the administrator from office, although it might be a good ground for removing him, the court saying: "A resignation tendered by an executor or administrator might be good ground for removing him or revoking his letters, and an acceptance of the resignation by the court, if entered, in the form of an order, in the record which the statute requires the court to keep of appointment of administrators, etc., with all orders relating to the same (Gen. Stat. 1866, chap. 49, § 8, subd. 3), might be taken to have the effect of a removal or revocation of the letters. But a resignation tendered, and an acceptance indorsed on it and filed, no entry being made in the record, and no further act done in respect to it,—and that appears to have been all there was in this case,—can have no legal effect on the status of the administrator."

## II. Act of court tantamount to removal.

### a. Generally.

Where a court which has the power to remove an executor or administrator treats one of two joint fiduciaries as the sole executor or administrator, disregarding the other, the latter is in effect removed. *State ex rel. Rucker v. Rucker* (1875) 59 Mo. 17; *Vosler v. Brock* (1884) 84 Mo. 574.

In *State ex rel. Rucker v. Rucker* (Mo.) supra, where an administrator

and administratrix had been appointed, and the administratrix thereafter became a nonresident of the state, it was held that while the non-residence alone did not work a revocation of her letters, the fact that the court from that time treated the remaining administrator as the sole administrator amounted to a virtual revocation of the power and authority of the administratrix.

In *Vosler v. Brock* (1884) 84 Mo. 574, it appeared that two executors had been appointed pursuant to the provisions of a will, and thereafter one of them removed from the state. The court then treated the other as the sole testamentary representative of the deceased. It was held that this, in effect, discharged the one who had become disqualified by nonresidence, although no formal entry to that effect appeared.

So, where ground for the removal of an executor or administrator exists, the appointment of a successor to him amounts to a removal, though no formal order of removal is made. *Ragland v. King* (1860) 37 Ala. 80; *Berry v. Bellows* (1875) 30 Ark. 198; *Loveman v. Taylor* (1886) 85 Tenn. 1, 2 S. W. 29.

In *Berry v. Bellows* (1875) 30 Ark. 198, it was held that where an administrator enlisted in the Confederate Army, the court had the right to appoint another in his place, as by enlisting he became incapable of properly managing the estate; and that the appointment of an administratrix under such circumstances was an implied revocation of the letters of the former administrator. The court said: "It would have been more regular to revoke his letters directly in the order appointing her, but his letters were by implication revoked."

In *Loveman v. Taylor* (Tenn.) *supra*, it appeared that the executor named in a will renounced his right and an administrator with the will annexed was appointed. Thereafter, in an action against the administrator for an accounting, a decree was rendered construing the will and ordering an accounting of the estate in the hands of the administrator, and ap-

pointing a trustee to take charge of the estate. It was held that the appointment of the trustee operated in law as a removal of the administrator.

In *Ragland v. King* (Ala.) *supra*, it appeared that an executor and executrix had been appointed, the executrix being the widow of the testator. The executor died, and, as the executrix refused to renew her bond, the court appointed an administrator *de bonis non*, with the will annexed. It was contended that as the executrix had neither died, resigned, nor been removed, the appointment of the administrator was void, as there was no vacancy in the office. It was held that the executrix had been removed, although no formal order had been entered to that effect, and with the view of sustaining the second grant of administration when collaterally attacked, it would be proper to consider the action of the court as amounting to the removal of the executrix.

#### *b. Annulment of will.*

The annulment of a will has been held to operate as a removal of an executor appointed thereunder. *Heffner's Succession* (1897) 49 La. Ann. 407, 21 So. 906. And a like holding has been made as to an administrator *c. t. a.* *Kilton v. Anderson* (1893) 18 R. I. 136, 49 Am. St. Rep. 751, 25 Atl. 907.

But in *Floyd v. Herring* (1870) 64 N. C. 409, an administrator *cum testamento annexo* had been appointed, there being no executor named in the will. Thereafter the probate of the will was revoked. It was held that the revocation of probate in common form did not have the effect of annulling the administration, which had been properly granted, although if it were set aside, a different question might arise.

#### *c. Probate of will subsequently discovered.*

It has been held that the probate of a will operates as a removal of an administrator appointed before the discovery of the will. *Schluter v. Bowery Sav. Bank* (1889) 117 N. Y. 125, 5 L.R.A. 541, 15 Am. St. Rep. 494, 22 N. E. 572. And a like effect has been

attached to the appointment of an executor under a will subsequently discovered. *Waltz's Appeal (Re Nelson)* (1913) 242 Pa. 167, 49 L.R.A. 894, 88 Atl. 974. In that case it was held that the appointment of an executor named in a will, after an administrator had been appointed, in effect revoked the appointment of the administrator. The administrator could not thereafter administer the estate, even though all the legatees had signed an agreement to that effect, and the estate had been almost completely administered. It was not in the power of the legatees to make such an agreement, as the testator had a legal right to name the persons who should administer it, and furthermore it was a condition of the bond prescribed by law that letters of administration should be surrendered "if it shall hereafter appear that any last will and testament was made by the deceased."

In *Dwight v. Simon* (1849) 4 La. Ann. 490, it appeared that an administrator of an estate had been appointed, and some time thereafter a will was found and probated, but the executor therein named did not signify his intention of accepting or renouncing the executorship until over three years after the probate. In the meantime the administrator had become bankrupt. It was held that the authority of the administrator continued until the executor took office and qualified, as otherwise the estate would have been without anyone in charge. It was also held that the fact that the administrator became bankrupt did not serve to prevent him from continuing to act, but was merely a ground for his removal.

### *III. Expiration of statutory period for settling estate.*

It has been held that where a statute fixes the time within which the estate of a decedent shall be administered, the expiration of that period terminates the authority of the executor or administrator. *Deranco v. Montgomery* (1858) 13 La. Ann. 513; *Brown v. Williams* (1840) 16 La. 344.

In *Deranco v. Montgomery* (La.) supra, it was held that an executor

could not be held liable to pay a legacy under the will after the lapse of over thirty years, the Statute of Limitations being applicable.

In *Brown v. Williams* (La.) supra, it was held that the term of an executor expired at the end of the year as provided by statute, and he had no authority, thirteen months thereafter, to bring an action in his capacity as executor.

Compare *Taylor v. Jeffries Estate* (1836) 10 La. 435, wherein it was held that the office of an administrator did not expire at the end of a year, by operation of law, but continued, according to the Code, in at least one class of cases, until partition was made among the heirs.

In *Gayoso de Lemos v. Garcia* (1823) 1 Mart. N. S. (La.) 324, it was held that where an executor was given power by will to sell land, he did not cease to be executor until the sale had been completed, although several years had elapsed since letters testamentary had been issued.

In other jurisdictions, however, the termination of the statutory period does not ipso facto discharge the executor or administrator. *Marfield v. McMurdy* (1905) 25 App. D. C. 342; *McLain v. Pate* (1910) 58 Tex. Civ. App. 500, 124 S. W. 718; *Poor v. Boyce* (1854) 12 Tex. 440.

In *McLain v. Pate* (1910) 58 Tex. Civ. App. 500, 124 S. W. 718, it was held that the lapse of eighteen years did not operate to bring about a discharge of an administratrix, and she was therefore clothed with all the powers of an administratrix, and could give a good title to a land certificate belonging to the estate.

In *Poor v. Boyce* (Tex.) supra, it was held that where an administratrix had continued to act as such after the time for administration had expired, and her right to act as such was recognized by the court, a sale made by her could not be held void as it would be presumed that her authority had been extended by the court even though no order was entered to that effect.

In *Marfield v. McMurdy* (D. C.) supra, it was held that an executorship

did not terminate at the end of the period of administration, but continued as long as there remained anything under the will to be executed. "The argument of the appellant, in opposition to this, is that the executorship, properly so called, ceased at the termination of the period of administration, that is, in about twelve or thirteen months after the issue of letters testamentary and the settlement of account or the lapse of the time for such settlement in the probate court; and that thereafter the appellee held the estate as trustee, with compensation, if any, dependent upon a court of equity. But this is an argument based upon words, not upon substantial things. The executor does not cease to be executor because the period of administration, so called, may be passed. He is still executor as long as he has anything under the will to execute. He is just as much a trustee during the period of administration as after it. Every executor, administrator, guardian, receiver, assignee, and other person or persons acting in a fiduciary capacity, is a trustee; and the only difference, at all events the principal difference, between an executor during the period of administration, and an executor after the lapse of the period of administration, is that the former is responsible to the probate court for the faithful execution of his trust, the latter to a court of equity. He is equally a trustee at both times, and equally an executor."

#### *IV. Expiration of period of appointment.*

##### *a. Temporary administration.*

The issuance of regular letters of an administrator effects the removal of a temporary administrator. *Re Haag* (1917) 100 Misc. 249, 166 N. Y. Supp. 621; *Re Dayton* (1917) 100 Misc. 632, 166 N. Y. Supp. 951, affirmed without opinion in (1918) 182 App. Div. 886, 168 N. Y. Supp. 1106; *Re Lewis* (1883) 17 N. Y. Week. Dig. 311; *Re Goetz* (1907) 120 App. Div. 10, 104 N. Y. Supp. 882; *Hastings v. Tousey* (1908) 123 App. Div. 480, 108 N. Y. Supp. 526; *Re Neil* (1918) 184 App. Div. 507, 172 N. Y. Supp. 79.

In *Re Haag* (N. Y.) *supra*, it was held that the appointment of an executor terminated the authority of a temporary administrator, except to make an accounting and to turn over to the executor the assets remaining in his hands.

In *Re Dayton* (1917) 100 Misc. 632, 166 N. Y. Supp. 951, affirmed without opinion in (1918) 182 App. Div. 886, 168 N. Y. Supp. 1106, it was held that the powers of a temporary administrator ceased on the probating of a will and the granting of letters testamentary to the executor named therein. The only power remaining to the temporary administrator was to make an account of its proceedings and to pay over to the executor the assets in its hands.

In *Re Goetz* (1907) 120 App. Div. 10, 104 N. Y. Supp. 882, it was held that the appointment of an administrator with the will annexed terminated the authority of a temporary administrator, the only remaining duties of the temporary administrator being to account to the surrogate's court which appointed him and to turn over the assets in his hands to the administrator with the will annexed, when directed to do so by the surrogate.

In the case of *Re Lewis* (1883) 17 N. Y. Week. Dig. 311, it was held that the appointment of an administrator as collector of an estate was absolutely superseded and ended by the appointment of an administrator with the will annexed. Nothing further was required to terminate his authority over the estate or his right to retain the funds which he had received during the time the letters to him continued to be in force.

In the case of *Re Neil* (1918) 184 App. Div. 507, 172 N. Y. Supp. 79, it was held that the formal revocation of the letters of a temporary administrator was unnecessary where permanent letters had been issued, as the issuance of the latter effected the removal of the temporary administrator in itself.

In *Hastings v. Tousey* (1908) 123 App. Div. 480, 108 N. Y. Supp. 526, it appeared that the plaintiff was tem-



porary administrator of the estate of Rosalie Tousey Hastings, and in this capacity brought suit to determine the ownership of a certain share of stock which he held, and if it should be held to belong to the estate, to compel a transfer of it on the books of the defendant corporation. Pending the suit, the plaintiff was appointed executor of the estate, and it was held that he could not continue the action in the character of temporary administrator, as his appointment as executor ipso facto extinguished whatever authority he might have had as temporary administrator, and this without any formal revocation of his letters of temporary administration.

*b. Administration during minority of next of kin.*

The office of an administrator appointed to act during the minority of the next of kin of an intestate terminates when the next of kin becomes of age. *Riegel's Appeal* (1886) 2 Sadler (Pa.) 58, 17 W. N. C. 279, 4 Atl. 173, wherein it was held that the office of an administrator appointed for the minority of the next of kin of the decedent, where the next of kin were all under age at the time, was terminated when the eldest son of the decedent arrived at full age, for although his letters did not so state, he took the letters subject to the condition expressed in the statute.

*c. Administration pendente lite.*

The authority of the administrator appointed pendente lite ceases with the termination of the litigation. *State ex rel. Ashton v. Imel* (1912) 243 Mo. 180, 147 S. W. 989; *Cole v. Wooden* (1840) 18 N. J. L. 15; *Woolley v. Pemberton* (1886) 41 N. J. Eq. 394, 5 Atl. 189.

In *State ex rel. Ashton v. Imel* (Mo.) supra, it appeared that the relator, Mrs. Ashton, was the widow and executrix of the will of Thomas Ashton, deceased. A daughter of the testator contested the will, making the relator a party defendant. Thereafter she applied to the probate court for an order appointing an administrator pendente lite. This application was granted, an administrator pendente

lite being appointed. The executrix asked leave to appeal from the order of the probate court appointing the administrator pendente lite. The probate court refused to allow an appeal, and the executrix sued out of the circuit court of Buchanan county an alternative writ of mandamus. In reply to the writ, the probate judge filed a demurrer, and the demurrer was sustained and judgment entered denying the right of the relator to an absolute writ of mandamus. Upon appeal from that judgment, the case was sent from the court of appeals to the supreme court of the state. While these suits were in progress, the contest of the will resulted in a judgment sustaining its validity. It was therefore held that, as the powers and duties of the administrator pendente lite had ceased ipso facto when the will contest was ended, the appeal should be dismissed, as there was no longer any real substance left in the case. If the writ of mandamus were allowed there would be nothing gained by it, as the legal existence of the administrator pendente lite had long since ceased. "By analogy, his office is said to be in the nature of a receivership; and, when the contest is at an end and the validity of the will established, his term of office expires and his right to act ends."

In *Cole v. Wooden* (1840) 18 N. J. L. 15, it was held that the authority of an administrator pendente lite ended when the suit for the duration of which he was appointed was at an end, and no agreement of those interested to continue such administrator in office could give him any authority. The only way this could be done would be to take out letters in the regular way.

In *Woolley v. Pemberton* (N. J.) supra, it was held, inter alia, that the functions of an administrator pendente lite ceased when the litigation over the will was concluded, except that he would still remain liable to account for what he received and to pay whatever remained in his hands to the person pronounced by the court to be entitled thereto for further distribution.

In *Diehr v. Dean* (1916) — Mo. App. —, 187 S. W. 602, it was held that the authority of an administrator pendente lite did not end with the termination of a will contest, but continued until the final result of the will contest was duly certified to the probate court.

*V. Disqualification.*

*a. Generally.*

It has been held that the office of an executor or administrator is vacated by his voluntary doing of an act which disqualifies him. *Poindexter's Succession* (1867) 19 La. 22; *Vogel's Succession* (1868) 20 La. Ann. 81; *Hebert v. Jackson* (1876) 28 La. Ann. 377.

In *Hebert v. Jackson* (La.) *supra*, it was held that an executor forfeited his office by leaving the Federal lines and joining the Confederate Army. The office thereby became vacant, hence a confession of judgment against the estate after the war was over was a nullity.

In *Poindexter's Succession* (La.) *supra*, it was held that a curator, by refusing to take the oath of allegiance and going beyond the jurisdiction of the proper authority, became *functus officio*, and lost all right to control or administer the property any further, and all right to any commissions, except on sums received or recovered by him prior to his abandonment of his trust.

In *Vogel's Succession* (1868) 20 La. Ann. 81, it was held that an executor who had voluntarily incapacitated himself from performing the duties of his office by refusing to take the oath of allegiance required of all persons exercising functions public or private, and by registering himself as an enemy of the United States, by reason of which he was expelled from the jurisdiction of the court, ceased to be an executor of the estate, and the appointment of a dative executor, without first revoking the letters testamentary previously issued, was proper, as the office had become vacant by the executor's acts.

But in *CHICAGO, R. I. & P. R. Co. v. FORRESTER* (reported herewith) *ante*,

163, it was held that the removal of an administrator of an estate from the state after his appointment as administrator did not *ipso facto* vacate the letters, but merely furnished sufficient ground to warrant the probate court in making an order revoking and vacating the letters.

*b. By marriage.*

In some jurisdictions it is held that the marriage of an executrix or administratrix terminates her authority to act. *Pistole v. Street* (1837) 5 Port. (Ala.) 64; *Kavanaugh v. Thompson* (1849) 16 Ala. 817; *Whittaker v. Wright* (1880) 35 Ark. 511; *Carrol v. Connet* (1829) 2 J. J. Marsh. (Ky.) 195; *Tribble v. Broaddus* (1893) 15 Ky. L. Rep. 324, 23 S. W. 349; *Wood v. Chetwood* (1876) 27 N. J. Eq. 311; *Re Fagin* (1887) 10 Ohio Dec. Reprint, 180. Compare *Cadwallader v. Evans* (1857) 1 Disney (Ohio) 585, 12 Ohio Dec. Reprint, 811.

In *Pistole v. Street* (Ala.) *supra*, it was held that an administratrix, by marriage, lost her capacity to act as administratrix during the coverture, but as she survived her husband her right to administer revived, but she remained liable for his administration of the estate.

In *Re Fagin* (1887) 10 Ohio Dec. Reprint, 180, it was held that an unmarried woman who was appointed executrix and subsequently married thereby lost her capacity to be an executrix. Her authority was extinguished by her marriage, as a statute expressly provided that it should be. Rev. Stat. § 6022.

In *Tribble v. Broaddus* (1893) 15 Ky. L. Rep. 324, 23 S. W. 349, it was held that the marriage of an executrix terminated her authority to act, there being a statute to that effect, except where the widow was constituted a trustee by the will, which the court held she was not in this case.

In *Wood v. Chetwood* (1876) 27 N. J. Eq. 311, it was held that where an executrix married, her husband became executor in her place and rendered himself a trustee with her of the assets of the estate, and, as such, he might be compelled to account.

In *Whittaker v. Wright* (1880) 35

Ark. 511, it was held that where an executrix of an estate married and removed from the state, she thereby ceased to be an executrix, as neither a married woman nor a nonresident could be administratrix or executrix.

In *Kavanaugh v. Thompson* (1849) 16 Ala. 817, it was held that where an administratrix married, her husband became administrator in his own right, and took on himself all the duties, and was entitled to all the privileges, which belonged to the administratrix before the marriage. He was therefore the proper representative of both, and service of citation upon him would be sufficient without also serving the wife.

In *Carrol v. Connet* (1829) 2 J. J. Marsh. (Ky.) 195, it was held that although an administratrix became incapable by reason of marriage, yet this did not release her sureties, as they remained liable for her husband's acts, since he became administrator by reason of the marriage.

In *Cadwallader v. Evans* (1857) 1 Disney (Ohio) 585, 12 Ohio Dec. Reprint, 811, it was held that where a woman was sole administratrix, her subsequent marriage did not terminate her office. Her husband thereby became coadministrator with her.

In other jurisdictions the marriage of an executrix or administratrix does not ipso facto revoke the letters issued to her, though it may be a ground for her removal. *Schroeder v. Superior Ct.* (1886) 70 Cal. 343, 11 Pac. 651; *McMillan v. Hayward* (1892) 94 Cal. 357, 29 Pac. 774; *Jenkins v. Jenkins* (1864) 23 Ind. 79; *Yates v. Clark* (1878) 56 Miss. 212; *Lindsay v. Lindsay* (1787) 1 S. C. Eq. (1 Desauss.) 150; *Hamilton v. Levy* (1894) 41 S. C. 374, 19 S. E. 610. Compare *Teschmacher v. Thompson* (1861) 18 Cal. 11, 79 Am. Dec. 151.

In *McMillan v. Hayward* (1892) 94 Cal. 357, 29 Pac. 774, it was held that the marriage of an executrix did not ipso facto extinguish her authority to act as executrix, but was merely a ground for her removal, and until removed she continued to exercise all the functions of the office.

In *Schroeder v. Superior Ct.* (1886) 70 Cal. 343, 11 Pac. 651, it was held

that the marriage of an executrix did not "eo instanti" extinguish her authority, but merely rendered her incompetent to act, and was a ground for her removal. The words "her authority is extinguished," it was held, were employed in §§ 1352 and 1350, 1411, 1436, 1437, and other sections of the Code of Civil Procedure as the equivalent of "she ceases to be competent."

In *Yates v. Clark* (1878) 56 Miss. 212, it was held that the marriage of an executrix did not per se revoke her authority to act as executrix, nor did the fact that her husband failed to furnish a bond, as required by statute in such cases, have that effect. It was but a ground for removal, and until the exercise by the proper court of its power of removal for this cause, her power as executrix remained in full force.

In *Jenkins v. Jenkins* (1864) 23 Ind. 79, it was held that a married woman was competent to act as an executrix or administratrix with her husband's consent, under the statutes relating thereto (2 Gavin & H. 486, § 1, and 2 Gavin & H. 491-493, §§ 22 and 27), and such consent did not make the husband a coadministrator with the wife.

In *Hamilton v. Levy* (1894) 41 S. C. 374, 19 S. E. 610, it was held that the marriage of an administratrix did not revoke her letters of administration, but made the husband her coadministrator, who would be liable for any act of administration afterwards performed by her.

In *Teschmacher v. Thompson* (1861) 18 Cal. 11, 79 Am. Dec. 151, it was held that where an executrix had intermarried with one of her coexecutors, her authority as executrix ceased, and therefore the action was properly brought in the name of the executors.

*c. By loss of office giving right to administer.*

Where the right to act as executor or administrator is appurtenant to the possession of a public office, it has been held that the resignation of the officer or the expiration of his term terminates his power to administer.

*Landford v. Dunklin* (1882) 71 Ala. 594; *Levi v. Huggins* (1868) 48 S. C. L. (14 Rich.) 166.

In *Landford v. Dunklin* (Ala.) *supra*, it was held that, by the particular phraseology of a statute which prescribed the duties of sheriffs and coroners, and stated that where a sheriff or coroner acted as administrator, the administration should attach to the office, and not to the person, the power of the sheriff to act as administrator ended when his term as sheriff expired, and that it was not necessary for letters of administration which would thus expire by operation of law to be revoked before letters could be granted to another person.

In *Levi v. Huggins* (1867) 48 S. C. L. (14 Rich.) 166, it appeared that the defendant was a commissioner in equity and as such took out letters of administration on an estate. Before he had received any assets of the estate, however, he resigned the office of commissioner and turned over to his successor all the assets in his hands including all those of the estates of which he was administrator. It was held that he ceased to be administrator when he resigned the office of commissioner in equity, and no action in respect to the estate could be maintained against him.

In other jurisdictions it is held that the loss of an office does not affect an administratorship or executorship held *virtute officii*. *Beale v. Hall* (1857) 22 Ga. 431; *Olsen v. Rich* (1881) 79 Ky. 244; *Hull v. Neal* (1854) 27 Miss. 424.

In *Beale v. Hall* (Ga.) *supra*, it was held that the office of administrator did not expire, when held by the clerk of the superior court, when his term of office expired, as the office of administrator was not appurtenant to the office of clerk of the court. The ordinary had discretion by law to appoint any suitable and proper person to be administrator, and if it were held that the successor of the clerk of the court became also his successor as administrator, the ordinary would be deprived of his right to exercise his discretion, and the purpose of the law would not be accomplished; namely,

to secure the administration of estates by fit and proper persons.

In *Olsen v. Rich* (1881) 79 Ky. 244, it appeared that the appellant, Olsen's administrator, had formerly been public administrator, but had resigned his office. After his resignation as public administrator, he commenced this action as the administrator of the estate of John Olsen. The court below was of the opinion that, his resignation of the office of public administrator having been tendered and accepted, it was a surrender of all the trusts confided to him by reason of his office, and dismissed the action. It was held that in so doing the court below erred, and that the public administrator continued to be administrator of those estates as to which he had been appointed while in office, until he should be removed from office for a cause as provided by statute.

In *Hull v. Neal* (1854) 27 Miss. 424, it appeared that a sheriff had been appointed administrator of an estate by virtue of his office. The law relating to this subject was thereafter repealed, so far as it related to that particular county. A son of the intestate applied to the court to be appointed administrator *de bonis non*, and the court made the appointment. The sheriff contended that the court had no authority to make the appointment without giving him timely notice of the application and until he had settled accounts as provided by law. It was held that, although the repeal of the law did not *ipso facto* revoke the letters of administration, it gave the probate court power to do so at any time and to commit the administration to the person entitled to the same by law.

#### VI. Completion of administration.

It has been held that an executorship ceases when all the duties specified in the will have been performed. *Downey v. Kearney* (1917) 81 W. Va. 422, 94 S. E. 509. In that case it appeared that a testator left his estate, consisting mainly of stocks and bonds, to his widow for life or during her widowhood. The will authorized the widow to make payment of legacies during her life if she wished to do so.

The only duties required of the executors were that they pay the debts and funeral expenses and turn over the remainder to the widow. Their executorship then terminated. They were not required even to pay specific legacies before turning over the estate to the widow. It was held that there was no implied trust created by the will whereby the executors were required to make distribution to the legatees, as the delivery to the life tenant passed all title and control of the assets from them.

So it has been held that the approval of the final account of an executor or administrator terminates his office. *Anderson's Succession* (1857) 12 La. Ann. 95; *Decuir's Succession* (1874) 26 La. Ann. 222; *State ex rel. Matteson v. Probate Ct.* (1901) 84 Minn. 289, 87 N. W. 783; *Vandever's Appeal* (1862) 42 Pa. 74; *Krogman's Estate* (1894) 14 Pa. Co. Ct. 567. Compare *Lowry v. Tilleny* (1884) 31 Minn. 500, 18 N. W. 452; *Re Scheffer* (1884) 58 Minn. 29, 59 N. W. 956.

In *Decuir's Succession* (1874) 26 La. Ann. 222, it was held that a judgment homologating the final account and tableau of an administratrix discharged her from her trust, and she had no standing, as administratrix, to bring an action a year after the rendition of the judgment, to have it set aside.

In *Vandever's Appeal* (1862) 42 Pa. 74, it appeared that an administrator of an estate had been appointed, had administered the estate, and had submitted an account showing distribution made, which was confirmed by the court. He credited it himself with the sum of \$921.34, which he claimed to hold as trustee under an appointment of the widow and heirs, it being one third of the net amount of the proceeds of sale of the real estate, and upon which interest was to be paid for life to the widow, and after her death to be distributed among the heirs. The administrator converted the money to his own use, and lost it by a sheriff's sale of the land in which it was invested, but continued to pay interest to the widow for six years. The widow then brought suit in the orphans' court to

compel the administrator to turn over the money in his possession to a successor to be appointed by the court. It was held that the relation of administrator and distributees theretofore existing between the parties was terminated by their own act in constituting the administrator a trustee, and therefore the court had no jurisdiction to compel the administrator to account. He was discharged by the confirmation of the administration account.

In *State ex rel. Matteson v. Probate Ct.* (1901) 84 Minn. 289, 87 N. W. 783, it was held that the office of an administrator ceased when the probate court had allowed the administrator's final account and had rendered its final decree of distribution assigning the residue of the estate. "The jurisdiction of the probate court in Minnesota is not conferred by the common law, nor by any statute of the state, but by our Constitution, and is limited to 'jurisdiction over the estates of deceased persons and persons under guardianship.' Const. art. 6, § 7. It follows that in cases where a court of probate acquires jurisdiction over the estate of a particular decedent such jurisdiction is ended, and the office of administrator, which depends upon such jurisdiction, becomes *functus officio* whenever such estate passes by operation of law from its final control. No argument can make this obvious proposition clearer, for it is self-evident that, if the jurisdiction is limited to the estate of such deceased person, and the sole basis of such jurisdiction, the estate, passes from its control, and the right to the possession and control thereof vests by operation of law in the heirs and distributees, it has no longer any jurisdiction in the premises."

But in *Lowry v. Tilleny* (1884) 31 Minn. 500, 18 N. W. 452, it was held that the fact that administrators had filed their account, that the same was allowed and an order of distribution made, did not abate the action then pending, nor relieve the administrators of their official responsibilities and duties, as they had not been discharged. Until discharged it was com-

petent for them to collect claims due the estate.

In the case of *Re Scheffer* (1894) 58 Minn. 29, 59 N. W. 956, it was held that in order to effect the removal of an executor, there must be some order or decree of the court which manifested the intent of the court to bring about that result, which must appear with certainty, beyond mere conjecture. It was therefore held that as there was nothing to show that the attention of the probate court was ever directed to the closing of the administration or of changing the possession of the estate in the hands of the executors from possession as executors to possession as trustees, or any intent to discharge the executors, they still remained subject to the jurisdiction of the probate court, and were not trustees subject only to a court of equity.

In *Krogman's Estate* (1894) 14 Pa. Co. Ct. 567, it appeared that the final account of an executor was confirmed and a decree of distribution made, awarding a distributive share to the petitioner. Instead of taking possession of the share awarded her, the petitioner allowed it to remain with the executor for several years thereafter. The respondent claimed that he held this money as banker, agent, or attorney, or in some capacity other than executor, and that there was an agreement between him and the petitioner by which he was to honor her drafts and pay her interest on the amount remaining in his hands. It was held that the proof showed that the contention of the respondent was correct, and that the only relation existing between the petitioner and the respondent was that of debtor and creditor, and the executor, as such, was discharged.

In *Anderson's Succession* (1857) 12 La. Ann. 95, the residuary legatees brought an action against the executors of an estate to recover interest at the rate of 20 per cent per annum on all sums which the executors had failed to deposit in the bank. The executors set up *res judicata* as a defense. It appeared that the executors had filed a final account, which was contested by the agent of the resid-

uary legatees, and, after being modified in certain respects, was approved and the agent put in possession of the property and rights of the residuary legatees. No appeal was taken from the judgment so entered. It was held that it must be presumed that the agent of the residuary legatees had been put in possession of the property thus adjudicated in favor of his principals. The functions of the executors were therefore at an end, and the right to enforce the penalty under the statute for a failure to make the deposit, even had it existed, had also ceased.

But by the weight of authority the removal or discharge of an executor or administrator is not effected by the approval of his final account without a formal order of discharge.

**United States.**—*Fewlass v. Keeshan* (1898) 32 C. C. A. 8, 60 U. S. App. 133, 88 Fed. 573.

**Alabama.**—*Ligon v. Ligon* (1887) 84 Ala. 555, 4 So. 405; *Whetstone v. McQueen* (1902) 137 Ala. 301, 84 So. 229.

**California.**—*McCrea v. Haraszthy* (1875) 51 Cal. 146; *Re Clary* (1896) 112 Cal. 292, 44 Pac. 569.

**Illinois.**—*Atherton v. Hughes* (1911) 249 Ill. 317, 94 N. E. 546.

**Michigan.**—*Root v. Beymer* (1906) 146 Mich. 692, 110 N. W. 57.

**Missouri.**—*Francisco v. Wingfield* (1901) 161 Mo. 542, 61 S. W. 842; *Ewing v. Parrish* (1910) 148 Mo. App. 492, 128 S. W. 538.

**Nebraska.**—*Hazlett v. Blakely* (1903) 70 Neb. 613, 97 N. W. 808.

**New York.**—*Re Williams* (1917) 165 N. Y. Supp. 716; *Willets v. Haines* (1904) 96 App. Div. 5, 88 N. Y. Supp. 1018, affirmed without opinion in (1905) 182 N. Y. 543, 75 N. E. 1135; *Rosen v. Ward* (1904) 96 App. Div. 262, 89 N. Y. Supp. 148.

**North Carolina.**—*Best v. Best* (1913) 161 N. C. 513, 77 S. E. 762.

**Washington.**—*Denny v. Sayward* (1894) 10 Wash. 422, 39 Pac. 119.

In *Fewlass v. Keeshan* (Fed.) *supra*, it was held that a sworn statement of an administrator that he had fully administered the estate, accompanied by an affidavit of the widow

of the intestate supporting his statement and asking that the statement should be accepted as his final account, was insufficient to discharge the administrator in the absence of any order of the court allowing the papers to constitute a final account and discharging the administrator.

In *Ligon v. Ligon* (Ala.) *supra*, it was held that a final settlement of the accounts of an administrator did not necessarily discharge him from further accounting unless there was an order discharging him from his office, or unless decrees were rendered distributing the residue of the estate among those entitled, and they had been paid.

In *Whetstone v. McQueen* (Ala.) *supra*, it was held that the mere fact that an administrator had made a final settlement of an estate, and had distributed all the funds thereof to the parties entitled thereto, did not necessarily show that the administrator had ever been divested of his administrative capacity, in the absence of any order of discharge entered on the records.

In *McCrea v. Haraszthy* (Cal.) *supra*, it was held that the mere allowance of the final account of an executor was not the equivalent of a decree discharging him. Until the entry of such a decree, the trust still continued in contemplation of law, and the executor remained clothed with the duty and authority of his office.

In *Re Clary* (Cal.) *supra*, it was held that an administrator who had rendered a final account and made distribution, but who had not been discharged, was subject to the jurisdiction of the probate court as administrator, and could be compelled to pay over a distributive share of the estate which he had appropriated to his own use, and in case of his refusal be punished as for a contempt. Until his final discharge, the jurisdiction of the probate court did not cease.

In *Atherton v. Hughes* (1911) 249 Ill. 317, 94 N. E. 546, it was held that the approval of the account of an administrator did not alone work his

discharge as administrator or settle the estate. If thereafter any property came into his hands and there were debts of the estate, it would become his duty to sell the property to satisfy the debts.

In *Root v. Beymer* (1906) 146 Mich. 692, 110 N. W. 57, it was held that the final settlement and approval of the account of an executrix did not necessarily put an end to the functions of the executrix, but, if the occasion should arise, she could further pursue her duties for the benefit of the estate unless there had been a formal discharge entered on the records.

In *San Francisco v. Wingfield* (1901) 161 Mo. 542, 61 S. W. 842, it was held that an executrix continued in office and remained clothed with the duties of the office and subject to the control of the probate court until a decree was entered discharging her, as it appeared that when the probate court approved her final settlement, the decree expressly provided that the estate should remain open, for the purpose of selling the real estate in accordance with the terms of the will.

In *Ewing v. Parish* (1910) 148 Mo. App. 492, 128 S. W. 538, it was held that an administrator who had submitted a final account which had been approved, the judgment of the probate court containing no full order of discharge, but merely declaring that the filing of the receipts from the distributees should be in full discharge of all funds in the administrator's hands, which receipts were not shown ever to have been filed so as to work a discharge even to that extent,—had not ceased to be administrator, and might therefore recover assets not included in his previous settlement and of the existence of which he was then unaware.

In *Hazlett v. Blakely* (1903) 70 Neb. 613, 97 N. W. 808, it was held that the final settlement of the accounts of an administratrix and her discharge thereon entered did not prevent an action being brought for a claim against the estate. The administratrix, it was held, was discharged only as to matters contained in the ac-

counts settled, but her liability as trustee of the estate continued.

In *Re Williams* (1917) 165 N. Y. Supp. 716, it was held that a decree settling the accounts of an administrator did not revoke his letters or vacate his office. Other assets might be realized and new liabilities incurred, and as to these the representative's duty continued. It was therefore held that the administrator had power to sell real property of the decedent to pay for a headstone which had been placed at the grave, and had not been paid for, as a suitable headstone was a part of the funeral expenses, to pay for which real property might be ordered sold.

In *Willeys v. Haines* (1904) 96 App. Div. 5, 88 N. Y. Supp. 1018, affirmed without opinion in (1905) 182 N. Y. 543, 75 N. E. 1135, it was held that an order directing executors, in settling their final account, to turn over property in their hands to themselves as trustees, did not terminate their authority as executors where the order did not expressly decree their discharge. They still had power to administer any other assets that might then be in, or should thereafter come into, their hands, and as to these the executorial duty continued.

In *Best v. Best* (1913) 161 N. C. 513, 77 S. E. 762, it was held that neither

the powers nor the duties of an administrator necessarily ceased because a final settlement had been formally made. Unless in terms discharged from further execution of his trust, he still had power and might have been under obligation to go on and collect assets when opportunity was further presented.

In *Denny v. Sayward* (1894) 10 Wash. 422, 39 Pac. 119, it appeared that the executors of an estate had brought suit in behalf of the estate to recover money paid by them on account of a judgment rendered against the decedent as surety. The defendant set up as one of his defenses to the action, that the plaintiffs did not have capacity to sue, as they had ceased to be executors when they rendered a final account. It was held that the executors still had capacity to sue, although the fact that a final account had been rendered and an order of distribution made and carried into effect would warrant the presumption that administration of the estate had been closed, but when the interests of the estate required the exercise of authority by an executor, his right to act should be upheld if he had not received his final discharge, unless his bondsmen had been released. B. F. D.

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## ENGELS COPPER MINING COMPANY, Plff. in Certiorari, v.

### INDUSTRIAL ACCIDENT COMMISSION et al.

*California Supreme Court (In Banc) — November 4, 1919.*

(— Cal. —, 185 Pac. 182.)

#### Workmen's compensation — injury to deputy sheriff — right to compensation.

A deputy sheriff employed by the operator of a mine to preserve order on its premises is acting in the course of his employment within the meaning of the Workmen's Compensation Act when quelling a riot in a shack owned by the operator, and situated adjacent to its property, so as to be entitled to compensation, although the statute excludes from definition of employee any person holding an appointment as deputy sheriff appointed for the convenience of the appointee, but receiving no compensa-



tion from the public for service, and providing that such last exclusion shall not prevent any person so deputized from recovering against a private person employing him, for injury occurring in the course of and arising out of such employment.

[See note on this question beginning on page 190.]

CERTIORARI to the Industrial Accident Commission to review its action in awarding death benefits to claimant in a proceeding under the Workmen's Compensation Act to recover compensation for the death of her husband while in the employ of petitioner. *Award affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. P. Wisecarver and Redman & Alexander for plaintiff in certiorari.

Mr. A. E. Graupner, for defendants in certiorari:

Under § 8(a) of the Workmen's Compensation, Insurance, and Safety Laws, Smith was an employee and his widow is entitled to compensation.

The fatal injury was received in the course of the employment and arose out of the employment.

Ohio Bldg. Safety Vault Co. v. Industrial Bd. 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; Nisbet v. Rayne [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; Anderson v. Balfour [1910] 2 Ir. R. 497, 44 Ir. L. T. 168, 3 B. W. C. C. 588; Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; Reithel's Case, 222 Mass. 163, L.R.A. 1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; Mechanics Furniture Co. v. Industrial Bd. 281 Ill. 530, 117 N. E. 986; O. L. Shafer Estate Co. v. Industrial Acci. Commission, 175 Cal. 522, 166 Pac. 24.

Lennon, J., delivered the opinion of the court:

Certiorari to review the action of the Industrial Accident Commission in awarding death benefits to Eva A. Smith, widow of Franklin H. Smith, deceased. Smith was an employee in the service of petitioner and was also a deputy sheriff. He was killed on the evening of August 4, 1918, while attempting to quell a drunken disturbance in a shack owned by petitioner, and situated adjacent to its premises. The single question presented is whether or not Smith was killed while "performing service growing out of and

incidental to" his employment. The return to the writ discloses the following facts:

At the time of Smith's death, petitioner was operating a mine in Plumas county. Upon its land were situated the various shops, machines, and buildings appropriate to such an operation, together with bunkhouses for the use of such of the men as did not choose to rent private houses, which were also situated on the premises. The shack where the disturbance occurred was located just below the petitioner's machine shop. It was a frame and canvas structure, and, while it does not appear who owned the land upon which it stood, it appears that the petitioner owned the frame and that the occupants were under its control; one of them, an Indian named John Smith, being in its employ.

At the time of his death, the deceased, Franklin H. Smith, was employed by petitioner as a general utility man, to look out for its interests on and off the company's property. He acted as fire warden, but his duties in this connection consumed on the average of less than an hour a day. He was required to meet trains and look after arriving employees, to remove women of questionable character from the premises, to watch prostitutes who established camps outside the company's property, and where they were making trouble, or were supposed to be selling liquor, to have them move on. He was, moreover, required to keep down disorder from drunkenness, to settle disturbances among the men, and to do the work

of a regular police officer in keeping order. Smith was also a deputy sheriff. During the period of his employment by petitioner as watchman or special officer, he had been called upon several times by the sheriff to act in civil matters, but he had rendered no service as deputy sheriff in criminal matters under the sheriff's orders. His activities were confined to matters going on around the mine, and concerning these matters it was his duty to report to the superintendent of the mine, rather than to the sheriff.

On the evening in question, a Mexican had brought some whisky to John Smith's shack and a drunken orgy ensued, in the course of which one of the occupants of the shack threatened gun play. One of the other occupants of the shack sent for the deceased. It does not appear exactly what information the deceased received, but one Greaves testified at the coroner's inquest that he saw the deceased, who said: "I have got to go down and see about a drunken Indian or buck." He then went down to the shack and was shot and killed.

These facts warrant a finding that in going to the shack to quell the disturbance the deceased was doing exactly what he was hired by petitioner to do. This conclusion is further fortified by the fact that the deceased had been expressly required to quell or prevent disturbances adjacent to the company's premises. The reason for these directions was explained by the company's superintendent as follows: "If a man got killed, and there was a big row, and it was an employee of the copper company, there would be a loss to us, if a court trial came up."

Petitioner does not deny that the deceased had acted to quell or prevent disturbances before, under the direction of the superintendent of the company. It is insisted, however, that in so doing he was, "of course," acting in an official capac-

ity as deputy sheriff. This raises the only serious question presented by the petition. Where a private company or individual employs a watchman or special officer, and in making its selection deliberately chooses an officer of the law, in order to take advantage of his authority, as did petitioner in the instant case, and where such officer performs acts advantageous to and expressly or impliedly directed by the employer, which happen at the same time to be acts which it would be his official duty to perform, is such an employee acting in the course of employment within the meaning of the Workmen's Compensation Act? Respondent relies upon § 8(a) of the statute (Stat. 1917, p. 835), which defines the term "employee" and includes "all elected and appointed paid public officers," but excludes "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation, or from the citizens thereof for services as such deputy." The section, however, provides "that such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment."

The question presented in the instant case involves the construction to be placed upon the words of the proviso above quoted. Petitioner contends that the "employment" referred to in the proviso has no relation to the performance of official acts, and that a deputized person can be an employee only when performing some act in no wise connected with his official duties. With this construction we cannot agree. It would not, we think, require an express statutory reservation to assure to a deputy sheriff the right to compensation for an injury received in the course of working at a me-

chanical art or trade. The clause in question should not be regarded as intended to effect this purpose, and thereby be interpreted as a purely supererogatory enactment, if it may fairly be construed in such a manner as to give it a rational purpose. In our opinion the statute is to be construed in the light of the common practice of property owners to choose as watchmen or special officers men who are deputized officers of the law, and to secure the deputization of such watchmen or special officers engaged by them as are not already deputies. It is obviously to this class of deputies that the excluding clause of the statute refers, in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while

official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties

**Workmen's compensation—  
—injury to  
deputy sheriff—  
right to  
compensation.**

prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the Workmen's Compensation Act.

Upon this view of the statute, petitioner cannot escape liability to compensate the widow for the death of Franklin H. Smith, on the plea that in performing the duties incident to his employment he was also fulfilling a duty to the county.

The award is affirmed.

We concur: Angellotti, Ch. J.; Olney, J.; Shaw, J.; Wilbur, J.; Lawlor, J.; Melvin, J.

Petition for rehearing denied, December 4, 1919.

### ANNOTATION.

**Workmen's compensation: compensation for death of or injury to peace officer employed in private plant.**

As to applicability of compensation acts to watchman, see annotation to *Gifford v. Patterson*, 6 A.L.R. 578.

It will be observed that in the reported case (*ENGELS COPPER MIN. CO. v. INDUSTRIAL ACCL. COMMISSION*, ante, 187) a deputy sheriff, employed in a mine as general utility man to maintain order, who was shot while attempting to quell a drunken disturbance on premises owned by the employer, was held to have been killed while performing service growing out of and incidental to his employment within the California Workmen's Compensation Act, which defines the term "employee," and includes "all elected and appointed paid officers," but excludes "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation, or from the citizens thereof for the

services as such deputy, there being further a proviso "that such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment," the court, with respect to this provision, taking the view that its effect was that where a deputy performed acts which, although official in their nature, were advantageous to the employer and were directed by him not incidentally merely, but as a part of the duties prescribed and contemplated by the contract of employment, the deputy was acting in the course of his private employment within the meaning of the Compensation Act.

But one other case involving the question under consideration has been disclosed, and that is a decision of the New York Industrial Commission (*James v. Witherbee-Sherman & Co.* (1915) 2 N. Y. Off. Dept. R. 483),

wherein it was held that one employed as a policeman at a monthly wage by a mining company, to protect its property and employees, who was shot while protecting an employee, was employed in a hazardous occupation within the New York Compensation Act; that his death was due to an accident arising out of and in the course of his employment, and that he was not acting in the capacity of deputy sheriff, although subsequently to his employment by the mining company, and at its request, he was appointed a deputy sheriff and received fees from the town or county. In the opinion by the Commission it was said: "The principal objection made to the award is based upon the fact that James was acting in the capacity of a public officer, and that the injuries which caused his death did not arise out of or in the course of his employment by the insured. Cases in which policemen and deputy sheriffs were in the employ of corporations have been frequently passed upon by the courts. It is only necessary to call attention to the case of *Sharp v. Eric R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Rep. 448. In that case, an action was commenced against the railroad company to recover damages for the death of a boy who was shot and killed by one Wheeler, a special officer in the employ of the railroad company, who was also a deputy sheriff. The boy had been stealing a ride and had jumped from the train and run to adjacent land. He was pursued by Wheeler, and while both were upon the adjoining premises, Wheeler shot the boy, the ball entering the back of his head, producing death. The question at issue was stated by Judge O'Brien, as follows: 'The question in this case is whether the defendant can be held responsible for the act of Wheeler in killing the boy. It is claimed that Wheeler acted in a dual capacity; that while he was the servant of the defendant for certain purposes he was also a public officer, and that he killed the boy while acting in the capacity of such officer, and not as the servant of the defendant.'

After reviewing the facts, the court stated the law as follows: 'A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant, and in protection of its interests and property. And hence, in such a case, the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct.' It is apparent from the foregoing that the relationship of master and servant which existed between James and his employers was not altered by reason of the fact that James was also a deputy sheriff. The real point at issue in the case is whether or not James was acting within the scope of his employment. We think it apparent that his official acts were to be used for the benefit of the employers, and for the protection of their interests and property. This being so, the fact that he might have received a fee from the town or county for making the arrest in question is not material. Had he not been in their employ he would probably never have been appointed as a deputy sheriff. From the report of the accident filed by Witherbee-Sherman & Company, Inc., with the Commission on October 6, 1914, it would appear that James was actually stabbed on the premises of the company. He had no regular hours of employment and it was largely within his own discretion as to what acts he would perform in the discharge of his duties to his employers. Under these conditions, and in view of all the facts, we hold

that he was acting within the general scope of his employment. The further objection is made that James in making the arrest exceeded his authority even as a public officer. In this respect it is claimed that Hydric was arrested for a misdemeanor, and that the arrest, being made at night and without a warrant, was illegal. Conceding that the arrest was for a misdemeanor (which was not established by any evidence in the case), the objection is not material, as appears from the decision of the court of appeals in the Sharpe Case, above quoted. The fact

that James exceeded his powers did not change the relationship of master and servant which existed between himself and his employers. The injury in question was received while James was doing the duty which he was employed to perform. Without further discussion it is sufficient to say that under such circumstances the injury arose in the course of his employment. The injury was a natural incident to the work which he was required to do for his employers, and therefore arose out of the employment."  
J. T. W.

**LAWRENCE GAS COMPANY, Appt.,**  
v.  
**HAWKEYE OIL COMPANY.**

*Iowa Supreme Court — December 18, 1917.*

(182 Iowa, 179, 165 N. W. 445.)

**Broker — authority to receive payment.**

1. A broker has no implied authority to receive payment for the property for which he secures a purchaser.

*[See note on this question beginning on page 203.]*

**— distinguished from factor.**

2. One doing business on his own account, who is employed to find purchasers for the product of a manufacturer without having custody or control of the goods, is a broker as distinguished from a factor or commission merchant.

*[See 4 R. C. L. 243.]*

**— when authority ceases.**

3. Ordinarily a broker's relation to the transaction ceases when he places an order with his principal.

*[See 4 R. C. L. 252.]*

**Evidence — burden of proof — authority of broker.**

4. A purchaser through a broker, who makes payment to the broker, has the burden of establishing by a preponderance of the evidence that the broker was authorized by his principal to receive payment for the particular shipment.

**Principal and agent — authority of agent to receive payment.**

5. An agent to sell may bind his principal by receiving payment, if he has power both to sell and deliver.

*[See 21 R. C. L. 867.]*

**APPEAL** by plaintiff from a judgment of the District Court for Black Hawk County (Boies, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a shipment of oil. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. T. Frame and Edwards, Longley, Ransier, & Smith for appellant.

Messrs. Mears & Lovejoy for appellee.

Gaynor, Ch. J., delivered the opinion of the court:

The plaintiff, Lawrence Gas Company, is an Illinois corporation, with its principal place of business at In-

(188 Iowa, 179, 185 N. W. 445.)

dianapolis, Indiana. The defendant, Hawkeye Oil Company, is also a corporation, and its principal place of business is at Waterloo, Iowa. A. T. Stewart Company is a brokerage firm, and its principal place of business is at Chicago, Illinois.

On January 6, 1914, the defendant, Hawkeye Oil Company, sent the following order to the brokerage firm of A. T. Stewart Company:

To A. T. Stewart Co.

512 Postal Tel. Bldg., Chicago, Ill.  
Ship at once to the Hawkeye Oil Company, Waterloo, Iowa, 2 cars 72° gasolene at 13.65c f.o.b. Waterloo, Iowa.  
Waterloo, Iowa, 11-24-13.

This order was received at the A. T. Stewart Company in due course of mail. A. T. Stewart Company were merchant oil brokers, and, soon after the receipt of this order, placed the same with the plaintiff, the Lawrence Gas Company, and the Lawrence Gas Company shipped the gasolene therein ordered to the Hawkeye Oil Company, and it was received by it at its home place.

It appears that there had been some prior arrangements between the A. T. Stewart Company and the plaintiff, Lawrence Gas Company, for the handling of the output of the plaintiff company by the A. T. Stewart Company, on a basis of  $\frac{1}{4}$  cent per gallon commission, A. T. Stewart Company to act as brokers in all transactions, with power to procure orders for plaintiff's product, send the orders to the plaintiff company, and, upon receipt of such orders, the goods to be billed directly to the purchaser. The A. T. Stewart Company never had possession of, or control of, any of the products of the plaintiff company.

The president of the Hawkeye Oil Company testified: "I knew from whom this carload of oil had been shipped. We had a bill of lading and an invoice to show that it had been shipped by the Lawrence Gas Company."

8 A.L.R.—13.

The original invoice received is in the following words and figures:

Lawrence Gas Company.		
High Grade Gasolene.		
Bridgeport, Illinois, December 26, 1913.		
Sold to Hawkeye Oil Co., Waterloo, Iowa.		
Terms: 30 days net 1 per cent 10 f. o. b.		
Waterloo.		
One tank car 72-74 straight run gasolene		
G A T X 4170.		995.19
8,000 gallons at 13.65c		\$1092.00
Shortage 432		.50
7,568	13.15	
8,000 gals. at 6.6, 52, 800 # at 24c		
less frt.		126.72
A. T. S. Order # 854.		
H. O. Co. Order # 5,082		\$868.47
15,440	1 per cent	8.63
	127.69	
Rec. 1-7-14	Jan. 7, 1914	859.79
#15,251		
P. J. 24		

He further testified: "I knew that the A. T. Stewart Company had been doing business with a great many different companies, and that they act as brokers for a large number of refiners. I had reason to think that they were acting for the Lawrence Gas Company as brokers. This was before we purchased this gasolene."

The president of the plaintiff, Lawrence Gas Company, testified that when he made his arrangements with the Stewart Company to handle the product of the plaintiff, he told Mr. Stewart that the company was simply to sell the goods as a broker; that it, the plaintiff, would make its own collections.

This action is brought by the Lawrence Gas Company against the Hawkeye Oil Company, to recover the amount of the shipment. The defense plea is payment. The plea of payment relied on has its support in the fact only that, on the 6th day of January, 1914, the defendant, Hawkeye Oil Company, sent to the A. T. Stewart Company a check in the following form, which was received by the A. T. Stewart Com-

pany, cashed by it, and the proceeds retained:

The Hawkeye Oil Company, No. 15,251.

Waterloo, Iowa, Jan. 6, 1914.

Pay to the order of Lawrence Gas Co. \$859.79; eight hundred fifty-nine and 79/100 dollars.

Not over nine hundred \$900.

To Leavitt & Johnson National Bank,

Waterloo, Iowa.

The Hawkeye Oil Co.,  
By H. S. Caward, Treas.

The question here presented is whether or not this is a payment to the plaintiff company that binds the plaintiff company and makes a good defense to the plaintiff company's claim to recover from the defendant company the amount due for said oil.

We think it must be conceded from this record that A. T. Stewart & Company were simply merchant brokers. The business of a broker is to serve as a connecting link between the parties to the real transaction. Every person whose business it is to negotiate purchases and sales of property, with the custody of which he has no concern, neither with the original possession nor the delivery, is a broker. He is strictly a middleman, or an intermediate negotiator between the parties. He is distinguished from a commission merchant or a factor in that he has no possession of the property affected by the negotiation. He has neither the possession, management, nor control of the property to be sold or bought. The general holding is that a broker is one who is not entitled to the possession of the property which is the subject of the sale or purchase, and, unless specially

**Broker—author-  
ity to receive  
payment.**

authorized to do so, has no right, as broker, to receive payment for the property sold. The distinguishing feature which differentiates a broker from a factor or commission merchant is that he is

not intrusted with the custody or possession of the property, and is not authorized to buy

**—distinguished  
from factor.**

or sell it in his own name. See *Morgan v. Jaudon*, 40 How. Pr. 366, 378; *Little Rock v. Barton*, 33 Ark. 436, 437, 444; *Gust v. Buckley*, 23 Ky. L. Rep. 992, 64 S. W. 632; *Braun v. Chicago*, 110 Ill. 186, 194.

It is apparent from this record that, when the defendant Hawkeye Oil Company mailed to the A. T. Stewart Company the order hereinbefore set out, it knew that the A. T. Stewart Company was a broker only; that it did not have the commodity ordered for delivery; that, to fill the order, it would be required to place it with some company that could fill it and ship according to the order. When the defendant, Hawkeye Oil Company, received the oil, they knew that A. T. Stewart Company had placed their order with the Lawrence Gas Company; that the Lawrence Gas Company had filled and shipped the oil in pursuance of the order. The original invoice received by the defendant, Hawkeye Oil Company, told them that the Lawrence Gas Company had shipped the oil on terms "30 days net, 1 per cent ten days, f.o.b. Waterloo." They knew that the A. T. Stewart Company did not own the oil they had received, and had no right to receive payment for the same unless authorized by the Lawrence Gas Company to receive payment. They were charged with knowledge that the A. T. Stewart Company, as brokers, had no interest in the property received, and were only interested in so far as receiving a commission for bringing about and effectuating the sale was concerned. Therefore, there is no presumption that the A. T. Stewart Company had a right to receive payment for the oil so received by the defendant. There is no plea of estoppel, and no plea of ratification in this case. Defendant, in its answer, places itself squarely upon the proposition that the A. T. Stewart Company was the agent of the

plaintiff, and was authorized to collect and receive the money on behalf of the plaintiff, and that a payment to the A. T. Stewart Company discharged its obligation to the plaintiff for the oil received.

Agency is a broader term than broker,—more comprehensive in its legal scope. A broker is an agent, but with limited authority. Ordinarily, they are not in any way connected with either the buyer or the seller of the property involved in any transaction. They are agents, it is true; but their powers are limited, and, when they have no charge or control over the property, but act only as go-betweens in effectuating a sale, they cannot be said to be agents, in the larger sense, in effectuating the sale. They place the order with one who may or may not fill the order,—is not bound to fill the order. If the order is filled by the one with whom it is placed, a commission is paid to the broker for the order. If it is not filled, the broker gets no commission. Ordinarily, the broker's relationship to the transaction ceases when he places the order with his principal.

—when authority ceases.

In no sense does he sell the goods of his principal. He accepts orders and submits them to his principal, who accepts or rejects. Ordinarily, he has many principals, and he may place the order with any of them, and they approve or reject as their judgment suggests. If they reject, the matter is at an end. He may then place it with others of his principals, or with anyone having goods of the character ordered, with which to supply the demand. He earns his commission only in the event that the order is accepted and the shipment made. He enters into no contract with either the buyer or the seller for the sale or delivery of the property ordered. He is not entitled to receive payment for the goods delivered, unless especially authorized by the owner of the goods to re-

ceive payment. Therefore, it follows that one who pays to one of these brokers assumes the burden of establishing by a preponderance of the evidence that the broker was authorized by his principal to receive payment for the particular goods shipped. The general rule is that an agent who sells goods on sample, a traveling salesman who sells his principal's goods for future delivery, is not, by virtue of his employment alone, entitled to collect for the goods sold. There are some cases apparently holding to a different doctrine. These cases are all distinguishable because of the peculiar features involved in the particular case. We think the general rule is practically without exception. In *Simon v. Johnson*, 101 Ala. 368, 13 So. 491, that court said: "The decided weight of authority,—indeed, well-nigh all the adjudged cases,—supports the proposition that a traveling salesman of merchandise, making sales by sample on a credit or for cash, to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser" (citing many authorities).

Therein it distinguishes the Maine and Vermont cases relied upon by appellant in this case. See also *Lyles-Black Co. v. Aldredge*, 10 Ala. App. 682, 65 So. 696. The same doctrine is recognized in *Minnesota. Brown v. Lally*, 79 Minn. 88, 81 N. W. 538.

In *Bailey v. Pardridge*, 134 Ill. 188, 27 N. E. 89, the court, while holding that the agent who sold the goods had a right to collect, and payment to him bound his principal, made the distinction as follows: "Had the agent Holmes sold the defendants a bill of goods, and taken an order from them for a shipment of the goods from the house in Philadelphia, it is clear a payment to the agent for goods thus bought would not have been binding on the plaintiffs. *Clark v. Smith*, 88 Ill. 298.

Evidence—  
burden of proof  
—authority of  
broker.



But this is a different case. Here, Holmes was not only clothed with the power of sale, but he had the possession of the goods, and was able to pass them over to the possession of the purchaser upon making sale and receiving payment."

The distinction seems to be that, where the power to sell and deliver is invested in the same agent, upon delivery he may receive payment and bind his principal.

In *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655, it appears that plaintiff brought an action to recover the amount of a bill of goods sold by him to the defendant. The sale and delivery were admitted. The only question for determination was whether the defendant had paid for them. Plaintiff was an importer, and the defendant a keeper of a hotel. The defendant purchased at the store of the plaintiff, from one J. B. Sheridan, a bill of goods. Sheridan was employed by the plaintiff to sell the goods, receiving a commission on each sale therefor. The goods were sold on credit to be paid for in the future. The goods were shipped to the defendant, and a letter sent by the plaintiff, in which he said: "Remit direct to me." Inclosed in the letter was a bill of the goods, billed in the name of the plaintiff, which said that all remittances must be made directly to the principal, saying: "The salesman not authorized to collect." Thereafter, the defendant paid the bill to Sheridan, and took his receipt. Sheridan absconded. Plaintiff sued to recover. Held, Sheridan was a mere salesman for commission. As such, he had authority to sell goods on credit, but not to discharge purchasers from debts incurred by them in purchasing goods through him from the plaintiff, the court saying: "An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless

he can show some authority in the agent other than that necessarily implied in a mere power to make sales. . . . Such authority may be shown by proof, either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public, or to the defendant, as having such authority."

See also *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490, 22 Pac. 588. In this case, the rule is laid down that "authority to an agent to sell goods does not include authority to collect pay for goods thus sold." Why multiply authority? This doctrine was recognized by this court in *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88, 7 N. W. 524, 8 N. W. 797; *Englert v. White*, 92 Iowa, 97, 60 N. W. 224; and *Sawin v. Union Bldg. & Sav. Asso.* 95 Iowa, 477, 64 N. W. 401, 3d paragraph. The *Sawin Case* was one in which the agent of the defendant association was empowered to sell stock. He sold stock to *Sawin*, received payment for the stock, and absconded. The sale was made by procuring *Sawin* to sign an application for five shares of stock. Assuming that the agent had authority to sell stock for the company, he procured plaintiff to sign an application for so many shares of stock. He had power to sell the stock and to collect and receive for membership fees in the association. *Sawin* sought to recover the amount paid the agent. The defense was that the agent had no authority to collect the money. The court held otherwise, saying: "As such agent, he had the right to do whatever was usual and proper to effect sales, including the receiving of money paid on account of them. 'A general agent is an agent who is empowered to transact all of the business of his principal of a particular kind in a particular place.'"

Recovery was allowed on the theory that the seller of this stock was the general agent of the company, with power not only to sell, but to receive payment; and, for the purposes of the case, placed the

Principal and agent— authority of agent to receive payment.

agent in the same situation as a seller of goods would be in, who had possession of the goods and a right to deliver them. The court assumed that the agent had power to sell and pass title upon the sale. The sale was completed by the agent.

There is no evidence that any power or authority had been given the A. T. Stewart Company by appellant to make collections. It is not claimed by appellant that there was any direct authority to so do. The burden is on the defendant to show such authority, if they would bind the plaintiff company by payments made to the A. T. Stewart Company. There is no claim, and no testimony to support the claim if such were made, that the defendant was misled by the conduct of the plaintiff into believing that the A. T. Stewart Company had authority to collect for the plaintiff company; and there is no plea and no evidence of estoppel; and there is no plea and no evidence that the plaintiff company ever ratified the payment in question. The defendant must stand or fall upon the proposition that the A. T. Stewart Company was authorized to receive this payment for the plaintiff. If they fail in this, they fail in their defense. Recognizing this fact, the defendant placed A. T. Stewart on the stand, and sought to show by him that the A. T. Stewart Company had collected for the plaintiff company on shipments such as are involved in this suit.

A. T. Stewart testified, on direct examination:

Q. During the time that you sold goods for the Lawrence Gas Company, did you make collections for them?

A. Yes, sir.

Q. Did you at any time indorse checks that were made payable to them?

A. The company did.

Q. Now, at any time before the transaction involved in this suit, did the Lawrence Gas Company make any objections to your making col-

lections for them upon the goods that you had sold for them?

A. No sir.

He was asked this question:

Do you have personal knowledge of the fact,—that is, of somebody representing the A. T. Stewart Company indorsing checks at other times before that for the Lawrence Gas Company?

A. Yes, sir.

Q. Do you have personal knowledge of the fact that the Lawrence Gas Company asked you or your company to make collections for it on goods that you had sold for it?

A. Yes, sir.

Q. And were these collections made?

A. Yes, sir.

On cross-examination, he was asked to state to whom the sales were made on account of which the A. T. Stewart Company had made collections. He named three companies, and in each of these cases it would seem that the Stewart Company did not rely upon general authority to collect, but procured special authority in the particular case to make collection, or made the collection without authority, and their action was repudiated by the Lawrence Gas Company. In some instances, drafts from purchasers passed through the hands of the A. T. Stewart Company to the Lawrence Gas Company. We find no evidence of express authority, and no conduct from which implied authority to collect can be found. In the absence of proof of express authority, or facts and circumstances from which authority to collect can be implied, the proof does not satisfactorily meet the issue tendered by the defendant.

Every man is presumed to know the law, and the law is: "A broker has, ordinarily, no authority to receive payment for property sold by him for his principal, and the purchaser who pays a broker does so at his own risk. Such payment does not discharge him from liability to the principal, unless the authority of the broker to receive payment

be express, or may reasonably be implied from the circumstances." *J. M. Robinson, N. & Co. v. Corsicana Cotton Factory*, 124 Ky. 435, 8 L.R.A. (N.S.) 474, 99 S. W. 305, 14 Ann. Cas. 802.

On the whole record, we find that the court was wrong in sustaining defendant's plea of payment, and the cause is therefore reversed.

Ladd, Evans, and Salinger, JJ., concur.

#### NOTE.

The authority of an agent to receive payment for commodities which he is authorized to sell, or for which he is to find a market, is the subject of the annotation following *PETERSEN v. PACIFIC AMERICAN FISHERIES*, post, 203. Cases which, like the reported case (*LAWRENCE GAS CO. v. HAWKEYE OIL CO.* ante, 192), deal specifically with brokers, are treated in subdivision II. b, 2, of that note.

**JAMES PETERSEN et al., Doing Business as the British American Mill Company, Appts.,  
v.  
PACIFIC AMERICAN FISHERIES, Respt.**

*Washington Supreme Court (Dept. No. 2) — August 5, 1919.*

(— Wash. —, 183 Pac. 79.)

#### **Principal and agent — payment to agent — effect.**

1. When a principal has clothed his agent with indicia of authority to receive payment for goods sold, as by intrusting him with possession of the goods, the purchaser is warranted in paying the price to the agent at time of sale.

[See note on this question beginning on page 203.]

#### **Payment — to agent — effect.**

2. Payment to an authorized agent will discharge the indebtedness, although the agent misappropriates the payment.

[See 21 R. C. L. 19.]

#### **Principal and agent — acts of agent — effect on principal.**

3. A principal is bound by his agent's acts within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing.

[See 21 R. C. L. 854.]

#### **— lessee of mill — power to market stock.**

4. A lessee of a mill who undertakes immediately to market stock on hand when it is finished has authority to make sales, and the purchaser is warranted in making payment to him, and such payment will be binding upon the principal.

#### **— assisting in sale — effect.**

5. That the owner assists the agent in making a sale does not, where the purchaser has reason to suppose that the owner is acting merely as agent, destroy the authority otherwise possessed by the agent to collect the purchase money.

#### **Equity — innocent person — burden of loss.**

6. As between two innocent persons one of whom must suffer, the loss should fall upon a principal who has clothed his agent with apparent authority and thus enabled him to obtain the advantage of the person with whom he deals, rather than upon the person so dealing with the agent.

#### **Appeal — failure to allow interest — reversal.**

7. Failure to allow interest is not ground for reversal, if the attention of the trial court was not called to the omission.

**APPEAL** by plaintiffs from a judgment of the Superior Court for Whatcom County (Hardin, J.) in their favor in part only, in an action brought to recover the purchase price of certain goods. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bixby & Nightingale, for appellants:

The court will not disturb findings of fact made by the lower court when those findings are based upon the credibility of witnesses who have testified orally in the presence of the court.

Anthes v. Erickson, 43 Wash. 491, 86 Pac. 668; King County v. Whittlesey, 52 Wash. 206, 100 Pac. 321.

The findings of the trial court will not be disturbed on a trial de novo unless the evidence preponderates against such findings.

Re Connolly, 89 Wash. 168, L.R.A. 1916D, 635, 154 Pac. 155; Winter v. Everhardt, 89 Wash. 77, 154 Pac. 139; Folmsbee v. Daniel, 89 Wash. 426, 154 Pac. 796.

The implied power to collect the purchase price is always dependent upon the exercise by the agent of the power to sell and deliver the goods.

21 R. C. L. § 38, p. 854.

The title and possession of the shooks having passed to the respondent by the act of the principal, there was no subject-matter upon which the agency could operate.

1 Mechem, Agency, 2d ed. § 617, note 50.

Messrs. Kerr & McCord for respondent.

Bridges, J., delivered the opinion of the court:

The appellants sued to recover \$1,065 as the purchase price of certain box shooks and \$75 as the purchase price of a certain shingle machine. The case was tried by the court without a jury. It gave judgment to the plaintiffs for \$75, being the sale price of the machine, but refused judgment on account of the box shooks.

The facts are substantially as follows:

Each of the parties hereto was the owner of a manufacturing plant at Bellingham. In May, 1916, the appellants and one Wood entered into a lease contract, whereby the appellants leased their factory to Wood. This lease, among other things, contained the following

clauses: "Understood that one of the conditions for the execution of this lease is that the lessees, immediately upon taking possession of the aforesaid plant, advise with lessor as to how the said stock and material on hand should be completed and finished to the best advantage, in order to obtain available markets therefor, and that lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand, so that the same can be marketed to the best advantage, and the lessees will be paid therefor the actual cost of finishing the said material and labor, plus 10 per cent on the same. Lessees further agree to immediately market said stock upon its being finished and completed, to the best advantage, and charge therefor a reasonable commission; and it is understood that said stock and material remain in the warehouse of said plant, where the same is now situate, until lessor determines to sell the same, without the paying of any rental or compensation for the use of said warehouse during said time."

Wood thereafter transacted business under the name of W. W. Wood Manufacturing Company. He at once entered into possession of the leased property, including all box shooks, lumber, etc., on the premises, and he remained in possession throughout the period of this controversy. Shortly prior to August, 1916, F. O. Biery, one of respondent's foremen, visited the Wood plant with the view of purchasing its hand shingle machine. While on the premises he saw a miscellaneous lot of box shooks, which he thought his employer might want to purchase. He entered into negotiations with Wood concerning the purchase of the machine and such of the box shooks as would suit the purposes of respondent. Wood, however, did

not have any inventory of the box shooks, and referred Biery to Thomas R. Waters for this information. Mr. Waters was an attorney at law at Bellingham and part owner of the leased property. Biery had several conferences with Waters looking towards the purchase of certain of the box shooks; they did not, however, at that time, agree upon a sale. Later Wood again took up the question of the sale with Biery and terms were substantially agreed upon. Biery, however, did not have any authority to consummate the sale, and requested Waters to meet H. B. Drisko, respondent's assistant manager, at the office of respondent, for the purpose of closing the deal. Upon this request Mr. Waters met Mr. Drisko at respondent's office, where the deal was closed. The shingle machine was sold for \$75, and such of the box shooks as the respondent might select out of a miscellaneous lot were sold for \$3 per thousand sets.

Waters testified that at this conference he requested the respondent to send to him or to one James McDonald the check for the purchase price. Drisko and Biery, who were both present at this conference, denied that anything was said about the check or to whom payment should be made. The following day Waters went East, and did not return to Bellingham until about the 1st of November, 1916. Wood took charge of the sorting and tallying and delivering of the shooks to respondent, Biery assisting in keeping the tally. From the time of the sale on till early in November, neither Wood nor any of the appellants had anything to do with the shooks. They had no further conferences with respondent and did not send respondent any statement of the shooks sold or make any demand for payment. Some time in October, and before Waters returned from the East, the Wood Manufacturing Company sent to the respondent a bill for the purchase price of the machine and the box shooks. This bill ran against respondent and in

favor of the Wood Company. It was on the billhead of the Wood Manufacturing Company. A few days after receiving the statement the respondent made its check for the amount of the bill to the Wood Manufacturing Company, and the latter, after having received the check, cashed it, and has never paid the appellant any of the proceeds thereof. Upon Waters's return from the East he learned that his company had not received its pay, and made inquiry of the respondent, and was told that payment had been made to the Wood Manufacturing Company. One O. W. Crandall, who was in the employ of the Wood Manufacturing Company and acted in the capacity of bookkeeper and manager, testified that Waters told him to send a bill to respondent and collect the money. Waters denied this.

The court's findings give the facts substantially as above, but, in addition, find that by the terms of the lease contract Wood was authorized and empowered to sell the box shooks and to collect the purchase price thereof, but that he did not have any authority to sell the machine or to collect therefor; that when the deal was closed at the office of the respondent Waters requested the respondent to send a check in payment either to him or McDonald, but nothing was said as to whom the check should be drawn; that Biery, who represented the respondent, did not know that Waters had or claimed to have any ownership in the box shooks, but thought he was representing the owner of the shooks or the Wood Manufacturing Company, as agent or attorney. The court further found that the power given by the lease to Wood to sell the box shooks had never been revoked.

The trial court based its conclusions and judgment almost entirely on the lease contract. The appellant urges a new trial, chiefly on two grounds: First, that the lease contract does not authorize Wood to sell the box shooks or to collect the price thereof, and, second, that if

(— Wash. —, 183 Pac. 79.)

the lease does authorize Wood to sell the shoocks and collect therefor, that power was revoked before the consummation of the sale in controversy here. The statement of a few fundamental principles will assist in arriving at a correct decision.

Where the principal has clothed the agent with the indicia of authority to receive payment, as by intrusting him with the possession of the goods to be sold,

Principal and agent—payment to agent—effect.

the purchaser is warranted in paying the price to the agent at the time of sale. But when the agent has not the possession of the goods and no other indicia of authority, and has only authority to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive the payment. 1 Am. & Eng. Enc. Law, 1014.

Payment to an authorized agent will operate as a discharge of the indebtedness, though the agent misappropriate the payment. 22 Am. & Eng. Enc. Law, 518.

A principal is not only bound by the acts of his agent, general or special, within the authority which he has given him, but he is also bound by his agent's acts within the apparent authority which the principal

Principal and agent—acts of agent—effect on principal.

himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. Galbraith v. Weber, 58 Wash. 132, 28 L.R.A. (N.S.) 341, 107 Pac. 1050.

The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. 31 Cyc. 1333.

One clause of the lease contract provided that Wood should advise with the appellants as to how to ob-

tain available markets for the box shoocks, and that "lessees will finish and complete within a reasonable time whatever work and material may be necessary in order to complete the aforesaid delivery of stock on hand so that the same can be marketed to the best advantage.

... Lessees further agree to immediately market said stock upon its being finished and completed to the best advantage, and charge therefor a reasonable commission, and it is understood that said stock and material shall remain in the warehouse of said plant, where the same is now situated, until the lessor determines to sell the same, without the payment of any rental or compensation for the use of the warehouse during said time."

The appellants contend that this provision of the lease only authorized Wood to find a market, and did not authorize him to sell the shoocks. We cannot so hold.

—lessees of mill—power to market stock.

The contract shows clearly that the intention was that Wood should not only have the authority, but it would be his duty actually to sell these box shoocks. The instrument even goes so far as to provide that the lessees shall be entitled to a reasonable commission for this service. It is true that the last clause above quoted provides that the box shoocks shall be permitted to remain in the warehouse "until the lessor determines to sell the same," but this was not intended to reserve the right of sale exclusively in the appellants, but was put in the contract merely to guard against any charge which the lessees might make the appellants for warehouse rent.

The appellants further contend, however, that the implied power to collect the purchase price is always dependent upon the exercise by the agent of his power to sell, and that, where the principal makes the sale, the presumption of law is that he alone had authority to make the collection, and that since Waters actually made the sale the agent had no authority to make the collection.

As principles of law these contentions may be accepted as correct, but they are inapplicable here, because the testimony does not show that Waters, as the owner of the property, made the sale. The most that he did was to assist in making the sale, and even in this the respondent supposed, and had reason to suppose, that Waters was acting

—assisting in  
sale—effect.

as the agent or attorney for the owner, and not as owner. The appellant contends that the trial court's finding was to the effect that Waters made the sale, but we do not so construe it. The finding was merely to the effect that Waters finally closed or confirmed the sale. We have very carefully read and considered the testimony, and it is perfectly plain to us that the terms of the sale were made between Wood and Biery, the foreman of the respondent, and that Waters did nothing more than to assist in the making of the sale. It cannot be said that what Waters did had the effect of revoking the powers given in the lease to Wood.

As between two innocent persons, one of whom must suffer, the loss should always fall on the principal who has clothed the agent with apparent authority, and thus enabled him to obtain the advantage of the person with whom he deals, rather than on the purchaser. *Galbraith v. Weber, supra*. Considering all the testimony, we cannot avoid the conclusion that not only did the lease itself give Wood the power to sell and collect, but that the conduct and acts of the appel-

lant, through Waters, was such as to hold out to the respondent that Wood was authorized to sell as well as to collect. Under all the circumstances as shown by the record, it seems to us that any person placed in the position of the respondent, and having the information which it had, would, without hesitancy and with perfect justification, have made the payment to Wood as the respondent did in this case. It will not serve any good purpose for us to particularly refer to the testimony upon which our conclusion is based.

The appellant contends that the judgment of the trial court for \$75 should have carried interest from the date it should have been paid to the date of judgment. If it should be conceded that the court would have had authority to have given interest, yet we find that the appellant is in no position now to raise that question. The court's conclusion of law No. 1 was to the effect that the appellant was entitled to judgment for \$75 and for its costs and disbursements. The conclusion did not provide for any interest. The appellant did not take any exception to the conclusion, nor do we find anything in the record which would tend to indicate that the appellant at any time called the court's attention to this question of interest. Appellant seems to have raised the question for the first time in this court.

Appeal—failure  
to allow interest  
—reversal.

Judgment affirmed.

Holcomb, Ch. J., and Parker, Fullerton, and Mount, JJ. concur.

Petition for rehearing denied.

ANNOTATION.

**Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market.**

I. Introductory, 203.

II. Majority rule:

a. Rule stated, 203.

b. Application of rule:

1. In general, 204.

2. Broker, 210.

3. Traveling salesman or drummer, 214.

c. Limitation of rule:

1. Authority of agent implied from possession of goods, 215.

*I. Introductory.*

The scope of this note is confined to the consideration of cases involving the sale of commodities by agents, and excludes the sale of real property or chattels other than articles of trade. Nor has the writer considered the authority of an agent to receive payment in forms or modes other than cash, or the authority to make collection on securities, except as these matters may have been involved collaterally in deciding an agent's authority to receive payment, as implied from his authority to sell.

While the authority of factors or auctioneers to receive payment does not differ materially from that of sales agents or brokers, nevertheless the peculiar form and nature of their employment necessitate the consideration of their authority apart from that of other agents, and accordingly the rule relative to factors and auctioneers has been treated under a separate subdivision (see *infra*, V.).

*II. Majority rule.*

*a. Rule stated.*

It is well established that an agent other than a factor or auctioneer (see *infra*, V.), authorized to sell or find a market for commodities, has no implied authority to receive or collect payment therefor. But this rule has certain well-recognized limitations which are discussed *infra*.

**Alabama.**—Simon v. Johnson (1893) 101 Ala. 368, 13 So. 491, later appeals

II. c.—continued.

2. Authority of agent implied from representations or acquiescence of principal, 218.

3. Authority of agent implied from custom or usage, 222.

4. Payment to agent of undisclosed principal, 223.

III. Minority rule, 225.

IV. Rule in Tennessee, 226.

V. Implied authority of factor or auctioneer, 227.

in (1894) 105 Ala. 344, 53 Am. St. Rep. 125, 16 So. 884; (1895) 108 Ala. 241, 19 So. 244; Lyles-Black Co. v. Alldredge (1914) 10 Ala. App. 632, 65 So. 696. See also Dothan Grocery Co. v. White Bros. (1915) 14 Ala. App. 405, 69 So. 992.

**Arkansas.**—See Hadley Mill. Co. v. Kelley (1915) 117 Ark. 173, 174 S. W. 227.

**California.**—Fred Medart Mfg. Co. v. Weary & A. Co. (1917) 33 Cal. App. 347, 165 Pac. 35.

**Florida.**—Lakeside Press Photo-Engraving Co. v. Campbell (1897) 39 Fla. 523, 22 So. 878.

**Georgia.**—See Keystone Lubricating Oil Co. v. Farmers Oil & Fertilizer Co. (1914) 15 Ga. App. 107, 82 S. E. 665; Walton Guano Co. v. McCall (1900) 111 Ga. 114, 36 S. E. 469.

**Illinois.**—Clark v. Smith (1878) 88 Ill. 298; Greenhood v. Keator (1881) 9 Ill. App. 183; Williams v. Anderson (1903) 107 Ill. App. 82. See also Saladin v. Mitchell (1867) 45 Ill. 80; Charles H. Brown Paint Co. v. C. A. Erickson & Bros. (1915) 190 Ill. App. 186.

**Iowa.**—LAWRENCE GAS CO. v. HAWKEYE OIL CO. (reported herewith) ante, 192.

**Kansas.**—Kane v. Barstow (1889) 42 Kan. 465, 16 Am. St. Rep. 490, 22 Pac. 588; Dreyfus v. Goss (1903) 67 Kan. 57, 72 Pac. 537.

**Kentucky.**—Graham v. Duckwall (1871) 8 Bush, 12; J. M. Robinson, N. & Co. v. Corsicana Cotton Factory



(1907) 124 Ky. 435, 8 L.R.A.(N.S.) 474, 99 S. W. 305, 14 Ann. Cas. 802.

**Louisiana.**—Toledano v. Klingender (1834) 6 La. 691.

**Massachusetts.**—Clark v. Murphy (1895) 164 Mass. 490, 41 N. E. 674.

**Michigan.**—Kornemann v. Monaghan (1871) 24 Mich. 36.

**Minnesota.**—Brown v. Lally (1900) 79 Minn. 38, 81 N. W. 538. See also Janney v. Boyd (1883) 30 Minn. 319, 15 N. W. 308.

**Mississippi.**—Sumrall v. Kitselman Bros. (1911) 101 Miss. 783, 58 So. 594.

**Missouri.**—Butler v. Dorman (1878) 68 Mo. 298, 30 Am. Rep. 795; Chambers v. Short (1883) 79 Mo. 204; Keown v. Vogel (1887) 25 Mo. App. 35.

**Nebraska.**—Ketelman v. Chicago Brush Co. (1902) 65 Neb. 429, 91 N. W. 282.

**New Jersey.**—Law v. Stokes (1867) 32 N. J. L. 249, 90 Am. Dec. 655.

**New York.**—Higgins v. Moore (1866) 34 N. Y. 417, reversing (1860) 6 Bosw. 344; Dunn v. Wright (1868) 51 Barb. 244; Harrison v. Ross (1870) 12 Jones & S. 230; Bassett v. Lederer (1874) 1 Hun, 274, 3 Thomp. & C. 671; Dean v. International Tile Co. (1888) 47 Hun, 319, 14 N. Y. S. R. 266, 28 N. Y. Week. Dig. 84; Lamb v. Hirschberg (1896) 1 App. Div. 519, 37 N. Y. Supp. 283; John Hurd Co. v. Consolidated Steel & Wire Co. (1900) 47 App. Div. 467, 62 N. Y. Supp. 439; Hahnenfeld v. Wolff (1895) 15 Misc. 133, 36 N. Y. Supp. 473; Zilberman v. Friedman (1907) 54 Misc. 256, 104 N. Y. Supp. 363; Hegedorn Bros. v. O'Rourke (1912) 134 N. Y. Supp. 528. See also Goldstein v. Tank (1912) 149 App. Div. 341, 134 N. Y. Supp. 262, affirming (1911) 73 Misc. 300, 132 N. Y. Supp. 466. Compare Scott v. Hopkins (1886) 2 N. Y. S. R. 324.

**North Carolina.**—See Latham v. Field (1912) 160 N. C. 335, 76 S. E. 251.

**Ohio.**—Crosby v. Hill (1883) 39 Ohio St. 100.

**Oklahoma.**—Scarritt-Comstock Furniture Co. v. Hudspeth (1907) 19 Okla. 429, 91 Pac. 843, 14 Ann. Cas. 857.

**Pennsylvania.**—Seiple v. Irwin (1858) 30 Pa. 513, affirming (1857) 2 Phila. 208; Western R. Co. v. Roberts

(1860) 4 Phila. 110; Higgins v. Grindrod (1883) 16 Phila. 200; Giltinan v. Bergey (1895) 5 Pa. Dist. R. 20.

**South Carolina.**—See Ohio Pottery & Glass Co. v. Talbert (1910) 57 S. C. 194, 69 S. E. 211.

**South Dakota.**—See Shull v. New Birdsall Co. (1901) 15 S. D. 8, 86 N. W. 654.

**West Virginia.**—Crawford v. Whitaker (1896) 42 W. Va. 430, 26 S. E. 516.

**Wisconsin.**—McKindly v. Dunham (1882) 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485.

**England.**—Puttock v. Warr (1858) 3 Hurlst. & N. 979. See also Capel v. Thornton (1828) 3 Carr. & P. 352; Howard v. Chapman (1831) 4 Carr. & P. 508.

**Canada.**—Murphy v. Canning (1905) 2 West. L. R. 103.

#### *b. Application of rule.*

##### *1. In general.*

In *Dreyfus v. Goss* (1903) 67 Kan. 57, 72 Pac. 537, it appeared that the defendants bought of the plaintiff's sales agent a quantity of whisky, which was shipped directly from the plaintiff's place of business, and the purchase price was paid to the salesman, who failed to account for the same to his principal. The court held, in an action to recover the price of the shipment from the defendants, that the agent had no implied authority to receive the payment for the goods sold, as it was well settled that an agent possessing authority to sell goods was not thereby invested with authority to collect the price thereof.

In *Kane v. Barstow* (1889) 42 Kan. 464, 16 Am. St. Rep. 490, 22 Pac. 588, an action to recover the price of a shipment of blackboards sold to the defendant by the plaintiff through its agent, the defendant pleaded a payment made to the agent as a defense. It appeared that the salesman had no express authority to receive any payments, and did not have possession of the article sold. The court approved a charge, requested by the plaintiff in the court below, in the following form: "Since the principal is bound only by such acts of his agent as have been

authorized or allowed, proof that an agent has authority to make a sale of goods or to take orders for them to be filled by the principal, is not sufficient to prove that the agent has the authority to collect the pay for the goods afterward. The defendants must prove that . . . [the agent] was authorized to receive the money, or else fail in their defense."

In *Kornemann v. Monaghan* (1871) 24 Mich. 36, wherein it appeared that the plaintiffs shipped a quantity of goods to the defendant on an order secured by their agent, and the defendant made payment to the agent, who absconded without accounting for the money to his principals, the court held, in an action to recover the value of the goods sold, that the payment to the agent did not constitute a defense, in the absence of proof of actual authority on the part of the agent to accept the same, for the agent was not intrusted with the possession of the goods sold, and therefore had no implied authority to collect payment.

Where it appeared that the plaintiff's agent was authorized to sell personal property, but did not have possession of the property to be sold, and after effecting a sale with the defendant he collected the purchase price, the court held, in an action by the principal to recover the amount of the sale, that a sales agent, not having possession of the thing to be sold, had no authority to accept or collect the purchase price, and that § 2325 of the Civil Code only provided that "a general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price." *Fred Medart Mfg. Co. v. Weary & A. Co.* (1917) 83 Cal. App. 347, 165 Pac. 85. The case, however, turned on the question of the estoppel of the principal to deny the authority of the agent by reason of its failure to notify the defendant of the lack of the agent's authority so to collect, after receiving knowledge that the salesman had received a part of the purchase money.

In *Keown v. Vogel* (1887) 25 Mo. App. 35, it appeared that the defendants bought of the plaintiff, through

his agent, a mowing machine, which was delivered by the plaintiff himself. The defendant made payment of the purchase price to the agent, although it appeared that the latter had no express authority to receive the same. The court held that the payment to the agent constituted no defense to the plaintiff's action for the purchase price, since the agent was only authorized to obtain orders for the sale of the plaintiff's property, and was not intrusted with the possession of the same so as to clothe him with authority to collect the purchase price. The court said: "Where the principal has clothed the agent with the indicia of authority to receive payment, as by intrusting to him the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent, but when the agent has not the possession of the goods, indicia of authority, and is only authorized to sell, if the purchaser pays the price to the agent he does so at his own peril, and it devolves upon him, in a suit for the purchase money by the principal, to prove that the agent was also authorized to receive payment." The court distinguished *Rice v. Groffmann* (1874) 56 Mo. 434, *infra*.

And in *Butler v. Dorman* (1878) 68 Mo. 298, 30 Am. Rep. 795, wherein it appeared that the plaintiffs' traveling salesman, who was authorized to sell goods for them by sample, sold to the defendant two bills of goods, which were shipped direct to the defendant from the plaintiffs, the court held that a payment to the agent did not preclude a recovery on the part of the plaintiffs for the purchase price, as an agent employed only to sell goods on sample, who did not have possession of the property sold, had no implied authority to receive the purchase price. Distinguishing *Rice v. Groffmann* (Mo.) *infra*, II. c. 1, the court said: "*Rice v. Groffmann* is no authority for the doctrine . . . of the instruction in question. It is true it is there stated in general terms that 'a power to sell goods includes a power to receive payment,' but the ground upon which the decision was based appears in that paragraph of the

opinion in which Judge Napton said: "Whatever the plaintiffs may say as to the agency of Berlzheimer, it is clear that he negotiated and effected the sale to defendant, that he had the cigars and delivered them, and there was nothing to show that he was not the owner except the bill; and conceding he was not, the presumption was that as he had authority to sell, he had authority to receive payment."

So, in *Chambers v. Short* (1883) 79 Mo. 204, wherein it appeared that the plaintiff's book agent sold by subscription to the defendant a set of books, which was delivered by the plaintiff and was never in the possession of the agent, the defendant, in an action to recover the purchase price, pleaded payment to the canvasser. The court held that the plea of payment to the agent could not defeat the plaintiff's right to recover, for the agent was only authorized to canvass and solicit subscriptions for the sale of books, and had no authority to receive payment, and, not having been intrusted with the possession of the goods sold, authority to collect the purchase price could not be implied,—following *Butler v. Dorman* (Mo.) *supra*.

In *Law v. Stokes* (1867) 32 N. J. L. 249, 90 Am. Dec. 655, an action to recover the amount of a bill of goods sold by the plaintiff to the defendant, it appeared that the latter purchased the commodities through the medium of an agent employed by the plaintiff to sell goods on commission, and that the goods were shipped direct by the plaintiff to the defendant, accompanied with a letter stating, among other things: "Please remit amount direct to me [plaintiff]," and a bill of the goods, on which was printed in red letters, "Salesmen not authorized to collect." The defendant pleaded a payment made to the agent. The court said: "An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a

mere power to make sales. . . . Such authority may be shown by proof, either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public, or to the defendant, as having such authority. . . . Where an agent is intrusted with the possession of goods, with an unrestricted power to sell, . . . or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer, . . . the authority to receive payment will be implied in favor of innocent persons, because the principal, by his own act, gives to the agent an apparent authority to receive such payment. But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent."

In *Zilberman v. Friedman* (1907) 54 Misc. 256, 104 N. Y. Supp. 363, it appeared that the plaintiff, a wholesale dealer in beds, sold and delivered goods to the defendant. The defendant ordered the goods from a salesman authorized by the plaintiff to solicit orders, but not to collect payments. It appeared further that the goods were never in the possession of the agent, but were shipped direct to the purchaser with an accompanying statement of account, on which was printed the notice, "Pay none but authorized collectors." Subsequently, and after receiving the shipment, the defendant paid the purchase price to the salesman, and in this action to recover the value of the goods pleaded the same as a defense. The court held that the agent had no real or apparent authority to collect the purchase price of the goods from the defendant, and payment to him did not bind the principal or discharge the purchaser, for an agent employed to make sales, and selling on credit, was not authorized to collect the price in the name of the principal.

In *Lamb v. Hirschberg* (1896) 1 App. Div. 519, 37 N. Y. Supp. 283, it

appeared that a cloth manufacturer in England, who was the assignor of the plaintiff, employed an agent for the purpose of soliciting orders for the sale of cloth in the United States and Canada, but without authority to collect moneys. It appeared further that the agent called on the defendants, and obtained an order from them for the sale of a quantity of cloth which, on receipt of the order by the manufacturer, was delivered directly by him to the defendants. Later, and after the goods had been received by the defendants, the agent called on them and collected a part of the purchase price, which he failed to account for to his principal. In an action to recover the amount of the purchase price paid to the agent, the court held that the payment to the agent did not bind the principal, for the former had no express authority to receive the same, nor could authority be implied, as the agent was not intrusted with the possession of the articles sold.

But compare *Scott v. Hopkins* (1886) 2 N. Y. S. R. 324, which was limited and confined by the court in *Lamb v. Hirschberg* (N. Y.) *supra*, wherein it appeared that a traveling salesman, employed by the plaintiff to solicit orders for the sale of coffee, contracted with the defendant for the sale of the goods in question, which were shipped direct to the defendant by the plaintiff. Subsequently, and after the goods had been received, the agent called again upon the defendant and, without express authority so to do, collected the purchase price. The court held that under the facts it could well be said that the salesman had apparent authority to receive payment for his principal. But in *Lamb v. Hirschberg* (N. Y.) *supra*, attention was called to the fact that the court, in the instant case, cited no authorities in support of its holding, nor could it be deemed as laying down a general rule of law, and it was contrary to the weight of authority in New York.

In *Hahnenfeld v. Wolff* (1895) 15 Misc. 133, 36 N. Y. Supp. 473, the court held that payment by the defendant

to an agent, who was authorized only to solicit orders for goods, and who did not have possession of the same, was no defense to an action brought by the principal to recover the purchase price of goods sold, as there was no implied authority in the agent to receive the payment.

So, in *Giltman v. Bergey* (1894) 11 Montg. Co. L. Rep. (Pa.) 162, an action to recover the value of goods sold by the plaintiff, the defendant claimed that he had paid part of the claim in dispute to the plaintiff's agent. It appeared that the agent took the order for the goods, but did not have possession of the same, and they were delivered directly by the vendor to the vendee. The court held that the agent was not impliedly authorized to receive payment for the property sold, for the mere fact that he was authorized to sell did not imply authority to receive payment therefor, where it appeared he was not intrusted with the possession of the property sold.

And in *Seiple v. Irwin* (1858) 30 Pa. 518, affirming 2 Phila. (Pa.) 208, it appeared that a salesman, employed in the plaintiff's store for the purpose of selling goods, effected a sale to the defendants, but the goods were delivered by his principals direct to the purchasers. The court held that a payment made to the agent subsequent to the delivery of the goods, and which the salesman did not account for to his employers, was no defense to this action to recover the purchase price, in the absence of proof of authority from the plaintiffs to the agent other than that implied from the authority to make sales as a salesman, saying: "It is undeniable that an agent to whom merchandise has been intrusted, with authority to sell and deliver it, is authorized to receive the price; otherwise the fraud on the purchaser would run into cruelty. This agent's powers were not embraced in that description. He was employed only to make sales. As a check, his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendants

sufficiently of the character of the agency. When the agreement had been made for payment in six months, the contract was complete. The subsequent acceptance of cash, with a deduction of 5 per centum from the bill, was a new and totally unauthorized arrangement on the agent's part. In making payment, the defendants took the risk of his integrity, and they must bear the loss which his unfaithfulness imposed." A charge to the jury by the court below was upheld, in which it was said: "Where a person is employed to sell goods, and is intrusted with the possession and disposal of them by the owners, and sells for cash, payment to him by the purchaser will be good; and it may well be so, when he sells on credit; but on the other hand, when the person is merely employed to sell goods, and sells on a credit, without having the possession or disposal of them, a payment to him will not be good without some other evidence of authority. Take, for instance, a sale of goods across a counter—there the person selling the goods has the actual possession and disposal of them, and a payment to him at the time will be good. It does not follow that he can collect the money afterwards. And I do not conceive that a clerk's having the authority to sell goods for his employers for credit carries with it an authority to collect the money for the goods. It is for the purchaser to see to whom he pays his money, and if he pays the clerk or salesman who effects the sale, without sufficient proof of his authority, it is at his risk."

In *Hegedorn Bros. v. O'Rourke* (1912) 134 N. Y. Supp. 528, wherein the plaintiff showed that it delivered a quantity of coal to the defendant, pursuant to an order for the same secured by its agent, who was authorized to solicit orders but not to receive payment, and where it further appeared that the defendant paid the purchase price to the agent, the court held that the action of the court below in dismissing the complaint was erroneous, as the plaintiff had made out a prima facie case, no implied authority being shown to warrant the

payment of the purchase price to the agent so as to bind his principal.

In *Clark v. Smith* (1878) 88 Ill. 298, an action to recover the price for a bill of goods sold by the plaintiff to the defendant, it appeared that the sale was consummated by the plaintiff's agent, who was employed and authorized to travel and solicit orders for whisky, which were filled by the principal. The defendant pleaded a payment of the amount claimed as the purchase price of the sale to the agent. The court held that the agent had no authority to receive payment for sales made by him, holding that mere authority in an agent to sell goods on credit did not show an authority in him to receive money in payment, so as to bind his principal.

So, in *McKindly v. Dunham* (1882) 55 Wis. 515, 42 Am. Rep. 740, 18 N. W. 485, wherein it appeared that an agent, employed by the plaintiffs to solicit orders, obtained an order from the defendant for a quantity of cigars which were shipped direct to the purchaser, who made payment of the contract price to the agent, the court held that the payment made to the agent was no defense to this action by the vendor to recover the purchase price, the agent having failed to account for the sum paid to him, for the agent, being authorized only to solicit orders for goods, which were transmitted to, and filled by, his principal, had no implied authority to collect or receive payments for the goods sold.

In *Sumrall v. Kitselman Bros.* (1911) 101 Miss. 783, 50 So. 594, wherein it appeared that the defendants bought certain goods from the plaintiffs through the latter's agent, who was authorized only to solicit orders, and the defendants made payment of the purchase price to this agent, the court held, in an action to recover the price of the articles sold, for which the agent did not account to his principals, that the agent had no authority to collect the money so as to bind the plaintiffs, for it appeared that he was not intrusted with the possession of the articles sold, so as to constitute implied authority to receive the payment therefor.

In *Ketelman v. Chicago Brush Co.* (1902) 65 Neb. 429, 91 N. W. 282, an action to recover for goods sold and delivered, the defendant pleaded payment to the plaintiff's agent, but did not prove authority in the latter, either express or implied, to receive the payment. The court held that, since it appeared that the agent did not have possession of the goods sold, and delivery was made by the plaintiff direct to the defendant, no authority to receive the purchase price of the property sold could be implied.

In *Brown v. Lally* (1900) 79 Minn. 38, 81 N. W. 538, an action to recover for goods sold and delivered, it appeared that the defendant paid a sum of money on account to the plaintiff's traveling salesman who sold him the goods, and took a receipt signed by the agent. The question was whether the sum so paid should be applied to the debt of the purchaser. The court held that the payment could not be so applied, for, independent of controlling usage to the contrary, the sale of goods by an agent did not of itself authorize him to receive payment therefor.

In *Murphy v. Canning* (1905) 2 West. L. R. (Can.) 103, it was held that agents who were authorized only to sell pianos and organs, which were shipped direct from the vendors to the vendee, had no implied authority to receive payment for the goods sold.

And in *Puttock v. Warr* (1858) 2 Hurlst. & N. (Eng.) 979, an action to recover the value of certain commodities sold to the defendant, it appeared that a clerk, employed by the plaintiff to solicit orders, called on the defendant and effected a contract for the sale of a quantity of timber, which was delivered several days later by the plaintiff. Subsequently the vendee paid the agent the price of the goods sold, which the latter wrongfully appropriated to his own use. The court held that the clerk, whose authority only extended to the solicitation of orders for the sale of goods not in his possession, had no implied authority to receive the purchase price so as to bind his principal.

But compare *Capel v. Thornton* 8 A.L.R.—14.

(1828) 2 Car. & P. (Eng.) 352, wherein the court held that, in the absence of notice to the contrary, an agent authorized to sell goods had an implied authority to receive the proceeds of the sale. But it will be noted that in this case the facts showed that the buyer dealt with the agent in the belief that he was the owner of the goods, and without knowledge of the agency.

In *Howard v. Chapman* (1831) 4 Car. & P. (Eng.) 508, there is a dictum to the effect that a traveler authorized to solicit and take orders for the sale of his principal's goods had authority to receive payment in money. This case, however, involved the question of an agent's authority to receive payment in goods of the buyer.

See also *Hadley Mill. Co. v. Kelley* (1915) 117 Ark. 173, 174 S. W. 227, wherein it appeared that the plaintiff sold, through its agent, a carload of flour to the defendant, who gave his time check to the salesman in payment therefor, the court, among other things, said: "Authority to sell did not necessarily imply the authority to collect the proceeds." But in that case it appeared that the agent had express authority to receive payment for sales made by him, and the real question presented was whether or not he had authority to accept payment in any medium other than money.

See also *Shull v. New Birdsall Co.* (1901) 15 S. D. 8, 86 N. W. 654, wherein it was said that the statutes of the state of North Dakota (Comp. Laws, §§ 3987, 3988) provided as follows: "A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price. . . . A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards." In that case it was held that an agent authorized to solicit orders for the sale of farm machinery had no authority to receive an old machine in part payment of the purchase price for the new machine ordered.

In *Goldstein v. Tank* (1912) 149 App. Div. 341, 134 N. Y. Supp. 262,

affirming (1911) 73 Misc. 300, 182 N. Y. Supp. 466, wherein the court recognized the general rule that a selling agent, selling an article not in his possession, was not authorized to receive payment for such article. However, the present case turned on the ratification of the agent's act, and not on the question of his implied authority.

And see *Janney v. Boyd* (1883) 30 Minn. 319, 15 N. W. 308, wherein there is dictum as follows: "Independent of controlling usage to the contrary, the sale of goods by an agent, or the fact that he is or acts as agent to take orders for goods, does not of itself authorize him to receive payment therefor." In the present case, however, it did not appear that the person to whom a payment was made was the agent of the vendor of goods sold.

In *Walton Guano Co. v. McCall* (1900) 111 Ga. 114, 36 S. E. 469, it was said that an agency to sell did not necessarily carry with it authority to collect. The determining factor in that case, however, appears to have been the lack of authority of the plaintiff's agent to receive in payment of a certain promissory note, given as security for the purchase price of the material sold by him, property of the defendant.

See also *Charles H. Brown Paint Co. v. C. A. Erickson & Bros.* (1915) 190 Ill. App. 186, where, in an abstract of the opinion of the court, it was stated that "evidence of payments to an agent is inadmissible where the agent's authority to receive payments is not shown."

See also *Keystone Lubricating Co. v. Farmers Oil & Fertilizer Co.* (1914) 15 Ga. App. 107, 82 S. E. 665, wherein it was said, in a syllabus by the court, that a mere agency to sell commodities did not necessarily include the power to collect the purchase price of the articles sold.

#### *2. Broker.*

In *Bassett v. Lederer* (1874) 1 Hun (N. Y.) 274, 3 Thomp. & C. 671, it appeared that plaintiff agreed with a broker to sell to defendant a quantity of muslin, and accordingly shipped the goods direct to the purchaser, the

articles being at no time in the possession of the broker. The defendant, it further appeared, received the shipment and paid the price thereof to the broker, believing him to be the actual owner of the goods, although an invoice accompanied the shipment, showing the plaintiff to be the actual vendor. In an action to recover the purchase price, which the broker failed to account for to his principal, the court held, first, that the invoice which accompanied the goods put the defendant on notice that the broker was in fact merely a selling agent, and not the owner of the goods; and, second, that the payment to the agent was not a payment to the principal so as to preclude a recovery, saying: "The only authority which the plaintiff gave to the broker over the goods was the right to sell them as a broker. And it appears from the defendant's own statement as a witness that he knew Westbrook as a broker and merchant generally. He should have inferred, from the circumstance that he came to make the sale without having possession of the property he proposed to sell, that he was then acting as a broker and not as a merchant. That was the mode in which brokers ordinarily made sales, and it was sufficient to charge the defendant with knowledge that he was then apparently proposing a sale in that capacity. The fact that he represented himself to be the actual owner cannot protect the defendant, as long as the plaintiff had conferred upon him no colorable authority to make such a representation. And the case in favor of the plaintiff can be in no way changed by the circumstance that the broker artfully contrived to be present when the cartman unloaded the goods, and then professed to have made the delivery of them himself. As long as the plaintiff did not empower him to deceive the defendant by his professions and artifices, he cannot be rendered responsible for their consequences. He simply authorized the broker to sell in that capacity, and as he was known to the defendant to be a broker, and had, in reality, no possession of the property

he offered for sale, the purchase must be held to have been made in that and no other way."

In *LAWRENCE GAS CO. v. HAWKEYE OIL CO.* (reported herewith) ante, 192, an action to recover an amount due for a shipment of oil sold by the plaintiff to the defendant, the latter pleaded as a defense, payment of the amount due to a broker employed by the plaintiff for the purpose of effecting the sale. The court held that the broker, not having possession of the goods sold, had no implied authority to receive payment due under the sale, stating that the burden was on the defendant to show that the broker had a special authority to receive payment for the goods shipped. The court said: "The general rule is that an agent who sells goods on sample—a traveling salesman who sells his principal's goods for future delivery—is not, by virtue of his employment alone, entitled to collect for the goods sold. There are some cases apparently holding to a different doctrine. These cases are all distinguishable because of the peculiar features involved in the particular case. We think the general rule is practically without exception. . . . The distinction seems to be that where the power to sell and to deliver is invested in the same agent, upon delivery he may receive payment and bind his principal."

In *J. M. Robinson, N. & Co. v. Corsicana Cotton Factory* (1907) 124 Ky. 435, 8 L.R.A. (N.S.) 474, 99 S. W. 305, 14 Ann. Cas. 802, an action to obtain possession of a quantity of cotton cloth, it appeared that on the request of a broker to buy the cloth in question, the defendant company shipped the goods to him, but reserved the possession and title to the same by forwarding therewith a draft drawn upon the broker for the purchase price, thereby conditioning the passing of title and possession on the payment of the draft. The broker, representing that he had a quantity of cotton cloth to sell for a mill, sold it to the plaintiff company, which paid him the purchase price but never received the goods, the draft drawn by the defendant upon the broker not

having been paid by reason of his subsequent insolvency, and the defendant, therefore, refusing to deliver the bills of lading. The court held that, since the draft had not been paid, possession and title never passed to the broker, and that he was merely a merchandise broker, not a factor, hence he had no implied authority to receive the purchase price so as to bind his principal, and the plaintiff could not recover without making a payment to the defendant owner of the goods, saying: "'A broker has, ordinarily, no authority to receive payment for property sold by him for his principal, and a purchaser who pays the broker does so at his own risk. Such payment does not discharge him from liability to the principal, unless the authority of the broker to receive payment be express, or may reasonably be implied from the circumstances.' . . . A broker differs from a factor in that he has not possession of the goods to be bought or sold for his principal. . . . Whether the selling agent has possession of the wares determines the character of his agency. That is the test, and the law defining their respective duties and powers is as old as the law of commerce."

Where it appeared that the plaintiff sold, through the medium of a broker, a quantity of cotton to the defendant, and, although the goods were shipped direct from the vendor to the vendee, the broker never having them in his possession, the defendant made payment of the purchase price to the broker, the court held that the payment did not bind the plaintiff, and the latter could recover the value of the property sold, stating that "in the absence of proof of any authority in the broker to receive payment, or of any act from which such authority might be presumed, we are of opinion that the defendant acted without due caution, and equity requires that he should sustain the loss." *Toledano v. Klingender* (1834) 6 La. 691.

In *Graham v. Duckwall* (1871) 8 Bush. (Ky.) 12, an action to recover the price of groceries delivered by the plaintiff to the defendant, it ap-



peared that the sale was effected by a broker, to whom the defendant claimed it made payment for the goods sold. The court held that the broker had no authority to receive the purchase price of the commodities sold, and the defendant paid him at its risk, stating the rule as follows: "So he cannot buy or sell on credit except in cases justified by the usages of trade. So a broker has ordinarily no authority *virtute officii* to receive payment for property sold by him; and if payment is made to him by the purchaser it is at his own risk unless from other circumstances the authority can be inferred."

And in *Harrison v. Ross* (1870) 12 Jones & S. (N. Y.) 230, an action to recover the purchase price of a quantity of sugar, it appeared that the defendants bought the same through a broker who acted for both the buyer and seller, and that the articles were shipped direct by the plaintiff to the defendant, at no time being in the possession of the broker. The defendant pleaded payment made to the agent. The court held that the broker had no implied authority to receive the payment, for, under the general rule, a broker employed to sell goods had no authority to receive payment, except where he was clothed with the indicia of authority to receive the purchase price by being intrusted with the possession of the goods, or where he acted for an undisclosed principal.

So, in *Dean v. International Tile Co.* (1888) 47 Hun (N. Y.) 319, wherein it appeared that the defendant contracted to buy a quantity of cement through a broker employed by the plaintiffs, and it further appeared that the cement was never in the possession of the agent, but was shipped directly from the plaintiffs to the defendant, the court held that a payment of the price of the goods sold to the broker, which the latter failed to turn over to his employers, was no defense to this action by the vendors to recover the value of the articles sold, for the broker, as he was at no time intrusted with the possession of the cement, nor had any other evidence of ownership,

had in fact no authority, either actual or implied, to receive the payment.

In *Crosby v. Hill* (1883) 39 Ohio St. 100, it appeared that a broker, employed by the plaintiffs to sell a quantity of shingles, contracted in his own name to sell the same to the defendant, who had no knowledge that the broker was not the real owner of the property. And it appeared further that the broker was not intrusted with the possession of the property sold, nor did his principals, by any conduct on their part, clothe him with authority to receive payment for them, but made shipment of the goods direct to the purchaser. The court held that a payment made by the defendant to the agent, which the latter failed to turn over to his principals, was no bar to the right of the plaintiffs to recover the purchase price, saying: "The broker has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and, besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious that he cannot do so unless the principal delivers over to him the possession and indicia of property."

Where it appeared that a broker, employed by the plaintiffs to sell a quantity of rye, sold the goods to the defendant, and it appeared further that the agent did not have possession of the property sold, but the same was delivered by the principals direct to the purchaser, the court held that a payment of the purchase price to the broker did not bind his employers, for an agent empowered to sell, who did not have possession of the articles to be sold, was not impliedly authorized to receive the payment therefor, especially where it appeared that the principals were known. The court said: "Where the person contracting for the sale has the property in his possession and delivers it, he is clothed with

the indicia of authority to receive payment, especially, when the owner is not known. . . . He is then clothed with apparent authority, and that, as to third persons, is the real authority." *Higgins v. Moore* (1866) 34 N. Y. 417, reversing (1860) 6 Bosw. 344.

In *Dunn v. Wright* (1868) 51 Barb. (N. Y.) 244, it was held that the purchaser of goods, bought through an agent employed by the vendor to sell on commission as a broker, could not successfully set off a debt due him from the broker, where it appeared that the agent did not have possession of the goods sold, but the same were shipped by the vendor direct to the vendee, and therefore he had no implied authority to receive payment for the articles sold. The court said: "The goods were received by the defendant at Canandaigua, to which place they were sent by the plaintiff by express, accompanied by a bill or invoice of the bags, sent to the same address by mail. When the defendant received the goods he knew that they came from the plaintiff, as they were marked with his name. He had not then paid for the goods, nor did he afterwards ever pay for them, in fact. He simply credited the amount of the cost of the bags in his books, to Stannard [the agent]. When he thus received the goods he had notice that Stannard [the agent] did not own them, and had no right to receive payment for them. The plaintiff did nothing to mislead him. He had not trusted Stannard [the broker] with the possession of the property, or with any evidences of title thereto."

And in *John Hurd Co. v. Consolidated Steel & Wire Co.* (1900) 47 App. Div. 467, 62 N. Y. Supp. 489, wherein it appeared that a broker employed by the plaintiff company effected a contract of sale for certain articles with the defendant, and the latter made payment of the purchase price to him, which the broker failed to account for to his employer, the court held, in an action to recover the value of the goods sold, that the plea of payment to the broker could not operate to defeat the plaintiff's right to recover,

for the general rule was that a broker to sell had no authority as such to receive payment, and this rule was departed from only when the person contracting for the sale had the property in his possession and delivered it, which did not so appear in the instant case.

So, in *Western R. Co. v. Roberts* (1860) 4 Phila. (Pa.) 110, the court held that a broker authorized merely to sell a quantity of iron rails, and not intrusted with the possession of the same, had no implied authority to receive payment for the goods sold, and a payment to him by the purchaser did not preclude a recovery by the vendor, where it appeared that the agent failed to account to his principal for the sum collected, but appropriated the same to his own use. Among other things, it was said: "All the authorities on the subject concur that while a factor, or other agent armed with an authority to sell and intrusted with the possession of and right to deliver the thing sold, will be presumed, in the absence of evidence to the contrary, to be also authorized to receive the price; for the protection of the principal, who would otherwise have no means of enforcing his lien for the purchase money, a mere authority to sell, without authority to deliver, will not extend to the receipt of the purchase money, and will cease to exist with the negotiation and completion of the contract of sale."

See *Higgins v. Grindrod* (1883) 16 Phila. (Pa.) 200, *infra*, V.

See also *Saladin v. Mitchell* (1867) 45 Ill. 80, wherein there is dictum to the effect that a broker had no power, unless specially authorized, to receive payment for a commodity for which he was to find a buyer. In that case, however, there appeared to be no evidence of payment to the broker.

In *Latham v. Field* (1912) 160 N. C. 235, 76 S. E. 251, wherein there is dictum to the effect that, in the absence of custom or usage, payment to a broker who did not have the possession of articles sold by him was not payment to the principal, as there was no implied authority on the part of

the broker to receive payment. This case, however, did not involve the unauthorized receipt by a broker of payment made by a purchase of goods.

### *3. Traveling salesman or drummer.*

In *Greenhood v. Keator* (1881) 9 Ill. App. 183, it appeared that the plaintiff sold to the defendant a safe pursuant to an order obtained by his traveling salesman, who was authorized only to solicit orders for safes, such orders being subject to the approval of the principal. The court held, in an action to recover the purchase price of the commodity sold, that the defendant's plea of payment made to the agent was of no avail, as the salesman had no power to collect the money for the sale, holding that the power to solicit and take orders did not carry with it authority to receive payments.

And in *Williams v. Anderson* (1903) 107 Ill. App. 32, it appeared that the appellee company sold a quantity of meat to the appellant through a traveling salesman, and the commodity was shipped to the purchaser direct from the company. In an action to recover the purchase price of the goods, the vendee pleaded payment to the vendor's agent, who, it appeared, had never accounted therefor to his principal. The court held that the payment to the salesman did not bind his principal, for the power to sell did not necessarily imply the power to collect, the agent not being intrusted with the possession and delivery of the goods sold, and no circumstance appearing from which such power could be implied. It also appeared, in the instant case, that the vendee received a bill for the goods sold before payment was made to the agent, on which appeared in large characters the word "NOTICE," underneath which was stated, among other things, the following: "Not responsible for money paid to salesmen." Respecting this notice the court held that where a printed notice on a billhead gave notice that salesmen were not authorized to collect, a payment would not bind the principal.

In *Lyles-Black Co. v. Alldredge* (1914) 10 Ala. App. 632, 65 So. 696,

the court held that it was well settled that a traveling salesman, authorized to make sales or take orders by sample for future delivery and payment, had no implied authority to collect from the vendee the purchase price agreed to be paid. In the present case a payment made by the defendant to the plaintiff's traveling salesman was held to be of no avail as a defense to an action brought to recover the amount of the debt owing to the plaintiff, and the plea of custom and usage so to pay a salesman could not justify the payment, in the absence of proof that the defendant knew of and acted on the custom.

So, in *Simon v. Johnson* (1893) 101 Ala. 368, 13 So. 491, (1894) 105 Ala. 344, 53 Am. St. Rep. 125, 16 So. 884, (1895) 108 Ala. 241, 19 So. 244, several appeals in an action to recover the amount of a bill of goods sold by the plaintiffs, through their agent, a traveling salesman, the defendant pleaded as defense a payment thereon to the salesman, the court held that the agent had no authority to bind his principal by receiving payment, stating that the decided weight of authority supports the proposition "that a traveling salesman of merchandise, making sales by sample on a credit, or for cash to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser."

In *Scarritt-Comstock Furniture Co. v. Hudspeth* (1907) 19 Okla. 429, 91 Pac. 843, 14 Ann. Cas. 857, wherein it appeared that the plaintiff's traveling salesman sold a bill of goods to the defendant, and the goods were shipped direct from the plaintiff to the purchaser, the court held that there was no implied authority in the salesman to receive a part payment of the price, and that, in the absence of proof of such authority, the vendor was not bound by a payment made to his agent, for a traveling salesman or agent merely to solicit orders for goods, and not intrusted with the possession of the same, had no implied authority to receive payment therefor.

In *Crawford v. Whittaker* (1896) 42 W. Va. 430, 26 S. E. 516, it appeared

that the plaintiff's traveling salesman sold to the defendant a quantity of goods which were not in his possession, and subsequently, and after the goods had been delivered by the plaintiff, the defendant paid the purchase price to the salesman, although he had had previous notice from the plaintiff not to pay any money to salesmen, justifying his act by the fraud of the agent, who falsely represented to the defendant that he was a member of the selling firm. The court held that the agent had no authority, either actual or implied, to receive the purchase price for the goods sold, as mere authority to sell, by one not having possession of the commodities to be sold, did not imply authority to receive payment or make collections.

In *Clark v. Murphy* (1895) 164 Mass. 490, 41 N. E. 674, an action to recover the price of goods sold and delivered under a contract of sale effected by the plaintiff with the defendant through a traveling salesman, who was authorized merely to solicit orders, the defendant pleaded payment made to the salesman. The court held that the plaintiff was entitled to recover, for an agent who merely solicited orders for goods, sending those orders to his principal to be filled, had no implied authority to receive payment for the goods sold, and the purchaser paid him at his risk.

In *Lakeside Press & Photo-Engraving Co. v. Campbell* (1897) 39 Fla. 523, 22 So. 878, wherein it appeared that a traveling salesman, employed by the plaintiff company to solicit orders for booklets and circulars to be printed and delivered by the company, obtained an order from the defendant for certain pamphlets and circulars, and subsequently accepted a payment from the defendant for the goods sold, although it did not appear that he had express authority to receive such payment, the court held that the agent, being a traveling salesman authorized only to solicit work and orders for his principal, not having possession of the goods sold, nor actual authority to receive payments for the sale of the same, had no implied authority to collect the amount due for the work and

materials furnished so as to bind his principal, and that the defendant made payment to such an agent at his peril.

See also *Dothan Grocery Co. v. White Bros.* (1915) 14 Ala. App. 405, 69 So. 992, wherein the court said, although the authority of the plaintiff's traveling salesman to accept payment was not questioned, that the general rule is that traveling salesmen, not having possession of goods, but selling for future delivery, have no authority to receive payments binding on the principal.

See also *Ohio Pottery & Glass Co. v. Talbert* (1910) 87 S. C. 194, 69 S. E. 211, wherein it was said obiter: "There is much authority for the proposition that a drummer or traveling salesman, who solicits orders by sample and is not intrusted with the possession of the property offered for sale, had no implied authority to collect." In that case, however, the court held that the question of ratification of the agent's act was a question of fact, which should have been submitted to the jury.

#### *c. Limitation of rule.*

##### *1. Authority of agent implied from possession of goods.*

Among the well-defined limitations of the general rule heretofore stated, it is established that an agent or broker, having possession of commodities which he is authorized to sell, has implied authority to receive or collect payment therefor.

**Arkansas.**—*Jarvis v. Pague* (1919) — Ark. —, 208 S. W. 601.

**Illinois.**—*Howe Mach. Co. v. Ballweg* (1878) 89 Ill. 318; *Bailey v. Pardridge* (1890) 134 Ill. 188, 27 N. E. 89, affirming (1889) 35 Ill. App. 121; *Simmons Motor Co. v. Dudley* (1915) 196 Ill. App. 329.

**Kansas.**—*Downes v. Rogers* (1918) 102 Kan. 797, 171 Pac. 1150.

**Missouri.**—*Rice v. Groffmann* (1874) 56 Mo. 434; *John Hutchinson Mfg. Co. v. Henry* (1891) 44 Mo. App. 263; *Birch Tree State Bank v. Brown* (1911) 152 Mo. App. 589, 138 S. W. 860; *Norrid v. Garner* (1916) — Mo. App. —, 182 S. W. 1025.

**New York.**—*Maxfield v. Carpenter*

(1895) 84 Hun, 450, 32 N. Y. Supp. 381.

**Ohio.**—*Beckwith v. Reid* (1879) 4 Ohio Dec. Reprint, 436.

**Texas.**—*Schliecher v. Armstrong* (1895) — Tex. Civ. App. —, 32 S. W. 327.

**Vermont.**—*Cross v. Haskins* (1841) 13 Vt. 536. See also *Brown v. Aitken* (1916) 90 Vt. 569, 99 Atl. 265.

**Washington.**—*Galbraith v. Weber* (1910) 58 Wash. 132, 28 L.R.A. (N.S.) 341, 107 Pac. 1050; *Woodworth v. School Dist.* (1916) 92 Wash. 456, 159 Pac. 757. And see *PETERSEN v. PACIFIC AMERICAN FISHERIES* (reported herewith) ante, 198.

**England.**—*Pickering v. Busk* (1812) 15 East, 38, 104 Eng. Reprint, 758, 13 Revised Rep. 364; *International Sponge Importers v. Watt* [1911] A. C. 279, 81 L. J. P. C. N. S. 12, 16 Com. Cas. 224, 55 Sol. Jo. 422, 27 Times L. R. 364, 48 Scot. L. R. 515.

See also the cases cited *infra*, V.

In *Simmons Motor Co. v. Dudley* (1915) 196 Ill. App. 329, wherein it appeared that the plaintiff's agent sold to the defendant an automobile which was in his possession for purposes of demonstration, and that the defendant paid to the agent the amount of the purchase price, the court held that, as the agent had possession of the article, he had an implied authority to receive payment therefor when sold by him.

And in *Bailey v. Pardridge* (1890) 134 Ill. 188, 27 N. E. 89, affirming (1889) 35 Ill. App. 121, an action to recover the purchase price of goods sold to the defendant, which the latter claimed he paid to the plaintiff's traveling salesman, it appeared that the agent sold certain articles which were in his possession as samples, and received therefor, from the defendant, the purchase price. The court held, the evidence having shown the authority of the salesman to sell the samples, that the payment to the agent bound the principal, for, although the rule is that an agent selling goods not in his possession has no implied authority to receive the purchase price, the rule is otherwise where it appeared that he had possession of the articles

sold, for in such a case he was clothed with the indicia of authority to accept payment.

So, in *Beckwith v. Reid* (Ohio) *supra*, wherein it appeared that the plaintiff's agent, who was authorized to sell goods on sample, entered into a contract of sale with the defendant for property which he obtained from his principal for delivery, the court held that the principal was bound by payment made to, and received by, the agent, for, the goods having been placed in the possession of the agent, the latter was clothed with implied authority to collect the purchase price, and the defendant was justified in assuming that the agent had such authority.

In an early case (*Pickering v. Busk* (1812) 15 East, 38, 104 Eng. Reprint, 758, 13 Revised Rep. 364), wherein it appeared that payment was made to a broker who sold goods in his possession for the benefit of his principal, but, without disclosing him, the court held that the possession of the goods gave the broker implied authority to receive the purchase price, and a payment so made bound the principal, although the agent proved unfaithful and did not account therefor to his employer.

And so, in *PETERSEN v. PACIFIC AMERICAN FISHERIES* (reported herewith) ante, 198, it appeared that the defendant purchased certain commodities from the lessees of the plaintiffs, who, under the terms of their lease, were authorized to sell goods for the lessors, but had no actual authority to receive payment. It appearing that the purchaser made payment to the agents of the plaintiffs, the court holds that the latter were bound thereby, for, having clothed their agents with the indicia of authority to receive payment by intrusting them with the possession of the goods sold, they enabled the agents to obtain the advantage of the purchaser, who rightfully assumed their authority to collect the purchase money.

In *Schleicher v. Armstrong* (1895) — Tex. Civ. App. —, 32 S. W. 327, the court held that an agent, having possession of property which he was au-

thorized to sell, gave good title to the purchaser although the agent violated his principal's instructions by receiving purchase-money notes.

And in *Cross v. Haskins* (1841) 13 Vt. 536, wherein it appeared that the plaintiff's agent was intrusted with the possession of certain commodities which he was authorized to sell, the court held that a payment made to him in good faith by the purchaser of the goods bound the principal, for the possession of the articles clothed the agent with implied authority to receive payment for the sale thereof.

So, in *Woodworth v. School Dist.* (1916) 92 Wash. 456, 159 Pac. 757, an action to recover the purchase price of certain school clocks sold by the plaintiff's assignor to the defendant, it appeared that the sale was made by a representative who was authorized to make sales, install the clocks, and hire labor for the purposes of installing and repairing the clocks. It further appeared that the agent installed the property and received from the defendant school warrants in payment therefor, which he cashed and appropriated to his own use. The court held that under the facts the plaintiff had clothed his agent with implied authority to receive payment for the goods sold by him, and was bound by the payment made by the defendant.

To the same effect in *Galbraith v. Weber* (1910) 58 Wash. 132, 28 L.R.A. (N.S.) 341, 107 Pac. 1050, an action to recover the possession of a horse, it appeared that an agent of the plaintiff, authorized so to do, sold the horse to the defendant. At the time of the sale the agent had the horse in his possession, and also several certificates of registration showing the animal's pedigree. The defendant paid the purchase price to the agent, which the latter failed to turn over to his principal, but appropriated to his own use. The court held that the plaintiff could not recover, for the agent had implied power to receive the payment, having exclusive possession of the property to be sold.

In *Rice v. Groffmann* (1874) 56 Mo. 434, distinguished in *Keown v. Vogel*

(1887) 25 Mo. App. 35, supra, II. b, 1, it appeared that defendant bought a quantity of cigars from the plaintiff's agent, and made a payment therefor to the agent, who failed to account for the money to his principal. In an action brought to recover from the defendant the value of the goods sold, the court held that the plaintiff could not recover, as an agent having power to sell goods had authority to receive the payment therefor.

And in *Norrid v. Garner* (1916) — Mo. App. —, 182 S. W. 1025, wherein it appeared that the plaintiff was the owner of a certain farm which he leased to a third party, whom he authorized to sell a crop of corn raised on the land and apply the proceeds thereof in payment of rents due, the court held that the agent was thereby authorized to receive payment for the corn upon a sale thereof to the defendant. And, further, that the power to sell the property included the right to receive payment, following *Rice v. Groffmann* (Mo.) supra. But it will be noted that this doctrine was limited by the court in *Keown v. Vogel* (Mo.) supra, II. b, 1, to those cases wherein it appeared that the agent had possession of the property sold.

In *Downes v. Rogers* (1918) 102 Kan. 797, 171 Pac. 1150, the court held that the plaintiffs' agent had authority to receive the purchase price of a farm tractor sold to the defendant, where it appeared that the agent had possession of the article sold, and that the plaintiffs held him out to the defendant and the general public as their agent for the purpose of selling farm tractors.

So, in *Howe Mach. Co. v. Ballweg* (1887) 89 Ill. 318, wherein it appeared that the agent of the plaintiff company, having in his possession an article of its manufacture, sold the same to the defendant and received from him part payments on the purchase price, the court held that under the circumstances the purchaser had a right to assume the authority of the salesman to accept the payments.

And in *Jarvis v. Pague* (1919) — Ark. —, 208 S. W. 601, wherein it appeared that plaintiff placed his agent

in possession of a drove of horses, with instructions to find a buyer for the same, it was held that such express authority carried with it the implied power to collect the proceeds of any sales made, and hence a payment to the agent was a good defense to an action brought to recover the value of horses sold by the agent.

In *Birch Tree State Bank v. Brown* (1911) 152 Mo. App. 589, 133 S. W. 860, wherein it appeared that an agent with authority to sell certain shares of stock had the possession of the same at the time of sale, and delivered them to the purchaser, the court held that a payment to the agent of the purchase price bound the principal, for the latter, in intrusting the possession of the stock to the agent, clothed him with implied authority to receive the payment.

In *Maxfield v. Carpenter* (1895) 84 Hun, 450, 32 N. Y. Supp. 881, the court held that where a broker not only had authority to sell goods for the plaintiff, but actually had possession of the same and delivered them himself, the defendant was justified in making a payment of the purchase price to the agent, for the possession of the articles sold implied a power to collect for the same, and led the purchaser to believe that the broker was in fact the owner of the commodities.

In *International-Sponge Importers v. Watt* [1911] A. C. (Eng.) 279, 81 L. J. P. C. N. S. 12, 16 Com. Cas. 224, 55 Sol. Jo. 422, 27 Times L. R. 364, 48 Scot. L. R. 515, wherein it appeared that a traveling agent, employed by the plaintiffs to sell the products of their trade, was intrusted with the possession of the goods to be sold, the court held that a payment made to him by the defendants for the purchase of goods was valid as against the principals, for the agent, having the custody of the property sold, had implied authority to receive payments therefor. It was held further that a notice on statements of account to the effect that payments should only be made by crossed checks was not sufficient intimation to the customer that the agent did not have authority to

receive payments in cash, or in a check in his favor.

And in *John Hutchinson Mfg. Co. v. Henry* (1891) 44 Mo. App. 263, the court held that, where it appeared that the agent of the owner of certain goods solicited an order for their sale and transmitted the order to his principal, who delivered the goods in question to the agent for delivery to the purchaser, the principal thereby clothed the agent with ostensible authority to receive payment for the goods.

See also *Brown v. Aitken* (1916) 90 Vt. 569, 99 Atl. 265, wherein there is dictum as follows: "If one intrusts another with the possession of personal property together with authority to sell and deliver the same, the authority to receive the pay therefor will be implied, since the principal, by his own act, clothes the agent with apparent authority so to do." This case, however, did not involve the sale of personalty, but a sale of certain real property.

*2. Authority of agent implied from representations or acquiescence of principal.*

Where a principal holds out his agent as having authority to receive payment for commodities which he is authorized to sell, or has acquiesced in the acceptance by the agent of payments in past transactions with the purchaser, the law implies authority in the agent to receive payment for goods sold by him.

**Arkansas.**—*American Sales Book Co. v. Cowdrey* (1911) 100 Ark. 325, 38 L.R.A. (N.S.) 700, 140 S. W. 134.

**Georgia.**—*Luckie v. Johnston* (1892) 89 Ga. 321, 15 S. E. 459; *Superior Mfg. Co. v. Russell* (1906) 127 Ga. 151, 56 S. E. 296.

**Illinois.**—*Harris v. Simmerman* (1876) 81 Ill. 413; *Kingan & Co. v. Breen* (1914) 190 Ill. App. 489.

**Massachusetts.**—*Packer v. Hinckley Locomotive Works* (1877) 122 Mass. 484.

**Michigan.**—*Haughton v. Maurer* (1884) 55 Mich. 323, 21 N. W. 426; *Warren v. Halley* (1895) 107 Mich. 120, 64 N. W. 1058.

**Missouri.**—*Diebold Safe & Lock Co.*

v. Dunnegan (1909) 135 Mo. App. 135, 115 S. W. 1051.

New York.—Talmage v. Nevius (1869) 2 Sweeny, 38; Carter White Lead Co. v. Pounds (1901) 65 App. Div. 476, 72 N. Y. Supp. 876.

Washington.—Grays Harbor Commercial Co. v. Taku Canning & Cold Storage Co. (1918) 102 Wash. 594, 173 Pac. 434.

Wisconsin.—Kasson v. Noltner (1878) 43 Wis. 646; Estey v. Snyder (1890) 76 Wis. 624, 45 N. W. 415.

England.—Townsend v. Inglis (1816) Holt, N. P. 278.

Canada.—Kaestner v. Hosie (1914) 7 Sask. L. R. 429, 29 West. L. R. 532.

Thus, in American Sales Book Co. v. Cowdrey (1911) 100 Ark. 325, 38 L.R.A.(N.S.) 700, 140 S. W. 134, wherein it appeared that a traveling salesman, representing the plaintiff company, made a sale to the defendant, and it further appeared that the salesman was provided with blank contracts by which he was authorized to collect all or part of the purchase price at the time of the sale, the court held that a partial payment made at the time the sale was consummated, and the receipt of the balance by the agent on a subsequent trip, were within his authority and binding upon the principal, despite the fact that on a statement of account rendered to the defendant was printed, "Pay no money to agents," the court said: "Here an agent was not only employed to negotiate sales, but was given a blank form of contract by which he was authorized to collect all or a part of the purchase price at the time he made the sale. The agent promised at the time the order was given, to come back and show the defendant how to run the recapitulator. The blank form of contract furnished the agent by the plaintiff made it optional with the agent to collect all or a part of the purchase price at the time he took the order. Hence it may be said, under the facts and circumstances in this case, he had not only express authority to travel and solicit orders, but the implied authority to collect the purchase price for the principal. It cannot be said that the clause, 'Pay no

money to agents,' printed on the statement of the account sent to defendant was notice or direction to him not to pay its agent. . . . The plaintiff was a corporation and, as such, could only transact its business through agents. Hence the words could mean no more than to pay no money to agents not authorized to receive it."

And in Harris v. Simmerman (1876) 81 Ill. 413, it appeared that the plaintiff's agents sold to the defendants a safe, and accepted in part payment an old safe which plaintiff received and retained, without giving notice to the defendant that the agent had transcended his authority. The court said: "Plaintiff should at once, upon the receipt of the old safe, which was express notice to him that his agent was exceeding what he says was the authority confided to him, have notified the defendants that the agreement was beyond his authority, and that he was not authorized to receive payment. By the acquiescing of the plaintiff in the arrangement the agent made, defendants were justified in assuming that the agent had the power to collect, as he represented he had, and not being otherwise informed until after they had made payment, the plaintiff should be bound by the payment."

In Packer v. Hinckley Locomotive Works (1877) 122 Mass. 484, wherein it appeared that the plaintiff company had, through a long course of dealing, sold quantities of coal through its agent, always sending to him bills of lading for the coal purchased, and bills for the purchase price, and it appeared further that payments were always made to the agent without complaint by the principal, the court held, in an action to recover for a quantity of coal, that defendant's plea of payment to the agent was a good defense, for by the course of dealing the defendant was warranted in assuming the authority of the agent to receive payment for goods sold by him.

In Warren v. Halley (1895) 107 Mich. 120, 64 N. W. 1058, an action in replevin to recover possession of a piano, sold by plaintiff's agent to defendant, and delivered directly from the plaintiff's place of business, it ap-



peared that the wife of the defendant called on the plaintiff at his office, and stated that they would pay cash for the piano, whereupon the plaintiff told her that he would send her a duly authorized agent to collect the money. Subsequently, the defendant paid the agent the purchase price of the piano, which the latter failed to turn over to his principal. The court held that, while mere authority to take orders for pianos did not imply authority to collect therefor, nevertheless the evidence showed such a holding out of the agent by the principal as to justify belief in his authority to receive the purchase price of the article sold.

Where it appeared that the plaintiff's agent, apparently having charge of its New York branch, was held out as being something more than a mere agent authorized only to sell goods, the court held that a payment to him for goods sold bound his principal. *Carter White Lead Co. v. Pounds* (1901) 65 App. Div. 476, 72 N. Y. Supp. 876.

In *Kaestner v. Hosie* (1914) 7 Sask. L. R. 429, it was held that, while under the general rule an agent employed to sell had no authority to receive or collect the purchase price of the goods sold, nevertheless, where it appeared that the plaintiffs had authorized their agent to collect certain moneys from the defendant, which he had done, and the amounts so collected were credited to the buyer's account, the latter was justified in assuming that the agent was authorized to collect the balance of the account. The court said: "It seems to be settled law that an agent employed to sell has no authority as such to receive payment. . . . But it is equally well established that where a principal has so conducted himself as to lead a third person reasonably to believe that his agent is clothed with a certain authority, and that third person, in such belief, in good faith enters into transactions with the agent within the scope of his ostensible authority, the principal cannot be heard to deny the authority of the agent to the prejudice of the one so dealing with him."

In *Estey v. Snyder* (1890) 76 Wis.

624, 45 N. W. 415, wherein it appeared that the plaintiffs had, for a course of time, allowed their agent to collect moneys due on sales made by him, the court held that they could not deny his implied authority to receive payment from a purchaser where he absconded with the money paid, saying: "It was easy and competent for the plaintiffs to limit the power of their agent, and not allow him to make collections of money secured by chattel mortgages and other instruments, but they could not allow him to make them 'when he turned the money in,' and deny his authority to make them when he did not. There is no justice or reason in such a rule of law, and we do not think it exists; and as it appeared from the testimony offered on the part of the plaintiffs that Hills [the agent] sold organs on credit, and collected the money with their approval, and by their course of dealing they held him out to the community as having authority to receive payments, they are certainly bound by his acts in that regard."

And in *Haughton v. Maurer* (1884) 55 Mich. 323, 21 N. W. 426, wherein it appeared that the defendant bought a lot of cigars through the plaintiff's agent, who subsequently collected payment upon a promissory note given by the defendant to secure the purchase price, the court held, on the question of the agent's authority to collect the payment, that representations and statements made by a member of the plaintiff firm, recognizing the authority of the agent so to receive payments, were sufficient to warrant the action of the defendant in paying the purchase money to the agent.

In *Diebold Safe & Lock Co. v. Dunnegan* (1909) 135 Mo. App. 135, 115 S. W. 1051, wherein it appeared that an agent, by his contract, was made liable to his principal for the price of goods sold, the court held that he was thereby necessarily authorized to collect payment for the goods when delivered to the purchaser.

In *Townsend v. Inglis* (1816) Holt, N. P. (Eng.) 278, wherein it appeared that in previous dealings with a buyer of goods the sellers had permitted

their broker to draw bills of exchange in his own name and receive payment thereon for goods sold for his principals, the court held that the vendors were bound by a payment made in like manner in the present case.

So, in *Kingan & Co. v. Breen* (1914) 190 Ill. App. 489, wherein it appeared that the defendant for a number of years had bought great quantities of commodities from the plaintiff, through its traveling salesman, and during that time payments were made to the salesman and accepted by the plaintiff without complaint, the court held, in an action to recover on an item of account which the defendant had paid to the plaintiff's agent, that the plaintiff, having recognized and ratified the acts of its salesman in receiving payments for so many years, was not in a position to deny his authority to receive the payment on the item in question.

And in *Talmage v. Nevius* (1869) 2 Sweeny (N. Y.) 88, wherein it appeared that a sales agent employed by the plaintiff had general charge of the latter's office, and, on a sale made by the agent to the defendant, had possession of the bill of lading for the shipment of the goods, and other evidences of authority, the court held that the facts constituted such a holding out of the agent by the principal as implied authority to receive payments for sales made by him.

Where it appeared that in a course of dealing between the plaintiff and the defendant, covering several seasons, payments were made to the plaintiff's broker, and that in the present transaction, involving a sale of commodities, the purchaser had stated its intention to pay the broker as in the past, the court held that the defendant was justified in assuming that the agent had authority to receive the purchase price for his principal. *Grays Harbor Commercial Co. v. Taku Canning & Cold Storage Co.* (1918) 102 Wash. 594, 173 Pac. 434.

In *Luckie v. Johnston* (1892) 89 Ga. 321, 15 S. E. 459, an action to recover the purchase price of two consignments of merchandise sold to the defendant, it appeared that one of the

shipments was ordered through the plaintiff's traveling salesman, who was authorized to sell, but was especially instructed not to receive payments. It further appeared that the agent did not have possession of the goods sold, but that subsequently bills were mailed to him for presentment to the defendant. On these invoices was printed, "All bills must be paid at this office." The defendant contended that he did not see this notice, and offered evidence to show that the salesman, with the principal's knowledge, had collected payments from other customers, and that the plaintiff and the agent had settled their accounts, included among which was the price of the goods paid by the defendant to the agent. It was held that the refusal of the trial court to charge that there was evidence of implied authority on the part of the agent to collect the price of goods sold by him was erroneous; that under the circumstances the authority of the agent to receive the payments so as to bind his principal was a question of fact for the jury to determine.

In *Superior Mfg. Co. v. Russell* (1906) 127 Ga. 151, 56 S. E. 296, wherein it appeared that the plaintiff, after efforts to collect an amount due for goods sold by its traveling salesman to the defendant, wrote to the salesman inclosing a statement of account, and authorizing him to dispose of it for cash at a discount, the court held that this authority to sell the account and deduct therefrom his commissions as agent included the authority to receive the amount for which the account was sold, and that a payment of the account to him by the defendant had the same effect as a sale of the account to the debtor himself, and the payment bound the principal.

And in *Kasson v. Noltner* (1878) 43 Wis. 646, wherein it appeared that the plaintiff's agent had authority to receive payments in cash or on the instalment plan for property sold by him, the court held that the agent had implied authority to collect on a promissory note given by the defendant to secure the purchase price of a com-

modity bought by him from the plaintiff.

*3. Authority of agent implied from custom or usage.*

The law also implies authority in an agent to receive payments for commodities sold by him where it is shown that it was the custom or usage in the particular trade so to pay to agents and salesmen. But in order to avail a purchaser, it must be shown that at the time he made the payment he had knowledge of, and acted in accordance with, the custom or usage. *Simon v. Johnson* (1893) 101 Ala. 368, 13 So. 491; *Lyles-Black Co. v. Alldredge* (1914) 10 Ala. App. 632, 65 So. 696; *Meyer v. Stone* (1885) 46 Ark. 210, 55 Am. Rep. 577; *Putnam v. French* (1881) 53 Vt. 402, 38 Am. Rep. 682; *Catterall v. Hindle* (1867) L. R. (Eng.) 2 C. P. 368, reversing (1866) 1 Harr. & R. 267, 35 L. J. C. P. N. S. 161, 12 Jur. N. S. 488, 14 L. T. N. S. 102, 14 Week. Rep. 371. See also *James v. Conklin* (1910) 158 Ill. App. 640.

In *Meyer v. Stone* (1885) 46 Ark. 210, 55 Am. Rep. 577, it appeared that a traveling salesman, representing the plaintiff company, sold a bill of goods to the defendant and collected the purchase price, but failed to account therefor to his principal. The court held that evidence of a custom of the trade warranting payment to a traveling salesman was admissible, and sufficient to show an implied authority on his part to receive the same. Referring to the rules governing the authority of a salesman to accept payment for merchandise sold, it was said: "It seems clear, upon principle, that where goods are received by a purchaser from the vendors with a bill thereof payable to themselves, the bare fact that the order for the goods had been procured by an agent of the vendors, whose general duty it was to solicit such orders, would not raise the presumption that the agent was authorized to collect the purchase price. In such a case, payment to the agent is no defense to an action by the vendors for the purchase money. But full validity may be given to the act of the agent in receiving payment,

if there be a known usage of trade or course of business to justify the purchaser in making it. . . . The most usual instance of the principal being bound . . . by the act of his agent, beyond the authority conferred, is where the agent contracting for the sale has possession of the property and delivers it to the purchaser, collecting the purchase money contrary to instructions. In that case, the possession and delivery of the property clothe the agent with the indicia of authority to receive the purchase price, and if the purchaser is not apprised of the limit placed upon the agent's authority, payment to the agent is payment to the principal. This incidental authority does not exist, however, if the agent is merely employed to negotiate a contract without possession of the property."

And in *Putnam v. French* (1881) 53 Vt. 402, 38 Am. Rep. 682, wherein there was evidence of a custom prevailing in the community whereby drummers authorized to sell goods were paid the purchase price therefor, the court held that a payment made in accordance with such a custom bound the principal, where the agent failed to account for the money paid to him. It was held, further, that a notice reading "Payable at office," printed on a bill sent to the purchaser, was not constructive notice to the vendee of the agent's want of authority, the court saying, in part, as follows: "In view of the obscure manner in which those words were written on the bill-head, and of the circumstances under which and the purposes for which, in other respects, that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence in not seeing those words as to be chargeable with notice which they did not in fact have."

In *Catterall v. Hindle* (1867) L. R. 2 C. P. (Eng.) 368, reversing (1866) 1 Harr. & R. 267, 35 L. J. C. P. N. S. 161, 12 Jur. N. S. 488, 14 L. T. N. S. 102, 14 Week. Rep. 371, the court held that it was a question of fact for the jury to decide, depending on the local

custom or usage, whether a payment made to a broker, employed to sell a quantity of yarn, was binding on his principal, and, it appearing that the question was not submitted to the jury below, a new trial was ordered.

In *Simon v. Johnson* (1893) 101 Ala. 368, 13 So. 491, the court held that knowledge must be shown on the part of a principal of custom or usage in a particular locality, whereby merchants paid for goods to traveling salesmen, making sales on sample for future delivery, in order to sustain the plea by defendant of a payment so made to the principal's traveling salesman.

And in *Lyles-Black Co. v. Alldredge* (1914) 10 Ala. App. 632, 65 So. 696, it was held that the plea of custom and usage could not justify a payment to a traveling salesman, selling by sample for future delivery, in the absence of proof that the purchaser had knowledge of, and acted on, such a custom.

See also *James v. Conklin* (1910) 158 Ill. App. 640, wherein the court said, by way of dictum: "Payments made to an agent are good and obligatory upon the principal, in all cases where the agent is authorized to receive payment, either by express authority, or by that resulting from the usage of trade, or from the particular dealings between the parties. . . . The principal is equally bound by the authority which he actually gives, and by that which by his own acts he appears to give. The principal is responsible for the appearance of authority." In the instant case, however, it does not appear that the agent received a payment for commodities which he was authorized to sell, or which he did sell.

**4. Payment to agent of undisclosed principal.**

It is generally held that payment by a bona fide purchaser of commodities to an agent who had the goods sold in his possession, and sold the same as the owner thereof, is binding on the undisclosed principal.

**California.** — *Lumley v. Corbett* (1861) 18 Cal. 494; *White v. Kincaid* (1919) — Cal. —, 179 Pac. 685.

**Iowa.**—*Eclipse Wind Mill Co. v. Thorson* (1877) 46 Iowa, 181.

**Kansas.**—*Tripp & M. Boot & Shoe Co. v. Martin* (1891) 45 Kan. 765, 26 Pac. 424.

**Kentucky.**—*Continental Tobacco Co. v. Campbell* (1903) 25 Ky. L. Rep. 569, 76 S. W. 125.

**Minnesota.** — *Lough v. Thornton* (1871) 17 Minn. 253, Gil. 230.

**Oregon.**—*DuBois v. Perkins* (1891) 21 Or. 189, 27 Pac. 1044.

**England.**—*Coates v. Lewes* (1808) 1 Campb. 444; *Blackburn v. Scholes* (1810) 2 Campb. 341, 11 Revised Rep. 723; *Campbell v. Hassell* (1816) 1 Starkie, 233; *Gardiner v. Davis* (1825) 2 Car. & P. 49.

**Canada.**—*Huard v. Banville* (1907) Rap. Jud. Quebec 31 C. S. 27.

Thus, in *Continental Tobacco Co. v. Campbell* (1903) 25 Ky. L. Rep. 569, 76 S. W. 125, an action to recover the price of a crop of tobacco, it appeared that the defendant bought the property through an agent of the plaintiff, and paid him therefor in the belief that he was the owner of the property sold, and it appeared further that the plaintiff permitted her agent to take possession of the property and appear to be the owner of it. The court held that the payment to the agent bound the principal.

In *DuBois v. Perkins* (1891) 21 Or. 189, 27 Pac. 1044, an action to recover the purchase price of a lot of cigars alleged to have been sold by the plaintiff to the defendant, it appeared that an agent of the plaintiff negotiated the sale and delivered the goods in his own name to the purchaser, who claimed that he was without notice that they were owned by the plaintiff. The court held that under the circumstances the agent had implied authority to collect the purchase price.

And in *Eclipse Wind Mill Co. v. Thorson* (1877) 46 Iowa, 181, an action to recover the balance due on the sale of a windmill, it appeared that the defendant bought the property in question from an agent of the plaintiff, without knowledge of the agency, believing that the agent was the owner of the property, and accordingly made payment to him of the purchase

price. The court held that the payment to the agent was a good defense.

So too, in *Lough v. Thornton* (1871) 17 Minn. 253, Gil. 230, it appeared that an agent of the plaintiff, who was intrusted with the possession of a quantity of boots and shoes for the purpose of effecting a sale, dealt as the owner of the goods with the defendant, who paid him therefor in the belief that he was the owner of the property, and with no knowledge of the agency. In an action, brought to recover the value of the goods, the court held that the plaintiff could only enforce his rights to the property subject to the equities of the defendant, for by intrusting the agent with the possession of the property he clothed him with the indicia of ownership, basing its finding on the ground that "of two innocent persons, he shall suffer who has put it in the power of another to do any injury." The court said further: "It is a well-settled rule of law that a payment to one who is in fact an agent, but is allowed to act in his own name, and it is not known that another is the principal, is valid."

Where it appeared that the defendant bought a quantity of boots and shoes from the plaintiff's agent, and paid him the purchase price under the belief that he was the owner of the goods sold, and it did not appear that the defendant had any cause or reason to know that the salesman was acting as the plaintiff's agent, the court held that the payment made bound the undisclosed principal, and that the latter could not question the agent's authority to receive the purchase price of the articles sold. Quoting from *Eclipse Wind Mill Co. v. Thorson* (Iowa) *supra*, the court said: "If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the purchase price to him will be a defense to an action by the owner for the amount." *Tripp & M. Boot & Shoe Co. v. Martin* (1891) 45 Kan. 765, 26 Pac. 424.

In *Lumley v. Corbett* (1861) 18 Cal. 494, wherein it appeared that the de-

fendant bought a certain quantity of ale from an agent of the plaintiff, authorized to sell, and it further appeared that the agent professed to act upon its own account, and not as representing the plaintiff, the court held that the payment of the purchase price to the agent bound the principal, for an agent of an undisclosed principal who was authorized to sell property had authority to receive payment for the same.

And in *Huard v. Banville* (1907) Rap. Jud. Quebec 31 C. S. 27, wherein it appeared that the plaintiff's agent effected the sale of certain merchandise, which was in his possession, to the defendant, and led the latter to believe he was the owner of the goods, the court held that a payment for the goods sold, made to the agent, bound his principal, for, having possession of the commodities to be sold, the agent was clothed with the indicia of ownership, enabling him to deceive innocent purchasers for value.

Where it appeared that goods were sold by a broker without disclosing his principal, the court held that the buyer was justified in assuming the agent to be the owner of the goods and in making payment of the purchase price to him. *Blackburn v. Scholes* (1810) 2 Campb. (Eng.) 341, 11 Revised Rep. 723.

And in *White v. Kincaid* (1919) — Cal. —, 179 Pac. 685, it appeared that the plaintiff corporation was formerly a copartnership which was indebted to the defendant company, and an agreement was made whereby the copartnership sold and delivered certain quantities of lumber to the defendant on the understanding that the purchase price thereof would be credited on its indebtedness. Subsequently, the partnership was dissolved and the corporation formed, but the former manager of the copartnership continued as manager for the corporation, and in that capacity delivered to the defendant the lumber herein sued upon. The defendant claimed that he was never notified of the dissolution of the partnership and the formation of the corporation, and continued to receive the lumber, believing that the

same was delivered by the copartnership. The court held that, under the facts, the copartnership was the agent of an undisclosed principal, the corporation, and, having settled with the agent, the defendant was no longer liable to the principal.

In *Coates v. Lewes* (1808) 1 Campb. (Eng.) 444, an action to recover the price of a quantity of linseed oil sold by the plaintiffs, through a broker, to the defendant, it appeared that the broker had possession of the goods and represented himself to the defendant as a principal. The defendant pleaded payment to the broker in the belief that he was the owner of the goods. The court held that the plea was good.

So, in *Campbell v. Hassell* (1816) 1 Starkie (Eng.) 233, it was held that a payment made to a broker, selling goods for an undisclosed principal, was good as against the principal, but that the payment must be made in accordance with the terms of the contract of sale.

And in *Gardiner v. Davis* (1825) 2 Car. & P. (Eng.) 49, an action for goods sold and delivered, the court held that the plaintiff, who had carried on the business of cow keeper in his own name with the consent of the real owner, who had not asserted any claim to the money due on the transaction involved, was entitled to recover, saying: "If a person allow another to trade in his own name, and to hold himself out to the world as carrying on the business, a payment to that other would be a good bar to an action brought by the person for whom the trade was really carried on. And the person ostensibly carrying on the trade is by law entitled to recover for goods sold in the course of that trade, unless the person so suffering him to carry on the trade interfere, by asserting his or her right to the sum due."

### III. *Minority rule.*

Two American states form a small minority, holding that an agent authorized to sell commodities has necessarily implied power to receive or collect payment therefor. *Trainer v. Morison* (1886) 78 Me. 160, 57 Am. 8 A.L.R.—15.

Rep. 790, 8 Atl. 185. See also *Daylight Burner Co. v. Odlin* (1871) 51 N. H. 56, 12 Am. Rep. 45.

Thus, in *Trainer v. Morison* (Me.) *supra*, an action to recover the price of merchandise sold, the defendant pleaded as a defense payment to the plaintiff's agent. It appeared that the agent, authorized to solicit orders, took an order from the defendant for the goods sold, which were shipped direct from the plaintiff's place of business to the defendant. Two weeks after the delivery, the agent returned and received payment for the goods, giving to the defendant a receipted bill which bore the notice: "All bills must be paid by check to our order, or in current funds at our office." The agent embezzled the collection. The court held that the plaintiff could not recover, for the agent had the authority to contract for the sale of the chattels, and therefore had the authority to collect pay for them, in the absence of any prohibition known to the purchaser. Relative to the notice printed on the billhead, the court said: "In this case, the agent assumed to complete a contract of sale, specific in its terms, stipulating that payment was to be made to himself. After the goods had been delivered, he presented for payment a bill, made upon a genuine 'billhead' of his principal. He assumed general authority, and no facts are proved that curtail or limit it. The plaintiff seeks to charge the defendants with knowledge that payment was required to be made, according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it."

And see *Daylight Burner Co. v. Odlin* (N. H.) *supra*, wherein the court held that a traveling merchant, authorized to sell the goods of his principal, had authority, as incident to his general powers, to receive payment of the purchase price, subject to be controlled, however, by proof of the mercantile usage in the trade or business, although it appeared that the

agent did not have the possession of the goods sold, but that the same were shipped direct from the principal to the purchaser. The case, however, did not involve a payment made by the purchaser to the agent.

#### *IV. Rule in Tennessee.*

A conflict of opinion seems to exist in the state of Tennessee on the question of the authority of an agent to receive payment for commodities sold by him. In two early cases the courts unequivocally hold to the minority rule that an agent authorized to sell has implied authority to receive payment for the property sold, whereas, in a comparatively recent case, the court refused to extend this doctrine to the facts appearing therein, but applied the rule of the majority jurisdictions, at the same time, however, expressly refraining from overruling the early cases.

In *Hoskins v. Johnson* (1858) 5 Sneed, 469, wherein it appeared that the plaintiffs' agent, who was authorized to sell merchandise, sold the same to the defendant, who paid him the purchase price therefor, the court held that the payment bound the plaintiffs, in the absence of proof of notice to the purchaser that the agent was authorized only to sell, for an agency to sell necessarily implied authority to accept payment for the article sold.

And in *Collins v. Newton* (1874) 7 Baxt. 269, the court held, following *Hoskins v. Johnson*, supra, that an agent, authorized to sell goods, had implied authority to receive payment therefor where the purchaser had no notice of a limitation of the agent's authority. In this respect, the court said in part as follows: "Unless the defendant was notified not to pay the agent, he might safely make his payments to him, as one authorized by plaintiffs to sell and to receive payment for goods sold by them. Parties dealing with recognized agents for the sale of the wares of their principals may pay them, unless otherwise notified by the principals."

In *Fabian Mfg. Co. v. Newman* (1900) — Tenn. —, 62 S. W. 218, the court refused to extend the rule laid down in *Hoskins v. Johnson* and Col-

lins v. Newton, supra, saying: "We have found no cases, and have been cited to none, overruling these two cases. The elementary principle cited and relied on in both cases is undoubtedly correct, but we feel sure that both of these cases are out of accord with the general rule and overwhelming weight of authority in the United States, and certainly out of accord with the general rule and custom of business as now conducted. While in no instance will this court undertake to overrule a decision of the supreme court of this state, yet in a case of this kind we certainly would not feel justified in extending the apparent principle of these two cases. In the first case, reported in 5 Sneed, 469, the statement is made . . . that goods were invariably shipped on the order of this agent. It is further stated that the merchants who bought the goods and made the payment had no correspondence nor other transaction with the merchant who sold, except through the agent. It is not clear that we have all the facts presented in the record, but from the facts stated these things do appear: that all the dealings were with the agent, and it would appear that in that case the payment was made in due course of business. In the last case,—that reported in 7 Baxt. 269,—it appears that there had been a draft, that the draft had not been paid, and that the agent subsequently called on the parties to whom he had sold, and it appears that when he called there was some conversation in regard to a rebate claimed on account of the inferior quality of the whisky sold. In neither of these cases does it appear that the agent was merely authorized to take orders for goods, but it is clear that in both cases they were agents authorized to, or at least the court treated them as having full power and authority to, make absolute sales, that they did so, and that such sales were confirmed by the principals. Aside from these cases, we would have no doubt about the rule in this state being that a mere authority to sell does not imply an authority to receive payment, unless the agent who made the sale had

in his possession the property or indicia of its ownership, with authority to deliver such, and unless the sales were made for cash. In such case, where the agent has the property in possession, and is authorized to deliver the same, and where the sale was for cash, of course the authority to receive payment is implied, because there the payment is necessarily incident to and a part of the sale. But where, as in this case, the agent was not in possession of the goods, was not in fact authorized to absolutely close any sale, but simply was an agent to take orders, subject to acceptance or rejection of the house, we are of the opinion that no authority to collect was or could be implied. To hold otherwise than here announced would, in our opinion, be contrary to reason, contrary to the present course and custom of an immense business of this character done in the United States, and would work great inconvenience, and would also be contrary to the overwhelming weight of authority, both in textbooks and decisions." Thus, where it appeared in the present case that the plaintiff's agent sold goods not in his possession, the court held to the majority rule, holding that the agent had no implied authority to receive payment where he was merely authorized to sell goods which were not in his possession. However, the court did not overrule the holdings in the cases cited above, and the result is that two apparently contrary rulings exist in this jurisdiction.

See also *Hackney v. Jones* (1842) 3 *Humph.* 612, wherein the court said, among other things, that an unrestricted power to sell authorized an agent to receive payment for the articles sold. That case, however, turned on the mode of payment, rather than the authority to receive the same.

**V. Implied authority of factor or auctioneer.**

A factor or auctioneer has authority to receive payment of the purchase price of commodities sold for the principal, except where the latter has given notice to the purchaser to pay direct to him. But after the sale is made and the goods have been deliv-

ered, the factor's or auctioneer's authority is at an end, and no authority is implied subsequently to receive the purchase price. *Adams v. Fraser* (1897) 27 C. C. A. 108, 49 U. S. App. 481, 82 Fed. 211; *Allen v. Pierce* (1796) 1 *Dane, Abr. (Mass.)* 612; *Kelley v. Munson* (1811) 7 *Mass.* 319, 5 *Am. Dec.* 47; *Golden v. Levy* (1814) 4 *N. C. (1 Car. Law Repos.)* 527) 6 *Am. Dec.* 555; *Higgins v. Grindrod* (1883) 16 *Phila. (Pa.)* 200; *Sykes v. Giles* (1839) 5 *Mees. & W.* 645, 151 *Eng. Reprint*, 273, 9 *L. J. Exch. N. S.* 106. See also *Drinkwater v. Goodwin* (1775) *Cowp. pt. 1, p. 256*, 98 *Eng. Reprint*, 1072.

Thus, in *Allen v. Pierce* (1796) 1 *Dane, Abr. (Mass.)* 612, the court held that where a factor, or one intrusted with property to sell, sold it and received the purchase money, the vendee was not liable afterwards to the real owner of the goods, though the factor misapplied the money; but where a factor sold goods, and before payment was made the real owner gave notice of his claim and demanded payment, a subsequent payment to the factor was made at the purchaser's peril, and he was liable to pay the real owner the value of the goods sold.

And in *Higgins v. Grindrod* (1883) 16 *Phila. (Pa.)* 200, it appeared that a broker employed by the plaintiff sold a bill of goods to the defendants, and for the purpose of delivering the same entered the plaintiff's warehouse without authority and took therefrom the goods sold. And it appeared further that, although they had been notified by the plaintiff not to do so, the defendants paid the purchase price to the broker, claiming in justification of such a payment that he was a factor. The court held that, conceding the broker did act as a factor for the owner of the goods, a payment to him after notification from the owner not to pay would be a payment by the buyer in his own wrong, and would not prejudice the rights of the principal. But it was held that the facts showed that the agent was not employed as a factor, but as a broker, and had no implied authority to receive the payment.



In *Kelley v. Munson* (1811) 7 Mass. 319, 5 Am. Dec. 47, the court stated the general rule relative to the authority of a factor to receive payment in the following terms: that a factor's sale created a contract between the owner of the goods sold and the buyer, and where it appeared that a factor sold upon credit, and the owner or principal gave notice of his interest and claim to the buyer before payment, and notified him not to pay the factor, the buyer was not justified in afterwards paying the factor. But it was stated that there were certain exceptions to this rule, the court saying: "There are exceptions to this rule; as where the factor sells in his own name, being himself responsible for the price of the goods sold, whether collected or not; (a) or where he sells them to his own creditor, where there are mutual dealings. The principal cannot, in those cases, interfere to the prejudice of the party dealing with the factor without any knowledge of his agency; and only the balance, if any be due to the factor, may be reclaimed by the principal."

It was held in *Golden v. Levy* (1814) 4 N. C. (1 Car. L. Repos. 527) 6 Am. Dec. 555, to be a well-established rule of law that a sale by a factor created a contract between the owner and the purchaser, and a payment by the purchaser to the factor for the goods sold would protect him from the demand of the owner, unless the latter had forbidden the vendee to pay the factor.

In *Adams v. Fraser* (1897) 27 C. C. A. 108, 49 U. S. App. 481, 82 Fed. 211, wherein it appeared that a factor was authorized only to conclude an agreement for the transfer of certain patent rights, to take place in the future, and payment to be made at the time of the transfer, the court held that immediately upon the execution of the agreement of sale the factor's duty was performed and his authority at an end, and that he had no authority to subsequently collect the purchase

price, stating the rule as follows: "A factor who has the possession of property, or who has assignments of it, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor when he sells and delivers the property, or the title deeds to it. . . . But a broker or other agent to sell property, who has concluded a contract of sale which is to be performed by a delivery of the property, or the title deeds to it, and the simultaneous payment of the purchase price at some future time, and who is not intrusted with the possession of the property, or of the conveyances of it, has no implied authority to collect the purchase price, or to extend its time of payment, or to otherwise modify the contract between the vendor and the purchaser."

And in *Sykes v. Giles* (1839) 5 Mees. & W. 645, 151 Eng. Reprint, 273, 9 L. J. Exch. N. S. 106, wherein it appeared that by the terms of a contract of sale made by an auctioneer he was authorized to receive a certain percentage of the purchase price as a deposit, the court held that his authority extended no further, for as soon as the sale had taken place and the deposit money paid, the authority of the auctioneer was at an end, and he had no implied authority to subsequently receive a payment of the remainder of the purchase price.

See also *Drinkwater v. Goodwin* (1775) Cowp. pt. 1, p. 256, 98 Eng. Reprint, 1072, wherein the court said: "A factor who receives cloths, and is authorized to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money; his receipt is a discharge to the buyer, and he has a right to bring an action against him, to compel the payment." The instant case involved, however, the right of a factor to impress a lien on the price of goods in the hands of the buyer.

W. J. K.

CONTINENTAL CASUALTY COMPANY, Appt.,  
v.  
MRS. JENNIE HARDENBERGH.

*Mississippi Supreme Court (In Banc) — December 22, 1919.*

(— Miss. —, 83 So. 278.)

**Insurance — accident — freezing — catching foot.**

A provision in an insurance policy limiting the recovery in case the accidental injury causing the loss, or the loss itself, results from freezing sustained by the insured while not engaged in his occupation, applies to the death of a hunter who catches his foot in a hole while wading in water on a cold day, and is subsequently found with his body frozen stiff and the water frozen around it.

[See note on this question beginning on page 231.]

**APPEAL** by defendant from a judgment of the Circuit Court for Copiah County (Miller, J.) in favor of plaintiff in an action brought to recover an amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. R. N. & H. B. Miller, Murphy O. Tate, G. Q. Whitfield, Manton Maverick, Martin P. Cornelius, and George R. Sanderson, for appellant:

The evidence conclusively shows that the death of the deceased was due to freezing while not engaged in his occupation, as provided within the policy, and the court erred in its refusal to direct a verdict for \$125 as requested by the defendant.

4 Joyce, Ins. § 2628, p. 4392; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; 2 Bacon, Life & Acci. Ins. p. 1151, § 504; Beane v. Continental Casualty Co. 106 Miss. 813, 64 So. 732; Standard Life & Acci. Ins. Co. v. Carroll, 41 L.R.A. 194, 30 C. C. A. 253, 58 U. S. App. 76, 86 Fed. 567; Gaynor v. Travelers' Ins. Co. 12 Ga. App. 601, 77 S. E. 1072; Continental Casualty Co. v. Cunningham, 188 Ala. 159, L.R.A. 1915A, 538, 66 So. 41; Ryan v. Continental Casualty Co. 94 Neb. 35, 48 L.R.A.(N.S.) 524, 142 N. W. 288, Ann. Cas. 1914C, 1234; Gaines v. Fidelity & C. Co. 111 App. Div. 386, 97 N. Y. Supp. 836; Travellers' Ins. Co. v. Houston, 3 Tex. Civ. App. Cas. (Willson) 508; Travellers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. ed. 155; Combs v. Colonial Casualty Co. 73 W. Va. 473, 50 L.R.A. (N.S.) 1218, 80 S. E. 779; Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779, 63 S. E. 962; Flower v. Continental Casualty Co. 140 Iowa, 510, 118 N. W. 761; Smith v.

Ætna L. Ins. Co. 185 Mass. 74, 64 L.R.A. 117, 102 Am. St. Rep. 326, 69 N. E. 1059; Missouri State L. Ins. Co. v. Crabtree, 124 Ark. 214, 187 S. W. 173; Barber v. Travelers' Ins. Co. 195 Ill. App. 270; Standard Life & Acci. Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530; Shader v. Railway Pass. Assur. Co. 66 N. Y. 441, 23 Am. Rep. 65; Flint v. Travelers' Ins. Co. — Tex. Civ. App. —, 43 S. W. 1079.

Mr. M. S. McNeil for appellee.

Sykes, J., delivered the opinion of the court:

The appellee, plaintiff in the circuit court, sued and recovered a judgment against the appellant for \$1,000 for the death of her son, Levy Hardenbergh, as the beneficiary under the conditions and clauses of an accident insurance policy issued by the appellant company to the deceased. The material parts of this policy are as follows:

"The Continental Casualty Company—Incorporated by the state of Indiana as a stock company. Old Line Plan. General Office, Chicago, Illinois (hereinafter called the company),—in consideration of the warranties and agreements contained in the application hereof and the payment of premium as therein provided, does on this 24th day of

December, A. D., 1917, hereby insure Mr. Levy Hardenbergh (hereinafter called the insured) in class Spl. — of the company, as a water service man, in the principal sum of \$1,000, with weekly indemnity of \$10, and subject to the conditions hereinafter specified promises to pay to the insured or to his beneficiary, Jennie Hardenbergh, his mother, indemnity as scheduled below, in the event that said insured, while this policy is in force, shall receive personal, bodily injury, which is effected directly and independently of all other causes through external, violent, and purely accidental means (suicide, sane or insane, not included), and which causes at once total and continuous inability to engage in any labor or occupation, and provided that neither such injury nor inability is in consequence of nor contributed to by any bodily or mental defect, disease, or infirmity of the insured.

“Specific indemnity.

“Part I. If, within ninety days from the date of the accident, any one of the following losses shall result necessarily and solely from such injury as is before described, the company will pay in lieu of any other indemnity and within ninety days from the furnishing of proof: A. For loss of life, said principal sum.  
. . .

“Special indemnities.

“Part III. A. In any of the losses covered by this policy and specified in parts I. or II., . . . or (3) where either the accidental injury causing the loss or the loss itself results from any poison, asphyxiation, or gas, or from fits, vertigo, somnambulism or intoxication, or from sunstroke or freezing sustained by the insured while not engaged in his occupation; . . . then and in all cases referred to in this paragraph A of part III. the amount payable shall be one eighth of the amount which otherwise would be payable under this policy, anything in this policy to the con-

trary notwithstanding, and subject otherwise to all the conditions in this policy contained.”

This policy was in effect at the time of the death of the insured.

The facts relating to the death are undisputed, and present a very pathetic picture. The insured went duck hunting on the morning of December 28, 1917, at a small station on the Illinois Central Railroad a few miles north of New Orleans, named La Branche. There was a hunting clubhouse at this place, and the keeper upon parting with the deceased that morning agreed to meet him at a certain point at 5 o'clock in the afternoon. The hunting ground was over a marshy swamp practically covered with water. The deceased wore hip boots and carried his gun and ammunition. It was a very cold day, and the wind was blowing almost a gale during the day. The thermometer stood at about 10 degrees above zero. The deceased failed to keep his appointment that afternoon with the lodge keeper. A fruitless search was made by the keeper and others for the deceased until midnight that night. Signal lights were also displayed to guide the deceased to his place of destination. The next morning a party of searchers was led to the body of the deceased by a hunting dog which belonged to the gamekeeper, but had accompanied the deceased on the hunt. The deceased was lying on his back dead about 150 yards from the agreed meeting point with the gamekeeper. The water around his body had frozen. His face and the upper part of his body were not submerged, however. The body itself was frozen stiff. The left leg was sunk to the knee in a hole of some kind, and there was some little trouble in extricating it. There were one or two empty shells near the body, indicating that the deceased had fired his gun after getting his foot caught in this hole. About a mile from the body was found a string of twenty-one ducks evidently killed by the deceased in

his hunt of that day. The undisputed testimony shows that the body of the deceased was frozen stiff, and that the water around his body had become frozen, and the ice had to be broken before it could be moved. The faithful dog had remained with the deceased all night, and the dog hair upon the clothing of the deceased showed that the dog had slept on the chest of the deceased.

It was the contention of the appellee in the lower court, and is his contention here, that it was a question of fact to be decided by the jury whether or not the proximate cause of the death of the deceased was getting his foot caught and mired up in the hole. The jury adopted this theory and returned a verdict in favor of the appellee for \$1,000.

The appellant contends that the uncontradicted testimony shows that the deceased met his death by freezing, and that under the terms of the policy above set out only one eighth of the principal sum can be recovered. The insuring clause of this policy provides that where the insured shall receive personal injury which is effected directly and independently of all other causes, etc. Under part III. caption "Spe-

cial indemnities," and eliminating those parts not material to this issue, clause 3 reads as follows: "Where either the accidental injury causing the loss or the loss itself results from . . . freezing sustained by the insured while not engaged in his occupation."

Under this clause the insurer is liable for only one eighth of the amount of the policy: First, where the injury causing the loss results from freezing; or, second, where the loss itself results from freezing. This clause of the policy is plain and unambiguous. It is a valid and binding clause. The parties to the contract were sui  
juris and had the  
right to make a  
contract with this  
clause therein. The uncontradicted facts in this case conclusively show that the death was the result of freezing, and under the plain terms of the insurance contract above set out the recovery must be limited to one eighth of the principal amount. Judgment will be entered here in favor of the appellee for this sum, namely, \$125, with interest.

Insurance—  
accident—  
freezing—  
catching foot.

The judgment of the lower court is reversed, and judgment entered here for the appellee.

### ANNOTATION.

#### Liability under accident policy for injury or death from freezing.

It will be observed that in the reported case (CONTINENTAL CASUALTY CO. v. HARDENBERGH, ante, 229), a provision was held valid which limited recovery to one eighth of the face of the policy where the accidental injury causing the loss resulted from freezing sustained by the insured while not engaged in his occupation, and that the evidence was held to conclusively show that the insured's death was the result of freezing.

Little authority exists on the question under consideration, but one other case having been disclosed.

In that case, *North West. Commercial Travellers' Asso. v. London Guarantee & Acci. Co.* (1895) 10 Manitoba

L. R. 537, it was held that the insured, a commercial traveler, met his death as the result of a bodily injury effected through accidental means, and that death was not in consequence of exposure to obvious or unnecessary danger, it appearing that while returning from a trip to see customers the driver lost the trail and the wagon broke down; that the weather turned colder after he started back; that although he was dressed as warmly as his driver he was so numb with cold that he was unable to walk the remaining 8 miles, or to ride on horseback; that the driver returned on horseback and sent a rescuing party, which lost their way in the storm, and that when the in-

sured was found by a second party he was frozen to death. Dubuc, J., said: "Now, as to its being caused by accidental means, it was argued by the defense that Church's death was occasioned by his own voluntary act or negligence in exposing himself to obvious and unnecessary danger. They contend that he should have gone to Macleod on horseback with the driver, or should have walked between the horses to keep himself from freezing. But the evidence shows that when he was invited by the driver to ride on one of the horses, he stated that he could not do it, but could walk; and after having tried he declared that he could not. The driver told him to keep moving and stamping to keep warm until he got back from Macleod, and he replied that he would. The driver then left him. He was found the next morning frozen to death. No doubt that he was already benumbed by cold and could hardly help himself. It is shown by the evidence that he was sufficiently clad to be protected from an ordinary cold, and the defense does not charge any negligence in driving through the prairie on that day. But after their starting the weather became colder and the wind blew and drifted the snow, and the driver lost the trail. Then the wagon broke down and they could not proceed any further with it. Now Church died either by natural death, or by a voluntary or suicidal one, or by accidental means. Death by freezing cannot be said to be a death by natural causes. There is nothing in the evidence to show, or even to create, the least suspicion that he intended or desired to end his life.

Everything points out that his death was accidental. An accident is defined to be 'an event happening without a concurrence of the will of the person by whose agency it was caused,' or 'any event that takes place without one's foresight or expectation,' and, again, 'the happening of an event without the aid and the design of the person, and which is unforeseen.' Church's death, according to the evidence, did certainly happen without a concurrence of his will, without his foresight or expectation, without his aid and design, and was clearly unforeseen. It was by accident that the weather grew colder, that the snow drifted by the wind covered the track and made the driver lose the trail; it was by accident that the wagon broke down and could not be used to proceed with the journey. It was by accident that Church was so benumbed by cold that he could neither walk nor drive the 8 or 9 miles remaining to be made to reach Macleod. It was by accident that while awaiting there the return of the driver or other persons to rescue him, he became insensible by cold and was frozen to death. He cannot be charged with exposing himself to obvious or unnecessary danger. He was in the exercise of his calling and occupation in traveling from one post to another with his samples of merchandise. When he started in the morning he had no reason to anticipate that the cold would grow stronger, with a higher wind, that the trail would be lost and the wagon broken. All these things occurred by accident."

J. T. W.

## STATE OF FLORIDA EX REL. RAILROAD COMMISSIONERS et al.

v.

W. S. BULLOCK, Circuit Judge, et al.

*Florida Supreme Court — August 12, 1919.*

(— Fla. —, 82 So. 866.)

### Courts — power to order railroad dismantled.

1. A circuit court in this state has no jurisdiction in a suit brought by

Headnotes by WEST, J.

a trustee against a common carrier railroad company to foreclose a trust deed upon the properties of such railroad company, given to the trustee to secure the payment of the indebtedness of the railroad company, without the assent of the state, to order the railroad dismantled, its properties sold and removed, and its operation as a common carrier discontinued.

[See note on this question beginning on page 238.]

#### Railroad — right to abandon.

2. The operation of a common carrier railroad is a business so affected with a public interest that when once undertaken and begun it cannot be discontinued and the road so operated abandoned and authorized to be dis-

mantled by a proceeding in which the state and the public are not represented, when such discontinuance and dismantling have not been consented to by the state.

[See 22 R. C. L. 908.]

APPLICATION for a writ of prohibition to require the respondent judge to show cause why a writ should not issue, forbidding him to enter an order in a certain cause, confirming the sale of the property of the defendant as junk to be dismantled, and from authorizing the dismantling or removal of the rails or tracks of said defendant, and from exercising further jurisdiction relating to the dismantling of the property. *Demurrer to petition overruled and writ issued.*

The facts are stated in the opinion of the court.

Mr. Dozier A. De Vane, for petitioners:

The circuit court is without jurisdiction in a suit brought, to foreclose a mortgage, to decree dismantling of a carrier's property, for the mere purpose of satisfying to better advantage the lien of a creditor of the carrier.

Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 5 Atl. 695; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Central Transp. Co. v. Pullman Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Talcott v. Pine Grove, 1 Flipp. 120, Fed. Cas. No. 13,735; Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 342, 5 Atl. 695; King v. Severn & W. R. Co. 2 Barn. & Ald. 646, 106 Eng. Reprint, 501, 21 Revised Rep. 433, 7 Eng. Rul. Cas. 445; State v. Hartford & N. H. R. Co. 29 Conn. 538; Railroad Comrs. v. Portland & O. C. R. Co. 63 Me. 269, 18 Am. Rep. 208; Farmers Loan & T. Co. v. Henning, Fed. Cas. No. 4,666; People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295; Potwin Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; San Antonio Street R. Co. v. State, — Tex. Civ. App. —, 38 S. W. 55; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; Spokane Street R. Co. v. Spokane Falls, 6 Wash. 524, 33 Pac. 1072; Ohio & M. R. Co. v. People, 121 Ill. 483, 13 N. E. 236; Riggs v. Johnson County, 6 Wall. 188,

18 L. ed. 774; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; People v. Albany & V. R. Co. 37 Barb. 216; People v. Albany & V. R. Co. 19 How. Pr. 523; People v. New York, C. & H. R. R. Co. 28 Hun, 543; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Southern P. Co. v. Railroad Commission, 60 Or. 400, 119 Pac. 727; Steward v. Denver & R. G. R. Co. 17 N. M. 557, 46 L.R.A. (N.S.) 242, 131 Pac. 981; San Antonio Street R. Co. v. State, — Tex. Civ. App. —, 38 S. W. 54; Barton v. Barbour, 104 U. S. 135, 28 L. ed. 677; State ex rel. Ellis v. Tampa Waterworks Co. 57 Fla. 533, 22 L.R.A. (N.S.) 680, 48 So. 639; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 650, 13 L.R.A. (N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; Gainesville v. Gainesville Gas & E. Power Co. 65 Fla. 404, 46 L.R.A. (N.S.) 1119, 62 So. 919; Brooks-Scanlon Co. v. Railroad Commission, 144 La. 1086, P.U.R.1919E, 1, 81 So. 727; State ex rel. Hubbard v. Colorado Title & T. Co. — Colo. —, 178 Pac. 6; State ex rel. West v. Florida Coast Line Canal & Transp. Co. 73 Fla. 1006, L.R.A.1917F, 776, 75 So. 582; State ex rel. Railroad Comrs. v. Louisville & N. R. Co. 63 Fla. 274, 57

So. 673; *Columbus R. Power & Light Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 669, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349.

The circuit court is without jurisdiction to pass on and determine the right of a railroad company to discontinue operation of a carrier, until after the question has been passed on by the Railroad Commission.

*People ex rel. Hubbard v. Colorado Title & T. Co.* — Colo. —, 178 Pac. 6; *St. Clair v. Tamaqua & P. Electric R. Co.* 259 Pa. 462, 5 A.L.R. 20, P.U.R. 1918D, 229, 103 Atl. 287; *V. & S. Bottle Co. v. Mountain Gas Co.* 261 Pa. 523, 104 Atl. 667; *Kline-Logan Co. v. Duquesne Light Co.* 261 Pa. 526, P.U.R. 1919A, 524, 104 Atl. 763; *New Brighton v. New Brighton Water Co.* 247 Pa. 232, 93 Atl. 327; *Mt. Union v. Mt. Union Water Co.* 256 Pa. 516, P.U.R. 1917E, 933, 100 Atl. 968; *Union Dry Goods Co. v. Georgia Public Service Corp.* 248 U. S. 372, 63 L. ed. 309, — A.L.R. —, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117; *People ex rel. Hubbard v. Colorado Title & T. Co.* — Colo. —, 178 Pac. 6; *State ex rel. Tate v. Brooks-Scanlon Co.* 143 La. 539, 78 So. 847; *Brooks-Scanlon Co. v. Railroad Commission*, 144 La. 1086, P.U.R.1919E, 1, 81 So. 727.

*Messrs. Hocker & Martin*, for defendant:

The office of a writ of prohibition is to prevent the unlawful assumption of jurisdiction.

*Sherlock v. Jacksonville*, 17 Fla. 93; *State v. Smith*, 32 Fla. 476, 14 So. 48; 34 Cyc. 605; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Detroit River Ferry Co.* 104 U. S. 519, 26 L. ed. 815.

If the inferior court had jurisdiction, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to prohibition.

*State ex rel. Rheinauer v. Malone*, 40 Fla. 129, 23 So. 575; 22 R. C. L. ¶ 22, p. 24.

The circuit court had jurisdiction to entertain the suit of *William S. Hood, Trustee, v. Ocklawaha Valley Railroad Company*, to order the sale of the property of the said railroad company in the alternative, as shown by the suggestion, and to confirm the sale thereof, as the court announced it would do.

*Railroad Commission v. Saline River R. Co.* 119 Ark. 239, P.U.R.1915E, 191, 177 S. W. 896; *Jack v. Williams*,

113 Fed. 823; *South Carolina ex rel. Cunningham v. Jack*, 76 C. C. A. 165, 145 Fed. 286; *Iowa v. Old Colony Trust Co.* L.R.A.1915A, 549, 131 C. C. A. 581, 215 Fed. 307; *New York Trust Co. v. Portsmouth & E. Street R. Co.* 192 Fed. 728; *Central Bank & T. Corp. v. Cleveland*, — C. C. A. —, 252 Fed. 530; *York & N. M. R. Co. v. Reg.* 1 El. & Bl. 858, 118 Eng. Reprint, 657, 7 Eng. Ry. & C. Cas. 459, 1 C. L. R. 119, 22 L. J. Q. B. N. S. 225, 17 Jur. 690, 1 Week. Rep. 358; *Great Western R. Co. v. Reg.* 1 El. & Bl. 874, 118 Eng. Reprint, 663, 16 Jur. 695; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *Morawetz, Priv. Corp.* § 1119, p. 1082; *Jones v. Newport News & M. Valley Co.* 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; *Wilson v. Central Bridge*, 9 R. I. 590; *Com. v. Fitchburg R. Co.* 12 Gray, 180; *State ex rel. Atty. Gen. v. Southern Minnesota R. Co.* 18 Minn. 40, Gil. 21; *People ex rel. Karl v. United Traction Co.* 145 App. Div. 647, 130 N. Y. Supp. 477; *Trelford v. Coney Island & B. R. Co.* 5 App. Div. 468, 39 N. Y. Supp. 30; *Sherwood v. Atlantic & D. R. Co.* 94 Va. 306, 26 S. E. 943; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 381, 75 Am. Dec. 518; *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; *People ex rel. Hubbard v. Colorado Title & T. Co.* — Colo. —, 178 Pac. 6.

Plaintiff has waived its right to question the jurisdiction of the circuit court.

*Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Holland v. State*, 15 Fla. 455.

*West, J.*, delivered the opinion of the court:

Upon a suggestion and petition for a writ of prohibition, a rule to show cause was issued by this court. It is made to appear that suit was brought in the circuit court of Marion county by *William S. Hood*, as trustee, against the *Ocklawaha Valley Railroad Company*, a corporation. The object of the suit was to foreclose a certain trust deed given by the railroad company, conveying all properties owned by it to said trustee for the purpose of securing to *Assets Realization Company*, a corporation, the payment of certain indebtedness of said railroad company to said *Assets Real-*

zation Company. The bill of complaint, which is in the usual form, was filed December 10, 1917. On the following day the defendant filed its answer, admitting the allegations of the bill, and, upon motion of solicitors for complainant, an order was made appointing a receiver for all the properties of the defendant described in the trust deed. Thereafter both the bill and answer were amended in unimportant particulars, and by agreement the cause was submitted, without testimony, upon bill and answer and certain affidavits in behalf of complainant. On December 24, 1917, a final decree in favor of complainant was entered.

In the final decree it was ordered that the properties of the defendant covered by said trust deed "be sold on a legal sale day at public auction, at public outcry to the highest and best bidder, in front of the courthouse door in said county of Marion, state of Florida, and at such sale the master herein appointed is hereby instructed to first offer (1) all the property included herein to be held, used, and operated as a common carrier of goods and passengers from Silver Springs, Florida, to Palatka, Florida, and if as much as \$200,000 is bid under such first offering herein provided for, the master will not offer the same for sale under the second offering herein provided for; otherwise he will immediately thereafter, on the same day and at the same place, (2) offer all of said property for the purpose of and with the privilege on the part of the purchaser of dismantling the same, and that unless the bid received under the second offering herein provided for shall exceed by \$100,000 the bid received under the first offering herein provided for, in the event any bid is made under the said first offering, then in that event it will be the duty of the said master to accept the highest bid made under the first offering herein provided for; but if no bid is made the first offering, or the bid under the second offering herein provided ex-

ceeds by \$100,000 the bid made under the first offering, then the said master shall accept the highest bid made under the second offering, and the said master shall report his doings in this behalf to the court."

The master was, by said decree, directed, upon making sale of said properties, to execute a deed therefor to the purchaser, pay the costs incurred in the suit, all taxes properly assessed against such properties, and out of the remainder of the proceeds of the sale to pay to the complainant, as trustee, the amount due by the defendant to Assets Realization Company.

Subsequently, other proceedings were had in said cause not necessary to be recited here. The state, by the Florida Railroad Commission, from time to time during such proceedings, asked leave to intervene and be made a party to said suit, but was not permitted to do so, and was not formally made a party until March 27, 1919.

In the meantime, and after having been by order of court for various reasons from time to time postponed, the sale of said property was made by the special master on February 3, 1919. At the sale there was no bid under subdivision 1 of the quoted paragraph of the final decree for the property to be operated as a common carrier. There was a bid under subdivision 2 of the quoted paragraph of the final decree for the property with the privilege of dismantling it and ceasing to operate the said railroad as a common carrier, which bid was accepted, and the sale and proceedings of the special master reported to the court.

Upon exceptions to the master's report and a motion for confirmation of the sale after an extended recital of the proceedings in the cause, and at the request of counsel, the court, by its order dated May 5, 1919, fixed a day when an order would be made confirming the sale and directing the execution of a deed to the purchaser, and further directing that upon the consummation of the sale the railroad be dis-



mantled and the receiver discharged. The purpose in fixing a day for the making of such order, so it is recited, was to give opportunity to the receiver and the Railroad Commission to take such further action in the matter as seemed to them to be necessary and proper.

On May 10, 1919, two days before the day fixed by the court for the entry of its order confirming the sale and permitting the dismantling of the road, upon suggestion and petition to this court, a rule was issued as prayed, requiring the circuit judge to show cause why a writ of prohibition should not issue forbidding him to enter an order in said cause confirming the sale of the property of said defendant railroad company as junk to be dismantled, and from authorizing or decreeing the dismantling, taking up, or removing any of the rails or tracks of said carrier, or from exercising any further jurisdiction in said cause relating to the junking or dismantling of said property.

By demurrer to the suggestion and petition the question is presented of whether a circuit court in this state has jurisdiction in a suit in which the state is not a party, brought by a trustee against a common carrier railroad company to foreclose a trust deed upon the properties of such railroad company, given to the trustee to secure the payment of the indebtedness of the railroad company, and in such suit order the railroad dismantled, its properties sold and removed, and its operation as a common carrier discontinued.

This question must be answered in the negative upon the theory that the operation of a common carrier railroad is a business so affected with a public interest that when once undertaken and begun it cannot be discontinued and the road so operated dismantled and abandoned by a proceeding in which the state and the public are not represented. By

the acceptance of its charter from the state such a company is permitted to exercise certain rights not enjoyed by individuals. It is given certain of the attributes of sovereignty itself, such as the power of eminent domain. It likewise is charged with the performance of certain public duties, namely, the duties of a common carrier. While it is constructed by private capital and is primarily controlled by individual effort, it is a public instrumentality, subject in its operation to regulation by public authority. Accordingly, therefore, the public has such an interest in the operation of such a road that, when once undertaken, it may not be discontinued by a proceeding in which the state is not represented, when such discontinuance has not been consented to by the state. 22 R. C. L. p. 750; *State ex rel. Naylor v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747; *Gates v. Boston & N. Y. Air Line R. Co.* 53 Conn. 333, 5 Atl. 695; *People ex rel. Hubbard v. Colorado Title & T. Co.* — Colo. —, 178 Pac. 6; *Brooks-Scanlon Co. v. Railroad Commissioner*, 144 La. 1086, P.U.R.1919E, 1, 81 So. 727.

In the case of *State ex rel. Naylor v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747, the supreme court of Kansas, in discussing a similar question, said: "Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure, and other permanent property of

Courts—power to order railroad dismantled.

Railroad—right to abandon.

the corporation, are devoted to the public use. From this use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise as an investment be profitable or unprofitable; the property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction, railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state."

This, we think, is the true rule. In the instant case, as may be observed from the statement, the state was not made a party to the suit until after the decree of foreclosure had been entered and the sale of the property made, when the Railroad Commission was permitted to intervene and be made a party. There is no contention that the consent of the state to the discontinuance of the road had been secured. On the contrary, it is alleged in the suggestion and petition that, upon application by the railroad company to the Railroad Commission, consent to the discontinuance of operation of its road had been denied.

It follows that the portion of the decree of foreclosure authorizing the dismantling of the road was in excess of the jurisdiction of the court.

The demurrer to the suggestion and petition is overruled, and the peremptory writ of prohibition will be issued, unless the respondent files a plea or answer within thirty days.

**Taylor, Ellis, and Whitfield, JJ., concur.**

**Browne, Ch. J.,** absent and not participating.

**Whitfield, J., concurring:**

A common carrier railroad com-

pany is a corporate entity with franchise rights and obligations, and its property is devoted to a public service which is continuous under the laws of the state. The franchise rights of the corporation may be forfeited to the state; but the corporation cannot lawfully dismantle its roadbed of ties and rail and withdraw the property that has been devoted to the public service, without the acquiescence of the state in some manner prescribed by law.

While a court of equity may enforce a mortgage lien on the property of a railroad corporation by a sale of the property, the court has no authority to order or permit the track and other property of the company to be withdrawn or removed from the public service to which it was devoted, except as may be prescribed by statute; and there is no statute in this state giving such authority to the courts or to other tribunals.

Mortgage contracts cannot give to the courts a power not conferred by law. In this case the contract lien is upon the property of the railroad company as an operating entity charged with the public duty; and the lien can give no right to destroy the operating character of the property in which the public have an interest; nor can the right of the mortgagees be enforced except pursuant to law. If the mortgage lien contracted for is ineffectual to secure the indebtedness, the mortgagee cannot justly complain, since the lien was taken under the law governing the subject-matter of the lien.

The court was without power to order a sale of the railroad company's track and property as junk, thereby destroying the public use of the corporate property, and the writ of prohibition should be made effective.

Petition for rehearing denied October 30, 1919.

## ANNOTATION.

**Power of court to authorize discontinuance of public service corporation upon foreclosing a mortgage on its plant.**

It is not altogether clear from the decision in the reported case (*STATE EX REL. RAILROAD COMRS. v. BULLOCK*, ante, 232) whether the court there proceeds upon the theory that there was no jurisdiction to order the abandonment of the railway because the consent of the state, through its railroad commission, had not been obtained, or whether it was merely because the state had not been made a party to the foreclosure proceedings. There is considerable difference between the effect of these theories. If the decision denying the jurisdiction is based upon the latter theory, jurisdiction might be obtained by making the state a party to the proceedings,—assuming that there is the right to sue the state. But if the decision is based upon the theory that a railroad cannot be abandoned without the consent of the state, either directly or through its railroad commission, an entirely different situation is presented. The latter is the theory of *People ex rel. Hubbard v. Colorado Title & T. Co.* (1918) — *Colo.* —, 178 Pac. 6, where it is held that a court has no jurisdiction, in foreclosing a mortgage on the railroad, to order its abandonment without the consent of the state, or a public utilities commission to which this question has been delegated. The court holds that the statute of that state confers upon the Public Utilities Commission exclusive jurisdiction to determine whether a railroad company may abandon service upon and dismantle a railroad lying wholly within the state, and holds further that the statute which gave the Commission jurisdiction over receivers appointed by any court whatsoever subjected a receiver appointed by a court in a foreclosure proceeding to the same control as the railroad before the appointment of the receiver. It was accordingly held that the court in the foreclosure proceedings had no jurisdiction to order a junking of the railroad. The statute conferring upon

the Public Utilities Commission the above jurisdiction was sustained over the objection to its constitutionality that it conferred judicial power upon the Commission, it being held that a determination of the fact whether a railroad company should discontinue service and dismantle its road is not the exercise of judicial power in a constitutional sense.

It is the general theory of both of the foregoing cases that the state has an interest to be considered in determining upon the abandonment of a railroad. This is a general theory that runs through all the cases. The majority of cases, although adhering to this theory, sustain the jurisdiction of a court in a foreclosure action to order the abandonment of the road. Thus, where the state is represented in the foreclosure proceedings by its attorney general, it has been held that a Federal court has jurisdiction to dispose of the property of a street railway company in any reasonable way which may be for the best interests of the mortgagee, and, if necessary, may order a sale under such circumstances as will permit the purchaser to dismantle the road as a railway and dispose of the property as junk. *New York Trust Co. v. Portsmouth & E. Street R. Co.* (1911) 192 Fed. 728. With reference to the public interest to have the operation of the road continued, the court, after stating that in some cases there has been a refusal to compel railroad companies to operate their roads at a loss, on the theory that it deprives the owners of their property without compensation, says that "other cases suggest the idea that the public interest is somewhat involved; but perhaps the better view would be that the public interest is one of the principal questions to be considered. Under this view it will become necessary that the plan of sale must be so arranged as to first enable the public or members of the public to buy the road as a going concern at

a sum considerably less than an upset price based upon the value of the materials sold under such authority and conditions as will permit the road to be dismantled."

In *Gilchrist v. Waycross Street & Suburban R. Co.* (1917) 246 Fed. 952, an action to enjoin the purchasers of a street railway at a mortgage foreclosure from dismantling the property and abandoning the operation thereof, the court, in denying the injunction, and in answer to the contention that the purchasers could not be relieved of the burden of continuing the operation of the road without the consent of the state, and that the courts have no power to give such assent, says: "We may concede all this to be true, but it does not follow in every case that the court is lacking in jurisdiction to enforce its decree because an incidental effect may be to put it out of the power of a street railway to operate its lines in a particular city under a permissive grant by virtue of a charter obtained under the general state law.

. . . The street railway company had the authority to mortgage all of its property for corporate purposes. A decree of foreclosure by sale would amount to nothing if the conditions were such that the railroad must be operated by the purchaser at foreclosure sale where the railroad could not be operated without loss. No purchaser would buy under compulsion of operating a street railroad at a loss, and unless the court under such circumstances could sell the physical property with the right of removal, the mortgage lien as well as the debt would be destroyed. . . . Under these circumstances, a court of equity had jurisdiction of the subject-matter and its decree is not void. To hold otherwise is to say that a mortgage creditor of an insolvent street railway company could never realize on his security by a sale of it if the circumstances are such that the railroad cannot be operated except at a loss, and the purchaser be compelled to operate the same."

In *South Carolina ex rel. Cunningham v. Jack* (1906) 76 C. C. A. 165, 145 Fed. 281, where the court ordered

the dismantling of a railroad and the sale of the iron rails, rolling stock, etc., in an action in which the state was not a party, the court subsequently refused to order the reconstruction of the railroad in a suit by the state. This case is approved in *Central Bank & T. Corp. v. Cleveland* (1918) — C. C. A. —, 252 Fed. 530, where the court ordered the discontinuance of a road upon the mortgage foreclosure.

In *Gasser v. Garden Bay R. Co.* (1919) — Mich. —, 171 N. W. 791, the owners of the railway, in their answer to the bill for foreclosure, asked the court to authorize abandonment of the railroad and decree that it might be dismantled and its steel sold as personal property. It is stated that the decision of the trial court that it had in the foreclosure proceedings jurisdiction to entertain this application to abandon operations and dismantle the line was not questioned in the appellate court. The mortgage sought to be foreclosed contained a provision that the mortgagees might enforce collection of the indebtedness by dismantling the road if that was necessary. At the time the mortgage was given the railroad company was a private, unincorporated logging road, and was held to no legal obligation as a common carrier, and it is stated that the subsequent incorporation of the road and its assumption of the obligations of a common carrier could not affect vested rights under the prior mortgage. Speaking of the duty of continuing the road, the court states that while the objectors to the abandonment may not be legally or equitably entitled to require that the operation of the road be continued at a loss, the court may, for preservation of that public function, give them an opportunity to bid for the same at the foreclosure sale on such conditions before authorizing the road to be dismantled and abandoned.

The question whether a court in a foreclosure proceeding has a right to sell the property of the railroad company as personal property and abandon the operation of the road is not expressly decided in *Royal Trust Co. v. Washburn, B. & I. R. Co.* (1902)

113 Fed. 531. It is, however, the assumption of that case that the court has jurisdiction, but as to the correctness of the judgment the court does not decide, saying that if the judgment "was an error, the court had jurisdiction to commit the error." The judgment in this case was modified on other grounds in (1905) 71 C. C. A. 579, 139 Fed. 865, where the court did not decide the question under annotation.

Some cases, while admitting that there is a public interest which must be considered in ordering the abandonment of a railroad, do not go to the extent of holding that the assent of the state must be obtained. Where there is no contract obligation to maintain a railway, it is held that the operation of a railroad cannot be compelled when it appears that it cannot be operated except at a loss. Under this theory some courts in foreclosure proceedings have directed that the question whether the road can be operated except at a loss be determined, and if it appears that it cannot, have ordered that the road be sold, with the right to the purchaser to abandon its operation. *Potter Matlock Trust Co. v. Warren County* (1919) 182 Ky. 840, 207 S. W. 709. A street railway was involved in this case, and the county and city in which the railroad operated were parties to the foreclosure proceedings. In the original action the question whether the road could be operated at a reasonable profit had not been determined; accordingly, the court ordered a further test of this question. It was first directed that the property should be offered for sale as a going concern at an upset price, with an obligation upon the part of the purchaser to continue its operation, and if no purchaser could be found at this price and under these conditions, then the court directed that the railway should be put in the hands of a receiver, to be operated for a year without incurring any expense in excess of the income of the property, and if, at the expiration of the year, it was found that the road could not be operated so as to yield a reasonable profit to the owners, an order should be made per-

mitting the owners or trustees for the bondholders, as the case might be, to sell the road in any manner they pleased and for any price that suited them, with the right on the part of the purchaser to take up the tracks and other equipment and abandon the road upon leaving the streets and highways in as good condition as the remainder of the adjacent streets and roads. The power of the court to grant this relief is not expressly considered in this case.

In *Iowa v. Old Colony Trust Co.* (1914) L.R.A.1915A, 549, 181 C. C. A. 581, 215 Fed. 307, it was held that a court which, through its receiver, had taken possession of a system of railroads in a suit to foreclose a mortgage upon it, might order the abandonment of a branch of the road which was unproductive and dilapidated, and imperiled the continuance of the system, where no funds were available for putting it in condition to operate. The petition for abandonment seems to have asked for the abandonment pending the foreclosure action, and there was not an order that the property should be sold with the right in the purchaser to abandon the property. The court, after stating that a railroad corporation is, in an important sense, a public corporation, and dependent upon the public for its franchises to exist and carry on business, and that, in consideration of these franchises, it assumes and must perform certain duties and obligations for the benefit of the public, among which, as a general rule, is the duty of maintaining its entire line of road in a reasonably safe and operative condition, states that there are some conditions which necessarily excuse full compliance with the requirements of these rules, and that the case at bar afforded a striking example of such conditions which justify an abandonment. The court then states that the principle justifying an abandonment seems especially applicable to railroads organized under and subject to the laws of the state of Iowa, as in that state authority is directly conferred to change or remove a line of road after it has been permanently located and constructed. A

provision of the Iowa statute was to the effect that any railroad company desiring to change or remove the line of its road might file a petition in the district court in any county wherein the change or removal was proposed to be made, and it was contended that the state court was the only tribunal authorized to grant this relief. In answer to this contention, the court states that "we have already seen that on a state of facts such as disclosed by the pleadings and proof in this case, any railroad company would have been justified, on general principles of the common law, in abandoning a part of its road in similar condition to that sought to be abandoned in this case, and without doubt could have received judicial sanction for such abandonment at common law, irrespective of any statute. The prayer for general relief in this case is quite sufficient to enable the court to grant all proper relief, whether the right be based on statute or common law." Speaking particularly of the jurisdiction of the Federal court to order the abandonment of a portion of the road, the court, referring to the dilapidated, worn-out condition of the portion abandoned, and to the fact that the continued operation of this portion imperiled the operation of the more important parts of the system, says: "In these circumstances what could the court, charged with the duty of caring for and protecting the whole property, have done except order the abandonment of the steam line and the sale of its salvage? . . . We think the court not only had the power to make the order complained of in the foreclosure suit, but that its exercise under all the facts and conditions of this case was wise and for the best interests of all concerned."

The Indiana Public Service Commission refused to order the continuance of the operation of a railroad sold under a judgment in foreclosure, which ordered the property to be disposed of without limitation, restriction, or condition of any kind, where the road was not earning enough to pay operating

expenses, and would be unable to do so if passenger rates were increased 2½ cents per mile and freight rates increased 20 per cent. *Dunbar v. Bluffton, G. & C. Traction Co. (Ind.)* P.U.R. 1918B, 670. In the opinion it is stated that the court which entered the judgment of foreclosure had jurisdiction of the subject-matter and of the parties, and determined the rights of the parties in the controversy, and that when a court has jurisdiction and has determined the rights of the parties, an administrative commission or another court has no authority to take jurisdiction and render a contrary decision. A similar decision appears in *Re Lake Erie, B. G. & N. R. Co. (Ohio)* P.U.R. 1916F, 553, where it was held that a public utility commission could not require the continuation of operation of a railroad in possession of a purchaser at a judicial foreclosure sale, who, not having yet paid the purchase price, is reselling the property piecemeal and carrying the proceeds into court under orders which probably gave him the right to dismantle the property, or, if not giving such right, expressly retained jurisdiction in the court to determine all undisposed-of questions.

In *Boisot v. Amarillo Street R. Co. (1917)* 244 Fed. 838, where the trustee under a mortgage and the receiver appointed in a foreclosure proceeding did not ask that the franchise of the street railway be sold, believing the same to be of no value, and taking it for granted that the purchaser would prefer to tear up the tracks, the court said that it was by no means certain that such a course would be thought advisable by the purchaser, but, without determining any question of the right of the city to demand that the purchaser continue to operate the cars in compliance with the franchise obligation, ordered the sale of the property and franchises to be made without prejudice to such right as the city might have in the premises.

See *Gress v. Ft. Loramie (Ohio)* post, 242. W. A. E.

C. P. GRESS et al., Plffs. in Err.,  
v.  
VILLAGE OF FT. LORAMIE et al.

*Ohio Supreme Court — June 10, 1919.*

(— Ohio St. —, 125 N. E. 112.)

**Bank — power to operate street railway.**

1. A national bank is without power to obligate itself to operate a street or interurban railroad.

[See note on this question beginning on page 248.]

**Street railway — purchase at judicial sale — duty to operate.**

2. The obligation of the original grantee of a franchise to operate a street railroad is assumed by the purchaser of the road when sold "as a going concern" at judicial sale.

[See 25 R. C. L. 1129.]

**Estoppel — operation of railway by bank.**

3. A national bank is not estopped by its purchase and temporary operation of a street or interurban railroad from pleading its want of power to operate such road.

**Equity — power to permit discontinuance of railway.**

4. A court of equity, having taken jurisdiction for the purpose of enforcing the performance of a contract to operate a street or interurban railroad, will retain jurisdiction for the purpose of authorizing the owner of such road to discontinue its operation, where no contractual obligation is found to exist and there is no prospect that the road can be made to earn a fair return upon the investment.

[See 10 R. C. L. 370.]

**Headnotes by the COURT.**

**ERROR** to the Court of Appeals for Shelby County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in a suit brought to enjoin discontinuance of the operation of interurban railroads. *Reversed on condition.*

**Statement by Robinson, J.:**

In 1910-11 an interurban railroad was built by the Minster & Loramie Railway Company, between the villages of Minster and Ft. Loramie, a distance of 3 miles. At the same time a street railway was built over certain streets in the village of Ft. Loramie by the same company, under a twenty-five-year franchise granted by the village. No power plant was ever constructed and no rolling stock ever acquired by said company, but said railways were operated under a contract with the Western Ohio Railway Company, which furnished both.

The cost of construction was provided by the issuance of bonds in the sum of \$42,700.

In 1914 the Minster & Loramie Railway Company was judicially de-

clared insolvent and placed in the hands of a receiver, owing all its original bonded indebtedness, with interest, and some thousands of dollars additional.

For the purpose of continuing the road in operation, the holders of the bonded indebtedness canceled the bonds. A new bond issue in the sum of \$20,000 was made, the bonds being purchased by the First National Bank of New Bremen at \$17,000, which paid the indebtedness of the company and lifted the receivership.

The company then operated until 1916, when it was again placed in the hands of a receiver, owing at the time to the First National Bank of New Bremen the face of the bonds, eighteen months' interest, and \$1,-630 in addition thereto.

By order of the court the receiver

sold all the property of the Minster & Loramie Railway Company to C. P. Gress, acting for the First National Bank of New Bremen, for the sum of \$23,000. The bank continued to operate the roads for the period of forty days, pending negotiations looking to their sale. Failing to secure a purchaser, it was about to discontinue the operation of the roads, when the village of Ft. Loramie brought suit against the plaintiffs in error and others to enjoin such discontinuance. Injunction was allowed, affirmed by the court of appeals, and the cause is here upon order of this court to certify the record.

Messrs. H. T. Mathers, J. H. Goeke, and Squire, Sanders, & Dempsey for plaintiffs in error.

Messrs. P. R. Taylor and Marshall & Fraser, for defendants in error:

The franchise of the Minister & Loramie Railroad from the village of Ft. Loramie was a contract.

Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 3 A.L.R. 696, P.U.R.1919B, 212, 120 N. E. 831; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 3 A.L.R. 705, P.U.R.1919C, 119, 121 N. E. 688; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A. (N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332.

A municipality may enforce the provisions of such a franchise contract.

Cincinnati & S. R. Co. v. Carthage, 36 Ohio St. 631; Milford v. Cincinnati, M. & L. Traction Co. 4 Ohio C. C. N. S. 191; State ex rel. Sheets v. Toledo R. & Light R. Co. 3 Ohio C. C. N. S. 285; Columbus v. Telephone Co. Ohio L. Rep. March 8, 1918.

This franchise contract must necessarily have passed to the purchaser of the road.

First Nat. Bank v. Burns, 88 Ohio St. 434, 49 L.R.A. (N.S.) 764, 103 N. E. 93; Thompson v. Schenectady R. Co. 124 Fed. 274; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570; 64 Fed. 628; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; North Beach & M. R. Co's

Appeal, 32 Cal. 499; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 848, 11 Sup. Ct. Rep. 243; United States v. Commonwealth Title Ins. & T. Co. 193 U. S. 651, 48 L. ed. 830, 24 Sup. Ct. Rep. 546.

Equity will not relieve against the obligations of a contract merely because such obligations prove unprofitable to one side or the other.

State ex rel. Taylor v. Columbus R. Co. 1 Ohio C. C. N. S. 145; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; Elliott, Mun. Corp. § 271; Dill. Mun. Corp. 5th ed. § 1228.

A railroad having once been located cannot be changed without the consent of the state.

Little Miami R. Co. v. Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Southern R. Co. v. Hatchett, 174 Ky. 468, L.R.A.1917D, 1105, 192 S. W. 694.

Where one has voluntarily assumed the benefits of a contract, he has also assumed its burdens, and cannot afterwards be heard to complain that any losses he may sustain by reason thereof deprive him of any constitutional rights.

Columbus R. P. & L. Co. v. Columbus (Dec. 9, 1918; Ohio Law Rep.); Wall v. Parrott Silver & Copper Co. 244 U. S. 407, 61 L. ed. 1229, 37 Sup. Ct. Rep. 609.

The bank, having lawfully purchased this railroad as a going concern, can thereafter operate it until such time as it can find a buyer for it, in that same condition, without exceeding its corporate powers.

Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; First Nat. Bank v. Conway, 87 Wash. 506, 151 Pac. 1129; Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co. 60 Ohio St. 96, 64 L.R.A. 395, 53 N. E. 711; Thomp. Corp. 2d ed. § 2772; Wyman, Pub. Serv. Corp. § 340; Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L.R.A. (N.S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Tourtelot v. Whited, 9 N. D. 467, 84 N. W. 8; First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679; Magoffin v. Boyle Nat. Bank, 24 Ky. L. Rep. 585, 69 S. W. 702.

The bank itself is not entitled to raise the plea of ultra vires.

Baker v. Schofield, 136 C. C. A. 320, 221 Fed. 322; Kerfoot v. Farmers' & M.



Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; New York Cement Co. v. Consolidated Rosendale Cement Co. 178 N. Y. 167, 70 N. E. 451; Kingman County v. Cornell University, 6 C. C. A. 296, 12 U. S. App. 551, 57 Fed. 149; Sioux City Terminal R. & Warehouse Co. v. Trust Co. 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; Central Trust Co. v. Columbus, H. Valley & T. R. Co. 87 Fed. 815; Goodland v. Bank of Darlington, 74 Mo. App. 365; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; Cook, Corp. 6th ed. § 681; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 267, 24 L. ed. 693, 695; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Bank of Chillicothe v. Chillicothe, 7 Ohio, pt. 2, p. 31, 30 Am. Dec. 185; Hays v. Galion Gaslight & Coal Co. 29 Ohio St. 330; Larwell v. Hanover Sav. Fund Soc. 40 Ohio St. 274; Coleridge Creamery Co. v. Jenkins, 66 Neb. 129, 92 N. W. 123; Banks v. Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

Mr. John Oldham also for defendants in error.

Robinson, J., delivered the opinion of the court:

While some eighteen assignments of error are made in the petition of the plaintiffs in error, the determination of the following legal propositions will decide this case:

(1) Did the ordinance of the village of Ft. Loramie, granting a franchise to the Minster & Loramie Railway Company to construct and operate a street railway in said village, and its acceptance by the company, constitute a contract obligating the company to operate the road for the life of the franchise?

(2) If so, did the First National Bank of New Bremen, by the purchase of said road at judicial sale, assume the obligation to so operate the road?

(3) Had the bank power to assume the obligation?

(4) Can the bank plead its own assumption of a power beyond that granted to it by its charter, for the

purpose of avoiding performance of its contract?

(5) Has a chancery court jurisdiction to relieve a public utility from its obligation other than contractual to operate such utility?

The Minster & Loramie Railway Company having first obtained a franchise from the village of Ft. Loramie, which franchise was for a period of twenty-five years, and, among others, contained a provision that "the owner, or owners, of said electric street railway, shall maintain thereon improved passenger cars with all modern conveniences for the comfort of passengers, and such cars shall be run at least as often as the Western Ohio Railway Company, or its successors, lessees, or assigns, shall run its regular passenger cars into the village of Minster, Auglaize county, Ohio, and said cars shall be run at such times as to make direct and immediate connections with all regular passenger cars leaving said village of Minster over what is now known as the Western Ohio Railway," constructed in 1910 a street railway in the village of Ft. Loramie and an interurban railway from the village of Ft. Loramie to Minster, at a cost of \$42,700, for all of which it issued bonds. From the date of completion to 1914 it operated the street and interurban railways, under a contract with the Western Ohio Railway Company, as one road, when it became so financially involved that it was judicially declared insolvent and placed in the hands of a receiver.

For the purpose of giving it another trial and saving the service to the public, the bondholders consented to a cancelation of the bonds. A new bond issue was made in the sum of \$20,000, and sold to the First National Bank of New Bremen for \$17,000, out of which a general indebtedness of some \$6,000 was paid, the receivership lifted, and the road continued in operation until 1916, when it, having defaulted in three instalments of interest, having accumulated an additional indebted-

ness of some \$1,600, and having made no improvements or repairs since its original construction, was again declared insolvent and a receiver appointed at the instance and suit of the First National Bank of New Bremen.

Such proceedings were had in such suit that the receiver was ordered to sell the railroad and all the property thereof, including the franchise, as a going concern. At the sale thereof, C. P. Gress, acting for and as agent of the First National Bank of New Bremen, bid the sum of \$23,000, and the sale was made to him for the bank for that sum.

Thereafter, the bank undertook to sell the road as a going concern, and pending negotiations continued for a period of forty days to operate the road, when, failing to make a sale as a going concern, it was about to discontinue operation and dismantle the road.

That the bank understood and believed that it had bought all the rights of the Minster & Loramie Railway Company under the franchise is apparent from its own acts in operating the road thereunder, and in attempting to sell it, including the franchise, as a going concern; and the court is disposed to adopt the bank's own interpretation of the scope of the purchase—especially in view of the fact that the sale was made at the instance of the bank and no issue made in that case as to the necessity for discontinuance of operation and dismantling of the road—and to hold that if the purchaser had the power to assume the obligations of the franchise contract that it so did, and that the ordinance granting the franchise, and its acceptance by the Minster & Loramie Railway Company amounted to a contract to operate for twenty-five years.

The power of a national bank to contract to operate a railroad, street, or otherwise, if it exists, must be found in subdivision 7 of

§ 5136, U. S. Rev. Stat. (13 Stat. at L. 101, Comp. Stat. § 9661, 6 Fed. Stat. Anno. 2d ed. p. 654), which reads: "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

The limitation of the power of a national bank to that expressly granted by the statute has been so definitely held by the Federal courts that it would seem that there is nothing that could be added by this court.

In Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496, it was held: "The National Banking Act is an enabling act for associations organized under it, and one cannot rightfully exercise any powers except those expressly granted, or such incidental powers as are necessary to carry on the business for which it was established"—followed in California Nat. Bank v. Kennedy, 167 U. S. 362, 366, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831.

It would not be contended that the bank could have accepted the franchise in the first instance from the village, nor have obligated itself to operate a street railroad or any other kind of a railroad. Upon the suit of any stockholder, a court would have promptly enjoined, and upon the initiative of the United States government its charter would have been revoked. Nor will it be permitted by indirection to do that which it cannot do directly.

In First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306, it was held: "A

Street railway—  
purchase at  
judicial sale—  
duty to operate.

Bank—power to  
operate street  
railway.

national bank has no power to engage in or promote a purely speculative business or to take stock in a corporation organized for that purpose, nor can the power to take such stock as a means of protecting itself from loss on pre-existing indebtedness be inferred from the right to accept it as security for a present loan"—followed in *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 301, 50 L. ed. 1036, 1040, 26 Sup. Ct. Rep. 613.

In *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582, it was held:

"A national bank which has lawfully acquired the title to property in payment of a debt has implied authority to make reasonable repairs thereon for the purpose of putting it in salable condition, and its directors cannot be held personally liable for money so expended in good faith.

"A national bank, however, has no power to prosecute a mining business on property which it has acquired—much less, to expend its funds in prospecting for mineral on such property; and directors who authorize such expenditure are personally liable therefor to the bank or its receiver."

In *Cockrill v. Abeles*, 30 C. C. A. 223, 86 Fed. 505, 58 U. S. App. 648, it was held in the syllabus: "Where a national bank acquired certain mill property in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mills as the bank's agent, using its funds, and operated them for the bank at a loss of \$23,000, the directors of the bank participating are liable to the creditors for the loss."

In the opinion, at page 230 of 30 C. C. A., it is stated that "the most liberal view which may be fairly taken of the implied powers of national banks would not sustain their right to engage directly in a manufacturing or business enterprise under any circumstances; but, even if the power in question should be conceded to exist under certain conditions, the present case was not

one which warranted its exercise. The directors of the bank had no right to employ its funds in an attempt to operate the cotton mills for the bank's account, in the manner alleged in the bill, and such action on their part was unauthorized and wrongful."

Is the defense of ultra vires available to plaintiff in error the First National Bank of New Bremen?

This proposition, too, has been the subject of repeated decisions of the Federal and other courts.

In *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059, it was held: "When a national bank enters into a contract which is beyond its powers, it cannot be estopped from pleading ultra vires by the performance of the contract by the other party."

Estoppel—  
operation of  
railway by  
bank.

In *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613, it was held:

"While a national bank may take by way of security property in which it is not authorized to invest, and may become the owner thereof by foreclosure in satisfaction of the debt, but, without deciding whether it could take shares in a partnership formed for purely speculative purposes as security, it cannot, even in satisfaction of a debt so secured, become the absolute owner of such shares. It would be ultra vires, and as it cannot take the shares it is not, and cannot be held, liable for any of the debts of the firm.

"A national bank which has taken such shares in satisfaction of a debt is not estopped either from denying that it was a partner or that it is liable for the debts of the firm."

In *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. St. Rep. 306, it was held: "Notwithstanding its subscription, a national bank, taking stock in a corporation organized for purely speculative purposes, may plead its want of authority so to do as a defense to the claim of a receiver of such cor-

poration for the double liability imposed by a state statute on the stockholders thereof."

In *California Nat. Bank v. Kennedy*, 167 U. S. 362, 363, 42 L. ed. 198, 199, 17 Sup. Ct. Rep. 831, it was held: "The want of such authority may be set up by a bank to defeat an attempt to enforce against it the liability of a stockholder."

In *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739, it was held: "In the case of such an actual purchase by a national bank, it is not estopped to deny its liability, as an apparent stockholder, for an assessment of such stock ordered by the Comptroller of the Currency."

The principle that a national bank has not the power to engage in business, other than banking business, to an extent beyond that necessary to save itself from loss, and the principle that it may plead such lack of power in its own defense, seems to be *stare decisis* in the Federal courts, and it would be a vain thing for a state court to attempt to overrule them. We are not holding, however, that the court would not be authorized to refuse to confirm a sale that had been made to an organization which could not, because of such lack of power, assume the obligations incident to the purchase, nor that a reviewing court would not be justified in setting such sale aside. This proceeding being wholly independent of the proceeding in which the sale was made, and with different parties plaintiff and defendant, that question is not here for determination.

Had the court, at the time this action was instituted, jurisdiction to authorize the discontinuance of service by the then owners of the road?

Having held that the bank was without power to enter into a contract to operate a railroad as a public utility, and that the defense of *ultra vires* is available to it, we have the situation of a national bank owning, as a going concern, a street

and interurban railroad which had been devoted to the public service, to which the public by reason of such devotion and operation had adjusted its business and social relations, thereby acquiring a right to have the service continued if such service could reasonably be continued without such loss as would amount to confiscation, but the owner of the road being without the power to obligate itself to operate it, and therefore without any contractual obligation to operate it, and, in addition, the power of a court of equity invoked to compel the owner to continue to render such service. Surely the bank had the right in such case to appeal to the same court to relieve it from such implied obligation and to judicially determine its rights as to the future use and disposition of the property.

The court having taken jurisdiction for the purpose of compelling the performance of an obligation will retain jurisdiction for the purpose of hearing the defense thereto, even though to establish such defense it will be necessary to grant affirmative relief and especially where for such affirmative relief there is no adequate remedy at law.

Equity—power to permit discontinuance of railway.

That the road at all times has been unable to earn a fair return on the capital invested must be conceded by everyone. That it has not been self-supporting seems apparent from its history as disclosed by the record. We are therefore of opinion that, independent of the lack of power in the First National Bank of New Bremen to operate the road, its financial history is such that the court ought to authorize the discontinuance of its operation and the dismantling of the road.

We, however, are not disposed to deprive the village of Ft. Loramie and the public of that vicinity of the opportunity to preserve the public service character of the road, nor to allow the bank to take advantage of its own lack of power to fulfil its

void contract, and make a profit from the transaction to the detriment of the village and of the public, without first giving all parties in interest an opportunity to purchase the road and assume an obligation to continue its public service operation under the franchise, or such new franchise as the village may have the power and be willing to grant.

The judgment of the Court of Appeals and of the Court of Common Pleas will therefore be reversed, and the plaintiff in error the First National Bank of New Bremen be authorized to discontinue the operation of said road at once. And, in

the event that no tender be made said bank of the amount paid by it for said road, with interest, plus the deficits which the bank has obligated itself to pay, if any, within thirty days, by an organization authorized and willing to obligate itself to operate said road under said franchise, or such franchise as the village is willing and empowered to grant, that the First National Bank of New Bremen be authorized to dismantle and sell all the assets of said road.

Jones, Matthias, Johnson, and Donahue, JJ., concur.

Wanamaker J., not participating.

### ANNOTATION.

#### Power and duty of bank which has acquired a public service plant to continue its operation.

The power of a bank to engage in an ordinary business other than banking has been the subject of many decisions. An extensive search, however, has disclosed no case other than the reported case (*GRESS v. FT. LORAMIE*, ante, 242) dealing with a public utility. It seems, however, that such a business stands on the same footing as any other with the exception that, in the case of railroads, at least, there is held to be a duty on the part of the owner which passes to and rests upon the purchaser at a judicial sale of the utility as a going concern to continue the business. The court in the reported case refuses to enforce such duty as against a national bank by enjoining the discontinuance, but, because of the lack of power of the bank to operate the railroad, holds the bank entitled to discontinue the road, dismantle it, and sell the assets, where it could not be sold by the bank as a going concern.

In *Continental Trust Co. v. Brown* (1915) — Tex. Civ. App. —, 179 S. W. 939, where a bank, under its right to act in a trust capacity, was acting as executor, the court states that ordinarily a bank could not own a railroad, but the handling of the stock of the railroad company as executor is quite a different matter.

As may be seen by a reference to some of the cases dealing with other kinds of business, cited in the reported case (*GRESS v. FT. LORAMIE*), the courts, while recognizing that banks have no power to engage in the ordinary business, have been liberal in allowing banks to rehabilitate property which has been acquired in payment of a debt. See *Cooper v. Hill* (1899) 36 C. C. A. 402, 94 Fed. 582, discussed in the reported case.

In *Emigh v. Earling* (1908) 134 Wis. 565, 27 L.R.A. (N.S.) 243, 115 N. W. 128, it is held that a bank which, to recover the debt owing it by a creamery company, takes an assignment of its property and undertakes to carry out its contract to receive the milk of patrons, convert it into butter, deduct a certain portion of the proceeds for its services, and turn the remainder over to the patrons, holds such remainder as the property of the patrons, and cannot refuse to turn over the money, although it has no power to conduct such business.

As indicated in the title, this note is confined to the power and duty of the bank to operate a public service plant, and does not deal with this power as it relates to business generally; hence it is not exhaustive of cases of the class illustrated by *Cooper v. Hill* and *Emigh v. Earling*.  
W. A. E.

J. C. ALLEN et al.

v.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.

*California Supreme Court (In Banc) — October 1, 1918.*

(179 Cal. 68, 175 Pac. 466.)

**Public utilities — sale of water for irrigation.**

1. That the owners of land sold under a water system, to whom water is sold for use for irrigation purposes upon their own lands and as an appurtenance thereto, are numerous, does not convert the several private uses into a public use within the control of the Public Service Commission.

[See note on this question beginning on page 268.]

**— separation of service and consumption.**

2. A distributing system used by a water company for the purpose of supplying water for the irrigation of lands sold under the system cannot be considered as a thing separate from the right to receive water, and declared to be a separate and public service, the rate for which can be fixed by the Public Service Commission, and made to exceed the rate specified in the water certificates under which the water is distributed.

**Constitutional law — impairing obligation of contract — changing water rate.**

3. Landowners having a right to receive for irrigation purposes water from a distribution system under which their lands were purchased have, by reason of the easements and servitudes thereby created, property interests in the system, and the contract fixing the rate for the use of such system cannot, under the contract clause of the Federal Constitution, be changed by the Public Service Commission so as to raise the rate.

**— taking property without compensation.**

4. So far as the increasing of rates of a corporation supplying water for irrigation purposes to those having an easement in the system because of the purchase of their lands thereunder, for the supplying of their quantum of water, inures to the benefit of the public use of other water through the same system, it is an unconstitutional taking of the private property of the owners of such easement for public use without compensation.

**Appeal — review of findings of Commission.**

5. The finding of a Public Service Commission that a corporation whose rates it attempts to regulate is a public utility goes to the jurisdiction of the Commission, and is therefore subject to review by the courts notwithstanding the statute provides that the finding of the Commission on questions of fact shall be final, where the statute also preserves to the corporation a hearing of the question whether the decision violates any provision of the Constitution.

**Public utility — water supply company.**

6. A water company, when it undertakes to supply a town site and the succeeding city with water for municipal and domestic purposes, and proceeds to fulfil its undertaking, becomes a public service corporation.

**— sale under private contract — effect.**

7. A water company does not, by undertaking to furnish a water supply to a municipality which will require only a small percentage of its products, become a public utility as to the remainder which it sells under private contracts.

**— claiming to be public utility — effect.**

8. A corporation which has sold real estate and undertaken to furnish water for its irrigation does not become a public utility so as to permit the changing of the rates established by its contract of sale by itself fixing the rates and charges for the water which it sells, or by declaring itself to be a public utility, and submitting to the

jurisdiction of the Public Service Commission.

**—declaration of intent to supply towns with water.**

9. A declaration in the charter of a water company which has sold land under contract to supply it with water for irrigation purposes, that it is organized inter alia to supply the inhabitants of towns with water, does not, standing alone, constitute a dedication of all its property to a public use.

**Evidence — dedication to public use — presumption.**

10. Dedication of property to public use is never presumed without evidence of unequivocal intention.

[See 8 R. C. L. 902.]

**Constitutional law — impairment of obligation of contract — state Constitution.**

11. The state cannot, in view of the contract clause of the Federal Constitution, by its Constitution and laws, place under the control of the Public Service Commission private contracts

for the purchase and sale of water for irrigation of land sold by the vendor of the water rights under the express agreement that water will be furnished for its irrigation.

**Public utility — definition.**

12. To constitute a public utility through the devotion of property to public use, the devotion must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that the service shall be continued so long as it is continued with reasonable efficiency, under reasonable charges.

[See 7 R. C. L. 41.]

**Constitutional law — construction — declaration of public utility.**

13. Constitutional and statutory provisions declaring that every private corporation furnishing water to or for the public, or which sells, rents, or delivers water to any person whatever, under contract or otherwise, is a public utility, must be construed to apply only to corporations which have in fact devoted their property to public use.

(Wilbur, J., dissents.)

**PETITION** by certain landowners for a writ to review a decree of the Railroad Commission declaring the applicant water company a public utility and fixing water rates to be charged and collected by it. *Decree annulled.*

The facts are stated in the opinion of the court.

Messrs. E. E. Keech and Henry Goodsell for petitioners.

Messrs. Douglas Brookman and Max Thelen for Railroad Commission.

Messrs. Oscar Lawler, James E. Degnan, W. A. Purington, William Collier, and H. H. Craig for applicant Water Company.

Messrs. Short & Sutherland and L. L. Cory, amici curiæ.

Messrs. Hunsaker & Britt and Joseph L. Lewinsohn for protestant Hart.

Mr. H. S. Dukes for city of Hemet.

Shaw, J., delivered the opinion of the court:

Upon further consideration of this case we adhere to the opinion prepared by Mr. Justice Henshaw and rendered by the court upon the original submission. Some additional treatment of points discussed upon the rehearing is appropriate.

The principal reason for the order

granting a rehearing was the desire of the court to re-examine the evidence upon the question of fact whether the Lake Hemet Water Company, at the time it executed to the respective petitioners the water contracts held by them, had dedicated to public use the water which the company thereby agreed to sell and deliver to the holders of the contracts, or whether these contracts were made without such dedication, and in each case for the private advantage of the parties contracting. Further examination on this point has satisfied us that our original conclusion was correct. The water was held in private ownership, it had not been dedicated to public use at the time these several contracts or water certificates were executed, and the right thereby vested in the landowners to whose

land the water was thereby made appurtenant was private property.

In the subsequent briefs emphasis is laid on evidence to the effect that in the year 1898, prior to the execution of a large number of the water certificates in question, the water company sold to persons who were not owners or purchasers of any part of the land to which Whittier and his associates intended the water to be applied, an amount of water equal to 50 per cent of its supply for that year. This, it is claimed, was in effect a dedication of that proportion of the water to public use. It is plain from the evidence in the case that these sales were not made with the intent to dedicate that water to public use. They were made solely and only because that year was one of extreme drouth in that vicinity, and as a temporary relief for that time only to outside lands which would otherwise have suffered great damage from the failure of their usual water supply. There was no intention to vary the original plan of applying the water to the land which the managers of the enterprise had for sale, and to none other, except to the extent of any incidental surplus.

In the argument by the attorneys for the Commission great reliance is placed on the decision in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and especially on the phrase, "affected with a public interest," used in the opinion. This case and this phrase are frequently invoked to advance the idea that the general interest of the state in the welfare and prosperity of its citizens is a sufficient basis for the right of the state to regulate prices for the use or sale of private property. Because of the use of this phrase the case itself is misunderstood. The phrase was used in quotations from the old English authorities declaring that there could be public regulation of the tolls to be taken by millers for grinding grain. These millers, having invited all persons to bring their grain to the mill to be ground, and having thus established a business,

sought to increase the tolls, or to favor some customers above others, and claimed the right to do so. It was held that, having thus dedicated the mill to this public use, the public had a right or interest in it, and in describing this right it was said that when property was thus "affected with a public interest" it ceases to be exclusively private property. So with the great grain elevators involved in the *Munn* Case, which, by the development of modern commerce and steam machinery, had become established as an adjunct to railroads, though managed by others, and as practically the only means of shipping grain on the railroads, it was said that they, too, as well as the ancient English mills, had become "affected with a public interest," and were, therefore, no longer private property only, and were subject to public regulation. The parallel is obvious

but it does not apply to water sold with land, for use

Public utilities—  
sale of water  
for irrigation.

upon the land, and as an appurtenance thereto, in the manner shown in the present case. The fact that the parties holding separate water rights, each upon his own land, are numerous, does not convert their several private uses into a public use.

There is no ground for the claim that the water distributing system used by the water company can be considered as a thing separate from the right to receive water, and declared to be a separate and public service, the rates

—separation of  
service and  
consumption.

for which, as to these petitioners, can be fixed by the Railroad Commission, and made to exceed the rates specified in the water certificates. The distributing system is a species of real property. *Stanislaus Water Co. v. Bachman*, 152 Cal. 726, 15 L.R.A. (N.S.) 359, 93 Pac. 858. The right of a landowner to receive water not devoted to public use upon land for its benefit, from an outside source, through a system of canals or pipes for conducting it to the land,



is an easement attached to the land, and a corresponding servitude upon the source of supply and the distributing system. *Copeland v. Fairview Land & Water Co.* 165 Cal. 154, 131 Pac. 119; *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 386, P.U.R.1917A, 447, 160 Pac. 228. The easement and the servitude constitute a single entity, and the one cannot be separated from the other without destroying both. The petitioners have property interests in the distributing system by reason of these easements and servitudes. The contract fixed the rate, not only for the water as such, but also for its delivery; that is, for the use of the system for that

Constitutional  
law—impairing  
obligation of  
contract—  
changing  
water rate.

purpose. To raise the rate without consent of the landowner would impair the obligation of the contract, and, so far as the increase inured to the benefit of the public use of other water through the same system, it would be taking the private property of these petitioners for public use without compensation.

It may be that the rates fixed by the contracts with petitioners are too low, and that the company will be unable to go on with the service, either to the public utility serving the town of Hemet or to the petitioners, unless both shall pay more for the service. That will demonstrate that the contracts which the water company voluntarily made for disposition of its own property were improvident and unwise. But that does not give the Railroad Commission power to interfere, however desirable such interference might be if the power were wisely exercised. It is not the guardian of those who do not wisely manage their property.

All the other points that are material or important to the decision of this case are fully and adequately treated in the former opinion. It leaves nothing more to be said and

we adopt it as the opinion of the court.

"The Lake Hemet Water Company, a corporation, hereinafter called the applicant, petitioned the Railroad Commission to fix the rates to be charged and collected by it for the sale and distribution of water, asserting itself to be a public service corporation. Some three hundred or more landowners receiving water under contracts from the applicant appeared and made objection, insisting that, so far as their water and water rights were concerned, these rights were held in private ownership, and that as to them at least the applicant was not a public service corporation, and jurisdiction to fix the rate charges for such water was therefore not in the Commission. The Commission heard evidence, made its finding and decree, by which it was declared that the applicant, as to all of its corporate functions, was a public utility, and thereupon fixed water rates. From this determination the aggrieved landowners sought and obtained this writ of review.

"This review is held under § 67 of the Public Utilities Act of 1915. It is plain, and indeed it has in effect been decided, that the declaration in that section that 'findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review,' has to do with the Commission's determinations upon questions of fact within its jurisdiction. When the question, ever one of mixed law and fact, goes, as here, to the jurisdiction itself, when the whole controversy revolves around the inquiry as to whether or not the corporation is a public utility, to say that the determination of the Commission upon this matter is final and conclusive, and is not subject to re-

Appeal—review  
of findings of  
Commission.

view, is the equivalent of denying to a petitioner a hearing upon a right carefully preserved to him by the language of § 67 itself,—a hearing and a determination of whether the order and decision under review

'violates any right of the petitioner under the Constitution of the United States or of the state of California.' So it will be found that in such petitions as *Pacific Teleph. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cal. 1915C, 822; *Del Mar Water Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948; *Title Guarantee & T. Co. v. Railroad Commission*, 168 Cal. 295, 142 Pac. 878, Ann. Cas. 1916A, 738; *Marin Water & Power Co. v. Railroad Commission*, 171 Cal. 706, 154 Pac. 864, Ann. Cas. 1917C, 114; *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 173 Cal. 577, 2 A.L.R. 975, P.U.R.1917B, 336, 160 Pac. 828; *Western Asso. v. Railroad Commission*, 173 Cal. 802, 1 A.L.R. 1455, P.U.R.1917C, 178, 162 Pac. 391,—this court has uniformly and without a dissenting voice investigated every complaint where the petitioners upon reasonable grounds asserted that the Commission had either exceeded its jurisdiction or refused to exercise the jurisdiction which in law it possessed. In the last-cited case the Commission, believing it did not have jurisdiction to entertain the application of the petitioner, refused to do so, and this court, reviewing its powers, held that it did possess this jurisdiction, and issued mandate to the Commission to exercise it. The converse of this proposition must be equally plain. If this court by mandate may compel the Commission to exercise powers which it does possess, upon the other hand it may restrain the Commission from exercising powers which it does not possess, or annul its decree when such unwarranted powers have been exercised.

"Thus we are brought to a consideration of the evidence upon which the Commission acted in holding this plaintiff to be in toto a public service corporation. The evidence, consisting for the most part, and indeed, so far as value is concerned, wholly, of undisputed record and written facts, is without substantial controversy. And indeed it

may be added that the pure findings of fact set forth by the Commission are not seriously disputed, petitioners' grievance arising over the conclusion—one of mixed law and fact—that the applicant is wholly a public service corporation.

"Into a Mexico rancho, the San Jacinto Viejo, flows the San Jacinto river. This rancho was partitioned between Estudillo, Stone, Jordan, and others. The allotments to the named persons did not border on the stream, but the partition judgment provided that each of these and their successors should have a right of way for a ditch, flume, or aqueduct across the lands of intervening owners for the purpose of securing and using, upon equal terms with the owners of all other allotments, their due proportion of the waters of the San Jacinto river for irrigation and other purposes in connection with their land. In 1886 the Fairview Land & Water Company was the owner of that portion of the rancho whereat the river entered. In that same year W. F. Whittier and his associates acquired certain rights and asserted certain claims to the waters of the river, and secured a contract from Estudillo for the sale to them of 3,000 acres of his land. The following year Mr. Whittier and his associates simultaneously organized two corporations under the laws of this state,—the Hemet Land Company and the Lake Hemet Water Company. These two corporations were in all essentials under identical ownership and control, with the same stockholders, boards of directors, offices and letterheads. From time to time Mr. Whittier acquired the interests of his associates, and at the time of this hearing, in January, 1916, he was the sole and real owner of both corporations, owning all the stock in equity and all of the stock in law, saving a few shares outstanding and used to qualify the members of his directorates. Sixty per cent of the stock of the Lake Hemet Water Company was originally issued to Mr. Whittier and his associates in

consideration of their transfer to the corporation of their interests in the land along and adjacent to San Jacinto river, and of their water, water rights, and claims to water pertaining thereto, and, in addition, of similar rights and claims to the waters of South Fork, North Fork, and Strawberry creek, tributaries of the San Jacinto river. To the Hemet Land Company they conveyed their interests in the lands of Estudillo, Stone, and Jordan which they had acquired, and under the ownership of the Hemet Land Company these lands became known as the Hemet tract. In 1887 Mr. Whittier caused the survey of these lands to be made and recorded. It was known as the 'map of the lands of the Hemet Land Company and of the 3,000-acre Estudillo tract.' This map was adopted by the Hemet Land Company. Upon it a town site embracing 160 acres was delimited, and the Hemet Land Company dedicated the streets and avenues thereon designated and named to public use, reserving therefrom, however, certain rights of way for street cars, steam cars, telegraph lines, sewers, gas conduits, 'flumes and water pipes for domestic use or irrigation purposes.' During this year also the Lake Hemet Water Company and the Fairview Land & Water Company adjusted and settled their conflicting claims to these waters, as will be found adequately set forth in *Copeland v. Fairview Land & Water Co.* 165 Cal. 148, 131 Pac. 119. The Lake Hemet Water Company in this year carried a pipe line into this 160-acre tract where the town or city of Hemet now is and established a public watering trough therein. Aside from the question of dedication, this was the first actual devotion to public use of any of the waters of the company. Lots were sold in the town site, homes and other structures erected, and the applicant supplied them with water from its system. In 1891 the applicant began the construction of the Hemet dam on South Fork, and completed it in 1895, and contemporane-

ously constructed a diverting, transmitting, and distributing system to deliver water for irrigation and domestic purposes to, and was at the time of the hearing delivering water upon, practically all of the lands as shown on its official map.

"If it has not already become apparent it soon will be that so far as Mr. Whittier and his associates are concerned, this was a purely private business venture for purposes of legitimate private gain. Vast areas of land in Southern California are valueless (except for grazing purposes) unless artificially supplied with water. Because of this, two methods of meeting the exigencies arose and both came into common use,—the one the method whereby certain landowners associated themselves together and expended money in securing water to be used on their own lands, forming for this purpose a mutual water company; the second, the method here put in practice, whereby men of means—for only men of means could do this thing—secured tracts of land at almost nominal prices (because the land without water had so little value), upon which lands they knew or believed they could put water. They then developed their water system and advertised the lands with appurtenant water rights for sale at a greatly enhanced price. The latter was the method here adopted by Mr. Whittier and his associates. In some of the minor details these companies moved along different plans. In their essentials, however, the methods were the same. Sometimes with the land went proportionate shares of water stock to the purchaser, entitling him to the use of a given amount of water on his land. Sometimes the land and water rights were held by a single corporation, and the conveyance of the land in express terms carried with it the right to the use of a given quantum of water. Mr. Whittier and his associates, soon after the official map of the Hemet Land Company was approved, began to advertise and sell

these lands, and the practice is set forth in the finding of the Commission as follows: "The testimony shows that, with possible minor exceptions all water regularly sold by petitioner for irrigation (as distinguished from "extra water") was sold to persons who are owners of water-right certificates issued by petitioner. Under the plan originally formulated by Mr. Whittier and his associates, owning both Hemet Land Company and Hemet Land & Water Company, whenever a parcel of land was sold by Hemet Land Company the purchaser of such land desiring water thereon was obliged to purchase a water-right certificate from Hemet Land & Water Company. Later, when other lands were purchased by Mr. Whittier and his associates, in addition to the original Hemet tract, a similar arrangement was made. The land company sold the land and the water company sold so-called "water certificates." These certificates entitled the holder to 1 miner's inch of water for 8 acres of land.'

"On the average these land purchasers paid \$75 per acre for their land and \$75 per acre for their water rights appurtenant to their land. The company issued prospectuses in 1887, 1902, and 1906, each prospectus in similar language declaring that 'each purchaser of land in the Hemet tract is provided with a contract calling for both a domestic and irrigation supply of water. Domestic water is free during the irrigation season, and \$1 per month for each family the remaining five months. The irrigation supply costs \$2 per acre per annum. Each acre of land under this contract is entitled to  $\frac{1}{8}$  of a miner's inch of water, continuous flow, during the irrigation season. That is, the water right is inseparable and is only transferable with the land.' These water-right certificates contained a binding obligation upon the water company to deliver to the purchaser a constant flow of 1 inch of water for each 8 acres on his designated land during the irrigation season,

with a right to cumulate the water, under such regulations as would best subserve the interest of all parties. The purchaser agreed to pay, and did pay, the \$75 per acre or such other sum as might have been designated in the contract for this water right, and the further sum of \$2 per acre while the contract remained in force. The use of the water was limited to described land. Provision was made for the use of water for domestic purposes as above outlined. The contract bound all assignees or successors in interest, but could not be assigned by the purchaser without the written consent of the water company. At the time of the hearing these water-right certificates covered 69 acres at an annual rate of \$5 per acre and 5,874 at an annual rate of \$2 per acre. The applicant also announced special rates, whereby the owners of these water-right certificates could, when the quantity of water which the applicant possessed justified it, secure extra water for irrigation at fixed rates, measured by the California miner's inch for all excess water above that provided for in the water certificates,—10 cents an inch when there was a large abundance of excess water, 25 cents an inch when there was an abundance of water immediately preceding the opening of the regular irrigation season, April 14th, and 50 cents an inch during the period of the irrigation season proper.

"The quantity of water which can be supplied by the applicant is limited. Of that 'net, safe yield,' not to exceed 3 per cent, and perhaps but  $1\frac{1}{2}$  per cent, is actually required and used by the city of Hemet. All the rest of this 'net, safe yield' is used under these water certificates, and after such use there is a protective remainder of water amounting to but 3 or 4 per cent of the total supply. This, of course, takes no account of excess waters, which being occasional, are not to be depended upon. Thus approximately 94 per cent of the waters of applicant are devoted to use under

its water-right certificates, 3 per cent in supplying the needs of the municipality and citizens of the city of Hemet, while the remaining 3 per cent remains in storage.

"The articles of incorporation of the Lake Hemet Land & Water Co. declared the purposes of the corporation to be 'to acquire by purchase and appropriation water and water rights and to develop water and to use, hold, and enjoy the same, . . . and to acquire all other and further easements necessary for the storing, conveyance, use, sale and other disposal of such water in the county of San Diego and elsewhere in the state of California; and to construct dams, reservoirs, flumes, and ditches and other conduits for the storage and distribution thereof; and to supply the inhabitants of the towns in San Jacinto valley with pure water for domestic purposes.'

"The petition of applicant to the Railroad Commission to fix its water rates upon the asserted ground that it was a public service corporation was based upon the allegation that the remuneration which was received by the applicant from the existing rates was wholly inadequate. In brief, the time had come when the applicant, Mr. Whittier, concluded that the duty was an onerous one and he sought a repudiation of these contracts and water-right certificates upon the ground, unquestionably sound in law, that if the corporation which entered into the contract was, at the time of entering, a public service corporation, these contracts were subject to modification at the instance of the Commission. *Southern P. Co. v. Spring Valley Water Co.* 173 Cal. 291, L.R.A.1917E, 680, 159 Pac. 865; *Limoneira v. Railroad Commission*, 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033. Certain facts in addition to those above set forth were presented to the Commission. Beginning with the year 1912, in response to a general order issued by the Commission to all public utilities, this applicant filed its schedule of rates, rules, and regulations for

the service of water for irrigation and domestic use, and did so each year thereafter. The applicant further recognized its own character and the jurisdiction of the Commission by making an application before it for an order authorizing the sale of certain of its properties. No doubt can be entertained but that from 1912 Mr. Whittier, who, as the sole owner of these corporations, may be indifferently regarded with the water company itself as the applicant, did all that lay in his power to declare the company to be a public service corporation and to destroy the water rights of these petitioners, for which water rights he had received the sum of \$438,938.60.

"The next series of facts presented to the Commission comes, first, from the testimony of Mr. Whittier as to the 'policy' of the water company, which was to sell its water 'to everyone that wanted water.' Mr. Whittier, at the time he gave this testimony, was eighty-four years of age. But Mr. Whittier further testifies that he is giving his evidence from his recollection, and that he is quite sure the records are better evidence, and this, of course, may not be questioned. The final fact before the Commission is that the applicant established and maintained a public watering trough on the town site of the present city of Hemet before it issued any of its water certificates.

"It is well now, for a clear understanding of the question, to epitomize the position of these petitioners. They concede that the applicant is a public service corporation in so far as the city of Hemet is concerned, and as to the amount of water which that city does or may require. They will not object to a finding that such present or future needs on behalf of the city constitute a first and preferential right to the use of the water. They insist, however, that, subject to that public use only, they have a private right in ownership by virtue of their water-right certificates to the use of all water provided for in those

certificates; that their rights, being private rights, are governed wholly and exclusively by their contracts. Next, as to the excess waters, the rates for which have been fixed by the applicant itself, their attitude is one substantially of indifference as to whether or not the rates to be charged for those waters shall or shall not be fixed by the Commission.

"The position of the Commission, and of the applicant before it, is, first, that, under the facts above set forth, applicant was from the time of its creation, and continuously thereafter, a public service corporation, and that it had dedicated all of its waters to public use; second, that whether or not it had so dedicated its waters and properties to public use, by virtue of the laws of this state and their definition of a public utility, the applicant was such a public utility. Necessarily resulting from the upholding of either of these positions it is declared (and granting the premise the conclusion is unescapable) that all of these water-right certificates were, in contemplation of law, issued subject to the rate-fixing power of the Commission, and that therefore in so fixing the rates in derogation of these contracts no right of contract is violated.

"1. Treating first of the facts above set forth as establishing or failing to establish the public service character of applicant, it may at once be said that when it engaged to supply the town site and the succeeding city of Hemet with water for municipal and domestic purposes, and proceeded to do this thing, it became a public service corporation, at least in so far as the needs, present or future, of the growing city of Hemet, were concerned. But, of course, it does not follow, either in law or in reason, that because of this it had dedicated all its water to public use. To-day the city of Hemet requires but 1½ per cent, or, at the utmost, 3 per cent, of those waters. It would be

Public utility—  
water supply  
company.

little short of ridiculous to contend that upon the 97 per cent remaining had been imposed the same servitude. Our decisions fully recognize that a private water company may be organized to sell water for purposes of private gain, and not in so doing become a public utility. *Thayer v. California Development Co.* 164 Cal. 117, 128 Pac. 21. Further, that a company having a single and undivided supply of water (if that circumstance be considered of consequence) may devote its properties and a part of those waters to public service, and may retain a part for the advantages of private sale, and not become a public service corporation as to all by virtue of the dedication of a part. *Leavitt v. Lassen Irrig. Co.* 157 Cal. 83, 29 L.R.A. (N.S.) 213, 106 Pac. 404; *Thayer v. California Development Co.* supra; *Del Mar Water & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948. Manifestly, the applicant did not become a public utility merely by itself fixing the rates and charges for the water which it sold, nor could its submission to the jurisdiction of the Railroad Commission, and its declaration that it was a public utility, in the slightest affect the previously vested rights of these petitioners. Herein

—sale under  
private contract  
—effect.

—claiming to  
be public  
utility—effect.

this case is broadly differentiated from that of *Francioni v. Soledad Land & Water Co.* 170 Cal. 221, 149 Pac. 161. In the last-named case a private corporation had been delivering water for private use under contract. It petitioned the proper authority to fix the rates to be charged for this service. The landowners who had been receiving water under private contract acquiesced in this petition and the rates were fixed. These rates were acted upon by all the parties in interest without question or dissent. Thereafter the company sought to amend its articles of incorporation and declare therein that it was supplying water 'as a private corporation, and not as a public water company,' and this court held

that it was within the power of a private corporation to change the character of its use, with the assent of the recipients of the water under private contract, that this change had been so effected, and, the property having thus become stamped with a public use, it was not within the power of the corporation alone to change that use back to a private use, as it undertook to do. So, while a public service corporation cannot, out of these waters impressed with a public use, sell private or preferential water rights, a private corporation can and may. *Leavitt v. Lassen Irrig. Co.* supra; *Byington v. Sacramento Valley West Side Canal Co.* 170 Cal. 124, 148 Pac. 791. Of course, the purposes avowed in articles of incorporation do not fix the character of the corporation in its future activities as being a public service corporation. Such declarations of purpose merely serve to give the corporation capacity to engage in such public service if it shall so desire. *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948.

"So far as weight is to be attached to the purposes of the organization of the applicant as expressed in its articles of incorporation, amongst those purposes is one 'to supply the inhabitants of the towns in San Jacinto valley with pure water for domestic purposes.' But this, standing alone, constitutes no dedication of applicant's properties to a public use. A most thorough and elaborate exposition of this, and, indeed, it may be added, of many other matters pertaining to this consideration, having been made by this court in *Thayer v. California Development Co.* supra, better cannot be done than to quote at some length from that exposition:

"The language plainly imports that the right, when acquired, is the property of the person who claims it and takes the steps prescribed to gain it. . . . The property does not become impressed with a public

use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically the latter must follow the former and cannot precede or accompany it. An "appropriation of water" under the Code is therefore not, ipso facto, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use. . . .

"According to the theory of the plaintiff in this case, whenever the owner of a water supply determines to and does sell it for a price agreed on between himself and the purchasers, it immediately becomes subject to public use, and any other person to whom it can be conveniently distributed in the same manner would have the right to a proportionate share of the water on the same terms as the purchasers, and, if the supply is limited, the first purchasers must divide with all others who may come in and claim a share. Under that theory, where a person having a surplus of water parts with a portion of it by sales to others, he thereby appropriates such portion to purposes of sale and dedicates it to public use. This application of the section would destroy private rights in water and convert every sale thereof into a dedication to public use. We do not believe that the Constitution was intended to have such effect, or that it should be so construed. Article 14, taken as a whole, shows plainly that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. It could not have been intended to declare that a single sale of a part of his water by one having more than he needs would convert the use into a public use in which others

—declaration of intent to supply towns with water.

could share. If a single sale could not do this, other sales of like character would not accomplish it. The section must be understood to apply to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale. To compel such a subdivision and distribution of water supplies as this construction would entail would destroy the value of all water rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, as far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage therein, such enterprises would be discouraged, the development, growth, and progress of the state would be much retarded, and its productive capacity greatly decreased.

"This provision of the Constitution has been in force thirty-three years. It has never been understood that it had the effect here contended for. There have been many instances in which the owners of large tracts of land have acquired water, conducted the same to the land, and sold and conveyed the land in small tracts to actual settlers with a proportionate share of the water appurtenant to the land, coupled with an agreement to continue the water supply at a fixed annual rate. Such a disposition is essentially a matter of private contract, and it shows no intent to create a public use."

"The quotations above given relieve from the necessity of any further exposition of the matter. This

applicant did carry out this declared purpose by dedicating so much of its water to public use as was or might be necessary to supply the town of Hemet. Further than that it has not gone. Further, the articles of incorporation as to the purposes declare that the corporation will acquire its water and water right 'by purchase and appropriation,' both methods being wholly within the purview of private ownership of such rights when acquired. It is not without significance that there is omitted therefrom the declaration of the right to acquire by condemnation, which right runs only with a public service; and of similar significance is the fact that when this applicant, in the course of its activities, needed to acquire, and did acquire, certain rights of way, it did not undertake to do so by condemnation, but effectuated its purpose by purchase.

"To hold that property has been dedicated to a public use is 'not a trivial thing' (San Francisco v. Grote, 120 Cal. 60, 41 L.R.A. 335, 65 Am. St. Rep. 155, 52 Pac. 127), and such dedication is never presumed 'without evidence of unequivocal intention' (Niles v. Los Angeles, 125 Cal. 572, 58 Pac. 190). The character of the contracts evidenced by these water-right certificates, the restriction upon transfer, the fixing of the acreage quantum, the enormous sum in the aggregate paid by these petitioners for their water rights, establish beyond the need of further discussion that the parties to those contracts believed that they were dealing in their private capacities and selling and receiving water for private use. But one suggestion here is sufficient. Is it conceivable that these landowners would have given Mr. Whittier and his associates a bonus of \$438,938.60 for the right to use water, which right the law had given them without the expenditure of one dollar of it?"

Evidence—  
dedication to  
public use—  
presumption.

"Upon this branch of the case,



then, the conclusion is inevitable that the applicant was not, as to all of its water and properties, a public service corporation, and that these petitioners entered into their contracts with applicant, both parties to each contract acting as of right in their private capacities. Nothing in the cases relied on by respondents militates against this conclusion. *Franscioni v. Soledad Land & Water Co.* 170 Cal. 221, 149 Pac. 161, has already been considered. In that case there was an acquiescence upon the part of the holders of private contracts to change in use from private to public. Here the holders of such contracts are protesting and have protested from the moment that it appeared that their contractual rights might be impaired. *Limoneira v. Railroad Commission*, 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033, was a case where the company was indisputably a public service corporation, but it had entered into two agreements which were asserted to be private and beyond regulation. It has heretofore been said that such private right cannot be carved out of a public use (*Leavitt v. Lassen Irrig. Co.* 157 Cal. 83, 29 L.R.A.(N.S.) 213, 106 Pac. 404), and the decision of this court upholding the jurisdiction of the Railroad Commission was based upon this ground, this court recognizing that if a new appropriation had been made by the company, waters from which appropriation were to be devoted to this private use, it might well be held that the contracts were of private character. But, so reads the decision, 'there is nothing to compel the conclusion that there was any new appropriation of water to enable the utility to satisfy the requirements of these contracts.' *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 380, P.U.R.1917A, 447, 160 Pac. 228, is of no value to the present consideration, since the contracts there under review in themselves provide for a rate which should be

'fixed by public authority.' And, finally, it may be added upon this matter that in *Copeland v. Fairview Land & Water Co.* 165 Cal. 148, 131 Pac. 119, this applicant here contended, and successfully contended, against the position which it now takes, the position there taken being that it was not a public service corporation. We do not cite this as being a determinative adjudication upon the question, but it serves at least to illustrate the changeable views which the applicant has entertained of its own activities, functions, and duties. In all respects vital to this consideration these certificates are of the character of those considered in *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L.R.A.(N.S.) 359, 93 Pac. 858. In the *Thayer Case*, supra, it was decided that the sale in gross by a water company of water to a mutual water company was not a dedication of such waters to public use. In *Marin Water & Power Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767, it was decided that a sale and delivery of water by a water company to a municipality owning its own water system, to be sold by the municipality to its inhabitants, was not a dedication of such water so sold in gross to a public use so that the gross rates were subject to municipal regulation. It is not possible to see how, in the light of the principles upon which these adjudications are rested, it can be held that these private contracts with private individuals for a private supply of water upon their private lands was a dedication of such waters to public use.

"2. The second position adopted by respondents, as above outlined, is that this applicant is a public service corporation, without regard to the question of the dedication of its properties to public use, by virtue of the definitions of such public service corporations found in our law. To begin with, the Constitution, art. 12, § 23, declares that every private corporation furnish-

ing water 'either directly or indirectly, to or for the public . . . is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission.' Further, this section of the Constitution declares that 'every class of private corporations, individuals, or association of individuals, hereafter declared by the legislature to be public utilities, shall likewise be subject to such control and regulation.' And, finally, this section provides that the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is plenary and unlimited by any provisions of the Constitution. Pursuant to this constitutional definition and grant of power, the legislature in 1913 (Stats. 1913, p. 84, chap. 80) declared: "Whenever any . . . corporation . . . sells, leases, rents or delivers water to any person, firm, private corporation, municipality, or any other political subdivision of the state whatsoever, except as limited by § 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the Public Utilities Act of this state and the jurisdiction, control and regulation of the Railroad Commission of the state of California."

"And the Public Utilities Act (Stat. 1915, p. 115) defines a water corporation in the following language: "The term "water corporation," when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state."

"It must in this be recognized that the Constitution of this state, and the legislature in pursuance of it, has undertaken to put out of existence any and all private rights in the matter of the rental or sale of water. So far as our Constitution and laws are concerned, the

state has done this thing. There stands between it and its enforcement, so far as this court is concerned, only the Constitution of the United States, which, as the supreme law of the land, is, whenever it speaks, the supreme law of this state.

Constitutional  
law—impair-  
ment of obliga-  
tion of contract  
—state  
Constitution.

"What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public; he invites and is urgent that the public should deal with him. The character of his business is such that, under the police power of the state, it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency

Public utility—  
definition.

under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority, as expounded by Mr. Lewis (Em. Dom. §§ 164 et seq.), but is the definition repeatedly announced by this court. Thus, in *Pinney & B. Co. v. Los Angeles Gas & E. Co.* 168 Cal. 12, L.R.A.1915C, 282, 141 Pac. 620, Ann. Cas. 1915D, 471, explaining that it is not the use which the consumer makes of the commodity which constitutes the test as to whether or not the owner or purveyor of that commodity is a public service corporation, it is declared: "It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility."

"To the same effect is *Thayer v. California Development Co.* 164 Cal. 117, 128 Pac. 21, while in *Del Mar Water Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 596, it is declared that 'even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment.'

"Our Constitution and our statutory definitions above quoted, therefore, must be construed as applying

only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. For if the latter be the true construction of our Constitution and statutes, then manifestly in their operation they are void wherever they unjustly interfere with private property or private contractual rights by force of article 1, § 10, and of the 14th

Constitutional  
law—construction—  
declaration  
of public utility.

Amendment of the Constitution of the United States. If the first alternative be selected, then, for reasons already given, such parts of these properties as are affected by the contracts with these petitioners have not been devoted to public use, and their private contractual rights must prevail.

"For these reasons the determination, conclusion, and judgment of the Commission that these petitioners' contractual and vested rights are subordinate to the regulatory powers of the Commission is in excess of the Commission's jurisdiction, and therefore void, and in so far the decree of the Commission is annulled."

We concur: **Lorigan, J.; Melvin, J.; Richards, Judge pro tem.**

**Wilbur, J., dissenting:**

I dissent. The main opinion holds that our state Constitution, and laws passed in pursuance thereof, authorizing the Railroad Commission to fix rates for the use of water, are in conflict with the Federal Constitution prohibiting the impairment of contracts, and are to that extent void and of no effect. It concedes that the state has exerted to the full all its sovereign powers to regulate and control the rates for the use of water, but holds the state to be impotent in the presence of the private rights to water and its distribution in this case. I concur in the main opinion in so far as it holds that the right to water ( $\frac{1}{2}$  inch per acre) is a private right. It was so held in *Thayer v. California Development Co.* 164 Cal. 117, 128 Pac. 21, and the subsequent constitutional amendment and statute must be held to have been adopted in view of that decision. But the decision of the Railroad Commission does not interfere with that right. To an understanding of the case it is essential that some facts disclosed by the record be stated in addition to those set forth in the main opinion. The contracts under which the petitioners claim, in addition to securing to them a certain

amount of water, require the water company to deliver such water "at such points on the pipes or conduits of the party of the first part (water company) as may be nearest the land" of the grantee. The contract thus recognizes that the distributing system belongs to the water company. For this system the water company has expended \$447,000, paid in by its stockholders. It has also received \$438,938.60 from the sale of its water, a part or all of which was expended in payment of current expenses. It would cost \$657,385 to reproduce the distributing system. That the water company has done all in its power to dedicate its water and its distributing system to a public use is held in the main opinion, and that, having conceded and invoked the jurisdiction of the Railroad Commission, the water company should be bound by its dedication, is held in *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 380, 384, 160 Pac. 229, where it is said by the court in banc: "It appears that in December, 1912, the Palermo Company applied to the Railroad Commission to have its rates for water established, and that the Commission made its order allowing an increase in the rates theretofore in effect. 3 Cal. R. C. 1247. The case, therefore, falls directly within the doctrine of *Franscioni v. Soledad Land & Water Co.* 170 Cal. 221, 149 Pac. 161, where we held that, as against the water company, such submission to the authority of the regulating body was effective to 'change the use from a private and particular use to a public use so as to make the service and terms of delivery subject to regulation and control by public authority.' No valid distinction can be drawn between the *Franscioni* Case and the one before us."

In the instant case the owners of property costing \$657,385 to reproduce dedicate the same to a public use, and the state, through its Constitution, its laws, and its duly accredited representatives, accepts

and acts upon such dedication. It is held in the main opinion that such dedication of such property is ineffectual. If it is once conceded that the distributing system is, or has been, dedicated to a public use, it follows that the rates to be charged for the use thereof are to be fixed by public authority, and that the inhibition of the Federal Constitution against the impairment of contracts does not apply, even though rates in excess of the contract rates are fixed. *Limoneira Co. v. Railroad Commission*, 174 Cal. 232, 162 Pac. 1033. The main opinion holds that the purchasers of the water contracts not only secured a right to the water, but also secured an easement in the distributing system attaching to the land, and thus have a property right in the pipe lines; citing *Stanislaus Water Co. v. Bachman*, 152 Cal. 726, 15 L.R.A.(N.S.) 359, 93 Pac. 858; *Copeland v. Fairview Land & Water Co.* 165 Cal. 154, 131 Pac. 119; *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 386, P.U.R. 1917A, 477, 160 Pac. 228. If we hold that the owners of water certificates have a property right so definite in the pipe lines and distributing system as to prevent the dedication thereof to a public use by the water company, it would seem that such owners should at least bear the corresponding burden of the maintenance thereof, including their proportion of the expense of distribution of the water contained therein, particularly as against the public also served thereby. The Railroad Commission finds that the system has at all times been run at a loss. Neither the public nor the private users of water have paid their proportion of the expense of maintenance. The annual loss, including depreciation, now approximates \$30,000. The proportion thereof properly apportioned to the owners of water certificates (94 per cent, according to the main opinion) would be \$28,200. If the system is to remain a going concern, this amount, at least, must be assessed

upon the public users (the 3 to 6 per cent), if the private users cannot be required to pay more than the contract rate. The holders of water certificates bought with knowledge that the system was used and to be used to distribute water devoted to a public use. By thus consenting that public waters, mingled with their private waters, could be conveyed through the distributing system in which they have an interest, they assented to the use of their property (the pipe line) for a public use. If they owned the whole pipe line and thus used it, it must be conceded that they thereby dedicated the same to a public use. Why does not their assent to such use of their undivided right therein necessarily constitute such a dedication thereof to a public use? Their rights in the water and in the system can be recognized by the Railroad Commission in fixing rates. A rate proportionately lower than that imposed on those having no property right in the water or distributing system can be fixed. Although it is conceded that the statute authorizes the fixing of rates by the Railroad Commission in this case, if constitutional, it is well to observe that the commingling of public and private waters in a privately owned distributing system is expressly made a basis of the jurisdiction of the Railroad Commission. Stat. 1913, p. 84, §§ 2-4.

"Sec. 2. Whenever any private corporation or association is organized for the purpose solely of delivering water to its stockholders or members at cost, and delivers water to no one except its stockholders or members at cost, such private corporation or association is not a public utility, and is not subject to the jurisdiction, control or regulation of the Railroad Commission of the state of California.

"Sec. 3. Whenever any private corporation or association organized for the purpose of delivering water solely to its stockholders or members at cost does deliver water to

others than its stockholders or members for compensation, such private corporation or association becomes a public utility and subject to the terms of the Public Utilities Act and the jurisdiction, control and regulation of the Railroad Commission of the state of California.

"Sec. 4. Whenever any private corporation or association is organized both for the purpose of delivering water to its stockholders or members at cost and to persons, firms, corporations, municipalities or other political subdivisions of the state in addition thereto, such private corporation or association is a public utility and subject to the provisions of the Public Utilities Act and to the jurisdiction, control and regulation of the Railroad Commission of the state of California." Stat. 1913, p. 85.

It is, of course, the duty of the Railroad Commission to recognize private and constitutional rights and fix the rates with reference thereto. In this case, while finding, erroneously, as we hold, that all the water distributed by the water company was dedicated to a public use, it nevertheless refused to consider the value of the water as a basis for fixing the rates, and, although the water company at first sought a reasonable interest upon the alleged value thereof (\$494,000), the company abandoned its claim, and the Railroad Commission refused to recognize it. In short, in effect, the water users who had paid \$438,000 therefor were recognized as entitled to water claimed to be worth \$494,000. The Railroad Commission fixed rates for water that would pay the operating and maintenance expenses and give a revenue to the company on a capitalization of less than one half of the value of their distributing plant. It seems clear that the water company and the certificate holders, by express dedication and by necessary implication, have consented to the jurisdiction of the Railroad Commission in so far as the distributing system is concerned, and that, therefore, it

has jurisdiction, and that in the exercise of that jurisdiction it has not violated any rights of petitioners in the water or distributing system, such as would justify our interference. I therefore conclude that the jurisdiction of the Railroad Commission may be well predicated upon the consent of the water company and the implied consent of the certificate holders whose property rights are given due consideration by the Railroad Commission. It is also true, I think, that the business of storing, conserving, and distributing water, whether privately owned or dedicated to public use, to large tracts of land for the use of large numbers of persons for domestic and irrigation purposes in an arid state, particularly where such distributor enjoys a monopoly, is so clearly a matter of great public concern as to justify the people in declaring that such business is a public utility. It is unnecessary to give reasons in detail for such an obvious conclusion, but it may be noted that changed labor conditions, increased cost of supplies and materials necessary to maintain such distributing system, bankruptcy, termination of corporate existence, or death of individuals furnishing water, all have a marked effect upon the ability of the distributor to distribute water, and upon the public so furnished with water, and that the ordinary remedies for breach of contract to distribute or deliver water, or equitable actions to protect and enforce such contract rights, would be wholly inadequate to protect the public directly and indirectly affected by such failure and the consequent damage. Many of these considerations, however, do not apply to the corporations excepted from control of the Railroad Commission, for the reason that in such mutual companies the actual cost of maintenance, whether great or small, is distributed among the water owners. As we are dealing with legislation that definitely and clearly authorizes the fixing of the rates for the water

company under constitutional provisions, authorizing such legislation and providing for such fixing of rates (art. 14, and art. 12, § 23), we need only consider whether the Federal Constitution prohibits such action, and for that purpose we must look to the Supreme Court of the United States as final and conclusive authority. The question of the limitations upon state legislative power by the Federal Constitution has been frequently under consideration by that court. Only a few cases need be noted.

In *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48, the Supreme Court of the United States said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In the case of *Munn v. Illinois*, supra, in passing upon the power of the legislature of the state of Illinois to declare grain elevators public utilities, and regulating rates for the storage and handling of grain, the Supreme Court said: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Hargrave's Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public inter-

est when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

In *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364, the rule is thus stated: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. ed. 394, 404; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. ed. 77, 84; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. ed. 989, 992; *Mugler v. Kansas*, 123 U. S. 623, 665, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 414, 415, 55 L. ed. 789, 795, 796, 31 Sup. Ct. Rep. 534."

In determining the question whether or not a business is of such public interest and concern as to subject it to regulation as a public utility, the Supreme Court of the United States holds that that question is primarily one for the legislature. In *Munn v. Illinois*, *supra*, it is said: "For our purposes we must assume that, if a state of facts could exist that would justify

such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

It seems clear from these authorities, upon the facts found by the Railroad Commission, that the state had power to declare the water system a public utility. It finds that "the consumers concede that, in so far as the supply of domestic water to persons other than the holders of water certificates is concerned, petitioner is a public utility." That the "petitioner adopted rules and regulations for the sale of water for irrigation and domestic use, which rules were printed and distributed to its consumers and referred to in petitioner's advertisements. Petitioner's business has grown from its initial supply of domestic water to the first inhabitants of what is now the town of Hemet, until in 1915, as shown by petitioner's annual report for the year ending December 31, 1915, on file with the Railroad Commission, petitioner sold water through 85 meters for irrigation, 481 meters for domestic use, 5 meters for manufacturing and power, and 6 meters for public use. During the same year petitioner sold water measured through other devices for irrigation of 5,554 acres of land. Approximately 2,500 people, including approximately 1,500 in the town of Hemet, rely upon petitioner's system as their sole source of water." That the "petitioner is a water company, incorporated under the laws of this state. It is the only water system in control of water which it sells for compensation. For more than twenty-five years petitioner has been engaged in the sale of water to the entire public on the

land to the service of which petitioner has dedicated its water. Petitioner has fixed and enforced rates, rules, and regulations for the service of water for irrigation and domestic purposes and to the town of Hemet for public purposes. Petitioner's water system consists of watershed lands, the Lake Hemet reservoir on the south fork of the San Jacinto river diversion works at four points of diversion, transmission mains of riveted steel and wood pipe, wooden flume and lined ditch and a distributing system of wooden and concrete flume, concrete and riveted steel pipe, all used in the delivery of water to wholesale and irrigation consumers. In addition, petitioner owns and operates a separate system with a separate diversion for the distribution of water through riveted steel and standard screw pipe to domestic consumers. In the operation of its system petitioner for more than fifteen years has had the control and use of 17/20 of the water of the north fork of the San Jacinto river and Strawberry creek under agreements with Fairview Land & Water Company, the owner of such waters. The safe yield of petitioner's water system is 161,000 miner's inch days annually, or 6,376 acres feet, delivering 725 miner's inches during the irrigating season."

It is also found that the water company had issued:

(a) Contracts covering 69.36 acres at the rate of \$5 per acre per year.

(b) Contracts covering 5,874.77 acres at the rate of \$2 per acre per year, and that the amount of acres irrigated was 5,554; that "petitioner's total operating expenses to December 31, 1914, were \$512,353.87; \$93,607.43 was depreciation. Total cost of operation was \$418,746.44. Total revenue, after deducting receipts from the sale of water rights,

\$239,824.47. It thus appears that the result of petitioner's operations under its rates now in effect has been a gross revenue of \$178,921.97, less than bare operating and maintenance expenses."

We are not called to pass upon the reasonableness of the rates fixed by the Railroad Commission, if no constitutional right is invaded.

I therefore conclude that the Railroad Commission had authority to fix rates under the Constitution and law:

First, for the reason that the water company had consented thereto by the express dedication of all its interest in the system, and that the Railroad Commission was empowered and required, in fixing rates, to fix them with due regard to the private ownership of the water-certificate holders in the water and the distributing system.

Second, for the reason that the owners of water certificates had consented to the use of the distributing system, and their interest therein by the public, and had thus jointly with the water company dedicated the distributing system to a public use.

Third, for the reason that the character of the business conducted by the water company and water users authorized the state to declare the same a public utility, and to provide for the fixing of rates by the Railroad Commission, whose duty it was to fix rates in due recognition of the private rights of water-certificate holders in such property, and that the intervention of this court is only proper where a clear violation of such rights appears.

Petition for rehearing denied October 31, 1918.

Petition for a writ of certiorari denied by the Supreme Court of the United States, March 10, 1919 (249 U. S. 601, 63 L. ed. 797, 39 Sup. Ct. Rep. 259).



## ANNOTATION.

### Irrigation company as a public utility.

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| <p>I. Scope: subject as related to question of eminent domain, 268.</p> <p>II. Irrigation companies as public service corporations, in general:</p> <p style="padding-left: 20px;">a. Statement of rules, 271.</p> <p style="padding-left: 20px;">b. Not strictly common carriers, 276.</p> <p style="padding-left: 20px;">c. Particular applications, 277.</p> <p>III. Mutual and private companies in general, 280.</p> <p>IV. Sale of land with water rights, 283.</p> | <p>V. Change from private to public use or vice versa; effect of incorporation, 284.</p> <p>VI. Effect of charter provisions or provisions of statute under which company is incorporated, 286.</p> <p>VII. Effect of provisions in appropriation notice, 288.</p> <p>VIII. Effect on remainder of dedication to public use of part of water supply, 288.</p> <p>IX. Effect of voluntary submission to Utilities Commission, 289.</p> |
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*I. Scope: subject as related to question of eminent domain.*

The present annotation deals with the question whether irrigation companies are public utilities, and, if not always public utilities, under what circumstances they are such. It does not cover the various questions as to rights and duties arising from such a status, once it is assumed or decided that the status of public utility exists. No attempt has been made to define or restrict to a narrow limit the term "public utility;" but the annotation aims to include cases in general which involve the question of governmental or judicial control of irrigation companies on the ground that they are affected with a public interest.

At the outset of the present discussion arises the question of the relationship of the question herein considered to that of the right of irrigation companies to exercise the power of eminent domain. It may be said in general that in some jurisdictions the fact that an irrigation company is clothed with the power of eminent domain, and exercises that power, is considered as marking it as in some sense, at least, affected with a public interest, and as separating it from the class of mere private corporations. But this does not appear to be the universal rule. Both on principle and authority, it would seem that a company formed for the purpose of irrigating land in an arid state might conceivably be regarded as taking its land for a canal for a public

purpose within the meaning of eminent domain statutes, and yet, because of the circumstances of its delivery of water to consumers, might not be regarded as a public utility in the sense that it could be compelled to deliver water generally to all under its canal who applied, or could be compelled to furnish water on rates and terms fixed by a utilities commission. The differences in the views of the courts will appear from the authorities herein cited. But since these views are divergent, and cases on the question of the right of irrigation companies to exercise the power of eminent domain are not conclusive in their reasoning, irrespective of the conclusion reached, on the question whether irrigation companies are public utilities, it seems desirable in the present annotation to point out these distinctions and the relation of the present question to that of eminent domain, rather than to cover the latter question.

In *Kinney on Irrigation & Water Rights*, vol. 3, pp. 2613, 2614, it is said: "As far as the use of the water appropriated and controlled by private water companies is concerned, whether they are incorporated or unincorporated, under the later authorities, a distinction must be observed between the terms 'public use,' and 'public service.' An individual may alone be engaged in the conducting of water from a natural source of supply solely for the purpose of irrigating his own tract of land, and such a use of the

water is deemed a public use, for the utilization of which he may condemn a right of way over the private lands of others, yet it could not be contended for an instant that this person was engaged in a public service, as the term is used in connection with public service companies. Again, to carry our illustration further, a group of individuals owning lands in the same immediate neighborhood, and each owning a water right, which he used to irrigate his own particular tract, may band themselves together and organize a water company, either incorporated or unincorporated, for the purpose of furnishing water to others, and the use to which the water is put is a public use, yet this company, where the distribution of the water is exclusively to its shareholders, is not a public service company, or comes within the restrictions imposed by the statutes regulating such companies. 'Public service' or 'quasi public' water companies, may be defined as those companies, either incorporated or unincorporated, which are engaged in the business of furnishing or carrying water for hire, to all consumers who can be provided with water under their systems, and who may apply for the same, up to the full capacity of such systems. Such a company is, therefore, a public agency, and the use to which the water is put is also a public use."

And in *Nampa & M. Irrig. Dist. v. Briggs* (1915) 27 Idaho, 84, 147 Pac. 75, in reply to the contention that the plaintiff irrigation district was a public service corporation, the court said: "The appellant is not a public service corporation in the sense that it is a common carrier to any other or greater extent than the term implies when applied to its own membership, and confined to the business of carrying water for the irrigation of lands within its own district. It is a mutual, co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district. . . . It is true, as has been suggested, that a corporation such as the appellant is may exercise the power of eminent domain,

but it must be remembered that in Idaho the right to take private property for a public use, upon payment of just compensation therefor, does not, of necessity, constitute a corporation invested with that right a public service corporation in the sense that the public may exact any service from it."

The distinctions above referred to appear more clearly from consideration of the case of *Nash v. Clark* (1904) 27 Utah, 158, 1 L.R.A.(N.S.) 208, 101 Am. St. Rep. 953, 75 Pac. 371, 1 Ann. Cas. 300, affirmed in (1905) 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171. Referring to the term "public use" for which property may be taken under eminent domain, the court, in holding that the reclamation of land by irrigation was such a public use that the legislature might lawfully authorize the condemnation of a right of way over private property to convey water for that purpose to land belonging to a private individual, stated: "What is a public use cannot always be determined by the application of purely legal principles. This is evidenced from the fact that there are two lines of authority, neither of which attempts to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies, —that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in harmony with enlightened public policy, and the liberal interpretation given the term 'public use' which the legislature has, in effect, declared shall be followed in this state, is far more conducive to individual and public advancement than the

restricted construction adopted and followed by the line of decision first referred to."

The rule was laid down in *State ex rel. Galbraith v. Superior Ct.* (1910) 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429, in holding that an irrigation company, assumed to be under no obligation to serve the public, might exercise the power of eminent domain; that the test of public use in the acquisition of water rights and rights of way for canals and ditches for irrigation purposes is not necessarily the service the party seeking to acquire such rights may be compelled to render to the public in connection therewith. The court cited a provision of the state Constitution that private property should not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches for agricultural purposes.

There are, however, some cases in which the courts closely associate the question of the exercise of the power of eminent domain with the question whether the irrigation company is affected with a public interest as a public or quasi public corporation.

Thus, in *Raywood Rice Canal & Mill Co. v. Erp* (1912) 105 Tex. 161, 146 S. W. 155, the court, in connection with a ruling which involved the view that an irrigation company was a quasi public corporation, stated: "The granting of the power of eminent domain imposes a public service in return. No authority under our law exists for conferring the power of eminent domain for private use. The moment such power is granted, the grantee becomes quasi public in character, and while his or its functions are exercised for profit, they must be exercised in the interest of the public, upon reasonable terms and without discrimination. This is the rule, independent of statutory enactment."

And in *Colorado Canal Co. v. McFarland* (1906) — Tex. Civ. App. —, 94 S. W. 400, the court stated that the power of eminent domain could be granted only for a public use, and that when it was conferred by law, as in that state, on irrigation companies,

their status as quasi public was fixed, regardless of whether the power was exercised or not.

Although holding the irrigation company in question, which had not exercised the power of eminent domain, not a public utility within the meaning of a statute requiring public utilities to make certain reports to the secretary of state, the court in *State ex rel. Coco v. Riverside Irrig. Co.* (1917) 142 La. 10, 76 So. 216, stated that the statutes conferred on corporations organized for the construction and maintenance of canals, and specifically accepting the statutory conditions, the right of eminent domain and other privileges, which would probably convert those which accepted into public service or public utility corporations.

After holding that water of an irrigation company had not been dedicated to public use, the court in *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128 Pac. 21, stated that it would follow, as a matter of course, that the company did not possess the power of eminent domain.

And in *Gravelly-Ford Canal Co. v. Pope & T. Land Co.* (1918) 36 Cal. App. 556, 178 Pac. 150, it was held that the California statute declaring irrigation to be a public use, and providing that the power of eminent domain might be exercised on behalf of such use, should not be construed as authorizing condemnation of property by a private irrigation company not proposing to deliver water to any except its own stockholders.

In *ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249, the court, in holding that the irrigation company in question had not dedicated its water to a public use, called attention to the fact that it had not exercised the power of eminent domain, and that its articles of incorporation declared that it would acquire its water and water rights "by purchase and appropriation."

An irrigation company which has obtained judgment in condemnation proceedings on the theory that it is exercising the right of eminent domain for the benefit of a specified district,

including the land through which the right of way is obtained, may be estopped by the judgment, as against the landowner, to deny that, so far as he is concerned, it is exercising a public use for the benefit of the landowners along the line of the ditch. *Lowe v. Yolo County Consol. Water Co.* (1910) 157 Cal. 503, 108 Pac. 297.

The annotation does not cover the question whether an irrigation canal is dedicated to a public use in the sense that it cannot be taken by condemnation proceedings for another public use, where the taking of property already dedicated to a public use is unauthorized. See, for example, *Albuquerque v. Garcia* (1913) 17 N. M. 445, 130 Pac. 118, holding that a community ditch in actual use for the conducting of water for the irrigation of land was dedicated to a public use, and could not be condemned by a city for use as a street.

The annotation does not cover the question whether irrigation districts are public or quasi public corporations.

## *II. Irrigation companies as public service corporations, in general.*

### *a. Statement of rules.*

The increasing importance of irrigation in the arid states has led in comparatively recent years to the enactment of many constitutional and statutory provisions declaring a public use in waters appropriated for sale, rental, and distribution, and providing, in some instances, that corporations so distributing water are public utilities or common carriers. But, irrespective of whether the statute so expressly declares, it seems to be well settled that an irrigation company which holds itself out generally to serve for compensation all who may apply for water within the area served by its irrigation system is not a mere private corporation, but is affected with a public interest, and is subject to regulation and control as a public service or quasi public corporation. The view that irrigation companies are public service or quasi public corporations, or are affected by a public interest, and are not mere private cor-

porations, obtains in many cases, it appearing in most of these cases that the corporation was organized for the purpose of supplying water to the public generally in the area served by it, and not merely to its stockholders or those having fixed contractual relations with it.

**United States.**—*Gutierrez v. Albuquerque Land & Irrig. Co.* (1902) 188 U. S. 545, 45 L. ed. 588, 23 Sup. Ct. Rep. 338; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* (1903) 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *San Diego Land & Town Co. v. National City* (1896) 74 Fed. 79, affirmed in (1898) 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897) 79 Fed. 39; *Mandell v. San Diego Land & Town Co.* (1898) 89 Fed. 295; *San Diego Land & Town Co. v. Sharp* (1899) 38 C. C. A. 220, 97 Fed. 394; *Boise City Irrig. & Land Co. v. Clark* (1904) 65 C. C. A. 399, 131 Fed. 415; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County* (1911) 191 Fed. 875, reversed on other grounds in (1914) 233 U. S. 454, 58 L. ed. 1041, 34 Sup. Ct. Rep. 652; *De Pauw University v. Public Service Commission* (1917) P.U.R.1918C, 274, 247 Fed. 183, later proceedings to same effect (1918) 253 Fed. 848.

**Arizona.**—*Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332; *Gould v. Maricopa Canal Co.* (1904) 8 Ariz. 429, 76 Pac. 598, followed in *Salt River Valley Canal Co. v. Slosser* (1904) — Ariz. —, 76 Pac. 1125, and *Salt River Valley Canal Co. v. Van Fossen* (1904) — Ariz. —, 76 Pac. 1126; *Salt River Valley Canal Co. v. Nelsen* (1907) 10 Ariz. 9, 12 L.R.A. (N.S.) 711, 85 Pac. 117, 16 Ann. Cas. 796.

**California.**—*Price v. Riverside Land & Irrigating Co.* (1880) 56 Cal. 431; *Merrill v. South Side Irrig. Co.* (1896) 112 Cal. 426, 44 Pac. 720; *Crow v. San Joaquin & K. River Canal & Irrig. Co.* (1900) 130 Cal. 309, 62 Pac. 562, rehearing denied in (1900) 130 Cal. 315, 62 Pac. 1058; *Franscioni v. Soledad Land & Water Co.* (1915) 170 Cal. 221, 149 Pac. 161; *Palermo Land & Water Co. v. Railroad Commission* (1916) 173

Cal. 380, P.U.R.1917A, 447, 160 Pac. 228.

**California Railroad Com. Cases.—**

Re North Moneta Garden Lands Water Co. (1915) P.U.R.1915A, 645; Re Fresno Farms Co. (1915) P.U.R.1915B, 324; Ferrasci v. Empire Water Co. (1915) P.U.R.1915B, 438; Gittings v. Windsor Water Co. (1915) P.U.R.1915B, 1069; Los Molinos Citrus Farms Co. v. Coneland Water Co. (1915) P.U.R.1915F, 554; Re Lake Hemet Water Co. (1916) P.U.R.1917A, 458; Berry v. Oro Loma Farms Co. (1917) P.U.R.1917F, 631; Re Madera Canal & Irrig. Co. (1917) P.U.R.1917F, 642; Nunn v. Sutter-Butte Canal Co. (1918) P.U.R.1918E, 563; Compton v. Richfield Land Co. (1918) P.U.R.1918E, 603.

**Colorado.**—Wheeler v. Northern Colorado Irrig. Co. (1888) 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Combs v. Agricultural Ditch Co. (1892) 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; Wyatt v. Larimer & W. Irrig. Co. (1893) 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144, reversing (1892) 1 Colo. App. 480, 29 Pac. 906; Junction Creek & N. D. D. & I. Ditch Co. v. Durango (1895) 21 Colo. 194, 40 Pac. 356; White v. Farmers' Highline Canal & Reservoir Co. (1896) 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028; Farmers' Independent Ditch Co. v. Agricultural Ditch Co. (1896) 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; People ex rel. Standart v. Farmers High Line Canal & Reservoir Co. (1898) 25 Colo. 202, 54 Pac. 626; Wright v. Platte Valley Irrig. Co. (1900) 27 Colo. 322, 61 Pac. 603; Denver v. Brown (1914) 56 Colo. 216, 138 Pac. 44; Northern Colorado Irrig. Co. v. Pouppirt (1912) 22 Colo. App. 563, 127 Pac. 125.

**Idaho.**—Wilterding v. Green (1896) 4 Idaho, 773, 45 Pac. 134; State v. Twin Falls Canal Co. (1911) 21 Idaho, 410, L.R.A.1916F, 236, 121 Pac. 1039; Hanes v. Idaho Irrig. Co. (1912) 21 Idaho, 512, 112 Pac. 859; Childs v. Neitzel (1914) 26 Idaho, 116, 141 Pac. 77; Re Hughes (1917) P.U.R.1917D, 359.

**Kansas.**—Lake Koen Nav. Reservoir & Irrig. Co. v. Klein (1901) 63 Kan.

484, 65 Pac. 684 (condemnation proceeding, but right to regulate rates recognized).

**Nebraska.**—Sherman County Irrig. Water Power & Improv. Co. v. Drake (1902) 65 Neb. 699, 91 N. W. 512; Farmers Canal Co. v. Frank (1904) 72 Neb. 136, 100 N. W. 286; Sammons v. Kearney Power & Irrig. Co. (1906) 77 Neb. 580, 8 L.R.A.(N.S.) 404, 110 N. W. 308; Fenton v. Tri-State Land Co. (1911) 89 Neb. 479, 131 N. W. 1088; Farmers & Merchants Irrig. Co. v. Hill (1912) 90 Neb. 847, 39 L.R.A. (N.S.) 798, 134 N. W. 929, Ann. Cas. 1913B, 524; Enterprise Irrig. Dist. v. Tri-State Land Co. (1912) 92 Neb. 121, 138 N. W. 171; McCook Irrig. & Water Power Co. v. Buttlers (1915) 98 Neb. 141, L.R.A.1915D, 1205, P.U.R.1915C, 587, 152 N. W. 334.

**Nevada.**—Steamboat Canal Co. v. Garson (1919) — Nev. —, 185 Pac. 801.

**New Mexico.**—See Candelaria v. Vallejos (1905) 13 N. M. 146, 31 Pac. 589; also Albuquerque v. Garcia (1913) 17 N. M. 445, 130 Pac. 118 (condemnation proceedings); State ex rel. Black v. Aztec Ditch Co. (1919) — N. M. —, 185 Pac. 549.

**Oregon.**—Mutual Irrig. Co. v. Baker City (1911) 58 Or. 310, 113 Pac. 9, 110 Pac. 392; see also Eldredge v. Mill Ditch Co. (1919) 90 Or. 590, 177 Pac. 939 (recognizing quasi public nature of mutual company).

**Texas.**—Borden v. Trespalacios Rice & Irrig. Co. (1905) 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11; Imperial Irrig. Co. v. Jayne (1911) 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322; Raywood Rice, Canal & Mill. Co. v. Erp (1912) 105 Tex. 161, 146 S. W. 155; American Rio Grande Land & Irrig. Co. v. Mercedes P. Co. (1919) — Tex. —, 208 S. W. 904, affirming on this point (1913) — Tex. Civ. App. —, 155 S. W. 286; Colorado Canal Co. v. McFarland (1906) — Tex. Civ. App. —, 94 S. W. 400, later appeal to same effect (1908) 50 Tex. Civ. App. 92, 109 S. W. 435; Lastinger v. Toyah Valley Irrig. Co. (1914) — Tex. Civ. App. —, 167 S. W. 788; Louisiana Rio Grande Canal Co. v. Frazier (1917) — Tex. Civ. App. —, 196 S. W. 210;

Nueces Valley Irrig. Co. v. Howard (1918) — Tex. Civ. App. —, 206 S. W. 575; see also Granger v. Kishi (1911) — Tex. Civ. App. —, 139 S. W. 1002 (distinguishing case of individual owner of private irrigation canal); and McBride v. United Irrig. Co. (1919) — Tex. Civ. App. —, 211 S. W. 498, rehearing denied in (1919) — Tex. Civ. App. —, 213 S. W. 988.

Washington.—Shafford v. White Bluffs Land & Irrig. Co. (1911) 63 Wash. 10, 114 Pac. 888, Ann. Cas. 1912D, 133; Evergreen Farm v. Attalia Land Co. (1916) 91 Wash. 192, 157 Pac. 487; Buford v. Consumers' Ditch Co. (1916) P.U.R.1916D, 448.

The proposition above indicated as to the public or quasi public nature of irrigation companies is conceded or assumed in many cases, among which are the following:

United States.—San Diego Land & Town Co. v. National City (1899) 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Osborne v. San Diego Land & Town Co. (1899) 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860, affirming (1896) 76 Fed. 319; San Diego Land & Town Co. v. Jasper (1903) 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571, affirming (1901) 110 Fed. 702; Pioneer Irrig. Co. v. Yuma County (1916) 236 Fed. 790, affirmed in (1918) 163 C. C. A. 420, 251 Fed. 264.

California.—Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 15 L.R.A.(N.S.) 359, 93 Pac. 858; San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County (1908) 155 Cal. 21, 99 Pac. 865; Barton v. Riverside Water Co. (1909) 155 Cal. 509, 23 L.R.A.(N.S.) 831, 101 Pac. 790; Leavitt v. Lassen Irrig. Co. (1909) 157 Cal. 82, 29 L.R.A.(N.S.) 213, 106 Pac. 404; Lowe v. Yolo County Consol. Water Co. (1910) 157 Cal. 503, 108 Pac. 297, see also earlier appeal (1908) 8 Cal. App. 167, 96 Pac. 379; Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 131 Pac. 119; Byington v. Sacramento Valley West Side Canal Co. (1915) 170 Cal. 124, 148 Pac. 791; Limoneira Co. v. Railroad Commission (1917) 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033; Henrici v. South Feather Land 8 A.L.R.—18.

& Water Co. (1918) 177 Cal. 442, 170 Pac. 1135.

California Railroad Com. Cases.—Security Invest. Co. v. Palermo Land & Water Co. (1915) P.U.R.1915F, 1105; Re North Fork Ditch Co. (1916) P.U.R.1916D, 477; Re American Irrig. Co. (1916) P.U.R.1916F, 1021; Re Citizens Water Co. (1916) P.U.R.1916F, 1005; Ogden v. Pacific Gas & E. Co. (1915) P.U.R.1916F, 1061; Spafford v. Fresno Canal & Irrig. Co. (1916) P.U.R.1916F, 1061; Montague v. Pacific Gas & E. Co. (1915) P.U.R.1916F, 1061; Re Gridley Land & Irrig. Co. (1916) P.U.R.1917A, 645; Re Rogers Development Co. (1917) P.U.R.1917C, 186; Re Murray (1917) P.U.R.1917C, 521; Monte Vista Valley Bd. of Trade v. Western Empire Suburban Farms Asso. (1918) P.U.R.1918C, 748.

Colorado.—Golden Canal Co. v. Bright (1884) 8 Colo. 144, 6 Pac. 142; South Boulder & R. C. Ditch Co. v. Marfell (1890) 15 Colo. 302, 25 Pac. 504; Northern Colorado Irrig. Co. v. Richards (1896) 22 Colo. 450, 45 Pac. 423; Northern Colorado Irrig. Co. v. Pouppirt (1910) 47 Colo. 490, 108 Pac. 23; Montezuma Water & Land Co. v. McCracken (1917) 62 Colo. 394, 163 Pac. 286.

Idaho.—Green v. Jones (1912) 22 Idaho, 560, 126 Pac. 1051; Hodges v. Capitol Water Co. (1916) P.U.R.1916F, 1005; McClelland v. Mountain Home Co-op. Irrig. Co. (1916) P.U.R.1916F, 1061.

Kansas.—Western Irrig. & Land Co. v. Chapman (1899) 8 Kan. App. 778, 59 Pac. 1098.

New Mexico.—Miller v. Hagerman Irrig. Co. (1915) 20 N. M. 604, 151 Pac. 763.

Nevada.—Public Service Commission v. Steamboat Canal Co. (1915) P.U.R. 1915F, 718, later proceedings in (1916) P.U.R.1916F, 120.

Washington.—Day v. Walla Walla Irrig. Co. (1916) P.U.R.1916F, 1061.

Some cases seemingly without any distinction of the nature and purposes of different companies have used language broad enough to imply that all irrigation companies are public service or quasi public corporations, or affected with a public interest; but

the court probably was dealing with a company which held itself out generally for hire, or was relying on a special statutory declaration of the nature of such companies. Of this class of cases are the following: *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897) 79 Fed. 39; *Crow v. San Joaquin & K. River Canal & Irrig. Co.* (1900) 130 Cal. 309, 62 Pac. 562, rehearing denied in (1900) 130 Cal. 315, 62 Pac. 1058; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.* (1896) 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; *Wilterding v. Green* (1896) 4 Idaho, 773, 45 Pac. 134; *Sherman County Irrig. Water Power & Improv. Co. v. Drake* (1902) 65 Neb. 699, 91 N. W. 512; *Sammons v. Kearney Power & Irrig. Co.* (1906) 77 Neb. 580, 8 L.R.A.(N.S.) 404, 110 N. W. 308; *Fenton v. Tri-State Land Co.* (1911) 89 Neb. 479, 131 N. W. 1038; *Enterprise Irrig. Dist. v. Tri-State Land Co.* (1912) 92 Neb. 121, 138 N. W. 171; *McCook Irrig. & Water Power Co. v. Burtless* (1915) 98 Neb. 141, L.R.A.1915D, 1205, P.U.R.1915C, 587, 152 N. W. 334; *Evergreen Farm v. Attalia Land Co.* (1916) 91 Wash. 192, 157 Pac. 487.

Thus, in the syllabus by the court in *Wilterding v. Green* (1896) 4 Idaho, 773, 45 Pac. 134, *supra*, it is said that under the Constitution and statutes of Idaho the waters of the state are appropriated for rental, sale, or distribution, and when so appropriated and taken out they become a public use, and are dedicated to the public; that the owners of canals and ditches are entitled to reasonable compensation for appropriating and delivering said water, and that those owning or controlling land under the ditches or canals are entitled to waters therein upon paying or tendering to the owners of the canals a reasonable compensation for such use. See also *Bardsly v. Boise Irrig. & Land Co.* (1901) 8 Idaho, 155, 67 Pac. 428, among other cases of a somewhat similar nature construing constitutional and statutory provisions in that state declaring the use of water appropriated for irrigation purposes a public use, and entitling persons owning or

controlling land under irrigation canals to receive water therefrom on proper demand and the giving of reasonable security for payment.

The Nebraska statute, as set out in *Farmers & M. Irrig. Co. v. Hill* (1912) 90 Neb. 847, 39 L.R.A.(N.S.) 798, 134 N. W. 929, Ann. Cas. 1913B, 524, expressly declares that "irrigation works constructed under the laws of the state are hereby declared to be common carriers." And in the Nebraska cases cited above, without distinguishing between the different purposes or modes of operation of various companies, and without setting out in detail the nature of the company in question, irrigation companies have been held to be quasi public corporations.

Thus, in *McCook Irrig. & Water Power Co. v. Burtless* (1915) 98 Neb. 141, L.R.A.1915D, 1205, P.U.R.1915C, 587, 152 N. W. 334, *supra*, the rule is laid down in the headnote by the court that an irrigation company is a common carrier of water to a limited degree, and its rates and charges are subject to regulation and control; that contracts between an irrigation company and water users under its ditch, providing for the use of water and for the maintenance of the ditch, are entered into with the law as to the right of the state to regulate rates forming a part of the contract, and such rates are subject to control. The court said: "At the time the canal was built the practice of irrigation in this state was in its infancy; but from the very first the legislature recognized the public interest in the use of water from the streams of the state for irrigation purposes. It placed canal companies in the same class as railways and other common carriers, and it has uniformly been considered that their rates were subject to regulation and control. . . . The question involved is an important one, and one as to which there has been some difference of opinion; but we believe the larger and broader view—that most consistent with the spirit in which the law of irrigation should be administered, and that to which the courts are more and more tending—is that any contracts entered into between the ir-

rigation company and consumers under the ditch, with reference to the annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legislative control."

Without setting out the nature of the particular company, except that it was organized to construct a canal for irrigation and power purposes, and had used its ditch for several years for irrigation purposes, the court in *Sherman County Irrig. & Water Power Improv. Co. v. Drake* (1902) 65 Neb. 699, 91 N. W. 512, *supra*, held that the company was a quasi public corporation, and that its property was not subject to seizure and sale on execution.

And a corporation organized for the purpose of owning and operating canals, reservoirs, dams, and other works for irrigation and water power purposes was held a quasi public corporation in *Sammons v. Kearney Power & Irrig. Co.* (1906) 77 Neb. 580, 8 L.R.A.(N.S.) 404, 110 N. W. 308, *supra*, the court stating: "In the case at bar we are dealing with an irrigation company,—a quasi public corporation. It also is a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity, it is bound to furnish water from its canal to persons desiring to use it, on equal terms and without discrimination. In this respect it stands on the same footing as a railroad company."

Also in *Fenton v. Tri-State Land Co.* (1911) 89 Neb. 479, 131 N. W. 1038, *supra*, the court said: "A stock corporation formed for the purpose of constructing an irrigation canal, though private as to its manner of organization, is of the nature of a public service corporation. Its rights and duties are modified by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch. Its duties to the respective consumers may be modified and affected by the operation of rights of priority and by the operation of the police powers of the state." In this case the court de-

nied a contention of an irrigation company, made on the ground that it was a public service corporation and bound to serve the public on equal terms, and without preference or discrimination, that a provision in the contract of purchase of the irrigation system, constituting a part of the purchase price, which relieved the sellers, who were consumers under the ditch, of payment of annual assessments, was invalid on grounds of public policy.

Without consideration of the nature of the particular company, the court in *Evergreen Farm v. Attalia Land Co.* (1916) 91 Wash. 192, 157 Pac. 487, *supra*, held that an irrigation company which, in a contract of sale of land to the plaintiff, had attempted to limit its liability to cases of gross negligence, was a public service corporation, and hence could not thus limit its liability.

Ditch corporations, it was said in *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.* (1896) 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444, *supra*, are quasi public carriers.

As stated above, in the majority of cases in which irrigation companies have been held to be public service or quasi public corporations, facts have been set out showing that the company was operating an irrigation system for hire; in other words, was holding itself out generally as a carrier of water, and not limiting its service to those merely of a certain class or in a certain area, with whom it had fixed contractual relations.

"We hold," said the court in *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332, "that the ownership and possession of arable and irrigable land is essential, under the statutes, for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. We hold that a corporation not the owner or possessor of arable and irrigable land may lawfully construct a dam, canal, or other conduit of water, and divert from such stream water for purposes of irrigation, but that in so doing it becomes in no sense an appropriator or owner of the wa-



ter so diverted. Its status is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform said service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water-right holders, or with whom it has not bound itself by contract to permanently render such service. If it confined its service as the private agent of certain appropriators, it cannot be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contract, and hence becomes a public agency, it cannot, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation."

A corporation owning a canal from which it supplies water for hire for irrigation purposes is a quasi public agency, subject to legislative control. *Wheeler v. Northern Colorado Irrig. Co.* (1888) 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; *White v. Farmers' Highline Canal & Reservoir Co.* (1896) 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028; *Junction Creek & N. D. D. & Irrigating Ditch Co. v. Durango* (1895) 21 Colo. 194, 40 Pac. 356.

An irrigation company carrying water for hire is not the proprietor of the water which it is entitled to divert, but must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their rights to appropriate water, as well as a private enterprise prosecuted for its benefit. *Denver v. Brown* (1913) 56 Colo. 216, 138 Pac. 44; *Wyatt v. Larimer & W. Irrig. Co.* (1893) 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; *Wheeler v. Northern Colorado Irrig. Co.* (1887) 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; *Wright v. Platte Valley Irrig. Co.* (1900) 27 Colo. 322, 61 Pac. 603.

It is quite uniformly held, it was said in *Colorado Canal Co. v. McFarland* (1908) 50 Tex. Civ. App. 92, 109

S. W. 435, that irrigation companies furnishing water to consumers for compensation, although private corporations, are public or quasi public carriers of water, charged with a public duty or trust, engaged in the business of transporting for hire water owned by the public to the people owning the right to its use; that as public carriers they are charged with certain duties to the public, and are subject to a reasonable control by the legislature and the courts.

*b. Not strictly common carriers.*

The status of irrigation companies carrying water for hire to all who apply within the area served by the irrigation system is not generally considered as precisely that of a common carrier. The laws relative to prior appropriation rights of consumers, application to beneficial use, etc., enter into and affect the relationship of the company to the consumer.

In *Colorado*, an irrigation company which distributes water for hire, while at least a quasi public servant or agent, and not a mere private agency, occupies a status differing in some particulars from that of the ordinary carrier; it does not become the proprietor of the water diverted; and its rights with respect to such water are dependent for their birth and continued existence upon the use made by the consumer; it is charged with a public duty or trust; and, in the absence of legislation on the subject, would be held at common law to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges. *Wheeler v. Northern Colorado Irrig. Co.* (1888) 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487. -

And in *Wright v. Platte Valley Irrig. Co.* (1900) 27 Colo. 322, 61 Pac. 603, the court said that the status of a ditch company was not, in the strict legal sense of the term, that of a common carrier, but was more like that of a private carrier, whose duties were measured by the obligations it assumed toward its consumers and those imposed by law, by reason of the na-

ture of the business in which it was engaged.

It was held in *Wright v. Platte Valley Irrig. Co.* (Colo.) *supra*, that a provision in a contract between a consumer and an irrigation company, limiting the use of the water to the necessities of the particular land described in the contract, was not against public policy and unenforceable against the consumer, on the theory that the water company was simply a common carrier, clothed merely with the right to carry water and receive compensation therefor.

An irrigation company which does not confine its service to the diversion and carriage of water from a public stream as the agent of particular appropriators with whom it has a fixed contractual relation, but undertakes to and does serve other consumers of water, becomes in a sense a public agency, although not, strictly speaking, a common carrier. *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332. The court said that were it not for the fact that appropriators of water from a public stream did not have equal rights to the use of such water, but each appropriation, as against other appropriations, depended for its priority upon the time when it was made, the status of a corporation undertaking to supply consumers of water for agricultural purposes, without regard to fixed contractual relations, would become that of a public carrier; that some of the courts in the arid states had chosen to regard such corporations as, in a sense, public carriers; but that, inasmuch as, in the nature of things, their ability to supply the public with water must be limited, and as the consumers, under the law of prior appropriations, were not and could not be on the same footing as to their right to the use of such water, the statutory term, "public acequia," more accurately described their character and status.

But in *Louisiana Rio Grande Canal Co. v. Frazier* (1917) — Tex. Civ. App. —, 196 S. W. 10, the court stated that the defendant irrigation company was a corporation chartered under the Texas law as a public irrigation com-

pany, by reason of which it was a quasi public service corporation or common carrier; and that it was undisputed that it was controlled by the rules of a common carrier.

The Nebraska statute, as set out in *Farmers & M. Irrig. Co. v. Hill* (1912) 90 Neb. 847, 39 L.R.A.(N.S.) 798, 134 N. W. 929, Ann. Cas. 1913B, 524, provides that "irrigation works constructed under the laws of this state are hereby declared to be common carriers." It is further provided that the owner or operator of any works for the storage, carriage, or diversion of water must deliver all water legally appropriated to the parties entitled to the use thereof for beneficial purposes, at a reasonable rate, to be fixed by the state Railway Commission, according to the law in such cases relating to common carriers.

#### *c. Particular applications.*

A construction company which, under the Carey Act of Congress, contracted with the state to construct an irrigation system and to organize an operating company to which the irrigation system was to be transferred, with reservation of the right to furnish water to settlers prior to the time of such transfer, was held in *Hanes v. Idaho Irrig. Co.* (1912) 21 Idaho, 512, 122 Pac. 859, to be a quasi public service corporation, in the operation of its canal and the furnishing of water.

And a company undertaking an irrigation project, which in its contract with landowners who purchased water rights agreed to construct the irrigation system and turn it over to the holders of water rights within a year after completion, was held a public or quasi public corporation, in *Childs v. Neitzel* (1914) 26 Idaho, 116, 141 Pac. 77.

A canal company engaged in distributing water through its canal for irrigation was held a public utility in *Steamboat Canal Co. v. Garson* (1919) — Nev. —, 185 Pac. 801, under a statute declaring that the term "public utility" should include, among others, every company owning or operating any "plant" or equipment for delivery

of water for agricultural or household purposes, the use of the term "plant" not being intended to limit the application of the statute strictly to companies engaged in delivering water, at least in part, through the agency of machinery, as a pumping station or other mechanical apparatus.

It was said in *Candelaria v. Vallejos* (1905) 13 N. M. 147, 81 Pac. 589, that under the Statute of 1895, providing that all community ditches theretofore or thereafter constructed should, for the purpose of the act, be considered as corporations or bodies corporate, community ditches belong to the class of corporations known as public involuntary quasi corporations. The question, however, involved in this case, was the power of a majority to change the location of the main irrigation ditch against the objection of a minority.

Assuming that the service rendered by the irrigation company was a public service, the court in *Miller v. Hagerman Irrig. Co.* (1915) 20 N. M. 604, 151 Pac. 763, held that a corporation organized for the purpose of collecting water from a public stream of the state, conveying and delivering it to such consumers as would contract with it for a permanent water right for irrigation purposes, could not be compelled to carry water for hire for a person who had not contracted with it for a water right, and who demanded the carriage of water from a source other than that which the corporation employed. The court said it did not wish to be understood as deciding that the service demanded by the plaintiff was a public service, but that in no event could the defendant, under the circumstances, be compelled to render the same upon the ground that it was a public service corporation; that such a corporation might limit its service to a class which it was designed to serve; that it might classify the public and supply water only to the owners of a restricted district; and that it needed no citation of precedent for the general proposition that no public service corporation could be compelled, as was sought in that case, to render a service entirely dif-

ferent in character from that for which it was organized.

A finding that an irrigation company operates "a water system for compensation" is not the equivalent of a finding that it is engaged in applying its water to a public use. *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, rehearing denied in (1914) 167 Cal. 682, 140 Pac. 948.

In *San Diego Flume Co. v. Souther* (1898) 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164, affirmed on rehearing in (1900) 44 C. C. A. 143, 104 Fed. 706, the court said that corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquired the water by appropriation or otherwise, were private corporations; that they were nowhere declared to be public or quasi public corporations. But the court stated that, for reasons affecting the public welfare, they were given the right of eminent domain, and, in order that the use of the water might be fairly and equitably adjusted to consumers, it was provided that, in a certain contingency, the rate to be paid by the consumer might be fixed in a manner prescribed by law; that the use was public only to the extent that the corporation might be compelled to furnish the water, provided it had capacity to do so, to all who received and paid for it, and that the compensation should be fixed by law in case the parties could not agree. The question at issue was the validity of contracts fixing rates, where the public authorities had not acted in the matter. The public nature of the irrigation company is recognized in a later appeal in the same case (1903) 57 C. C. A. 561, 121 Fed. 347.

In *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein* (1901) 63 Kan. 484, 65 Pac. 684, which was a condemnation proceeding, the court recognized the right of the legislature and of the courts to regulate the rates of irrigation companies on the ground that they are quasi public carriers, and held that a statute authorizing such companies to fix rates for water furnished must be construed as subject

to the provision that the rates must be reasonable and just.

In a number of cases before the California Railroad Commission, irrigation companies have been held to be public utilities.

Thus, it has been held by the Commission that the fact that an irrigation company organized as a public utility, which has held itself out to serve anyone within the area of service for compensation, has entered into water-right contracts, does not prevent it, even as to the lands covered by such contracts, from being a public utility, subject to the jurisdiction of the state Railroad Commission. *Nunn v. Sutter-Butte Canal Co.* (1918; Cal.) P.U.R.1918E, 563. To a similar effect is *Re Madera Canal & Irrig. Co.* (1917; Cal.) P.U.R.1917F, 642.

A water company which, among other things, owns, controls, and manages a water system in California, and which is not organized for the purpose of delivering water to its stockholders or members at cost, but is engaged in the business of selling water for compensation to purchasers of land, and to portions of the public located within certain boundaries, which has held itself out as willing to sell water to a certain syndicate, its successors and assigns, and which has a monopoly of the business of transmitting water for sale, rental, or distribution in a certain region, is a public utility, subject to the jurisdiction of the state Railroad Commission, and it is immaterial that the company requires consumers to enter into contracts before rendering service. *Los Molinos Citrus Farms Co. v. Cone Land Water Co.* (1915; Cal.) P.U.R.1915F, 554.

A land company owning and operating a water system, which undertakes to supply water for compensation to all who apply within a designated tract of land to which the water was dedicated, is a public utility subject to the jurisdiction of the state Railroad Commission, and not a mutual company, although it was the intention of the land company that ultimately the water system should be operated upon a mutual basis for the sole benefit of the landowners. *Comp-*

*ton v. Richfield Land Co.* (1918; Cal.) P.U.R.1918E, 608.

A company that holds itself out to serve the public within a given area with water upon specified terms is a public utility. *Berry v. Ora Loma Farms Co.* (1917; Cal.) P.U.R.1917F, 631.

It was held also that the water company was not relieved of its character of a public utility by requiring, as a condition to furnishing service, the execution of contracts establishing rates and rules for the use of water. *Ibid.*

And it was held in *Berry v. Ora Loma Farms Co.* (Cal.) *supra*, that a provision in a contract of an irrigation company that the service was in effect that of an agency operating temporarily as an agent preliminary to the taking over and operating the system by mutual companies did not relieve the company of its present character of a public utility, subject to the jurisdiction of the state Railroad Commission, where the water was being delivered generally to water users who had no stock in a mutual concern, and had no voice in the establishment of the rates, nor the fixing of conditions other than those in the contract.

Irrigation companies organized as public utilities, which have appropriated water for the irrigation of certain lands, and have so applied it, which have obtained franchises from certain counties as public utilities, which have held themselves out to serve anyone within the area of service for compensation, and which, by advertising or otherwise, have solicited business generally from everyone within such area, are public utilities subject to the jurisdiction of the state Railroad Commission. *Nunn v. Sutter-Butte Canal Co.* (1918; Cal.) P.U.R.1918E, 563.

A land development company operating a water system in connection with its colonization scheme is a public utility with respect thereto, where it serves many persons not stockholders, at established rates. *Monte Vista Valley Bd. of Trade v. Western Em-*

pire Suburban Farms Asso. (1918; Cal.) P.U.R.1918C, 748.

It was held in *Re Lake Hemet Water Co.* (1916; Cal.) P.U.R.1917A, 458, that a water company which served consumers who were not stockholders, at established rates filed with the state Railroad Commission, and had always held itself out to serve, in accordance with its existing rules and regulations, any user, and had submitted itself to the jurisdiction of the Commission, was a public utility, under the Constitution and statutes of California, although it originally served only holders of water-right certificates.

A water company supplying water for domestic and irrigation purposes is a public utility under the laws of California, although its service is rendered by virtue of contracts to furnish water to lots within a certain tract of land. *Gittings v. Windsor Water Co.* (1915; Cal.) P.U.R.1915B, 1069.

The California Railroad Commission held in *Re North Moneta Garden Lands Water Co.* (1915; Cal.) P.U.R. 1915A, 645, that a corporation organized to carry on the business of a water company in all its branches, for the supplying of certain lands and the occupants thereof with water for irrigation or domestic uses, or both, was not a mutual water company, but a public utility, subject to the jurisdiction of the Railroad Commission, where only a portion of its stock was made appurtenant to the land, and the control of the company was vested in outside parties. The statute provided that whenever any private corporation or association was organized for the purpose solely of delivering water to its stockholders or members, at cost, and delivered water to no one except its stockholders or members at cost, such corporation or association was not a public utility, and not subject to the jurisdiction of the state Railroad Commission.

### *III. Mutual and private companies in general.*

For cases of private corporations which sell land with a water right, see IV. *infra*. That irrigation companies are not in all respects common carriers, see II. b, *supra*. See also *San*

*Diago Flume Co. v. Souther* (Fed.) under II. c, *supra*, recognizing the private character of an irrigation company in some respects, although taking the view that its rates were subject to regulation, and that it might be compelled to furnish water.

The private nature of irrigation companies has been determined or assumed in a number of cases. And while the cases of this nature are not so numerous as those holding irrigation companies to be public service or quasi public corporations, it appears to be well settled that the mere fact that a company is delivering water for irrigation purposes does not, in the absence of express constitutional or statutory provision, necessarily make it a public service or quasi public corporation, or clothe it with a public interest, so as to subject it to public supervision. It may occupy the status of a mere private corporation, if it does not hold itself out to serve consumers generally under its canal, but only its stockholders or those with whom it has fixed contractual relations. This view is supported by the following cases: *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332; *ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249; *McFadden v. Los Angeles County* (1888) 74 Cal. 571, 16 Pac. 397; *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 72 Pac. 395, reversing (1902) 7 Cal. Unrep. 44, 70 Pac. 672; *Burr v. Maclay Rancho Water Co.* (1911) 160 Cal. 268, 116 Pac. 715; *Garrison v. North Pasadena Land & Water Co.* (1912) 163 Cal. 235, 124 Pac. 1009; *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128 Pac. 21; *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, rehearing denied in (1914) 167 Cal. 682, 140 Pac. 948; *Franscioni v. Soledad Land & Water Co.* (1915) 170 Cal. 221, 149 Pac. 161; *J. M. Howells Co. v. Corning Irrig. Co.* (1918) 177 Cal. 513, 171 Pac. 100; *Stevinson Water Users' Asso. v. Stevenson* (Cal.; Decision No. 4222, Case No. 855, March 31, 1917) P.U.R.1917E, 539 (abstract); *Sand Creek Lateral Irrig. Co. v. Davis* (1892) 17 Colo. 326,

29 Pac. 742; *State ex rel. Coco v. Riverside Irrig. Co.* (1917) 142 La. 10, 76 So. 216; *Larned v. Jenkins* (1918) 102 Neb. 796, 169 N. W. 723; *Rowles v. Hadden* (1919) — Tex. Civ. App. —, 210 S. W. 251; *Knight v. Oldham* (1919) — Tex. Civ. App. —, 210 S. W. 567.

In the absence of special constitutional or statutory provisions, it seems to be clear from the authorities that a mutual irrigation company which supplies water to its stockholders only, at cost, is not a public service or quasi public corporation. But there are several cases in which the language of the court is to the contrary.

A mutual irrigation company devoting the water which it diverts exclusively to the use of its own stockholders, and not to the general public, is not engaged in a public service, and is not a public utility. *J. M. Howells Co. v. Corning Irrig. Co.* (1918) 177 Cal. 513, 171 Pac. 100.

It was held also in *McFadden v. Los Angeles County* (1888) 74 Cal. 571, 16 Pac. 397, that a corporation organized for the purpose of supplying water for irrigation purposes to its stockholders only, at cost, was not within the statute authorizing boards of supervisors to fix water rates. The court said: "We think the answer in the particulars above set forth shows that the water was acquired and held for the use of the stockholders of the corporation only, and not for sale, distribution, or rental to the public generally. . . . An individual can certainly acquire water to be used on his own land. With such use a board of supervisors would have nothing to do. We know of no reason why individuals cannot associate themselves, take on a corporate form, and acquire water to be used on their own lands. When this is done, we are of opinion that a board of supervisors can have no more power over the rates to be paid by the stockholders than in the case of individuals."

A mutual irrigation company not organized for profit, but for the sole purpose of delivering water to its stockholders, was said in *Eldredge v. Mill Ditch Co.* (1919) 90 Or. 590, 177

Pac. 989, not to be a public service corporation as that term is generally applied, and not to be a common carrier of water. The court said that, nevertheless, such a corporation has many elements of a quasi public nature; that it was dealing with property which belonged originally to the public and was of a public character; that the legislature had conferred upon it the power of eminent domain, and had declared its use of the water to be a public and beneficial use and public necessity; that it was distributing water to a portion of the public,—to how large a portion did not appear; and that it seemed that such a corporation might be fairly classed as a quasi public one, regardless of the fact that it was not a general company, and was not engaged in furnishing water to all comers. The court said further that the recognition of the public character of such corporations was constantly broadening, and that it seemed difficult longer to distinguish between corporations which served identically the same purpose because one dealt with the entire public and another dealt with a definite group. It was held that the property of the irrigation company was not subject to sale on execution; this decision, however, being based not on the ground that the company was a quasi public corporation, the court stating that it was not necessary to decide how far its water rights and franchises were exempt from execution on this ground, but on the ground that it was a holding company, trustee, or agent for the real owners of the water, the users thereof.

But a mutual irrigation company which furnished water generally for irrigation only when there was a surplus in its ditches after supplying the needs of its stockholders was said in *Baker City Mut. Irrig. Co. v. Baker City* (1911) 58 Or. 310, 110 Pac. 392, 113 Pac. 9, to be impressed with a public character, and to hold its property subject to an exercise of the police power of the state to a greater degree than a private person. The question involved was the right of the city to make regulations as to the use of the

streets by the irrigation company, which had constructed irrigation ditches along the curbs of the streets prior to the incorporation of the city.

The mere appropriation of water of a stream by a corporation for irrigation purposes is not, under the California statutes, ipso facto a dedication or appropriation to public use; to accomplish this result there must follow the appropriation some act or declaration of the corporation, dedicating it to such use. *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128 Pac. 21.

The use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefited, who can get water from the ditches to their land; if the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use. *Ibid.*

The provision of the California Constitution that "the use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state," was held in *Thayer v. California Development Co.* (Cal.) *supra*, not necessarily to create a public use whenever any water was sold or distributed, regardless of the number of persons to whom it was delivered, or the manner or character of the disposition made of it. See quotation from this case in *ALLEN v. RAILROAD COMMISSION* (reported herewith) *ante*, 249.

And a constitutional provision declaring that the use of all water appropriated for sale or distribution is a public use should not be construed to mean that all water which is distributed among a number of persons is, from that fact alone, to be considered as devoted to a public use. *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 72 Pac. 395.

So, the fact that the owners of land sold under a water system, to whom water is sold for use for irrigation

purposes upon their own lands and as an appurtenance thereto, are numerous, does not convert the several private uses into a public use within the control of the Public Service Commission. *ALLEN v. RAILROAD COMMISSION* (reported herewith). In this case it was held that constitutional and statutory provisions declaring that every private corporation which furnishes water to or for the public, or which sells, rents, or delivers water to any person whatever under contract, or otherwise, is a public utility, must be construed to apply only to corporations which have in fact devoted their property to public use.

An irrigation ditch, constructed, repaired, and controlled by two or more persons, does not become public property, merely because the several persons interested in it have not accurately defined their respective rights therein or in the water flowing in it, nor because they have, by election or otherwise, selected a person to distribute the water among those who have contributed to the construction and maintenance of the ditch; such mode of construction and management of the ditch and its waters does not operate as a dedication of the ditch or its waters to the public. *Cate v. Sanford* (1879) 54 Cal. 24, 8 Mor. Min. Rep. 124.

An irrigation company which confines its service to the diversion and carriage of water from a public stream as the agent of particular appropriators of water, with whom it has a fixed contractual relation, is a private agency, owing no duty to others, whether appropriators or not. *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332.

It was held in *Larned v. Jenkins* (1918) 102 Neb. 796, 169 N. W. 723, that the Nebraska statute providing that "a multiplicity of outlets shall at all times be avoided so far as may be, and the same shall be under the control of a superintendent," etc., did not apply to owners in common of a ditch for irrigation purposes who were not carriers of water for hire.

The fact that a private irrigation company, organized for the purpose

of supplying water to its stockholders only, furnished surplus water for several years to another company as a matter of accommodation, under express agreement that the latter should not acquire any right to the continued supply of water, was held in *Garrison v. North Pasadena Land & Water Co.* (1912) 163 Cal. 235, 124 Pac. 1009, not to entitle consumers of the latter company to compel continuance of the supply on the theory that the company had become a public service corporation.

And it was held that water appropriated by a corporation from a stream to irrigate lands in a specified area was not dedicated to public use so that delivery of water could be compelled by a landowner having no contractual relations with the company, where it made no declaration devoting the water to a public use and did not offer it for sale generally, but supplied the water only through subsidiary mutual water companies organized by it, which distributed the water at fixed prices to stockholders only. *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128 Pac. 21.

A corporation which was engaged in the raising of rice, and in the supplying of water through its canal system to its own land for this purpose and to the land of others for a percentage of the rice crop, and which had acquired its right of way by purchase, and not by condemnation, was held in *State ex rel. Coco v. Riverside Irrig. Co.* (1917) 142 La. 10, 76 So. 216, not to be a public utility within the meaning of a statute requiring corporations operating public utilities under a franchise granted by the state to make certain reports to the secretary of state.

A land company cannot be found to be an irrigation utility upon evidence of mere statements on letterheads and circulars that it owns the canals supplying the land with water. *Stevinson Water Users' Asso. v. Stevenson* (Cal.; Decision No. 4222, Case No. 855, March 31, 1917) P.U.R. 1917E, 539 (abstract).

See also *Combs v. Agricultural*

*Ditch Co. (Colo.)* under VI., *infra*, where an irrigation company set up the defense that it was a mutual company, and not obliged to furnish water, but the court held, in view of the charter provisions of the company, that it was not a mutual company; *Hildreth v. Montecito Creek Water Co. (Cal.)* under V. *infra*, where the transfer by private owners of a water system to a corporation was held not to change the use from private to public. For other cases where the particular corporation was held not to be a mere mutual company, see II. c, *supra*.

#### IV. Sale of land with water rights.

For cases where, in addition to supplying water to land sold by it with a water right, the irrigation company supplied water to other consumers under its canal, see II. c, *supra*.

*ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249, holds that a devotion of water to a public use did not result so as to subject to control of the state Railroad Commission contracts with consumers, made on a sale of land and water rights, where the irrigation company did not hold itself out to serve generally consumers under its canal.

A company engaged in selling land owned by it, and, as an incident of the sale, furnishing water for irrigation and domestic use to the purchasers, and no others, at a fixed contract rate, is not a public utility, and therefore not subject to regulation by the Oregon Public Service Commission. *De Pauw University v. Public Service Commission* (1917) P.U.R. 1918C, 274, 247 Fed. 183. In subsequent proceedings in (1918) 253 Fed. 848, it was held also that the company was not a public utility.

And water taken by an irrigation company to fulfil its private contractual obligations to deliver water to certain lots which it has sold with a water right, and not offered to the public generally or to all who may want it within a certain territory, is not taken for a public, but for a private, use. *Burr v. Macclay Rancho Water Co.* (1911) 160 Cal. 268, 116 Pac. 715.



A corporation which had not exercised the power of eminent domain, which was incorporated prior to the enactment of the Texas Statute of 1913, requiring irrigation companies to supply water to landowners along their ditches at reasonable rates, creating a board of water engineers, and giving it power to fix rates, and which merely owned springs and supplied water therefrom to purchasers of land sold by it, was held in *Knight v. Oldham* (1919) — Tex. Civ. App. —, 210 S. W. 567, not subject to the control of the state board of water engineers.

But where the contracts provided that the water should be supplied at such rates as might be fixed by law, it was held in *Palermo Land & Water Co. v. Railroad Commission* (1916) 173 Cal. 380, P.U.R.1917A, 447, 160 Pac. 228, that an irrigation company which contracted to supply water to those purchasing land of it was not engaged in a private service within the rule that the distribution of water for such purposes was essentially a matter of private contract, but was a public utility, subject to the jurisdiction of the Railroad Commission.

And the California Railroad Commission in *Re Fresno Farms Co.* (1915; Cal.) P.U.R.1915B, 324, held that a land company which owned valuable water rights, and owned and controlled ditches and laterals for the conveyance and delivery of water to irrigate land which it sold, was a public utility, although it does not appear that the company undertook to supply water for irrigation purposes except to purchasers of its land, and the distribution of water for irrigation to these lands was partly by contract with another irrigation company.

The Washington Public Service Commission has held that it has jurisdiction over the rates of an irrigation distribution system, although built merely to promote the sale of lands. *Burford v. Consumers' Ditch Co.* (1916; Wash.) P.U.R.1916D, 448. The Commission referred to the provision in the Washington Public Service Law that the term "water company," as used in the statute, should include

every corporation controlling, operating or managing any water system for hire within the state.

And the obligations of a private company organized for the purpose of selling arid lands and furnishing water for their irrigation were said in *Shafford v. White Bluffs Land & Irrig. Co.* (1911) 63 Wash. 10, 114 Pac. 883, Ann. Cas. 1912B, 133, to be quasi public, and no arbitrary action under the guise of rules or regulations was tolerable. The point involved in the case was the right of the company to adopt an "alternating plan" in delivering water to consumers.

As to effect of the transfer to a corporation of a water system owned by an individual to distribute water to land sold by him, see *Franscioni v. Soledad Land & Water Co.* (Cal.) *infra*, V.

*V. Change from private to public use or vice versa; effect of incorporation.*

That a water company which is a public agency may not discontinue its service in whole or in part so as to become a mere private agency was held in *Gould v. Maricopa Canal Co.* (1904) 8 Ariz. 429, 76 Pac. 598, overruling the former decision of the court on this point in *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332. The court said that while a canal company, in the nature of things, could not be a common carrier, as that term was used in law, yet it was a quasi public servant, and, as such servant, having received benefits from the public, owed a duty to conduct its business as a carrier of water in such a way as might best promote the interests of the community when this might be done without sacrifice of any of its property rights; that the community was interested in the permanent reclamation and improvement of land; and that if a right of appropriation might be made of no use to its holder through the refusal of a canal company to divert and carry the water to which such holder was entitled, and which the canal company had theretofore diverted and carried, the holding of such right of appropriation by such precarious tenure would not only im-

pair its value to the holder, but would discourage the making of improvements and the putting of the land to which it was attached to its highest and best use; that to the extent, therefore, that such a canal company has diverted and carried water from a public stream, and to the extent to which this water has been applied by appropriators for the necessary irrigation of their lands, the canal company must continue the service so long as it is required by the appropriators and the water is available.

And the rule is laid down in *Riverside Land Co. v. Jarvis* (1917) 174 Cal. 316, 168 Pac. 54, that water dedicated to public use cannot lawfully be converted into a private use so as to create a private preferential right thereto for the benefit of a specific parcel of land. The principle involved cannot, of course, be treated exhaustively in the present annotation, because it is supported by other cases than those involving irrigation companies.

One who has appropriated water for the purpose of sale, rental, and distribution to the public, cannot, upon disposing of his water system, reserve to himself a portion of the right which he had appropriated to public use. *Leavitt v. Lassen Irrig. Co.* (1909) 157 Cal. 82, 29 L.R.A. (N.S.) 213, 106 Pac. 404.

That private rights cannot be carved out of a public use of water for irrigation purposes, see *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, P.U.R. 1917D, 183, 162 Pac. 1033, which is set out in *ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249, and which involves an irrigation company admittedly a public utility.

But a water company engaged in distributing water to persons to whose lands it has agreed to deliver it for irrigation, upon a use which is private, and not public or general, may, with the consent of the owners of the right to receive such water, change the use from a private to a public use, so as to make the service and terms of delivery subject to regulation and control by public authorities; and

all the parties concerned and consenting thereto, including the corporation engaged in such distribution, will thereafter be bound to conform to the rates, rules, and regulations of the service as established by the public authorities. *Franscioni v. Soledad Land & Water Co.* (1915) 170 Cal. 221, 149 Pac. 161.

It was accordingly held in *Franscioni v. Soledad Land & Water Co.* (Cal.) supra, that a change from a private to a public use of water had been effected where, pursuant to a statute applicable only to persons and corporations engaged in the sale or distribution of water for public use, a water company which had theretofore been engaged in supplying water for irrigation as a private corporation joined in a petition with the inhabitants and taxpayers of the county, to the board of supervisors, to regulate and control the rates of the company, and the board fixed the company's rates, which were acquiesced in by all parties for a period of six years. It was held that the dedication of the water to public use could not be revoked by the company and the use changed to a private use, at least without the consent of all the beneficiaries of such use.

But the mere fact that a corporation takes over a water system owned by an individual, who is distributing water to land which he sells, and that the corporation undertakes to carry out his obligation to deliver water to the several purchasers of the land, does not change the use of the water from private to public. *Ibid.*

And in *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 72 Pac. 395, it was held that the mere fact that a water system and the distribution of water thereunder were transferred to a corporation by private owners did not necessarily change the use from private to public, or constitute a dedication of the water to a public use, even though the Constitution provided that the use of all water appropriated for sale, rental, or distribution was a public use. The court said: "Where a number of persons owning land are each entitled to take

water from a common stream or source for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code, or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property, and not the subject of public use, although the persons so owning interests in the stream are very numerous, and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds; and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several, and will remain private property. If the persons owning such rights see fit to form a corporation, and delegate to such corporation the work of making the diversion and distribution and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before."

Also in *Sand Creek Lateral Irrig. Co. v. Davis* (1892) 17 Colo. 326, 29 Pac. 742, it was held that the fact that parties constructing an irrigation ditch became incorporated did not change the use thereof from private to public, so as to prevent its being a private ditch within the meaning of a statute authorizing the enlargement, on payment of compensation, and use in common of private ditches, so as to prevent duplication of ditches through improved or occupied land.

See *Palermo Land & Water Co. v. Railroad Commission* (Cal.) *infra*, IX., where an irrigation company was held to have changed its use from

private to public, so far as concerned its own right thereafter to assert that it was not a public service corporation, by voluntarily applying to the state Railroad Commission to fix its rates.

*VI. Effect of charter provisions or provisions of statute under which company is incorporated.*

The cases in general hold that the mere fact that an irrigation company is authorized in its articles of incorporation to engage in the distribution and sale of water in such manner as would render it a public service corporation will not necessarily fix its status as such a corporation; it may or may not avail itself of its charter privileges; and its mode of operation rather than its charter powers is controlling. But in some instances the courts have looked to the articles of incorporation to aid in determination of the question whether the corporation was a public utility.

The fact that a water company is authorized by its charter to sell water to the public does not, *ipso facto*, make it a public utility, if it has not in fact held itself out as ready and willing to furnish water to all who may apply within a given area, but in the sale of land, in which it is engaged, agrees to furnish water on certain terms and conditions to the purchasers, and no others, and merely undertakes to furnish water in fulfillment of these private contracts, and not to the public generally. *De Pauw University v. Public Service Commission* (1918) 253 Fed. 848. The court said the charter authority did not mark the nature of the operating companies, but was merely a naked authority to do business, and until pursued in a certain way did not make the companies public utilities.

And the fact that the articles of incorporation of an irrigation company empower it to engage in public service does not, of itself, constitute proof that it is engaged in such public service, or that it has dedicated its property to a public use. *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 581, rehearing denied in (1914) 167 Cal. 682, 140 Pac.

948. In this case the articles of incorporation conferred on the company the power to sell and distribute water for domestic, irrigation, and all other purposes, and to acquire, hold, and operate waterworks and distributing systems for these purposes. The court said that the power given in these articles of incorporation did not necessarily imply an intention to engage in public service; that "one may acquire and hold a water supply and waterworks, and thereby distribute and sell water for domestic use and irrigation or other purposes, without engaging in public service. It may make such sales to particular persons and in such a manner that the public would not be entitled to it. The mere fact, therefore, that a company having such powers has acquired a water supply and constructed waterworks constituting a system, which it is operating for compensation does not necessarily justify the conclusion that it is engaged in public service, or that its water is dedicated to public use. The only effect of the adoption of such articles by a corporation is to give it the capacity to engage in such public service if it so desires. After having become incorporated in this manner, it has the power to engage in such service in the same sense that an individual has power to engage in such service. It may or may not do so, and until it does, it cannot be said to be subject to the jurisdiction of the Railroad Commission."

That a charter declaration on the part of a water company, among other purposes, to supply the inhabitants of towns with water for domestic purposes, does not, standing alone, constitute a dedication of all the company's water to a public use, see *ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249.

In *Combs v. Agricultural Ditch Co.* (1892) 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966, the court considered the purposes of an irrigation company as expressed in its charter, in denying the contention that the company was not obliged to deliver water because it was a mutual company, stating: "Under the Constitution and

laws of this state a ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and bona fide consumer making seasonable application and offering proper compensation therefor. . . . The defendant attempted to justify his refusal to deliver the water upon the ground that by the declared objects of its incorporation it was a mutual company; that it was not organized for the purpose of carrying water for others for hire; that its only obligation in the matter of carrying water was to supply its stockholders. An inspection of the certificate by which the [irrigation company] was incorporated, as introduced upon the trial, does not sustain this ground of defense. . . . There is nothing in the certificate to indicate that it might not be the legitimate business of the defendant company to carry and supply water for irrigation generally to those occupying land within the vicinity of the ditch. Hence, we do not have to consider whether a purely mutual company might or might not stand on a different footing."

It was held also in *Combs v. Agricultural Ditch Co.* (Colo.) supra, that refusal to deliver water could not be justified by a provision in the by-laws of the company that no water should be sold from the company's ditch except to stockholders.

The California Railroad Commission in *Ferrasci v. Empire Water Co.* (1915; Cal.) P.U.R.1915B, 438, held that a water company empowered to distribute water for compensation, whose articles of incorporation and by-laws did not state that the water was to be distributed to stockholders only, or limit the territory to be served, was a public utility, within the constitutional and statutory provisions of California, although it did not own the water it distributed, but acted merely as the agent of landowners in such distribution.

It was held that a water company was not a mere private agency, but was a public agency which might be compelled to furnish water for irrigation purposes without discrimination

except as between prior appropriators, where its articles of incorporation did not indicate a purpose to limit its service as a carrier of water to any particular land or to serve its shareholders only, but expressed a purpose to conduct the business of supplying a portion of a river valley with water for irrigation, manufacturing, and other purposes, and the history of the company showed that it had not limited its service to shareholders, but had, for a number of years after its organization, supplied indiscriminately all landowners under its canal who applied for water, although later it discriminated in fixing rates as between shareholders and other consumers, and, at a still later period, furnished water to its shareholders and to their lessees, and declined to furnish water to others. *Gould v. Maricopa Canal Co.* (1904) 8 Ariz. 429, 76 Pac. 598, followed in *Salt River Valley Canal Co. v. Slosser* (1904) — Ariz. —, 76 Pac. 1125, and *Salt River Valley Canal Co. v. Van Fossen* (1904) — Ariz. —, 76 Pac. 1126. A similar conclusion was reached in *Slosser v. Salt River Valley Canal Co.* (1901) 7 Ariz. 376, 65 Pac. 332, and in *Salt River Valley Canal Co. v. Nelssen* (1906) 10 Ariz. 9, 12 L.R.A.(N.S.) 711, 85 Pac. 117, 16 Ann. Cas. 796.

It was said in *Price v. Riverside Land & Irrigating Co.* (1880) 56 Cal. 431, that every corporation organized under the Statute of 1862, "An Act to Authorize the Incorporation of Canal Companies and the Construction of Canals," was impressed with a public trust,—the duty of furnishing water, if it had water, to all those who came within the class or community for whose alleged benefit it was created. The statute, however, is not set out; but the irrigation company in this case was organized to supply water "to any person or corporation, for irrigation, mechanical, or other purposes."

Corporations organized under the Texas Statute of 1895, which declares the unappropriated waters of the state to be public property, authorizes the formation of corporations to construct irrigation systems for the purpose of

conducting water to all persons entitled to the same, gives irrigation companies the right to eminent domain, and entitles all persons owning land adjoining an irrigation canal to be supplied with water from such canal, are quasi public corporations. See *Imperial Irrig. Co. v. Jayne* (1911) 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322, and other Texas cases cited under II. a, supra.

#### *VII. Effect of provisions in appropriation notice.*

The fact that the notice of appropriation of the water by a corporation states that it is appropriated for "general rental, sale, and disposition for the purposes of irrigation," does not alone make the appropriating corporation a public utility, if the company thereafter undertakes to furnish water only to purchasers of land from it in fulfilment of private contracts with such purchasers for water on certain terms and conditions. *De Pauw University v. Public Service Commission* (1918) 253 Fed. 848.

#### *VIII. Effect on remainder of dedication to public use of part of water supply.*

In *ALLEN v. RAILROAD COMMISSION* (reported herewith) ante, 249, it was held that a water company did not, by undertaking to furnish a water supply to a municipality which would require only about 3 per cent of its water, become a public utility as to the remainder, sold under private contracts.

The rule was laid down in *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128 Pac. 21, that a part of a stream, or a part of a single appropriation therefrom, may be devoted to public use and another part entirely to private use.

So, the fact that an irrigation company, which appropriated water in a stream in California at a point near the Mexican boundary, and made a detour of its canal into Mexico before reaching the Imperial valley in California, carried on a public service in Mexico in the supply of water to those along the line of the canal, did not affect the character of the use of the water in California, but it might still

in that state retain its character of a private use. *Ibid.*

An irrigation company owning a water supply may dedicate a part of it only to public use, and reserve the remainder for private purposes or private sale or disposition, as it sees fit. *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, rehearing denied in (1914) 167 Cal. 682, 140 Pac. 948.

It was held in *Del Mar Water, Light, & P. Co. v. Eshleman* (Cal.) *supra*, that statutory provisions empowering the state Railroad Commission to direct any public utility to extend its plant and enlarge the territory supplied should be construed as limited in their application to such public service corporations as have devoted their entire property to the use of the entire public, or to those which may have undertaken to supply a certain district, and have failed or refused to furnish adequate service when it was within their means reasonably to furnish such service, and not as authorizing the Commission to order an irrigation company which has devoted only a part of its property to public use, to extend its system, and devote all or a large part of its water supply to such use.

The proposition that an irrigation company may devote its property and a part of its supply of water to public service and retain a part for private use, and not become a public service corporation as to all by virtue of the dedication of a part, is supported by the case of *Leavitt v. Lessen Irrig. Co.* (1909) 157 Cal. 82, 29 L.R.A. (N.S.) 213, 106 Pac. 404, holding that one who, when appropriating water for sale, rental, and distribution to the public, makes at the same time an appropriation for the benefit of his own

8 A.L.R.—19.

land, to be taken through the ditches constructed for the public use, would, after selling his public rights, be limited to the amount of water which he had been actually taking and applying to a beneficial use upon his land.

*IX. Effect of voluntary submission to Utilities Commission.*

That a water company has declared itself to be a public utility and submitted to the jurisdiction of the Public Service Commission does not conclusively fix its status as a public utility. *ALLEN v. RAILROAD COMMISSION* (reported herewith) *ante*, 249.

But it was held in *Palermo Land & Water Co. v. Railroad Commission* (1916) 173 Cal. 380, P.U.R.1917A, 447, 160 Pac. 228, that an irrigation company, otherwise engaged in a private service, by applying to the state Railroad Commission for the establishment of rates, changed the use, as against it, from private to public, so as to make it subject to the jurisdiction of the Commission. It will be observed that in this case the irrigation company was subsequently objecting to the jurisdiction of the Commission, whereas in *ALLEN v. RAILROAD COMMISSION* (reported herewith), the irrigation company, by submission to the jurisdiction of the Railroad Commission, was seeking to declare itself a public utility, to the impairment of the vested rights of holders of water contracts.

See, in this connection, the decision of the California Railroad Commission, in *Re Lake Hemet Water Co.* (Cal.) under II. c, *supra*, where the fact that the company had submitted itself to the jurisdiction of the state Railroad Commission was considered as a factor in determining its status.

R. E. H.

O. J. M. FAVORITE et al.

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR  
THE COUNTY OF RIVERSIDE et al.*California Supreme Court (In Banc) — September 24, 1919.*

(— Cal. —, 184 Pac. 15.)

**Judge — disqualification — wife a stockholder in corporation.**

1. That the wife of a judge holds stock in a corporation which is a party to a suit before him does not disqualify him from sitting in the cause under a statute working such disqualification if he is related to a party to the cause.

[See note on this question beginning on page 295.]

**Pleading — demurrer — effect.**

2. In considering a cause upon demurrer to the petition, facts not stated in the petition, although pertinent to its prayer, cannot be considered.

[See 21 R. C. L. 504, 505.]

**— ownership of stock.**

3. A mere recital that a judge had stated that he had disposed of all his stock in a corporation is not an allegation of the fact of his ownership.

**— supplying deficiency.**

4. Lack of material averments in pleading cannot be cured by statements of counsel in argument nor by statements in affidavits.

**Prohibition — jurisdiction — courts.**

5. The mere fact that jurisdiction of appeals in equity cases is by the Constitution vested in a particular court does not prevent another court from taking jurisdiction of a proceeding to prohibit a trial court from proceeding to hear an equity cause.

**Venue — change — disqualification of judge.**

6. A judge disqualified because of holding stock in a corporation party to a cause must grant a motion to transfer the cause to another judge, not deny the motion and call in another judge.

**Judge — construction of statute.**

7. Under the rule that the expression of one thing excludes all others, a judge is not disqualified to sit in a cause to which a corporation in which his wife holds stock is a party, where the statute works such disqualification if he is related to an officer of a corporation which is a party.

[See 25 R. C. L. 981.]

**— presumption as to disqualification.**

8. There is no presumption that the liability of a judge holding stock in a corporation for the debts of the concern had accrued with respect to a controversy subsequently brought before him at the time that he disposed of his stock, so as to disqualify him from sitting in the cause.

TRANSFER by the District Court of Appeal for the Second District to the Supreme Court for rehearing of a petition for a writ of prohibition to prevent respondents from proceeding with a certain cause in the Superior Court in which petitioners were plaintiffs. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. George B. Bush and D. B. Chapin for petitioners.

Messrs. A. Aird Adair and A. Heber Winder, for respondents:

The district court of appeal had no jurisdiction to issue any writ of prohibition in this case.

Erving v. Napa Valley Brewing Co. 17 Cal. App. 367, 119 Pac. 940; Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457;

Beswick v. Churchill Co. 21 Cal. App. 721, 132 Pac. 771; Re Turner, — Cal. —, 185 Pac. 171; Collins v. Superior Ct. 147 Cal. 264, 81 Pac. 509.

It was Judge Craig's duty to dispose of the motion before him, either to grant it, or deny it.

Swan v. Talbot, 152 Cal. 142, 17 L.R.A.(N.S.) 1066, 94 Pac. 238.

The interest of Judge Craig in the

litigation was not such as to disqualify him.

Oakland v. Oakland Water Front Co. 118 Cal. 249, 50 Pac. 268; Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 37, 53 Pac. 440; Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; Bank of Lassen County v. Sherer, 108 Cal. 513, 41 Pac. 415.

Judge Craig had the right to call in a judge from another county to try the action.

North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315; Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848; Krumdick v. Crump, 98 Cal. 119, 32 Pac. 800; Santa Cruz Bank v. Taylor, 125 Cal. 249, 57 Pac. 987; Anaheim Water Co. v. Jurupa Land & Water Co. 128 Cal. 568, 61 Pac. 80; Parrish v. Riverside Trust Co. 7 Cal. App. 95, 98 Pac. 685; University of California v. Turner, 159 Cal. 547, 114 Pac. 842; Adams v. Minor, 121 Cal. 372, 53 Pac. 815; Remy v. Olds, 5 Cal. Unrep. 182, 42 Pac. 239; John Heinlen Co. v. Superior Ct. 17 Cal. App. 660, 121 Pac. 293; People v. Ebey, 6 Cal. App. 769, 93 Pac. 379; Imperial Land Co. v. Imperial Irrig. Dist. 166 Cal. 491, 137 Pac. 234; Re Burch, 168 Cal. 18, 141 Pac. 813.

Shaw, J., delivered the opinion of the court:

This is an application for a writ of prohibition to prevent the superior court of Riverside county from proceeding in a cause pending in said court wherein the said petitioners are plaintiffs, and the Security Investment Company and others are defendants. This proceeding for prohibition was begun in the district court of appeal for the second district and after decision there was transferred to this court for rehearing. The original petition was filed on December 16, 1918. An amended petition was filed on December 19, 1918.

Honorable Hugh H. Craig is the regularly elected judge of the superior court of Riverside county, before whom the cause originally came on for disposition. On December 9, 1918, the petitioners here, without notice to the other party, presented to Judge Craig, ex parte, a paper purporting to set forth a motion to change the place of trial

in the action. The sole ground for the motion was stated therein as follows: "On account of the disqualification of yourself to try the same." The fact which caused the disqualification referred to was not stated. Petitioners did not then file said paper, or any papers in the case, but stated to the judge that they would renew the motion on the following day. On December 10, 1918, the petitioners filed an application to change the place of trial of said cause on the sole ground that the wife of the judge was a stockholder in the said corporation, and that Judge Craig was for that reason disqualified to try the cause or make any order therein, other than to change the place of trial, as prescribed by § 398 of the Code of Civil Procedure. The attorneys for the defendants appeared to this motion, and the hearing was postponed to December 12, 1918, on which day the parties appeared, the motion was argued by the respective attorneys, and was denied by the court. It was made to appear that the wife of Judge Craig had disposed of her stock in the corporation on December 10, 1918. On the same day Judge Craig requested Honorable J. W. Curtis, Judge of the superior court of San Bernardino county, to sit for him on the following day for the purpose of disposing of the said cause. On December 13, 1918, Judge Curtis presided in the said court, and the said cause was called for further proceedings. Thereupon the petitioners objected to any further proceedings therein, and moved the court to change the place of trial thereof, upon the ground that the wife of Judge Craig was a stockholder in the defendant corporation during the pendency of the action at all times prior to December 10, 1918; that on December 9, 1918, the petitioners had made the application above mentioned to Judge Craig; that they had filed a motion for change of place of trial on December 10, 1918, as above stated; that the matter was heard on December 12,



1918, at which time it had been denied by Judge Craig. This application was heard by Judge Curtis, then presiding in the court, and, after argument, was denied. Thereupon, as before stated, this proceeding in prohibition was instituted against said superior court, and also against Hugh H. Craig, as presiding judge thereof. The object of the proceeding is to restrain the said court from making any order in the said cause, except an order changing the place of trial to the nearest or most accessible superior court, the judge of which is not disqualified from trying the same.

The cause was submitted on a demurrer to the petition. The facts alleged are therefore admitted to exist. But other facts, though pertinent to the prayer of the petition, cannot be considered.

Upon the argument here, it was stated that Judge Craig had been the owner of stock in the corporation defendant prior to June 13, 1917, and it was urged that he was, and continued thereafter to be, disqualified by reason of such fact, so long as his direct liability as a stockholder continued to exist. On this point we need only say that neither in the petition nor in the notice of motion is it alleged that he ever owned any stock in said corporation. The mere recital of the fact that Judge Craig had stated "that he had disposed of all his stock in said corporation to his wife" is not an allegation of the

—ownership  
of stock.

fact of ownership. It cannot be regarded as such allegation, and particularly in view of the fact that it is not assigned, either in the petition or in any motion addressed to the superior court, as ground for the application to change the place of trial. Nor can statements made by counsel in argument, or statements in an affidavit filed in behalf of the

—supplying  
deficiency.

respondent, cure the lack of a material allegation in the petition. This court, therefore,

cannot consider the effect of such ownership, if, as a matter of fact, Judge Craig ever did own such stock. The decision of the case must depend wholly on the effect of the alleged and admitted fact that his wife was the owner thereof at the time the application was made to the court, when Judge Craig was presiding therein, to change the place of trial.

There is no merit in the motion of respondent to quash the writ of prohibition issued by the district court. The motion was based on the claim that the case before the superior court was an action in equity—a case in which appellate jurisdiction is, by the Constitution, lodged in the first instance in the supreme court alone (Const. art. 6, § 4), from which fact, it is argued, an original proceeding in prohibition to prevent

Prohibition—  
jurisdiction—  
courts.

action by the superior court in such a case is cognizable only in the supreme court. This assumption is not correct. The same section of the Constitution gives equal and concurrent jurisdiction to the district courts of appeal and to the supreme court to issue writs of prohibition in all proper cases. So far as jurisdiction to do so is concerned, the questions of appellate jurisdiction and of the nature of the action in which the act sought to be prohibited is threatened are entirely immaterial. As a matter of policy and practice, both this court and the district courts of appeal, respectively, have at times refused to take jurisdiction of an original proceeding, where the case involved was in the superior court and was originally appealable to the other court. *Collins v. Superior Ct.* 147 Cal. 264, 81 Pac. 509; *Re Turner*, — Cal. App. —, 177 Pac. 854. But this practice was not adopted because of any want of original jurisdiction in such cases in either court. This was expressly stated in the *Collins Case*.

If the fact that the wife of Judge Craig owned stock in the corporation on December 10, 1918, when the

application was filed and presented to him as judge of the superior court, is sufficient to disqualify him from sitting or acting as judge in that action, there is no doubt, under our decisions, that it was his duty, upon the fact being established, to grant the application and make an order transferring the case as provided

Venue—  
change—  
disqualification  
of judge.

in § 398 of the Code of Civil Procedure. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848; *Krumdiek v. Crump*, 98 Cal. 119, 32 Pac. 800. There was but one judge of the superior court of Riverside county, and hence the rule stated in *Oakland v. Oakland Water Front Co.* 118 Cal. 249, 50 Pac. 268, that an action could be retained and tried by another judge of the same court, does not apply. If his disqualification depends upon a fact not within the knowledge of the judge, as might be the case, power to determine from the evidence whether or not the fact existed would be implied from the necessity of the case, but, when established, the mandate of § 398 would certainly apply and be imperative, as was held in said cases, leaving him no discretion in the matter. It is true, as was said in *Paige v. Carroll*, 61 Cal. 215, that if, before the motion was made, the disqualified judge had called in another judge, not disqualified, to sit for him in the cause, the judge so called in could properly deny the motion to change the place of trial. But in this case Judge Craig did not call in Judge Curtis to sit in the cause until after he had denied the motion, and therefore, as said in *Upton v. Upton*, 94 Cal. 28, 29 Pac. 411, it was "his duty to grant it," instead of denying the motion and thereafter calling in the judge. See also *Barnhart v. Fulkert*, 59 Cal. 130; *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746. The first question presented on the merits, therefore, is whether or not the ownership of the stock by his wife at the time the motion was regularly presented to

him operated to disqualify him from trying the case.

The claim that the fact that the wife is a stockholder disqualifies the husband from trying the case as judge rests upon the following language of § 170 of the Code of Civil Procedure: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: 1. To which he is a party or in which he is interested. 2. When he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity, or affinity, within the third degree, computed according to the rules of law."

A provision follows for the waiver by the parties of such disqualification under subdivision 2. It is not material here. The argument is that the wife, as holder of corporate stock, is the owner of an interest in the corporation; that the corporation represents her in such action, and acts for her protection and benefit, and consequently that she is a "party" to the action, within the meaning and scope of the first clause of subdivision 2. That a stockholder is not technically a party cannot be doubted. "When a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action." 1 Clark & M. Priv. Corp. p. 15.

It is only where the corporation defendant refuses to defend the action, or, having begun a defense, it is made to appear that it will not prosecute the defense in good faith, that a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation. He must show that he cannot induce those in control of the corporation to do that which is right in the matter. *Waymire v. San Francisco & S. M. R. Co.* 112 Cal. 650, 44 Pac. 1086; 2 Clark & M.

Priv. Corp. p. 1690. Hence the use of the word "party" in the clause relied on does not signify that the ownership of stock by person related to the judge within the prohibited degree disqualifies the judge from trying a case against the corporation.

The succeeding clause clearly indicates that the legislature intended that it should not have that effect, for that clause states the fact which the legislature must be presumed to have considered necessary to disqualify the judge where a corporation is a party. It limits the disqualification to cases where the relative is an officer of the corporation. The rule of construction that the expression of one thing excludes all others applies, and it is therefore to be presumed that the legislature

did not intend to create a disqualification by reason of the relationship of the judge to any person connected with the corporation except an officer thereof. That this is the proper construction of a statute prohibiting action by one who is related to a party to the suit is well established. It was directly held under a statute precisely like ours in this respect that the judge was not disqualified by his relationship to a stockholder. *Searsburgh Turnp. Co. v. Cutler*, 6 Vt. 322. And a statute prohibiting a sheriff or constable from serving process in a case to which he is a party, or is related to a party, does not apply to prevent him from serving process in a case where a corporation is a party and he is a stockholder therein. *Adams v. Wiscasset Bank*, 1 Me. 365, 10 Am. Dec. 88; *Merchants' Bank v. Cook*, 4 Pick. 415. The supreme court of Maine in the above case stated the reasons in very apt and convincing language as follows: "The argument arising from inconvenience is very strong. . . . Shares are continually changing owners; and a corporation of this kind if disposed to be evasive

might, by frequent and secret transfers, abate every process commenced against them."

These reasons apply with greater force to the present case. If the corporations of this state could disqualify a judge and obtain a change of the place of trial whenever some relative of the judge within the third degree was or should become a stockholder of such corporation, it might be made very difficult, as against many corporations, to find a judge or a court where the cause to which such corporation was a party could be tried. No great effort of the imagination is necessary to perceive the consequences of such a rule. In many cases it would operate to defeat justice. We are satisfied, therefore, that the subdivision should not be construed so as to include the stockholder as a party where the corporation only is named as such.

The petitioner relies on the decision in *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747, in support of his position. In that case the sons of the judge were the vendees of certain persons claiming heirship to an estate under an executory contract by which such heirs agreed to convey to the sons an interest in the estate, in consideration of their services as attorneys in establishing the heirship. The decision in the case would settle the question of such heirship. The sons were therefore as much interested in the controversy as the parties themselves. Upon a distribution they would not be improper parties, and would have a right to appear in respect to their personal interests. The general notice of the proceeding to be given to all persons would be notice to them, as well as to every other person who claimed any interest in the estate. In view of this direct interest as compared with the remote and indirect interest of the stockholders of a corporation, and because of the provisions of the section itself above referred to implying the contrary intention in the case of corporations, we do not think this case should be

Judge—  
disqualification  
—wife a stock-  
holder in  
corporation.

—construction  
of statute.

extended to include cases like the one at bar. Our conclusion, therefore, is that Judge Craig was not disqualified to act in the matter by reason of his wife's ownership of stock in the corporation defendant.

We have shown that there is no allegation in the petition to the effect that Judge Craig was himself at any time a stockholder in said corporation. Inasmuch as it may be claimed that his ownership was a matter within his personal knowledge and that he should have taken cognizance thereof at the mere suggestion, it may be proper to present some further considerations on the subject. Upon the hearing in the district court of appeal an affidavit of Judge Craig was filed by the respondents, showing that he had not been the owner of any stock in the corporation since the date of June 13, 1917. There is no information obtainable from the record to show that ownership at that date would disqualify him. The cause was submitted, as we have said, upon a demurrer to the petition. The petition does not set forth the complaint in the action pending in the superior court, nor purport to state the substance thereof. No evidence was introduced at the hearing, either in the district court of appeal or in this court, as to the character of said action or as to the allegations of the complaint therein. The petitioners in their briefs set forth what purports to be a statement of some of the facts alleged in said complaint. As these facts were not alleged we cannot take no-

tice of them when presented in this manner. It is true that the liability of a stockholder for the debts and liabilities of the corporation is direct and is created as soon as the corporate debt or liability is contracted or incurred (Const. art. 12, § 3), so that, if the liability involved in the action was contracted or incurred prior to the disposition by Judge Craig of his stock, as stated in his affidavit, he might still be interested in the action and be disqualified by subdivision 1 of § 170. But there can be no presumption in this case that such liability did exist at that time, for we have no facts upon which it could

—presumption  
as to disquali-  
fication.

be predicated. Hence the contention that he is disqualified by reason of his own interest is not sustained by the allegations or proof.

It may properly be suggested that there is no good reason for further contention in the court below upon this subject. By calling in Judge Curtis, Judge Craig has already indicated his intention not to try the case. If it is improper for him to do so, or to choose the judge, under the actual circumstances of the case, as they may appear, the objection can easily be obviated by requesting the governor to designate the judge to try the case.

The application for a peremptory writ of prohibition is denied, and the proceeding is dismissed.

We concur: Angellotti, Ch. J.; Wilbur, J.; Olney, J.; Lawlor, J.; Lennon, J.; Melvin, J.

### ANNOTATION.

#### Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding.

##### Generally.

It is held as a general proposition that a stockholder of a corporation is not a "party" to a suit merely by reason of the fact that the corporation is an actual party, and that consequently a judge is not disqualified to hear the suit by reason of his relationship to

the stockholder. *Ewa Plantation Co. v. Holt* (1907) 18 Haw. 509; *Re Dodge & S. Mfg. Co.* (1879) 77 N. Y. 101, 33 Am. Rep. 579; *Place v. Butter-nuts Woolen & C. Mfg. Co.* (1863) 26 How. Pr. (N. Y.) 601, reversing (1857) 28 Barb. 503; *Bank of Lansingburgh v. McKie* (1852) 7 How. Pr. (N. Y.)

360, affirmed (see (1855) 14 How. Pr. 549); *Houston Cemetery Co. v. Drew* (1896) 13 Tex. Civ. App. 536, 36 S. W. 802; *Ex parte Tinsley* (1897) 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306; *Lewis v. Hillsboro Roller-Mill Co.* (1893) — Tex. Civ. App. —, 23 S. W. 338; *Kingman-Texas Implement Co. v. Herring Nat. Bank* (1913) — Tex. Civ. App. —, 153 S. W. 394; *Wise County Coal Co. v. Carter Bros.* (1887) 3 Tex. App. Civ. Cas. (Willson) 372; *Searsburg Turnp. Co. v. Cutler* (1834) 6 Vt. 315. See *David Colliery Co. v. Charlevoix Sugar Co.* (1908) 155 Mich. 228, 118 N. W. 929.

In *Searsburgh Turnp. Co. v. Cutler* (1834) 6 Vt. 315, the defendant pleaded to the jurisdiction of a justice of the peace that he was related within the second degree of affinity to one of the corporators and stockholders of the plaintiff company. The action was for trespass on the case for breaking down and passing a turnpike gate owned by the company. The statute provided that a justice of the peace "shall not take cognizance of a case, where he is related within the fourth degree, either by affinity or consanguinity to either of the parties." It was held that the stockholder was not in a legal sense a party to the suit and that the justice was not disqualified.

*Houston Cemetery Co. v. Drew* (1896) 13 Tex. Civ. App. 536, 36 S. W. 802, was an appeal from an order of the district court appointing a receiver of the property of a cemetery company. On a bill brought by a shareholder on behalf of himself and all others similarly situated, it was held that the judge who granted the order for a receiver was not disqualified by the fact that his grandmother was a shareholder in the cemetery company; that she was not a party to the suit, since a bill filed in the interest of a party and all other persons similarly situated did not make the persons similarly situated parties to the suit. In *Ex parte Tinsley* (1897) 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306, the court followed the decision in *Houston Cemetery Co. v. Drew* (Tex.) *supra*, on a proceeding arising out of the same receivership.

In *Wise County Coal Co. v. Carter* (1887) 3 Tex. App. Civ. Cas. (Willson) 372, it was held that a judge was not disqualified to hear an action to which a corporation was a party by the fact that he was related to one who was president of, and a stockholder in, the corporation.

In *Lewis v. Hillshow Roller-Mill Co.* (1893) — Tex. Civ. App. —, 23 S. W. 338, a roller mill company brought suit to recover a sum of money due on a subscription for the purpose of erecting the mill. It was urged that the presiding judge was disqualified to try the case because he was a brother-in-law of one of the stockholders in the company. The court held that a stockholder was in no sense a party to a suit by the corporation.

In *Kingman-Texas Implement Co. v. Herring Nat. Bank* (1913) — Tex. Civ. App. —, 153 S. W. 394, a garnishment proceeding against a bank, it appeared that the judge was the father-in-law of the cashier, who was a stockholder of the bank. The court held that the judge was not disqualified, since his interest was contingent on his daughter's dying without issue, in which case he would inherit from her, and that this was too remote to work a disqualification.

*Bank of Lansingburgh v. McKie* (1852) 7 How. Pr. (N. Y.) 360, affirmed (see (1855) 14 How. 549) was a motion to vacate an attachment by the plaintiff bank. The defendant moved to set aside the attachment on affidavits in which it appeared that the president of the plaintiff bank, who was a stockholder therein, was the brother-in-law of the judge. It was held that the judge was not disqualified; that the statute (2 Rev. Stat. 275, § 2) which disqualified judges by reason of consanguinity or affinity to either of the "parties" meant persons for whose immediate benefit the action was prosecuted, and that a stockholder was not such a party, not having immediate interest in the suit.

*Re Dodge* (1879) 77 N. Y. 101, 33 Am. Rep. 579, was an appeal from an order denying a motion to set aside an order appointing a receiver for a corporation and directing an assessment

against its stockholders. It was held that relationship to a stockholder did not disqualify the judge to make the order. The court said: "It is very certain that to exclude a judge from sitting in any cause by reason of kinship, such kinship must exist between him and some person who is actually a party to the cause. It is not enough that he is related to some person, not a party, who is or may be interested in it, or affected by his order. Interest on the part of the judge disqualifies him from sitting, but interest on the part of a relative of the judge does not. The statute very clearly expresses that such relative must be one of the parties to the cause, to render the judge incompetent."

The holding in *Place v. Butternuts Woolen & C. Mfg. Co.* (1857) 28 Barb. (N. Y.) 503, that a stockholder in a corporation was a party to a suit by the corporation so as to disqualify a justice of the peace, who was the stockholder's brother, was reversed without opinion in (1863) 26 How. Pr. 601.

In *Ewa Plantation Co. v. Holt* (1907) 18 Haw. 509, it appeared that two of the justices of the Hawaiian Supreme Court, before which were pending several appeals involving the income taxes of corporations, had relatives within the third degree of consanguinity or affinity who owned shares of stock in one or more of the corporations. The court held that the stockholders were not parties, whatever their pecuniary interest in the outcome of the suit might be, and as long as the justices themselves had no pecuniary interest in the suits, they were not disqualified.

However, in *Davis Colliery Co. v. Charlevoix Sugar Co.* (1908) 155 Mich. 228, 118 N. W. 929, an action against a corporation, a decree was entered in the trial court in favor of the defendant. The complainant appealed, alleging that the trial judge was disqualified because the sister of his wife

was a stockholder in the corporation. It was held that the judge was disqualified.

#### Wife of judge as stockholder.

In South Dakota it is held, contrary to the decision in the reported case (*FAVORITE v. SUPERIOR CT.* ante, 290) that a judge whose wife is a stockholder in a corporation which is a party to a suit is disqualified to hear the case. *First Nat. Bank v. McCarthy* (1900) 13 S. D. 356, 83 N. W. 423; *First Nat. Bank v. Keenan* (1899) 12 S. D. 240, 80 N. W. 1185; *First Nat. Bank v. McGuire* (1899) 12 S. D. 226, 47 L.R.A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074.

*First Nat. Bank v. McGuire* (1899) 12 S. D. 226, 47 L.R.A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074, was an action for the foreclosure of collateral given by the defendant to secure payment of promissory notes. The defendant presented a petition to the court praying that the judge should proceed no further in the case because of his being unconsciously biased and prejudiced in favor of the plaintiff corporation on account of the fact that his wife owned a large amount of stock in the corporation. It was held that the judge was disqualified on these grounds; that the interests of his wife were his interests.

In *First Nat. Bank v. Keenan* (1899) 12 S. D. 240, 80 N. W. 1185, the facts and decisions were the same as in *First Nat. Bank v. McGuire* (S. D.) supra.

*First Nat. Bank v. McCarthy* (1900) 13 S. D. 356, 83 N. W. 423, was an action to foreclose a mortgage given by the defendants to secure a loan from the plaintiff bank. It was shown that the wife of the presiding judge was a stockholder of the plaintiff and one of the directors. The court held that the judge was not qualified to hear the case, following the rule in *First Nat. Bank v. McGuire* (S. D.) and *First Nat. Bank v. Keenan* (S. D.) supra.

M. T. Q.

## NATIONAL BANK OF SAN MATEO, Resp.,

v.

ST. JOHN WHITNEY, Appt.

*California Supreme Court (In Banc)—September 3, 1919.*

(— Cal. —, 183 Pac. 789.)

**Banks — check to order of cashier — loss from misappropriation.**

1. The loss due to the misappropriation by a bank cashier of the proceeds of a check made payable to him personally to satisfy a note held by the bank against the drawer must, in case both persons are equally innocent, fall upon the bank, rather than upon the drawer.

[See note on this question beginning on page 304.]

**— making note payable to cashier.**

2. The maker of a note held by a bank does not become chargeable with loss due to the misappropriation by the bank's cashier of the proceeds of a check given to pay the note, by the fact that, upon request of the cashier, he made the note payable to the cashier's order.

**Notice — intention of cashier to defraud.**

3. That the cashier of a bank applies for payment of a note given by an officer of a corporation which has borrowed to its limit from the bank, in order to secure more funds for the corporation, within twenty-four hours after the note was made and at the place of business of the corporation, to be made by check payable to himself, is not so suspicious as to place the loss caused by the cashier's misappropriation of the funds upon the drawer of the check, if the excuse given by the cashier was that the payment was necessary to meet the requirements of the bank examiner.

**Bank — right of customer to rely on representations of cashier.**

4. The maker of a note to a bank has a right to rely on statements of the bank's cashier with respect to necessity and form of payment of the note in determining his course of action with respect thereto.

**Trial — instructions — presumption as to purpose of payment.**

5. Upon an issue whether or not a check payable to the cashier of a bank was intended to pay a debt to him or to the bank, an instruction is erroneous that the presumption of law is

that money paid by one person to another was due the latter.

[See 14 R. C. L. 784; 21 R. C. L. 126.]

**— instruction on facts.**

6. An instruction that a check made payable to a bank cashier in response to his demands, made at the office of the drawer, and in order to satisfy a note given by him to the bank, was not in the ordinary course of business, is erroneous as being upon a question of fact.

[See 14 R. C. L. 740.]

**— jury — question of suspicion of drawer of check.**

7. Whether or not the suspicions of the drawer of a check to the order of a bank cashier to take up a note payable to the bank were or should have been aroused by the fact that the cashier made demand at the drawer's place of business for a check payable to himself is for the jury.

**Evidence — authority of bank cashier.**

8. Upon the question whether or not a check made payable to a bank cashier was to pay a note to the bank or a debt to the cashier, testimony by the bank's directors that the cashier had no authority to collect the note, and that no examination was to be made by the bank examiner, which was the excuse given by the cashier for demanding payment, is immaterial.

**Bills and notes — payment to agent — demand for production of note.**

9. The rule that one paying a note to an agent, without demanding production of the note, does so at his own risk, does not apply in case of payment to a bank cashier of a note held by the bank.

(— Cal. —, 183 Pac. 789.)

**APPEAL** by defendant from a judgment of the Superior Court for San Mateo County (Buck, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Norman A. Eisner for appellant.  
Messrs. Walter H. Linforth and  
Ross & Ross for respondent.

Wilbur, J., delivered the opinion of the court:

This is an action upon a promissory note executed on September 13, 1915, to the plaintiff for \$3,000. The case was tried before a jury. Plaintiff recovered judgment, and defendant appeals. The sole issue presented to the jury was whether or not the promissory note was paid on September 14, 1915, by a check of the Leslie Salt Refining Company, drawn on the Bank of California for \$3,000. This check was issued by the defendant as secretary of the Salt Company, and was received by W. M. Roberts, cashier of the plaintiff. That it was deposited by him to his credit with the plaintiff bank is admitted. The plaintiff, in support of its contention that the note was not paid by the check in question, relies upon the possession of the note as prima facie evidence of its nonpayment, and upon the fact that the check was made payable to W. M. Roberts, instead of to the bank, and was a check of the Leslie Salt Refining Company, instead of the defendant, and in support of its claim presented instructions to the jury, which were given by the court, to the effect that its possession of the note raised a presumption of its nonpayment; that the giving of the check to W. M. Roberts personally gave rise to the presumption that it was in discharge of an obligation owing to Roberts.

In order to understand fully the assignments of error made by the appellant, it will be necessary to state additional facts. The defendant was a stockholder and the secretary of the Leslie Salt Refining Company. W. M. Roberts, plaintiff's cashier, was a director of the Leslie Salt Refining Company, holding five shares of stock to qualify

him as such director. The Salt Company was a borrower from the plaintiff, and, having borrowed to the limit of its credit, the defendant negotiated a loan for \$3,000 on the 13th day of September, 1915, and gave his personal note, herein sued upon, as evidence of such indebtedness. Miss Zula Clements, stenographer and general office assistant of the Leslie Salt Refining Company, testified that, on September 14th, William M. Roberts, plaintiff's cashier, called at the office of the Salt Company in the Flatiron Building, in San Francisco, between 3 and 4 o'clock in the afternoon, and left a message for the defendant to the effect that the bank examiner had been at the bank and had questioned the loan, and that it was necessary for the bank to have a check for \$3,000 to take up the note, and that the check was to be made out personally to him and mailed down that night without fail, as he expected the examiner would be there again in the morning; that about 4:30 of that afternoon she gave this message to the defendant; that the check in question for \$3,000 was made out at that time. The defendant testified that in pursuance of this message he wrote the check in question and mailed it to Mr. Roberts at the bank; that the check was made payable to W. M. Roberts, because it was requested in that form, although other checks in payment of moneys borrowed from the plaintiff had been made payable to the plaintiff bank; that neither the defendant nor the Leslie Salt Refining Company owed anything to Mr. Roberts personally, nor was there any debt to Mr. Roberts in which the defendant or the Salt Company was interested; and that the \$3,000 check was not sent as a loan to Mr. Roberts. Roberts testified that he received the check in question for the purpose of taking up a note of the defendant for



the sum of \$3,000, that he received the check at the bank, that he had no personal transaction with the defendant, and that the defendant owed him no money and loaned him no money.

It will be observed, then, that the only persons who have any knowledge as to the purpose for which the check in question was given by the defendant, namely, the defendant, his stenographer, and Roberts, all testified that it was given in payment of the note herein sued upon, and for no other purpose. The authority of Roberts, as cashier, to receive the payment of the note, must be conceded. *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 279, 122 Pac. 458; *Morse, Bank & Bkg.* 5th ed. § 159, pp. 356, 357; 7 C. J. § 160. His application of the check to his own overdrawn account was a confessedly fraudulent misappropriation of the check, and the only question involved in the case is as to whether the plaintiff or defendant must suffer by reason of the cashier's dishonesty. If we assume that both the plaintiff and defendant were equally innocent of wrong in connection with the transaction, and that the loss

**Banks—check to order of cashier—loss from misappropriation.**

resulted by reason of the fraud of the plaintiff's agent in misapplying the proceeds of the check paid to him by the defendant, then, under a familiar principle of the law, the bank, for whom Roberts was acting, would be required to bear the loss, for "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." *Mundorff v. Wickersham*, 63 Pa. 89, 3 Am. Rep. 531, cited in *Schultz v. McLean*, 93 Cal. 329, 356, 28 Pac. 1053. Still, assuming equal innocence of both parties hereto, the loss resulted from the fact that the plaintiff had in its employment in a position of trust and confidence a dishonest employee, who dishonestly utilized his position of trust and confidence to appropriate \$3,000

paid to him as such agent for and on behalf of the principal. Where the agent of a depositor of a bank utilized his position of trust and confidence to fraudulently raise certain checks intrusted to him, and thereby secured from the bank larger sums than called for by the checks, it was held that, although such conduct amounted to forgery, and the bank would ordinarily be responsible to the depositor for payment of such forged checks, nevertheless, by reason of the fact that the crime was committed by the depositor's agent, the depositor, and not the bank, should bear the loss, upon the theory that the principal was liable "for the fraud, torts, or other wrongful acts committed by such agent in and as part of such business." *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31, 39, 41 L.R.A. (N.S.) 529, 124 Pac. 704, 707. Similar reasoning would require us to hold the bank liable for the misconduct of its cashier, Roberts.

Plaintiff, however, contends that both parties are not equally innocent in the transaction; that the defendant, by making the check payable to the cashier, and by acceding to the unusual demand of the cashier, either had notice of the cashier's fraud, or thus put it within his power to commit the wrong, and that therefore the defendant must suffer the loss. In view of the law that the cashier, by virtue of his office, had authority to collect the note, does the fact that he asked for and received a check payable to himself in payment so far inculcate the defendant in the wrongdoing of the cashier as to change the rule? It is undoubtedly true that the form of the check received by Roberts may have enabled him to deposit the same in his own name in the bank without arousing suspicion, which might have resulted from the deposit by Roberts to his own account of a check payable to the plaintiff. But this would have been equally true in case the payment had been made by money, or by the transfer of negotiable paper by in-

(— Cal. —, 183 Pac. 789.)

dorsement in blank or, in short, by any form of payment other than by negotiable paper payable to the order of the plaintiff. It cannot be said, therefore, that the form of the payment facilitated the fraud of the cashier, but rather that the payment by a check drawn to the order of the bank might have made it less easy to effectuate the fraud. Even if the check had been payable to the order of the plaintiff, the cashier, by virtue of his agency, would have had authority to indorse the same and thus gain the possession of the proceeds thereof. *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036; *McBoyle v. Union Nat. Bank*, supra. Where, as here, the duly authorized agent of the plaintiff bank was demanding payment, and such payment was made by a negotiable instrument, the proceeds of which were subsequently secured by the agent, the form of the payment is immaterial. Nor was the fact that

—making note  
payable to  
cashier.

the agent requested the payment by check to his own order of any significance, for the reason that he made such request in his capacity as agent for the plaintiff, and such request was, in effect, the request of the plaintiff. The defendant was not bound to view with suspicion the conduct of plaintiff's agent.

It is next contended that the facts and circumstances surrounding the payment were such as to put the defendant upon inquiry; in other words, to cause the defendant to suspect the intended fraud of the cashier. It being conceded that the demand for payment of a note twenty-four hours after its execution, at the office of the defendant in San Francisco, instead of at the bank, by the cashier personally coming to the office, was unusual, and not in the ordinary course of business, the character of the demand was such as might justly allay all suspicion of the defendant. The defendant knew that the Salt Company had borrowed up to its limit from the bank, and that the \$3,000

represented by the promissory note had been secured by him while an officer of the Salt Company. Defendant knew that the plaintiff bank was supervised by the bank examiner, and therefore that the demand of the bank for payment was not, under the circumstances, unreasonable. Bearing in mind that Roberts came to the defendant for the purpose of demanding payment by the defendant of an obligation owed by defendant to plaintiff for reasons peculiarly applicable to the business of the plaintiff, there was apparently nothing in the transaction to put defendant upon notice that Roberts was trying to defraud either defendant or the bank. The fact that the statements were untrue, and were made for the purpose of allaying the suspicion of the defendant concerning the unusual demand, was not known to the defendant. Defendant had a right to rely upon the truth of these representations in determining his course of conduct, and such representations must be deemed to have been made by the plaintiff. As the question involved is the fact of payment, the representations are wholly immaterial, except as they tended to allay the suspicion which might be aroused in the defendant by reason of the demand for payment and a request that the check be made to the order of the cashier. Upon the issue of payment it is true that there was a conflict of the testimony, arising not only from the fact that the plaintiff had possession of the note, but also because of the fact that the plaintiff was justified in relying upon certain circumstances brought out in the testimony of the defendant concerning the delay of the defendant in notifying the bank that the note had been paid, thus tending, together with other things, to discredit in some measure the testimony of the defendant. If the

Notice—intention of cashier to defraud.

Bank—right of customer to rely on representations of cashier.

issue of payment had been submitted to the jury under proper instruction and evidence, the finding of the jury would be binding on this court. But in the light of the foregoing discussion some of the instructions must be held erroneous. For instance, at the request of the plaintiff the court gave the following instruction: "(2) The court instructs you that the presumption of law is that money paid by one person to another was due the latter, and therefore in this action, if you believe from the evidence that the Leslie Salt Refining Company issued its check, payable to W. M. Roberts, and delivered or sent said check to said Roberts, then the presumption of law is that said Leslie Salt Refining Company did so because it wished to make the check payable to said Roberts."

The jury were thereby instructed that under the circumstances and proof in the case, in the absence of evidence to the contrary, they were entitled to believe that the check given to Roberts was in payment of an obligation due from the Salt Company to Roberts. The real question in issue was whether or not the check was given to the plaintiff by the delivery of the same to its cashier, or whether it was given to Roberts personally for some other purpose. Under these circumstances the instruction of the court, based upon the form of

**Trial—instruction—presumption as to purpose of payment.**

the check, was an erroneous application of the presumption

"that money paid by one to another was due to the latter" (Code Civ. Proc. § 1968, subd. 7), for the very question involved was: To whom was the money paid?

At the request of the plaintiff the court instructed the jury as follows: "(7) The court instructs you that if you believe from the evidence in this case that W. M. Roberts went to the office of the Leslie Salt Refining Company in San Francisco, and there made a demand for the payment of the note here in

question, and directed that any check drawn for the purpose of payment thereof be made payable to him, said W. M. Roberts, and that no other check for the payment of any note to said bank by the defendant, or by said Leslie Salt Refining Company, had been made payable to said W. M. Roberts, but had been made payable to the plaintiff, then you are further instructed that the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank, and that therefore the direction to have said check made payable to said W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be made payable to said Roberts instead of to the plaintiff bank."

This instruction was erroneous, for the reason that

it was an instruction <sup>—instruction on facts.</sup> upon a question of fact; namely, "that the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank."

It is true that the evidence showed that the Salt Company usually paid the bank by checks drawn in favor of the bank, but the instance under consideration is the only one in which the defendant paid an obligation of his own. But, however that may be, the ordinary course of business, so far as involved in this case, was the payment to the cashier of the bank, and not the form of said payment. It was in the ordinary course of business, so far as this case is concerned, for payments to be made to the cashier of the bank. It was also an instruction which, in effect, informed the jury that "the direction to have said check made payable to W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be payable to said Roberts, instead of to the plaintiff bank."

As has been above stated, there was no reason why the check should not be made payable to Roberts. The only legal question properly involved by the form of the check given in payment was whether or not the payment was made to Roberts as cashier of the bank, or to him in his personal capacity and for his personal benefit. This instruction is particularly objectionable, in view of an instruction given at the request of the defendant, as follows: "A bank's client or customer, dealing with the cashier of the bank permitted by its directors to have complete control of the business relations with its clients and customers, may trust in the integrity of such cashier in transacting its banking business with him, when there is nothing in the known state of the affairs of the bank, or of his relation to it, to excite suspicion that he is using his position to the prejudice of his bank."

Under these instructions, upon the admitted facts, the jury must have understood, as a matter of law, that the defendant was not entitled to rely upon the integrity of the cashier, or, in other words, that defendant could not claim the check to be a payment if the cashier misappropriated it, as it is conceded he did. These instructions were erroneous. The question as to whether the suspicions of the defendant

were or should have been aroused was a question of fact for the jury. Other instructions were given, at defendant's request, tending to modify, in some degree, the effect of these instructions; but we cannot say that they cured the basic error of the instruction that defendant's suspicions must necessarily have been aroused by the facts stated in instruction No. 7.

The testimony of the directors of the plaintiff bank was received, over the objection of the defendant, to the effect that they had not authorized the cashier to demand payment of the note in question, and that no examination was made

or was to be made by the bank examiner. The effect of this evidence was merely to prove that the statements made by the cashier to the defendant at the time he demanded payment of the note in question were false. The defendant had a right to rely upon the representations of the plaintiff's agent, and the plaintiff could not take advantage of their falsity. It was therefore immaterial whether or not such representations were true. The evidence, being immaterial, might be regarded

Evidence—  
authority of  
bank cashier.

as harmless, were it not for the fact that in this case the considerations involved are so evenly balanced that it is difficult to say what the effect of such testimony might be upon the mind of the jury. It showed that the bank was being imposed upon by its own agent, and might therefore give the impression to the jury that the bank was to that extent "innocent," while as a matter of law the bank must be deemed to have made such representations. Nor was it proper to show that there was no express authority on the part of Roberts to collect the money. That authority resulted from his official position as cashier, and, in the absence of an express prohibition by the directors, he had authority, as such, to make the collection in question. The evidence should not have been admitted.

The defendant complains of those rulings of the court upon the admissibility of evidence which precluded his proving a transaction by which Roberts sought to reimburse the plaintiff for his wrongdoing. Under proper pleading and offers of proof it would no doubt be permissible for the defendant to show that the plaintiff had received the fruits of the check given by the defendant, if such was the fact. We cannot say, however, that there was error in sustaining the objections to the particular questions that were asked.

Respondent relies upon the rule that where the payee of a promis-

sory note pays an agent who does not produce the note "the payment is at the risk of the maker of the note, and if such person were not, in fact, entitled to receive payment of the note, the maker of the note must bear the loss, for it is his duty to demand the production of the note before he made payment."

The principle, however, has no application here, for the reason that the cashier of a bank has authority to collect notes due to the bank.

In view of the necessity of a new trial it perhaps should be noted that the evidence in this case is not entirely clear as to what became of the credit of \$3,000 which the cashier secured to himself by the

deposit of the check given by the defendant. If such deposit was used by him to reduce an overdraft, and was not subsequently withdrawn by the cashier for his own purposes, the bank, of course, having received the benefit of the check, could not now collect upon defendant's note, upon the theory that the same had not been paid, for it would in fact have received the benefit of the check in the form of a payment upon the indebtedness of the cashier, and the remedy of the bank would be against the cashier, and not against the defendant in that event.

The judgment is reversed.

We concur: Angellotti, Ch. J.;  
Melvin J.; Shaw J.; Lawlor, J.;  
Olney, J.

### ANNOTATION.

#### Making paper payable to agent as charging drawer with loss due to agent's misappropriation.

The reported case (*NATIONAL BANK v. WHITNEY*, ante, 298) is authority for the proposition that the mere fact that a check is made payable to an agent does not necessarily charge the drawer with loss to the principal due to such agent's misappropriation of the fund. Here the court applied the rule in the case of a check made payable to the creditor bank's cashier under facts which were declared not to have put the drawer upon guard as to the possibility of misappropriation by the cashier, even though the check was so drawn at the request of that official. It was also held that the fact that the payee was a bank official who had authority to collect debts due the bank rendered inapplicable the general rule that where the maker of paper pays an agent who does not produce such paper, the payment is at the maker's risk.

A similar decision is found in *Griffin v. Erskine* (1906) 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193, where the owner of a bond secured by mortgage sent the papers for collection to a bank which conducted practically all

of its business through its president, and the latter received and misappropriated a draft drawn in his favor rather than that of the bank, it having been held that receipt of the draft, which was honored, was a payment to the bank which satisfied the debt, although the payee subsequently misappropriated the proceeds of the draft. This case, also, expressly passed upon the question of the effect of the rule that an agent to collect cannot receive anything but money in payment, by holding that such rule was inapplicable as to banks, at least in the absence of express direction to the contrary, in view of the universal custom of such institutions of using checks and drafts as means of payment. It was also ruled that the debtor was justified in making the draft payable to the bank officer rather than to the bank itself, which could act only through its officers. In the course of the opinion, Ladd, J., among other things, said: "Did the delivery of this draft to the bank constitute payment? The rule universally accepted is that under authority merely to collect, an agent, in

the absence of a custom to the contrary, may receive nothing except money in payment. A debtor who owes money, in payment to an agent, must do so in such a manner as to facilitate the agent in transmitting money to his principal. . . . Bills payable are not satisfied by new paper of the same kind unless so agreed. This rule applies to checks and drafts, and, though they are in general use in the transfer of money from one person to another, payment thereby is deemed conditional on the drawee's acceptance and payment. . . . Checks, drafts, and other bills of exchange are the means of transferring the money in adjusting nearly all commercial transactions, and in authorizing an agent, whether a bank or individual, to make collections, it may be assumed, in the absence of instructions to the contrary, that the authority is to be executed in the manner usual and customary in the commercial world. While the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored upon presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt. Such a payment offers no greater temptations to the agent than payment in cash to which ordinarily it is equivalent. If honored by the drawee, payment relates back to the time of delivery. If not honored, the creditor has parted with nothing by reason of conduct of his agent; for, though the agent may receive such paper as conditional payment, he is not permitted, on its strength, to deliver conveyances, leases, or other valuables at the risk of his principal. . . . In view of the universal custom of using drafts and checks as a means of payment, we think an agent may receive a draft or check as conditional satisfaction of the claim placed in his hands, unless instructed to the contrary, whenever he has good reason to believe that it will be paid upon presentation. In the case at bar the bank was required by *Erskine* to remit the money to him in North Carolina, and the evidence

shows that this was expected to be done by the ordinary bills of exchange. He was charged with knowledge of the general custom in the matter of collecting notes and mortgages, such as those sent to the bank, and must be assumed, in the absence of other instructions, to have intended that the bank should execute the duty imposed upon it in the usual and customary way. This being so, it is not necessary to inquire how the bank disposed of the drafts. It was equivalent to money and could have been used as such by his agent, and was no more likely to be misappropriated by the officers of the bank than had money been paid instead. We are of opinion that, under the circumstances disclosed, the bond and mortgage were satisfied by the delivery and subsequent payment of the draft."

And in *Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Constr. Co.* (1905) — Ark. —, 88 S. W. 1031, where the agent was directed to collect for certain materials sold by the principal by getting a check and bringing the money if he could cash it, and the agent did get a check and cashed it, but failed to account therefor to the principal, it was held that as the collection was strictly in accordance with the terms of the agency, the payment was good and relieved the purchaser of any further liability. In this case the misappropriation was not intentional, but this fact does not seem to have influenced the decision, which was clearly upon the ground that the payment had been made in strict accordance with the terms of the agency. So, in *Scott v. Gilkey* (1894) 153 Ill. 168, 39 N. E. 265, where a creditor left certain promissory notes with a private bank for collection and the maker paid the interest thereon by checks drawn in favor of the bank, the proprietors of which absconded without paying the creditor, it was held that the checks constituted a valid payment of the interest. And see *Gibson v. Ward* (1911) 9 Ga. App. 363, 71 S. E. 506, wherein it was held that delivery to the creditor's agent who was authorized to receive payment of a draft drawn in his favor, which was duly

honored so that the agent received the money, effected a payment to the creditor although the agent failed to pay over the money so received.

And in New York a distinction has been made between checks and drafts and notes, mortgages, etc., upon the ground that checks and drafts are usual and ordinary means of transferring money, and that notes, etc., are not so regarded; in consequence of which delivery of a check to an agent authorized to collect money, and payable to him, constitutes payment from the time that the check is cashed, so that conversion by him of the proceeds does not affect the drawer. This was the holding in *Potter v. Sager* (1918) 184 App. Div. 327, 171 N. Y. Supp. 438, which reversed (1916) 98 Misc. 25, 161 N. Y. Supp. 1088. In the lower court the decision was upon the broad ground that an agent cannot accept payment in anything but money, that a check does not constitute payment until accepted and received; and that where the check is made payable to the agent individually, there is no payment unless the principal actually received the money; but the appellate division in a majority opinion declared that checks, when cashed in due course, were on a par with money as regards payment to an agent, even though the money, because of the agent's default, never reached the principal's hands. In reaching this conclusion, Hubbs, J., said: "Where a person is an agent with authority from his principal to collect principal and interest, the general rule is that a payment by a debtor to such agent, to constitute a good payment, must be made in cash. The reason for this rule is that a payment in any other medium is not as good as cash,—is not the exact equivalent of cash. Thus, it has been held that the giving of a note, mortgage, post-dated check, property, etc., does not constitute a payment, because the acceptance of those things by the agent exceeds his authority and constitutes the exercise of a discretion by the agent not vested in him by his principal. It would seem, however, that this court should take judicial notice of the fact that checks and drafts are usual and ordinary

means of transacting business and transferring money in all business transactions; that where an agent is given authority to collect money, the authority granted implies that he shall do so in the usual and ordinary way, and, where a check is given by the debtor, not postdated, and payable at a bank in the same city, the giving of such check payable to the agent constitutes payment from the time that such check is cashed in due course. . . . Such a check, of course, would not constitute payment if not in fact honored on presentation in the ordinary course of business. The agent could not accept such a check in absolute payment and satisfaction. He can, however, receive a check which he has reason to believe will be honored upon presentation as a convenient and customary way of obtaining the money which he is authorized to collect. Such a payment offers no greater temptation to the agent than the payment of the money would offer. If the check is paid to the bank, then the agent has received what he was authorized to receive, and, if not paid when presented, the creditor has lost nothing. The reason for the rule which does not permit a payment to an agent by note, mortgage, etc., does not apply when payment is made by a check which is actually cashed by the bank upon which it was drawn." And in the earlier New York case of *Cohen v. O'Connor* (1873) 5 Daly (N. Y.) 28, affirmed on opinion below in (1874) 56 N. Y. 613, it was held generally that the delivery to an agent who was sent for the money, of a check payable to the order of the agent, who cashed the same and converted the proceeds, was a good payment to the principal, it having been declared that "the objection that this was not a direct payment of money to the agent and as requested is equally untenable, as if the money had actually been paid" over to and lost by the agent.

On the other hand there is authority to the effect that there is no payment which will relieve a debtor from liability where there is simply an execution and delivery of a check drawn to the individual order of an agent

merely authorized to make a collection in money, unless he had authority to receive payment in that manner, notwithstanding the check was cashed by him, provided, of course, that the money did not reach the principal. Thus under the rule that a person who deals with an agent and knows, or is charged with knowledge of, the extent of his authority with respect to receiving payment for his principal, must protect himself by making payment in conformity with the authority of the agent, it has been held that where debts were paid by drafts payable to the order of an agent, misappropriation of the moneys by the agent did not relieve the debtor of liability to the principal, the agent not having been authorized to receive payment by draft drawn in his personal favor. *Crowley v. McCambridge* (1910) 154 Ill. App. 135.

And there is considerable authority to the effect that where delivery is made to an agent having no authority, either express or implied, to receive payment other than in cash of a note drawn to his order, the execution and delivery of such a paper, the proceeds of which have been misappropriated by the agent, does not extinguish the debt.

Thus, in *Baldwin v. Tucker* (1901) 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841, where a person purchased a piano from a traveling agent, and executed a note for the purchase price, drawn payable to the agent, it was held that no title passed where the agent misappropriated the proceeds of the note, since in a transaction like the one under consideration the purchaser was bound to know that there was a limitation upon the agent's authority which would prevent him from taking a note payable to himself for the purchase money, there being nothing in the case showing that in the business of selling pianos by agents it was usual for them to take notes payable to themselves for the purchase money.

So, in *Corning v. Strong* (1848) 1 Ind. 329, 1 Smith, 197, where creditors issued a written order directing their debtors to pay the debt to their agent and to accept his receipt, it was held

that they were not discharged by the execution and delivery of a note drawn to the order of the agent, who transferred the same to third persons for full value in payment of his own debts. The court argued that the order did not authorize the agent to accept a note payable to himself; that an agent with limited powers must, in order to bind his principal, conform strictly to such powers; that the taking of a note in his own name payable at a future date was an attempt to transfer the debt to himself with a postponement of the right to enforce payment; that the creditors were not authorized by the order to consider the agent as agent for the creditors for any other purpose than to receive payment; and that the receipt of a note for a precedent debt is not a payment, in consequence of which an agent sent to collect such a debt has no authority to give a discharge upon receipt of a note. And in *McCulloch v. McKee* (1851) 16 Pa. 289, it was again ruled that a special agent to collect a debt has no right to take anything but the money, and that the debtor is not released from liability to the principal by giving a note for the amount of the debt, drawn in favor of the agent individually, for without the consent of the principal the agent cannot be substituted as creditor of the debtor.

And in *Robinson v. Anderson* (1886) 106 Ind. 152, 6 N. E. 12, proceeding upon the theory that one dealing with a special agent is bound at his peril to ascertain the extent of the agent's authority, it was held that where an agent with express authority to sell goods and to take notes therefor, payable to his principal, retained in his possession notes which he should have promptly forwarded to his principal, in whose favor they were drawn, and without the consent of his principal surrendered the same while unmatured to the maker and received notes payable to himself, the principal was not bound by the transaction and could recover on the original notes. The court said: "It could not be implied that he [the agent] was thereby authorized to surrender the note of his principal and receive in payment a



note payable to himself. An agent having authority to collect a debt cannot be supposed to have the right to take as payment the note of the debtor payable to himself, thus substituting himself as creditor in the room of his principal. . . . That a debt may be paid by the execution of the negotiable promissory note of the debtor may be conceded, but the execution of such note to a third person, without the consent of the creditor, has no resemblance of payment. As the exchange of securities, and taking, in the stead of those payable to his principal, others payable to himself, was not within the scope of the agent's authority to sell and collect, if he had authority to collect, any exchange, if authorized at all, must have been a special agency, and in that event the appellees were bound to ascertain the extent of his authority in that regard. Failing to do so, they made the exchange at their peril, subject to the ratification of the principal, or of their ability to prove affirmative authority in that respect. Since the act was repudiated by the principals, and no proof was offered tending to show authority, the right of the plaintiffs to collect the note sued on was unaffected by the unauthorized transaction which is put forward in support of the plea of payment."

Again, in *Davis v. Severance* (1892) 49 Minn. 528, 52 N. W. 140, where a note was intrusted to an attorney for collection, and he settled with the debtors by taking part payment in cash and unauthorizedly taking a new note running to himself for the balance, which renewal note he wrongfully assigned to a third person, it was held that the client could establish the original note as against the maker. And *Willis v. Gorrell* (1904) 102 Va. 746, 47 S. E. 826, is to the same effect. And in connection with the latter case, see *Smith v. Powell* (1900) 98 Va. 431, 36 S. E. 522.

And in *Holt v. Schneider* (1899) 57 Neb. 523, 77 N. W. 1086, applying the rule that generally an agent to collect can take nothing but money, and that where the agent exceeds his authority, the principal is not bound thereby, it was held that where a debtor gave his

note to the agent, who applied the proceeds to his personal claim, he was not relieved of liability to the creditor since he was not justified in believing that the agent had authority to accept the paper for the principal.

And in *Everts v. Lawther* (1897) 165 Ill. 487, 46 N. E. 233, it was held that the unauthorized acceptance by an agent of a note payable to himself in satisfaction of a debt due his principal did not constitute a payment of the original debt, the proceeds of the note never having been paid over to the principal. It was said that the debtor must be considered as having trusted to the good faith of the agent that he would pay the money to his principal rather than to have supposed that his note was an actual payment to the creditor.

In *Lochenmeyer v. Fogarty* (1884) 112 Ill. 572, where a note made payable to a guardian for the benefit of his ward was left with the guardian's attorney and was paid after the guardian's death had revoked the attorney's authority, by drawing other notes which were made payable to the attorney, who discounted the same and retained the proceeds, it was held that the taking of the renewal notes did not constitute payment of the original debt or relieve the maker from further liability. This was upon the ground that payment of a note to a person who has no authority to receive the money does not extinguish the debt, but the court expressly recognized the rule that "if the notes had been paid to a person authorized to receive payment, the indebtedness would have been extinguished." In reaching the above conclusion the court argued as follows: "Here, Hammon, the guardian, died, leaving the notes in the possession of Lynch [his attorney]. It nowhere appears that Hammon, while living, had authorized Lynch to collect; but if he had, that authority was revoked by his death, and Lynch could not then collect or convert the notes to his own private use. He had authority merely, after Hammon's death, to hold the notes in his possession until some person authorized should call upon him for them. Appellants are in no position to

claim that they paid the notes innocently or in good faith. They knew that the notes were given for land that belonged to the minor. They also knew that the notes were payable to the guardian, that he was dead, and that the money which the notes represented was trust funds, and knowing these facts, they had no right to take up the notes from Lynch by giving others payable to his order, nor can they claim any rights by virtue of such a transaction. It may be a hardship that these parties are required to pay their notes a second time; but who is to blame? They knew, or by the exercise of the least precaution might have known, when they obtained the notes of Lynch, that he had no authority to surrender them; and if they saw proper to deal with him, they acted at their own peril."

Conversely, the debtor can make a note payable to the agent where such agent has authority, either express or implied, to receive payment in that manner. For instance, in *Galbraith v. Weber* (1910) 58 Wash. 132, 28 L.R.A. (N.S.) 341, 107 Pac. 1050, the court recognized the general rule that where an agent has authority to sell for cash only, he cannot take notes payable to himself, and that where he has authority to sell on credit, he must take the

credit in the name of the principal, but held that, in the case under consideration, the facts were such as to warrant a finding that the agent had implied authority to take a purchase money note payable to himself so that there was no independent liability of the maker over to the principal. And see *Schleicher v. Armstrong* (1895) — Tex. Civ. App. —, 32 S. W. 327.

And, of course, an undisclosed principal cannot complain of the fact that the agent took promissory notes made to the agent as an individual. A case illustrative of this situation is *Gardner v. Wiley* (1905) 46 Or. 96, 79 Pac. 341.

In connection with the foregoing cases which involved the giving of notes to the collecting agents, it should be noted that no case in addition to *Potter v. Sager* (1918) 184 App. Div. 327, 171 N. Y. Supp. 438, which is set out and quoted supra, has been discovered wherein a distinction between notes and checks has been expressly made in connection with the specific subject under annotation herein. However, the facts in many of the cases are such that the drawing of the distinction advanced in the *Potter* Case would eliminate much of the apparent conflict among the authorities.

G. J. C.

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CLARENCE A. PLANK, Appt.,

v.

DICK SWIFT.

*Iowa Supreme Court—October 14, 1919.*

(— Iowa, —, 174 N. W. 236.)

### Checks — for gambling debt — effect of Negotiable Instruments Act.

1. The Negotiable Instruments Law did not repeal an existing statutory provision making void checks given for a gambling debt.

[See note on this question beginning on page 314.]

Evidence — burden of proof — good-faith holder of paper given for gambling debt.

2. One seeking to recover on checks given for a gambling debt has the

burden of showing that he is a good-faith holder by a preponderance of credible evidence.

[See 12 R. C. L. 758.]

**Checks — for gambling debt — bona fide holder — establishment of rights.**

3. An attorney attempting to recover on checks given for a gambling debt does not establish his bona fides as matter of law by evidence that

he received them for services rendered the payee in avoiding extradition on a charge of murder at a time when he was under arrest for violation of a local ordinance against vagrancy.

[See 3 R. C. L. 1041.]

**APPEAL** by plaintiff from a judgment of the District Court for Sioux County (Bradley, J.) in favor of defendant in an action brought to recover the amount of certain bank checks drawn by defendant on a bank, and made payable to a certain person whose name appears to be indorsed thereon. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Van Oosterhout & Kolyn, for appellant:

Statutes invalidating contracts connected with gambling transactions, and extending such invalidity to the contract in hands of bona fide holders for value, are inconsistent with the provisions of the Negotiable Instruments Law, and in so far are by implication repealed by the enactment of the same.

Wirt v. Stubblefield, 17 App. D. C. 283.

Defendant, having himself issued and put the checks in circulation, is estopped to assert their invalidity as having arisen in connection with gambling transactions.

Henderson v. Anderson, 3 How. 73, 11 L. ed. 499; Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 717, 75 N. E. 1103, 5 Ann. Cas. 158; Manning v. Manning, 8 Ala. 138; Fosdick v. Myers, 81 Ill. App. 544; Bodkins v. Taylor, 14 Ohio, 489; Treon v. Brown, 14 Ohio, 482; Gowen v. Shute, 4 Baxt. 57; Higginbotham v. McGready, 183 Mo. 96, 105 Am. St. Rep. 461, 81 S. W. 883; Sabine v. Paine, 166 App. Div. 9, 151 N. Y. Supp. 735.

The party to a negotiable paper cannot be a witness to invalidate it by showing that it was founded upon an illegal consideration.

Treon v. Brown, 14 Ohio, 482.

Mr. C. E. Gantt, for appellee:

The checks are void in the hands of an innocent purchaser before maturity.

Traders Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863; Alexander v. Hazelrigg, 123 Ky. 677, 97 S. W. 353; Perry Sav. Bank v. Fitzgerald, 167 Iowa, 446, 149 N. W. 497.

Section 4965 of the Iowa Code, de-

claring instruments given in payment of gambling losses void, is not repealed by implication by the enactment of the Negotiable Instruments Law.

Alexander v. Hazelrigg, 123 Ky. 677, 97 N. W. 353; Perry Sav. Bank v. Fitzgerald, 167 Iowa, 446, 149 N. W. 497; Twentieth Street Bank v. Jacobs, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695; 8 C. J. 768, § 1033; Sabine v. Paine, 223 N. Y. 401, 5 A.L.R. 1444, 119 N. E. 849; Henry v. State Bank, 131 Iowa, 97, 107 N. W. 1034; Eskridge v. Thomas, 79 W. Va. 322, L.R.A. 1918C, 769, 91 S. E. 7.

Unless the defendant, by other acts than merely issuing the checks, assured plaintiff of their validity, he would not be estopped from setting up the defense that the checks were void.

First State Bank v. Williams, 143 Iowa, 177, 23 L.R.A. (N.S.) 1234, 136 Am. St. Rep. 759, 121 N. W. 702; Wingert v. Snouffer, 134 Iowa, 97, 108 N. W. 1035; 16 Cyc. 752.

Defendant is a competent witness to testify as to the consideration given for the checks in suit.

Dysart v. Furrow, 90 Iowa, 59, 57 N. W. 644; Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201; Davis v. Hall, 128 Iowa, 647, 105 N. W. 122; Chew v. Holt, 111 Iowa, 362, 82 N. W. 901.

Plaintiff could not be considered a bona fide purchaser unless the consideration for the transfer of said checks was paid before notice of such invalidity.

Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

The evidence fails to show good faith on the part of the plaintiff in the acquirement of the checks in suit.

Lundean v. Hamilton, — Iowa, —, 169 N. W. 208; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237.

Weaver, J., delivered the opinion of the court:

The checks sued upon are two in number, one for \$150, and another for \$250, both drawn by the defendant, Dick Swift, upon the First National Bank of Hawarden, and made payable to the order of John Wilson,—a name which appears to be indorsed thereon. Plaintiff, claiming to be a good-faith holder for value, alleges that the checks have been dishonored and asks judgment against the maker.

The defendant admits making the checks and delivering them to one Edwards, who negotiated them to plaintiff, and pleads in defense that they were made and delivered in payment of a gambling debt contracted in a game of craps with said Edwards. The issues were tried to the court, a jury being waived. Judgment for defendant.

The plaintiff is a practising lawyer of experience, residing at Hawarden. Living in the same town is the defendant, Swift, a retired farmer of convivial habits, socially inclined, and (until his experience hereinafter referred to) profoundly confident of his ability to beat a professional gambler at his own game. Edwards is a traveling fakir who follows up county fairs and other public assemblies where gather the sheep for his shearing; while "Wilson," if there be any such individual anywhere, is not shown to have any definite location except in jail in Minnesota on a charge of murder.

Shortly before the date of these checks, Edwards drifted into Hawarden and, as was quite natural, soon came into contact with Swift. The powerful attraction of similar tastes led them to seek a convenient room where they spent most of Sunday night together. Swift is candid enough to say: "I can't say we were both perfectly sober. I don't think we was too sober, or that we was very drunk."

Edwards furnished the dice which defendant swears he himself carried away at the close of the game (and,

indeed, it seems that the dice were all that was left to him when the game was over), when examination revealed that they were "dirty," "loaded," or "marked" to make the game a sure thing for their owner. Being asked by his counsel to explain or describe the game, he proceeded, with apparent surprise at the professed ignorance of his counsel, to elucidate the mystery and science of it, in the following luminous manner:

It is what is called a "crap game." You play this game with dice.

Q. How many?

A. Two.

Q. You shake these dice from a box?

A. No, you have them in your hand and throw them that way (indicating). There is no limit to the number that can play the game.

Q. How does the game go? How is the winner and loser determined?

A. You don't understand the game?

Q. I don't understand the game at all. That is why I am asking you so particularly.

A. Well, it is seven come eleven when they first come out, see, and if you don't make it, see, if you make a six you lose, see.

Q. Well, you take turns about throwing the dice?

A. Yes, there is the dice, see, and I lose if I don't get my seven. You have as many throws as you want until you make that seven, if they first come that way. You can bet all the way from 2 cents to \$1,000 if you want to. No, we didn't have the money on the table. We just started a game—I had a little silver at first, but not much, but I lost that, and we kept on playing, see, and when we got through I gave him the checks, see. We were playing for ten and twenty, there wasn't any limit any more. Ten and twenty dollars a throw.

During the night's session, the participants had two reckonings, at the first of which the account was settled by the defendant's check of

\$150, and at the second the other check was made and delivered. For reasons perhaps not hard to divine, Edwards took the precaution to have both checks made payable to "Wilson." Swift made his way home on Monday morning and took early opportunity to go to the bank and stop payment of the paper, being led thereto apparently not so much because of his losses as by indignation at the discovery that Edwards had abused his confidence by cheating him with "dirty" dice.

The truth of defendant's story as to the origin and consideration of the checks is apparently conceded by the plaintiff; or, to say the least, there is no attempt made to deny or discredit defendant's testimony in this respect.

Edwards, apparently finding Hawarden a fertile field for the exercise of his special talent, remained there through the week without presenting the checks for payment. On September 26th he was arrested as a vagrant indulging in games of chance and brought before the mayor for hearing. Among the entries in the mayor's docket in that proceeding are the following:

"And now, on this 26th day of September, 1915, the defendant being brought into court, he was arraigned, says his right name is C. E. Edwards. Defendant was advised of right to counsel and time to prepare for trial. Defendant asks that the trial be set for the following day and refuses bonds.

"And now, on the 27th day of September, 1915, at 3 o'clock, P. M., the case came on for hearing. Plaintiff appears by himself and his attorney, C. A. Plank, and pleads guilty to the charge as set forth in the information. Defendant by himself and his attorney pleads bankruptcy and agrees that the fine and penalty to be assessed shall stand in full force against the defendant should he return to Hawarden. It is therefore ordered that the defendant be released and that he according to agreement leave

Hawarden at once and the fine and penalty assessed shall stand remitted so long as he returns not to the city, but in full force and effect should he return,

"After hearing the plea of the defendant, the evidence offered, and the arguments in the case, the court finds the defendant guilty upon his own plea entered by his attorney C. A. Plank, and no sufficient cause to the contrary being shown, it is ordered, adjudged, and determined that defendant pay a fine of \$25, and the costs of this action, taxed at \$6.35, or in lieu of the above fine, that he be imprisoned in the county jail for a period of thirty days."

Observing the dates disclosed by the mayor's record, it is interesting to find that plaintiff does not claim to have obtained the checks until September 28th,—the morning after the sentence of banishment was imposed upon his client by the mayor.

It is but fair to plaintiff to say that he denies having appeared for Edwards in the mayor's court on that day; but, on cross-examination, his denial seems to be as to the correctness of the date rather than of the fact of his appearance.

The story of plaintiff's receipt of the checks is too long and too intricate to permit its entire inclusion here, but it is, in effect, that on the very afternoon of September 27th, when the mayor's record shows the trial of Edwards to have taken place, a pretended detective from Minnesota appeared in Hawarden and arrested Edwards on a murder charge and proposed to hale him across the state line. According to plaintiff, Edwards then appealed for legal aid and advice to plaintiff, who immediately took up the matter, and for the rest of that day and the following day he wrestled with the case very diligently and succeeded in so demonstrating the innocence of his client that the invading hosts from Minnesota abandoned the pursuit, and, folding their tents like Arabs, stole away to their native wilds; while Edwards disappeared

in the setting sun, or elsewhere, having transferred the two checks to plaintiff as his well-earned fee for professional services.

I. If it were a vital question in the case whether plaintiff can claim any standing as an innocent holder of the paper without notice of any defense thereto, it would be a sufficient answer upon this appeal to say that, accepting his own story as literally true, our respect for his intelligence would compel a negative answer to this inquiry. It appears beyond reasonable doubt that Edwards's title to the checks was defective in the sense of that term as used in our statute (Code\* Supp. 1913, § 3060a55), and the burden is thus cast upon plaintiff in any event

Evidence—  
burden of proof  
—good-faith  
holder of paper  
given for  
gambling debt.

to establish his claim to be a good-faith holder by a preponderance of credible evidence.

We have too often said that in such cases, if the fair tendency of the facts indicates bad faith of the holder, the question is one of fact for the jury, and not one of law for the court. It would be little less than ridiculous to hold, under the admitted and well-proved facts in this

Checks—for  
gambling debt—  
bona fide holder  
—establishment  
of rights.

case, that plaintiff's claim to be a good-faith holder has been established as a matter of law.

McNight v. Parsons, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 655; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; O'Conner v. Kleiman, 143 Iowa, 435, 121 N. W. 1088; Arnd v. Aylesworth, 145 Iowa, 185, 29 L.R.A. (N.S.) 638, 123 N. W. 1000.

II. But an insuperable objection to plaintiff's right of recovery is found in the established fact that the checks were given for a gambling debt, and under our statute they are absolutely void even in the hands of a professed innocent holder. Code,

§ 4965; Traders Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863; First Nat. Bank v. Carroll, 80 Iowa, 11, 8 L.R.A. 275, 45 N. W. 304; First Nat. Bank v. Oskaloosa Packing Co. 66 Iowa, 41, 23 N. W. 255; People's Sav. Bank v. Gifford, 108 Iowa, 277, 79 N. W. 63.

The case of Kushner v. Abbott, 156 Iowa, 598, 137 N. W. 913, has sometimes been cited as holding that the Negotiable Instruments Law has had the effect to repeal or modify Code, § 4965, and the syllabus or headnote to that case does not reflect the real point decided in the opinion. Though the question as to the effect of the later statute is there mentioned, the court expressly says it is not presented by the record, nor is its decision attempted.

Our attention is called to a case cited from the court of District of Columbia, and possibly others, which tend in some respects to uphold the plaintiff's contention; but we are thoroughly persuaded that in enacting our Negotiable Instruments Law the legislature did not intend thereby to repeal or modify the statute which places a ban on all gambling contracts, and we are not willing to hold that it has any such destructive effect by implication.

—for gambling  
debt—effect of  
Negotiable In-  
struments Act.

The law which throws its shield around commercial paper is too often made to do duty as a city of refuge for unscrupulous persons in the perpetration of frauds and unlawful purposes generally, and courts will hesitate about swinging the door any wider for their shelter until compelled so to do by explicit legislative command.

III. Plaintiff claims that defendant had estopped himself to rely on his defense because of his negligence.

The objection so raised is not well taken. Defendant did stop payment with reasonable promptness, and plaintiff's evidence is insufficient to sustain a finding that

he was in any manner deceived or misled to his injury by any act of the defendant. The judgment below is too clearly right to call for

further discussion, and it is therefore affirmed.

Ladd, Ch. J., and Stevens and Gaynor, JJ., concur.

### ANNOTATION.

#### Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration.

##### Generally.

The majority of the cases which have passed directly on the question hold that a statute invalidating negotiable instruments given for a gambling consideration is not repealed by the adoption of the Uniform Negotiable Instruments Act, which contains a provision to the effect that a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves. *Alexander v. Hazelrigg* (1906) 123 Ky. 677, 97 S. W. 353; *Martin v. Hess* (1914) 23 Pa. Dist. R. 195; *Twentieth Street Bank v. Jacobs* (1914) 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695. And see the reported case (*PLANK v. SWIFT*, ante, 309). Compare *Wirt v. Stubblefield* (1900) 17 App. D. C. 283.

The Negotiable Instruments Act was adopted in Kentucky in 1904. At the time of its enactment there was in force a statute which declared all gaming contracts to be void. The case of *Alexander v. Hazelrigg* (Ky.) supra, was the first to pass on the effect of the Negotiable Instruments Act on the earlier statute. In that case it appeared that the plaintiff was a bona fide holder of a negotiable instrument which had been executed for a gambling consideration. It was held that the Negotiable Instruments Law in no way modified or repealed the statute invalidating such instruments. The court said: "It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the legislature has for many years deemed to be sound public policy. It is inconceivable that the general assembly in the passage of the Act of 1904, for the

protection of innocent holders of negotiable instruments, intended to, or did, repeal § 1955 of Kentucky Statutes, which declares all gaming contracts void. In our opinion the dis-appointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts." In the subsequent case of *Holzbog v. Bakrow* (1913) 156 Ky. 161, 50 L.R.A. (N.S.) 1023, 160 S. W. 792, it was held that a note given for a gambling consideration was not enforceable by a bona fide purchaser unless the maker was estopped to assert the defense, but the Negotiable Instruments Act was not referred to.

In Pennsylvania, in *Martin v. Hess* (1914) 23 Pa. Dist. R. 195, the question was raised as to the effect of the Negotiable Instruments Act (Act of May 16, 1901, P. L. 194), on the Act of April 22, 1794, providing that "every contract, note, bill, bond, judgment, mortgage or other security or conveyance whatsoever, given, granted, drawn or entered into for security or satisfaction of the same, or any part thereof, shall be utterly void and of none effect." In that case it appeared that the plaintiff was a bona fide purchaser of a promissory note given for a gambling consideration. The sections of the Negotiable Instruments Act relied on by the plaintiff were as follows: "The title of a person who negotiates an instrument is defective, within the meaning of this act, when he obtained the instrument or any signature thereto by fraud, duress or force, and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circum-

stances as amount to a fraud." § 55. "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." § 57. The court said: "The latter act does not expressly repeal or refer to the Act of April 22, 1794, 3 Smith's Laws, 177, but § 197 thereof reads: 'All acts or parts of acts inconsistent herewith be and the same are hereby repealed.' The public policy of this state is expressed in the Act of April 22, 1794, 3 Smith's Laws, 177, and the decisions of the courts thereunder have been that contracts and their obligations based upon gaming transactions are null and void *ab initio*. . . . Did the legislature, in adopting the Negotiable Instruments Act of 1901, intend by implication to sweep away all existing legislation in Pennsylvania on the subject of making void gaming contracts and the notes or securities given in payment thereof? 'Repeals by implication are not favored, and will not be indulged unless it is manifest that the legislature so intended. . . .' It is manifest that the object and purpose of the Act of 1794 is to place the ban of the law on gaming and to make void gaming contracts, notes, checks, and securities given in satisfaction of payment thereof; and it is equally clear that the object and purpose of the Act of May 16, 1901, P. L. 194, is to regulate the issuance of, and the rights of parties to, and the holders of, negotiable instruments, or what is more generally known as commercial paper. The whole scope of the latter act refers to dealings with commercial paper, so as to protect innocent purchasers of such against mere defenses available as between the original parties. However, this act applies only to paper that might have been obligatory between the parties,—that which it was legally possible for the parties to make. Where the parties were never bound because the law made the note void, as being contrary to public policy as expressed in the statutes, the Nego-

table Instruments Act does not have any application. That this act was not intended to inject life into a written instrument that by law was null and void *ab initio* is apparent from the use of the word 'liable' in § 57 of this act, viz.: 'A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.' The liability is defined to be the state of one who is bound in law and justice to do something which may be enforced by action: Bouvier, p. 206. The maker of a note given in payment of a gambling transaction is not liable on such instrument, as by law such instrument is null and void and of no effect. It is questionable whether such a note ever becomes a negotiable instrument. The construction of the Act of May 16, 1901, P. L. 194, sought for by the plaintiff, would likewise repeal existing laws for the protection of infants, married women, and insane or feeble-minded persons; and it is evident that such was not the intention of the legislature. Our conclusion is that the two acts of the legislature here considered are not inconsistent and irreconcilable, as the Act of May 16, 1901, P. L. 194, has application only to such instruments that were obligatory upon the original party or parties thereto."

The supreme court of West Virginia, in the case of *Twentieth Street Bank v. Jacobs* (1914) 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695, expressly ruled on the effect of the Negotiable Instruments Act on an earlier act declaring all gambling contracts to be void. In that case it was held that the Negotiable Instruments Law did not modify or repeal the statute. The court said: "The legislature was dealing, at the time of the passage of the act and in the passage thereof, with the matter of negotiability of paper which the law allowed men to put on the market and the courts to enforce. It was not then considering the subject of gaming, to which it had



previously given its careful attention, nor acting upon it. The act does not mention it, nor did any provision thereof suggest it to the legislative mind. Any presumption that any member of the legislature, while considering or acting upon the bill, had the slightest suggestion or intimation from any of its terms, that it would, in any sense or to any degree, legalize gambling debts, would be a most violent one. Nobody in reading the act, without having had the subject of gaming debts fixed in his mind, at the time, by some means other than its terms, would likely discover the alleged opening for the use of paper expressly declared by law to be absolutely void in the hands of any and all persons, and appreciate at the same time the far-reaching effect of it. The partial legalization contended for would virtually destroy the previous statute, for every paper negotiable in form, taken for money lost or bet in gambling, would be made valid by the mere indorsement and delivery thereof to some person ignorant of the character of the consideration. Of course, the legislature never saw nor intended any such result." The court followed the decision of the Kentucky court in *Alexander v. Hazelrigg* (1906) 123 Ky. 677, 97 S. W. 353, *supra*, and declined to follow the holding of the District of Columbia court in *Wirt v. Stubblefield* (1900) 17 App. D. C. 283, *infra*.

In the reported case (*PLANK v. SWIFT*, ante, 309) it is held that the Negotiable Instruments Act of 1902 neither modifies nor repeals that section of the Iowa Code which provides that "all promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked or bet, at or upon any game of any kind or any wager, are absolutely void and of no effect." In *Kushner v. Abbott* (1912) 156 Iowa, 598, 137 N. W. 913, referred to in the reported case (*PLANK v. SWIFT*) as having sometimes been cited as holding that the Negotiable Instruments Act modified the statute declaring void obligations given for a gam-

bling consideration, the court expressly said that it was not "necessary to determine . . . whether the adoption of the Negotiable Instruments Law has modified our prior statute relating to gambling transactions so as to render valid in the hands of an innocent holder a promissory note or other negotiable instruments executed in connection with or in pursuance of a gambling transaction."

In *Wirt v. Stubblefield* (1900) 17 App. D. C. 283, it appeared that the plaintiff was a bona fide purchaser of a promissory note which had been executed for a gambling consideration. It was held that the Negotiable Instruments Act, made applicable by Congress to the District of Columbia in 1899, repealed as to bona fide holders the statute invalidating contracts based on a gambling consideration. The court said: "It is difficult to conceive, if we bear in mind the object and policy intended to be promoted by, as well as the entire scope and express provisions of, the 'Negotiable Instruments Law,' that the framers of that act ever intended to save and preserve unrepealed, as part of the law governing negotiable instruments, the old English Statutes of 16 Car. II. and 9 Anne, against gaming. On the contrary, it was most clearly among the objects and purposes of that act, to get rid of all such impediments and hindrances to the circulation of negotiable instruments as had been created by those old statutes, and to embody the entire law upon the subject, as far as practicable, into one well digested and consistent act. . . . It is quite clear that the act of Congress was intended to cover the whole subject of negotiable instruments as far as it could be done by statute; and therefore to exclude the operation and effect of former statutes like those of Charles and Anne. . . . We are clearly of opinion that the British Statutes of 16 Car. II. chap. 8, and 9 Anne, chap. 14, against gaming, so far as they might or would, if in force, affect the validity of the negotiable instruments embraced by the act of Congress, are inconsistent with the provisions of the latter act, and they are, therefore, to the extent that

they are so inconsistent or repugnant to the act of Congress, repealed, and no longer, as to negotiable instruments, in force in this District."

**Decisions in Alabama, Colorado, Nevada, and Tennessee.**

In at least four jurisdictions since the adoption therein of the Negotiable Instruments Act decisions have been rendered with reference to the rights of a bona fide holder of an instrument given for a gambling consideration under a statute invalidating instruments so given. In none of these cases, however, was the effect of the Negotiable Instruments Act discussed by the court. Thus, in the Alabama case of *Birmingham Trust & Sav. Co. v. Curry* (1909) 160 Ala. 370, 135 Am. St. Rep. 102, 49 So. 319, the court, reversing on another ground, laid down the rule, for the guidance of the trial court, that a negotiable instrument given for a gambling consideration, declared void by § 2163 of the Code of 1896, was void not only as to the parties, but also as to innocent purchasers for value, the Negotiable Instruments Act, adopted some two years previously, not being mentioned.

The Colorado decisions have not, in express language, dealt with the effect of the Negotiable Instruments Act on § 850 of the General Statutes, which provides as follows: "All contracts, promises, agreements, conveyances, securities and notes made, given, granted, executed, drawn or entered into, where the whole or any part of the consideration thereof shall be for money or property won by gaming or money or property loaned for the purpose of gaming, 'shall be utterly void and of no effect.'" In *Ayer v. Younker* (1897) 10 Colo. App. 27, 50 Pac. 218, it appeared that the plaintiff was the bona fide holder of a negotiable note given for a gambling consideration. Without considering the Negotiable Instruments Act, it was held that no recovery could be had since the note was void in its inception. Referring to the act invalidating instruments resting on a gaming consideration, the court said: "The language employed is open to no other construc-

tion. The protection which the law extends to an innocent holder, who, for value, in the usual course of trade, has received negotiable paper, is of no avail when the statute in terms or by unavoidable implication has pronounced the instrument absolutely void. Stricken with nullity at its birth, it can thereafter gain no validity." So, in the subsequent case of *Western Nat. Bank v. State Bank* (1902) 18 Colo. App. 128, 70 Pac. 439, it was held that the indorsement and transfer of a certificate of deposit for a gambling consideration was absolutely void even as against an innocent purchaser. However, in the case of *Sullivan v. German Nat. Bank* (1902) 18 Colo. App. 99, 70 Pac. 162, wherein it appeared that a bank certificate of deposit was indorsed in Texas in payment of a gambling debt contracted in that state, and it further appeared that the transaction was legal in Texas, the court applied the *lex loci contractus* and permitted the bona fide purchaser to recover.

The certificate of deposit involved in the Nevada case of *Burke v. Buck* (1909) 31 Nev. 74, 22 L.R.A.(N.S.) 627, 99 Pac. 1078, 21 Ann. Cas. 625, was transferred for a gambling consideration in the same year (1907) that the Negotiable Instruments Act was adopted. Nothing appears in the case to show whether the cause of action arose prior or subsequent to its passage. It was held, without mention of the Negotiable Instruments Act, that the transferee of the certificate could not recover as against the indorser.

Apparently the only case which has arisen in Tennessee involving a negotiable instrument given for a gambling consideration is *Snoddy v. American Nat. Bank* (1890) 88 Tenn. 573, 7 L.R.A. 705, 17 Am. St. Rep. 918, 13 S. W. 127, wherein it was held that a bona fide holder could not recover on a note given in connection with a deal in futures, which, under the Tennessee statute, was invalid as a wagering contract. The court made no mention of the Negotiable Instruments Act which was adopted in 1889. A. S. M.

**GENERAL ACCIDENT, FIRE, & LIFE ASSURANCE CORPORATION,  
Limited, Plff. in Err.,  
v.  
LAURA HYMES.**

*Oklahoma Supreme Court — December 9, 1919.*

(— Okla. —, 185 Pac. 1085.)

**Insurance — intentional injuries — mistaken identity.**

1. A provision contained in an accident insurance policy, which excepts from operation of the policy "injuries intentionally inflicted upon the insured by any other person," contemplates injuries intended against the insured, and not injuries intended against another, and such exception will not relieve the insurer from liability for an injury to the insured inflicted by another person, where the other person, intending to injure someone other than the insured, mistook the insured for the person to be injured, and intentionally inflicted upon him the bodily injury while the insured was not aware of the intent to injure him and had done nothing to bring about the injury.

[See note on this question beginning on page 322.]

**Evidence — burden of proof — excepted insurance risk.**

2. The burden of proof rests upon the insurer to establish the fact that death or injury has resulted from one of the excepted clauses enumerated in a policy of accident insurance.

[See 14 R. C. L. 1437.]

**Insurance — construction against insurer.**

3. Where the meaning of a policy of insurance is ambiguous, or so drawn as to be fairly susceptible of different constructions, it will be construed more strictly against the insurer, and that construction adopted which is most favorable to the insured.

[See 14 R. C. L. 926.]

**— accident — what is.**

4. Where one person injures another and the injury is not the result of misconduct or provocation by the injured person and is unforeseen by him, it is as to him an "accident" within

the meaning of an accident policy insuring him against bodily injuries effected through external, violent, and accidental means.

[See 14 R. C. L. 1260.]

**— conclusiveness of proof of loss.**

5. The proofs of loss furnished by a claimant under an accident insurance policy are not conclusive against insured nor irrebuttable.

[See 14 R. C. L. 1445.]

**Trial — demurrer to evidence — effect.**

6. Upon demurrer to the evidence the court cannot weigh conflicting evidence, but must treat that as withdrawn which is most favorable to demurrant, and all the facts which the evidence in the slightest degree tends to prove, and all reasonable inferences and conclusions which may logically and reasonably be drawn from the evidence, as admitted.

[See 26 R. C. L. 1062.]

Headnotes 1-4 by BAILEY, J.

**ERROR** to the District Court for Wagoner County (Hughes, J.) to review a judgment in favor of plaintiff in an action brought to recover an amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. W. Noffsinger and Y. P. Broome, for plaintiff in error:

The proofs of loss furnished to defendant by plaintiff fully justified it

in refusing to pay any but the one month's indemnity.

Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed. 793; Hill v.

(— Okla. —, 185 Pac. 1085.)

*Etna L. Ins. Co.* 150 N. C. 1, 63 S. E. 124; *Reserve Loan L. Ins. Co. v. Isom*, — Okla. —, 173 Pac. 841; *Watson v. Traveller's Ins. Co.* 93 Me. 469, 74 Am. St. Rep. 368, 45 Atl. 518; *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, L.R.A.1915A, 538, 66 So. 41; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Traveler's Protective Asso. v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 886; *Continental Casualty Co. v. Fleming*, — Ky. —, 124 S. W. 331; *Jarnagin v. Travelers' Protective Asso.* 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; *Brown v. United States Casualty Co.* 88 Fed. 38; *Strother v. Business Men's Acci. Asso.* 193 Mo. App. 718, 188 S. W. 314.

Messrs. Watts & Summers, for defendant in error:

In construing the exceptions to liability in insurance policies, they are construed with great strictness against the company.

*Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338, 51 L.R.A. 698, 83 N. W. 78; *Union Acci. Co. v. Willis*, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812; 7 Enc. Ev. 549.

The company is liable under the policy.

*Union Acci. Co. v. Willis*, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Travelers Protective Asso. v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991.

Bailey, J., delivered the opinion of the court:

This action was brought in the district court of Wagoner county, by the defendant in error as plaintiff, against plaintiff in error as defendant, to recover on a policy of accident insurance, issued by plaintiff in error, to one Charles Nave, and in which policy defendant in error, Laura Hymes, was named as beneficiary. The cause was tried to a jury, resulting in a verdict in favor of defendant in error for the principal sum named in the policy, and from judgment rendered thereon plaintiff in error appeals. We will refer to the parties hereafter as they stood in the trial court.

The evidence in the case disclosed these facts: The insured, a negro, was attending a negro dance at the time he met his death. One Pom-

pey Drew, another negro, was also there. During the course of the evening Nave and Drew were drinking, and that during the festivities one Spencer Luckey was held up at the point of a pistol by Drew and \$15 was taken from Spencer by Drew. The evidence further discloses that Drew and Nave were friends and upon friendly terms and relations. Just after the holdup of Spencer, Nave appeared in the yard near Drew, inquiring: "Where is P. D.? He ain't no bad son of a bitch." Immediately thereafter, Drew fired upon Nave, inflicting a mortal wound, from which he died a few days later. Other evidence will be noted as may be necessary hereafter in the opinion.

The policy of insurance, which is purely one of accident and health, contains the provision, that "in the event of death resulting from the following causes, the corporation's liability shall be one month's indemnity, as provided in §§ 2 and 5 of this policy: . . . Injury intentionally inflicted upon the insured by any other person."

It was stipulated between the parties in the trial court that one month's indemnity under this policy is \$30, and that defendant had tendered this amount to plaintiff in full settlement of its liability, and that such tender was made good at the trial. It is the contention of plaintiff in error that under the facts in the case, and the clause of the policy above quoted, its liability is limited to the one month's indemnity of \$30, and that the court should have so instructed the jury.

After introducing the policy sued upon plaintiff introduced the proofs of death furnished by defendant, in which proofs of death there were contained affidavits as to how the insured met his death, and in which affidavits there were contained the following questions and answers:

Ques. Exactly what was the insured doing at the time?

Ans. There was no quarrel between the deceased and guilty par-

ty, party who done the shooting was sentenced to life imprisonment.

Ques. Precisely how did the accident happen?

Ans. Pompey Drew held up Spencer Luckey and took \$15. Deceased, not knowing what was being done, stepped out the door, and Pompey Drew shot him, without any provocation whatever.

At the end of plaintiff's testimony in chief, defendant interposed a demurrer to the evidence of plaintiff, which demurrer was overruled by the court, and which action of the court is assigned as error; it being the contention of plaintiff in error that these proofs of death established that the deceased was intentionally shot by Pompey Drew, and that therefore plaintiff was not entitled to recover other than one month's indemnity. It is true that proofs of death are prima facie evidence against plaintiff of the facts therein stated, but we do not think such proofs as here offered necessarily show an intention upon the part of Drew to shoot Nave, and, besides, counsel has failed to note that as a part of the plaintiff's evidence in chief, it was testified that at the instant of the shooting Nave said, "O Lord!" and Drew said: "Did I shoot you, Charley? I did not know that was you I shot."

The proofs of loss, though prima facie true against the insured, are not conclusive nor irrebuttable. Reserve Loan L. Ins. Co. v. Isom, — Okla. —, 173 Pac. 841; Hill v. Ætna Ins. Co. 150 N. C. 1, 63 S. E. 124.

Under numerous decisions of this court, when a demurrer to the evidence is interposed, the court cannot weigh conflicting evidence, but must treat that as withdrawn which is most favorable to the demurrant, and all the facts which the evidence in the slightest degree tends to prove, and all reasonable inferences or conclusions which may be logically and reasonably drawn from the evidence, are

admitted. Rawlings v. Ufer, — Okla. —, 161 Pac. 183; Bean v. Rumrill, — Okla. —, 172 Pac. 453. We do not think the court committed any error in overruling defendant's demurrer to the evidence.

It is next assigned as error that the court erred in giving the following instruction: "The jury are further instructed that the intent on the part of the said Pompey Drew, with which he inflicted the injuries upon the said Charles Nave from which said injuries the said Charles Nave died, is to be gathered from all the facts and circumstances proved in the case and the facts and circumstances surrounding the killing at the time. And in this case if you should believe that the said Pompey Drew shot at the said Charles Nave believing at the time that the said Charles Nave was some other person, and that the said Pompey Drew would not have shot and killed the said Charles Nave had he known that the person at whom he was shooting was Charles Nave, then in that event you are instructed that the injuries inflicted upon the said Charles Nave would not be intentional within the meaning of the policy, and in the event of such finding your verdict should be for the plaintiff."

This instruction presents for the consideration of the court the real proposition in this case, viz., whether a recovery is to be permitted under the terms and conditions of the policy as above quoted even under a finding that, at the time Drew shot and killed Nave, he believed Nave to be some person other than Nave. It has been noted that at the time of the shooting Drew and Nave were upon friendly terms and relations; no difficulty had occurred between them. A few moments prior to the shooting, however, Drew had been involved in a difficulty with one Luckey. Numerous parties appear to have attended the dance. Some of these, including Drew, were outside of the house, and in the darkness of the night, a few moments after the difficulty

Insurance—  
conclusiveness  
of proof of loss.

Trial—demurrer  
to evidence—  
effect.

between Drew and Luckey, in Luckey's absence, Nave appeared. The shooting immediately occurred, followed by the exclamation, "O Lord!" with Drew stating: "Did I shoot you, Charley? I did not know that was you I shot." Under such state of the record, the question of intent was a question of fact for the jury, unless it is to be held that, under the provisions of the policy quoted, such intention is not to be governed or controlled or liability be affected by reason of the identity of the person injured.

It is apparent that the trial court submitted the case to the jury upon the theory that if, at the time Drew shot and killed Nave, he shot under the mistaken apprehension that Nave was someone else, and that he would not have shot Nave had he known who he was, such facts did not bring the injury within the terms of the exception clause quoted. It may be noted here that the

Evidence—  
burden of proof  
—excepted in—  
insurance risk.

burden of proof was upon the defendant, after proof of death by accidental means, to prove the injury within the terms of the exceptions noted. Union Acci. Co. v. Willis, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812. And it may also be observed that the injury is accidental within the meaning of an insurance policy, insuring against external, violent, and accidental means, although it is inflicted intentionally

Insurance—  
accident—  
what is.

and maliciously, if unprovoked, unforeseen, and unintentional on the part of the insured. Ibid. Maloney v. Maryland Casualty Co. 113 Ark. 174, 167 S. W. 845; Newsome v. Travelers Ins. Co. 143 Ga. 785, 85 S. E. 1035; Travelers Protective Asso. v. Fawcett, 56 Ind. App. 111, 104 N. E. 991. It has become settled law that where a stipulation or exception in a policy of insurance is capable of two meanings, or is ambiguous or uncertain, that meaning and interpretation is to be adopted which

is the most favorable to the assured. Shawnee L. Ins. Co. v. Watkins, 53 Okla. 188, 156 Pac. 181; Friend v. Southern States L. Ins. Co. 58 Okla. 448, L.R.A.1917B, 208, 160 Pac. 457.

The finding of the jury, under the instruction above quoted, was necessarily a finding that at the time Drew shot and killed Nave it was not within his knowledge that he was shooting at Nave. In a leading case (Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812) wherein there was under consideration a policy of insurance containing an exception as follows: "And was not the result of design, either on the part of the deceased or of any other person," it is said: "It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry."

In Union Acci. Co. v. Willis, supra, while considering a state of facts not similar to the facts in the instant case, the principles announced in Utter v. Travelers' Ins. Co. supra, were quoted with apparent approval, and likewise in Orr v. Travelers' Ins. Co. 120 Ala. 647, 24 So. 997, the rule as announced in Utter v. Travelers' Ins. Co. supra, was approved. See also Hutchcraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570. In Travelers' Ins. Co. v. Fawcett, supra, the supreme court of Indiana, in discussing an exception clause reading, "Intentional injuries" inflicted on the assured by some other person," held that such words, "within the meaning of this contract, refer to injuries which the other person actually directed against the insured and intended to inflict upon him." It may be noted the provision considered in

Utter v. Travelers' Ins. Co. was "that the said death or personal injury . . . was not the result of design, either on the part of the deceased or of any other person."

And our attention has been called to *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, L.R.A. 1915A, 538, 66 So. 41, and *Strother v. Business Men's Asso.* 193 Mo. App. 718, 188 S. W. 314, wherein it is held that the language of the policy considered in the Utter Case, to wit, "the result of design," is of narrower import than "injuries intentionally inflicted," as contained in the policy under consideration. But in *Newsome v. Travelers Ins. Co.* 143 Ga. 785, 85 S. E. 1035, in considering a policy of insurance wherein there was excepted from operation of the policy "injuries intentionally inflicted upon the insured by any other person," the court, considering the case of *Utter v. Travelers' Ins. Co.* supra, and the provision of the policy under consideration in that case, held that "the use of the word 'design,' as thus employed, does no render the exception contained in that policy substantially different from that involved in the" case under consideration then before that court, and on a careful consideration of the terms as generally defined, and considering the sense and meaning usually given to them, we think the exception clause, "injury intentionally inflicted upon insured," may, under the rule of construction herein adopted, be fairly held and construed to refer to an injury which was intentionally aimed directly and

individually at the insured, and not intended for some other person.

In *Newsome v. Travelers Ins. Co.* supra, the court said: "A provision contained in an accident insurance policy, . . . which excepts from operation of the policy injuries 'intentionally inflicted upon the insured by any other person,' . . . contemplates injuries intended against the insured, and not injuries intended against another. Accordingly, such exception will not relieve the insurer from liability for an injury to the insured inflicted by another person, where the other person, intending to injure someone other than the insured, mistook the insured for the person intended to be injured and intentionally inflicted upon him a bodily injury, while he was unaware of the intent to injure him, and had done nothing to bring about the injury."

Under the evidence in this case, there being nothing to warrant the conclusion that the deceased, Nave, was aware of any intent to injure him or that he had done anything to bring about such injury, the evidence further justifying the conclusion on the part of the jury that at the time insured was shot and killed the assailant did not believe that he was assaulting the insured, or had intended to assault insured, the court did not err in giving the instruction quoted.

In view of the conclusion we have reached, it is not necessary to consider other assignments of error, and, for the reasons herein given, the judgment of the trial court is affirmed.

## ANNOTATION.

**Insurance: applicability of provisions as to injuries intentionally inflicted where insured is injured because of mistake of identity.**

Provisions of accident policies excluding or limiting liability in case of injuries intentionally inflicted upon the insured are generally held inapplicable where the insured is injured or killed by one who mistakes him for

another person. *Newsome v. Travelers Ins. Co.* (1915) 143 Ga. 785, 85 S. E. 1035; *Travelers Protective Asso. v. Fawcett* (1914) 56 Ind. App. 111, 104 N. E. 991; *Hutchcraft v. Travelers' Ins. Co.* (1888) 87 Ky. 300, 12 Am. St.

Rep. 484, 8 S. W. 570; *GENERAL ACCL. FIRE & LIFE ASSUR. CORP. v. HYMES* (reported herewith) ante, 318.

It will be observed that in the reported case (*GENERAL ACCL. FIRE & LIFE ASSUR. CORP. v. HYMES*) the provision of the policy limiting liability for "injury intentionally inflicted upon the insured by any other person" was held to refer to an injury which was intentionally aimed individually at the insured, and not intended for some other person, and was therefore held not to reduce the liability where the insured was shot by one who believed him to be another person.

And in *Newsome v. Travelers Ins. Co. (Ga.)* supra, a provision of an accident policy excepting injuries "intentionally inflicted upon the insured by any other person" was held to contemplate only injuries intended against the insured, and not to relieve the insurer from liability for an injury to the insured by another who mistook him for the one intended to be injured, it appearing that the insured was unaware of the intent to injure him and had done nothing to bring about the injury.

And in *Travelers Protective Asso. v. Fawcett* (1914) 56 Ind. App. 111, 104 N. E. 991, where the insured, a bank cashier, while in a group of four men in front of the vault in the bank, was shot by one who was attempting to rob the bank, the evidence was held to support a finding that there was no specific intent to injure the insured, and it was held that the insurer was not relieved from liability by a provision of the policy excluding liability on account of injuries intentionally inflicted on the insured by any other person. The court said: "The evidence shows without dispute that Hoal (the robber) discharged several shots from revolvers into a group of four men huddled together in front of the vault in the bank. There is a general presumption that a person intends the usual and ordinary consequences of his act. Appellant, relying upon this presumption, asserts that the usual and ordinary consequences of such an act would be to kill or injure some one or more of them, and that, as there is

no evidence whatsoever tending to overcome such presumption, it must prevail and be sufficient to establish the fact that Thomas Hoal intentionally killed the assured. If the question involved were one affecting the rights of Thomas Hoal either in a civil or criminal action, the presumption stated would obtain against him in all its strictness. In such a case if it appeared that the injury inflicted was the result of an act which was reasonably calculated to produce injury to some one of a number of persons, a general intention to injure some person will be presumed. Such presumption includes all persons who were liable to be harmed by such act and therefore includes the person who actually receives the injury. In such a case it is presumed as against the party inflicting the injury that he intended to injure the person who was actually harmed, regardless of whether he had any actual specific intention to injure such person rather than another, and notwithstanding that he really may have intended his act to harm someone else. In this case the rights of the person who inflicted the injury are not involved. The question arises under a contract by which it was stipulated that the association should not be liable on account of injuries intentionally inflicted on the assured by any other person. 'Intentional injuries' inflicted on the assured by some other person, within the meaning of this contract, refer to injuries which the other person actually directed against the insured and intended to inflict upon him. The parties contracted with reference to the actual intention of the person inflicting the injury, rather than such an intention as the law presumes against a wrongdoer. In cases where rights of parties claiming under such a contract are involved, and where it becomes necessary to prove an actual intent to injure a particular person, the presumption that a person intends the ordinary and usual consequences of his act cannot be given so wide a scope as it is given in cases which affect the rights of the party who causes an injury. In such a case if an act is



shown which would naturally and reasonably result in injury to some one of several persons, it may be presumed that the author of the act intended to injure someone, but it cannot be presumed as against anyone except the author of the act that he intended the injury for the particular person who received it."

In *Hutchcraft v. Travelers' Ins. Co.* (1888) 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570, where the insured was waylaid and killed for the purpose of robbery, a provision of the policy that no claim should be made when death was caused "by intentional injuries inflicted by the insured or any other person" was held applicable and to prevent a recovery, but the court said: "We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the insured may receive at the hands of third persons who are attempting to do mischief generally; or who are attempting to injure any particular individual, other than the insured, or class of individuals, or any kind of property, for in such cases it cannot be said that the injuring was intentionally aimed directly and individually at the insured."

The provision involved in *Utter v. Travelers' Ins. Co.* (1887) 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812, is somewhat different from the usual clauses found in accident policies, it being as follows: "This insurance shall not be held to extend to . . . death or personal injury unless the claimant . . . shall establish by direct and positive proof that the said death or personal injury . . . was not the result of design, either on the part of the insured or of any other person." In this case the insured was shot by a sheriff, but, the evidence being conflicting as to whether he knew who the insured was when he shot, it was held that the case should have been submitted to the jury, that the "design" mentioned in the provision was a design to kill the insured, and that if at the time the sheriff fired he did not know that he

was shooting at the insured, a recovery was not barred by the provision quoted.

A result not in accord with the preceding cases was reached in *Continental Casualty Co. v. Cunningham* (1914) 188 Ala. 159, L.R.A.1915A, 538, 66 So. 41, where the insured, a police officer, was shot by one whom he was pursuing, it being held that, although he was shot under the mistaken belief that he was another, this did not prevent the shooting from being intentional within the meaning of a provision of the policy limiting liability "where the injury causing the loss results wholly or in part . . . from the intentional act of the insured or any other person." The court said: "In a number of charges given at the instance of plaintiff, and also in his oral charge, the trial judge instructed the jury in effect that the killing of Cunningham, the insured, by McGuffin, was not intentional unless McGuffin shot and killed him knowing him to be John L. Cunningham; and also that, if McGuffin shot him believing him to be some other person, the restrictive provision of the policy was not applicable, and plaintiff was entitled to recover the full amount of the insurance. We are indebted to the briefs of counsel for a full and helpful discussion of this theory of the case. Upon very thorough consideration we are entirely convinced of its unsoundness. We find no warrant in the language of the policy for such a narrow and exacting construction of the phrase 'intentional act.' We think it is wholly immaterial whether or not Cunningham was known to McGuffin, or whether, knowing him, McGuffin mistook him for someone else whom he intended to shoot. If in fact, having the requisite mental capacity, he intended to shoot the human being who accosted him and threatened to obstruct his flight, his act was an intentional act, and the killing was an intentional result, no matter what he may have supposed was the name or personal identity of his victim. Such a shooting is in no sense accidental so far as the

assailant is concerned, and it falls within the restrictive language and purpose of the contract." The decision in *Utter v. Travelers' Ins. Co.* (Mich.) supra, was distinguished on

the ground that the provisions of the policies were different, but the court stated that if not so distinguishable they would be constrained to regard the *Utter Case* as unsound. J. T. W.

## EX PARTE MILE (MILAN) GRBIC.

*Wisconsin Supreme Court—November 4, 1919.*

(— Wis. —, 174 N. W. 546.)

**Ne exeat — power of court to grant in divorce proceeding.**

1. Jurisdiction to grant divorces with authority to do all acts and things necessary and proper in such actions and to carry its orders and judgments into execution includes power to grant writs of ne exeat to prevent defendant from leaving the jurisdiction to avoid payment of alimony.

[See note on this question beginning on page 327.]

— function — how ascertained.

2. Where a statute authorizing the issuance of a writ of ne exeat does not specify the grounds upon which it may issue, resort must be had to the com-

mon law to ascertain the functions of the writ, as well as the grounds upon which it may issue.

[See 19 R. C. L. 1342.]

**MOTION** by plaintiff to quash a writ of habeas corpus to secure petitioner's release from custody to which he had been committed under a writ of ne exeat issued by the Circuit Court for Milwaukee County in a divorce action. *Motion granted.*

Statement by *Rosenberry, J.:*

August 27, 1919, the plaintiff began an action for divorce against the defendant. On the 8th day of September the defendant was ordered to pay the plaintiff \$8 a week temporary alimony, and \$25 attorney's fees. On the 11th day of September, upon the verified complaint and affidavit of the plaintiff, a writ of ne exeat was issued, and on the 12th day of September the sheriff took the defendant into custody under the writ. On the 16th day of September the defendant served his verified answer, denying the allegations of the plaintiff's complaint, and by order of the court the plaintiff was required to show cause why the writ of ne exeat should not be vacated. On the 18th day of September the trial court denied defendant's motion to vacate the writ. In the affidavit upon which the writ was partly based,

it is alleged that before the order for alimony could be served the defendant withdrew from the banks all of the moneys on deposit belonging to the parties, \$3,100, which sum represented their joint savings. It is further alleged that the defendant attempted to remove the money beyond the jurisdiction of the court, and that he told the plaintiff and other persons that he would go to Europe and take the money with him. The defendant remained in the custody of the sheriff, not having given bail.

The defendant applied to this court for a writ of habeas corpus, and on the 7th day of October the sheriff made his return, setting forth the writ ne exeat, from which it appears that the defendant was required to give bail in the sum of \$1,500, with sufficient sureties. The plaintiff moved to quash the writ.

Messrs. L. A. Zavitowski and George A. Bowman for Helen Grbic, contra.

Messrs. Arthur R. Barry and Benjamin T. Schick for relator.

Rosenberry, J., delivered the opinion of the court:

The question raised by the motion to quash the writ is whether or not the circuit court of Milwaukee county had jurisdiction, upon the facts and circumstances shown by the affidavit and verified complaint of the plaintiff, to issue a writ of ne exeat. The statutory provisions relating to the writ of ne exeat are found in §§ 2784-2786. While § 2785 provides that no writ of ne exeat shall be granted unless it satisfactorily appears to the court or the judge by the affidavit of the plaintiff or some indifferent witness that sufficient grounds exist therefor, the grounds upon which the writ may issue are not specified. As said in *Davidor v. Rosenberg*, 130 Wis. 22, 118 Am. St. Rep. 986, 109 N. W. 925, resort must be had to the com-

Ne exeat—  
—function—how  
ascertained.

mon law to ascertain the function of the writ, as well as the grounds upon which it may issue. The nature of the writ and the grounds upon which it may issue are discussed in *Davidor v. Rosenberg*, and the cases there cited; no reference being made to actions for divorce. "It is an undoubted general principle of the law of divorce in this country that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that, to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings, or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere, or otherwise asserted or exercised." *Barker v. Dayton*, 28 Wis. 367.

Section 2348, Wis. Stat., provides: "The circuit court has jurisdiction of all actions to affirm or to annul a marriage, or for a divorce

from the bond of matrimony, or from bed and board, and authority to do all acts and things necessary and proper in such actions and to carry its orders and judgments into execution as hereinafter prescribed. All such actions shall be commenced and conducted and the orders and judgments therein enforced according to the provisions of these statutes in respect to actions in courts of record, as far as applicable, except as provided in this chapter."

In *Damon v. Damon*, decided the same term as *Barker v. Dayton*, it was held that a third party might be joined with the husband in an action for divorce, where the third party had accepted a conveyance of the husband's property in an attempt to defraud the wife. The court says: "It is urged that the power of the court in these divorce cases is limited; that it cannot exercise full equity powers, but only such as are conferred by the statute; and, inasmuch as the statute does not expressly provide that third parties may be made defendants in divorce suits, that therefore no person can be made a defendant in those actions other than a party to the marriage contract. We do not so understand the statute. We think that when the court is empowered to award alimony to the wife out of the husband's estate; to adjudge to her property, or the value of it, that came to her husband by reason of their marriage; to sequester his personal estate, and the rents and profits of his real estate, to enforce compliance with its judgment; and to divide and distribute the whole estate between the parties,—that the power to bring before it as a party defendant in the same action any person who is attempting fraudulently to keep the estate, over which the court has such absolute control, away from the jurisdiction of the court and out of the reach of its judgment, must necessarily follow." *Damon v. Damon*, 28 Wis. 510.

See *Griffin v. Griffin*, 47 N. Y. 134; *Perry v. Perry*, 2 Paige, 501.

Under the power conferred upon the circuit court to enforce its judgments, as in other cases, it was held in *Barker v. Dayton*, *supra*, that the plaintiff could maintain a supplementary proceeding, it being a proceeding in the same action, although a substitute for a creditors' bill under the old practice.

While recognizing the difficulties, in that it was impossible to name a specific sum as being due, and the right to alimony being uncertain, Chancellor Kent allowed the writ in a divorce action where the defendant husband threatened to remove his property from the jurisdiction of the court. *Denton v. Denton*, 1 Johns. Ch. 364, second appeal, 441. See also *Yule v. Yule*, 10 N. J. Eq. 138; *Prather v. Prather*, 4 S. C. Eq. (4 Desauss.) 33, 118 Am. St. Rep. 993, note. We think the authority is conferred upon the circuit court

by § 2348 to do all acts and things necessary and proper in such actions, and issue such writs as may be issued in respect to other actions for the purpose of making its orders and judgments effective, and that the court had jurisdiction, therefore, to allow the writ in this case.

—power of court to grant in divorce proceeding.

The reasoning of the court in *Damon v. Damon* applies fully to the facts in this case. If it were held that the court had no jurisdiction to issue the writ under the facts in this case, its judgment, when rendered, excepting so far as it affected the status of the parties, would be ineffective, and the plaintiff without remedy.

Motion to quash granted, and petitioner is remanded to the custody of the sheriff of Milwaukee county. Petitioner to pay the clerk's fees.

## ANNOTATION.

### Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective.

I. Introductory, 327.

II. View that writ will issue before alimony decreed, 327.

#### I. Introductory.

Ne exeat is a writ in common use in equity, and issues to restrain a person from going beyond the confines of the country, or more especially from going beyond the limits of the jurisdiction of the court, until he has satisfied the plaintiff's claim or has given bond for the satisfaction of the decree of the court. In many of the American commonwealths the writ of ne exeat, seeming to be repugnant to American institutions, has been abolished by statute, either expressly or by implication, though in a few jurisdictions it is still in force and recognized by statutory enactment. 19 R. C. L. 1340, 1342. While it may be stated as a general rule that the writ of ne exeat will not be granted except in cases of equitable debts or

III. View that writ will not issue before alimony decreed, 330.

IV. Particular jurisdictions, 332.

claims (2 Story, Eq. Jur. 801), it is a well-recognized exception to the rule that the writ will issue to prevent a decree for alimony from becoming ineffective. See the cases cited *infra* throughout the note.

#### II. View that writ will issue before alimony decreed.

In a number of American jurisdictions the rule seems to be that where the facts warrant it, a writ of ne exeat will issue from a court of equity in a matrimonial action, even before a decree fixing the amount of alimony to be paid has been rendered.

Colorado. — *Marselis v. People* (1903) 18 Colo. App. 258, 71 Pac. 429.

Florida. — *Bronk v. State* (1901) 43 Fla. 461, 99 Am. St. Rep. 119, 31 So. 248. See also *Bronk v. Bronk* (1903)

46 Fla. 474, 110 Am. St. Rep. 101, 35 So. 870.

**Georgia.**—*McGee v. McGee* (1850) 8 Ga. 295, 52 Am. Dec. 407; *Lamar v. Lamar* (1905) 123 Ga. 827, 107 Am. St. Rep. 169, 51 S. E. 763, 3 Ann. Cas. 294; *Crapps v. Crapps* (1918) 148 Ga. 510, 97 S. E. 680.

**New Jersey.**—*Yule v. Yule* (1854) 10 N. J. Eq. 138; *Anshutz v. Anshutz* (1863) 16 N. J. Eq. 162; *Elmendorf v. Elmendorf* (1899) 58 N. J. Eq. 113, 44 Atl. 164; *Dithmar v. Dithmar* (1905) 68 N. J. Eq. 533, 59 Atl. 644. See also *Bylandt v. Bylandt* (1846) 6 N. J. Eq. 28; *Kirrigan v. Kirrigan* (1862) 15 N. J. Eq. 147.

**Rhode Island.**—*Robinson v. Robinson* (1898) 21 R. I. 81, 41 Atl. 1009.

**South Carolina.**—*Prather v. Prather* (1809) 4 S. C. Eq. (4 Desauss.) 33; *Devall v. Devall* (1809) 4 S. C. Eq. (4 Desauss.) 79.

In *Yule v. Yule* (1854) 10 N. J. Eq. 138, a bill filed for alimony only, a writ of ne exeat was prayed. The court followed the rule laid down in *Denton v. Denton* (1815) 1 Johns. Ch. (N. Y.) 364, and held that the writ was properly issued before a decree of alimony was entered, but it was also held that the affidavit should show that the defendant contended going abroad and that it must be positive as to this point, or as to his threats or declarations to that effect, or as to facts evincing it, or circumstances amounting to it.

In *Bronk v. State* (1901) 43 Fla. 461, 99 Am. St. Rep. 119, 31 So. 248, it appeared that the petitioner was held in custody under a writ of ne exeat issued in an action for divorce, wherein no decree for alimony had been awarded. A writ of habeas corpus was sought on the ground that the writ was in excess of the jurisdiction of the court and void. It was held that the writ was properly issued, the court saying: "The power in our courts of equity to issue ne exeat in proper cases is expressly recognized by statute, and the matter of issuing such writs is to some extent regulated by §§ 1473-1476, Revised Statutes. By § 1473 it is provided that no writ of ne exeat shall be granted until a bill

sworn or supported by affidavit is filed praying such writ, except in certain cases not necessary to mention. It is further provided by that section that the writ may issue in any case where the issue shall seem to the chancellor just. We are of opinion that under our system the writ ne exeat may now be issued by our equity courts in suits for maintenance, before a decree fixing an amount to be paid is rendered, in all cases where it seems to the chancellor just to issue it and a necessity therefor exists."

In *Prather v. Prather* (1809) 4 S. C. Eq. (4 Desauss.) 33, pending a suit for separate maintenance, a writ of ne exeat was issued to prevent the defendant husband from leaving the state. On appeal the chancellor refused to discharge the writ under the circumstances of the case, saying: "Upon the whole, I think the weight of authority is against the writ in such cases; and if the application were now making to me de novo for the writ, I have doubts if I should feel myself authorized to grant it. But the order has been made by proper authority, and the application is to rescind it; which application is made by a man who admits by his demurrer that he has used his wife cruelly without cause, and turned her out of doors without provision, and has taken home to his house a worthless woman, who usurps the place of the legitimate wife, and abuses her children; and that he threatens the life of his wife, and is about to remove himself and property into foreign parts. Under these circumstances I will not sanction the defendant's evasion of justice, by rescinding the order for the ne exeat."

In *McGee v. McGee* (1850) 8 Ga. 295, 52 Am. Dec. 407, the plaintiff, pending a suit for a divorce, filed a bill alleging that the defendant had threatened to leave the jurisdiction, and praying that a writ of ne exeat be issued. It appeared that in 1813 a statute was enacted reciting in the preamble that "great evils have existed, and do yet exist, in this state, in consequence of the law of England, regulating writs of ne exeat, not having provided for cases where the de-

mand set forth by the complainant is not due," and providing that "the judges of the superior courts shall be, and they are thereby authorized, to grant writs of ne exeat, as well in cases where the debt or demand is not due, but exists fairly and bona fide in expectancy, at the time of making application, as in cases where the demand is due." It was held that the writ was properly issued on the affidavit of the plaintiff in the case at bar, the court saying: "The bill charges that the defendant has property in possession of the value of \$4,000, and that there are no children; and the complainant not only makes a case in her bill which shows that she is entitled to suitable provision for her maintenance, but her affidavit states expressly that she considers herself entitled to adequate support out of her husband's property. Here, then, in contemplation of the Statute of 1813, is 'a bona fide demand, existing in expectancy,' and comes both within the spirit and letter of the act. We feel the less hesitancy in coming to this conclusion, not only because it is essential to the ends of justice, but it is warranted by the universal practice which has obtained throughout the state, under this act." In *Lamar v. Lamar* (1905) 123 Ga. 827, 107 Am. St. Rep. 169, 51 S. E. 763, 3 Ann. Cas. 294, it was held that the omission to incorporate the provisions of the Statute of 1813 into a subsequent codification of the Georgia statutes did not have the effect of restoring the English rule that the claim must be reduced to judgment before the writ can issue. See also *Crapps v. Crapps* (1918) 148 Ga. 510, 97 S. E. 680.

Where, however, the court has no jurisdiction over the subject-matter of the suit in which the claim for separate maintenance or alimony is made, or to render a personal judgment against the defendant on such claim, a writ of ne exeat issued for the protection of the demand is without warrant of law, and will be discharged on application being made for such relief. *Anshutz v. Anshutz* (1863) 16 N. J. Eq. 162; *Elmendorf v. Elmendorf* (1899) 58 N. J. Eq. 113; *Dithmar v. Dithmar*

(1905) 68 N. J. Eq. 533, 59 Atl. 644; see also *Bylandt v. Bylandt* (1846) 6 N. J. Eq. 28; *Kirrigan v. Kirrigan* (1862) 15 N. J. Eq. 147.

Thus, in *Dithmar v. Dithmar* (1905) 68 N. J. Eq. 533, 59 Atl. 644, supra, where it appeared that both of the parties were nonresidents, it was held that a writ of ne exeat was improperly granted, as the court did not have jurisdiction of the subject-matter and there was no equitable demand on which the writ could be based.

So, in *Elmendorf v. Elmendorf* (1899) 58 N. J. Eq. 113, supra, it appeared that the plaintiff had obtained a divorce from the defendant in New Jersey, but the defendant was not served personally within the state or did not appear. An award of alimony was made and a proceeding was brought to obtain a writ of ne exeat. The court held that the defendant, not having been served within the state, and not appearing, the decree for alimony fixed personal liability without due process of law, and was therefore void under the Federal Constitution, and that, as the decree for alimony was void, the court had no power to issue the writ of ne exeat.

In *Anshutz v. Anshutz* (1863) 16 N. J. Eq. 162, wherein a bill was filed by a wife against her husband for alimony, for the support and maintenance of herself and her children, a writ of ne exeat was issued against her husband. It appeared that the statute conferred original jurisdiction on the court in matters of alimony only where the husband, without any justifiable cause, abandoned his wife and neglected to maintain and provide for her. The court held that the writ was not properly issued, saying: "It is urged that although no abandonment or separation has actually taken place, yet where the facts and circumstances show that there is a well-grounded apprehension that the husband is about to abandon his wife, to dispose of his property, and to remove beyond the jurisdiction of the state, the court will interfere to prevent it. The bill is manifestly framed with a view to relief in this form, and it was mainly upon this ground that the writs of ne

exeat and injunction were issued. But, upon reflection, I do not perceive upon what principle this exercise of the power of the court can be sustained. The court has no power to compel the parties to live together or to restrain a separation. The wife has no right to the interference of the court for her maintenance until the abandonment or separation has taken place. The writs were not issued to protect any subsisting right or interest of the wife, but on the mere ground of apprehension on the part of the wife that a right might thereafter be created which would entitle her to protection."

In *Bylandt v. Bylandt* (1846) 6 N. J. Eq. 28, the plaintiff in a suit for divorce alleged in her petition that her husband intended to leave the state and prayed that a writ of ne exeat be issued. Annexed to the petition was an affidavit by one Romein, showing the intention of the husband to leave the state. The court, in holding that the writ could not be granted, said: "It would be irregular to grant the ne exeat under these circumstances. There was no cause or proceeding in court respecting the subject of the affidavit made by Romein when it was made. . . . The proper course is to file the bill or petition for divorce, and after that to file a petition for the ne exeat, supported by the necessary affidavit, sworn subsequently to the filing of the bill."

In *Kirrigan v. Kirrigan* (1862) 15 N. J. Eq. 146, an action for a divorce, the chancellor found that the proceedings had not been instituted by the complainant in good faith, but for the mere purpose of recovering money from the defendant or of compelling him to support her, and that the parties had already been divorced by the decree of a judicial tribunal, obtained by the husband in Indiana. It was held that a writ of ne exeat previously sued out should be quashed.

It seems that the affidavit for the writ must state the facts on which is based the belief of the affiant that the defendant is about to depart from the jurisdiction, in order that the court may judge of their sufficiency.

Thus in *Robinson v. Robinson* (1898) 21 R. I. 81, 41 Atl. 1009, an action by a wife for a divorce, a verified application for a writ of ne exeat was filed, which alleged that the petitioner had good reason to believe that the respondent was about to depart from the state, and would depart from the state before the time for hearing, for the purpose of avoiding any order that the court might make in the premises. It did not state the facts on which the belief of the petitioner was based. Holding the application to be insufficient, the court said: "The practice which has prevailed in this state as to the issuing of writs of ne exeat has not been uniform, and has sometimes been too lax. In some cases the affidavits which have been filed have been wanting in certainty and fullness, and in others writs have been issued even without any affidavit at all. For the purpose of establishing a more correct practice, the writ will not hereafter be granted except upon affidavit verifying the charges contained in the main petition, and containing allegations of facts or circumstances satisfactorily evincing an intention of the respondent to depart from the state to avoid performance of the decree of the court on hearing, or of his threat or declaration of such intention." See to the same effect *Yule v. Yule* (1854) 10 N. J. Eq. 138.

Where the defendant gives bond to escape imprisonment under the writ, conditioned that he will not go out of the state without leave of the court, no time being fixed after which, without lawful discharge, he is at liberty to depart, his departure without such discharge and without leave of the court, whether before or after a decree for alimony, is a breach of the condition. *Marselis v. People* (1902) 18 Colo. App. 258, 71 Pac. 429.

### *III. View that writ will not issue before alimony decreed.*

In a few American jurisdictions and in England, the rule is that the writ will not issue until the right to alimony has been established, and the amount fixed by judicial decree. *Bayly v. Bayly* (1847) 2 Md. Ch. 326; *Drolet v. Drolet* (1884) How. N. P. (Mich.)

14; *Bailey v. Cadwell* (1883) 51 Mich. 217, 16 N. W. 381; *Street v. Street* (1823) Turn. & R. 322, 37 Eng. Reprint, 1124; *Vandergucht v. De Blaquiére* (1838) 8 Sim. 315, 59 Eng. Reprint, 125, 7 L. J. Ch. N. S. 270, 2 Jur. 738, affirmed in (1839) 5 Myl. & C. 229, 41 Eng. Reprint, 358, 3 Jur. 1116; *Coglar v. Coglar* (1790) 1 Ves. Jr. 94, 30 Eng. Reprint, 246; *Shaftoe v. Shaftoe* (1802) 7 Ves. Jr. 172, 32 Eng. Reprint, 70; *Dawson v. Dawson* (1803) 7 Ves. Jr. 174, 32 Eng. Reprint, 71; *Haffey v. Haffey* (1807) 14 Ves. Jr. 261, 33 Eng. Reprint, 521; *Smithson's Case* (1726) 2 Vent. 345, 86 Eng. Reprint, 477; *Read v. Read* (1668) 1 Ch. Cas. 115, 22 Eng. Reprint, 720, 2 Rep. in Ch. 19, 21 Eng. Reprint, 604; *Ex parte Whitmore* (1750) Dick. 143, 21 Eng. Reprint, 223; *Oldham v. Oldham* (1802) 7 Ves. Jr. 410, 32 Eng. Reprint, 166. See also *Anonymous* (1741) 2 Atk. 211, 26 Eng. Reprint, 530; *Head v. Head* (1749) 3 Atk. 295, 26 Eng. Reprint, 972; *Pearne v. Lisle* (1749) 1 Amb. 75, 27 Eng. Reprint, 47; *Cock v. Ravie* (1801) 6 Ves. Jr. 283, 31 Eng. Reprint, 1053.

In *Bayly v. Bayly* (1847) 2 Md. Ch. 326, the plaintiff in an action for separation and for alimony prayed a writ of ne exeat. The writ was granted and on a motion to discharge the writ the court said: "In the case now under consideration, no decree for alimony has been passed, and, indeed, the title to any such decree is strongly contested by the answer in averments and statements responsive to the allegations of the bill. There is moreover, a wide difference between the statements in the bill and answer with reference to the value of the defendant's estate, the bill alleging him to be worth \$15,000, whilst in his answer, he says he is not worth \$500.

. . . This is a case, then, in which the writ issued upon the ex parte application of the wife, verified alone by her affidavit, before a decree had passed establishing her right to alimony, and in which her right is disputed by strong statements in the answer imputing gross misconduct to her. The allegation of an intention to remove from the state is positively denied by the defendant, and the ques-

tion now is whether, according to the case as presented by bill and answer, the writ shall, or shall not, be discharged. . . . In this case the chancellor considers it proper, in view of the positive denial in the answer of the intention to leave the state imputed to the defendant by the bill, and of the other defenses taken in the answer, to grant the motion, and will pass an order accordingly."

In *Bailey v. Cadwell* (1883) 51 Mich. 217, 16 N. W. 381, it was held that the courts of equity in Michigan had only "the powers and jurisdictions of the court of chancery in England, with the exceptions, additions, and limitations created and imposed by the Constitution and laws" of the state; that no additions to their jurisdiction to issue writs of ne exeat had been thus declared; and that therefore there was no power to issue the writ before the rendition of a decree for alimony, since in the English courts the jurisdiction had been limited to cases where the default of the defendant was capable of direct measurement, and clearly made out, and where no other remedy was attainable. So, in *Drolet v. Drolet* (1884) How. N. P. (Mich.) 14, the court said: "In general the writ will not be granted unless in case of equitable debts and claims. The debt must exist at the time, or be so far matured that present payment can rightfully be demanded. . . . The English courts hold that the writ will not be allowed in cases of permanent alimony decreed except for arrears due and unpaid. . . . And it seems the writ will not be granted in cases of temporary alimony. . . . I am therefore of the opinion that a writ of ne exeat is not authorized in this state in cases of temporary alimony."

In England, the law governing the issuance of a writ of ne exeat in alimony cases was settled at an early date. The chancery courts granted the writ where the facts warranted it, in favor of a wife who had obtained a sentence for alimony against her husband in the ecclesiastical court. *Read v. Read* (1668) 1 Ch. Cas. 115, 22 Eng. Reprint, 720, 2 Rep. in Ch. 19, 21 Eng. Reprint, 604; *Ex parte Whit-*



more (1750) Dick. 143, 21 Eng. Reprint, 223; *Smithson's Case* (1725) 2 Vent. 345, 86 Eng. Reprint, 477; *Head v. Head* (1749) 3 Atk. 295, 26 Eng. Reprint, 972. See also *Oldham v. Oldham* (1802) 7 Ves. Jr. 410, 32 Eng. Reprint, 166. The ecclesiastical court could not compel the husband to find bail. For that reason chancery lent its assistance in aid of the sentence of that court and of the wife in whose favor it had passed. *Pearne v. Lisle* (1749) 1 Ambl. 76, 27 Eng. Reprint, 47; *Anonymous* (1741) 2 Atk. 211, 26 Eng. Reprint, 530; *Vandergucht v. De Blaquiére* (1838) 59 Eng. Reprint, 125, 7 L. J. Ch. N. S. 270, 8 Sim. 315, 2 Jur. 738, affirmed in (1839) 5 Myl. & C. 229, 41 Eng. Reprint, 358, 3 Jur. 1116. It was done out of compassion for her, and to aid that court. *Anonymous* (Eng.) supra. The writ could not be obtained pending the suit in the ecclesiastical court, but only after sentence had passed, granting alimony and fixing the amount. *Coglar v. Coglar* (1790) 1 Ves. Jr. 94, 30 Eng. Reprint, 246; *Cock v. Ravie* (1801) 6 Ves. Jr. 283, 31 Eng. Reprint, 1053. Where the application for the writ was made pending the suit in the ecclesiastical court, but, before it was disposed of, sentence for alimony was obtained, the court granted it for the amount thus decreed. *Shaftoe v. Shaftoe* (1802) 7 Ves. Jr. 172, 32 Eng. Reprint, 70. Where an appeal was taken from a sentence for alimony, a writ of *ne exeat regno* would not be issued during its pendency, the alimony not being considered by the ecclesiastical court as due so long as an appeal from the sentence was pending; nor would it be issued for interim alimony. *Street v. Street* (1823) Turn. & R. 322, 37 Eng. Reprint, 1124. If alimony for which sentence had been passed was payable in instalments, the writ could be obtained only for arrears actually due. *Dawson v. Dawson* (1803) 7 Ves. Jr. 174, 32 Eng. Reprint, 71; *Haffey v. Haffey* (1807) 14 Ves. Jr. 261, 33 Eng. Reprint, 521.

#### IV. *Particular jurisdictions.*

In Connecticut there seems to be only one case, and that an early one, involving an application for the writ

of *ne exeat* in support of a demand for alimony. The application was not made until after the decree had been rendered, and was granted by the court. *Lyon v. Lyon* (1851) 21 Conn. 199, note a.

In New York, though the writ of *ne exeat* is now abolished by statute (Code Civ. Proc. § 548), an order for arrest of the defendant in a suit for separation or divorce is authorized under circumstances which would have formerly warranted the issuance of the writ, by § 550 of the Code, which provides that "a defendant may also be arrested in an action wherein the judgment demanded requires the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the state, or, being a resident, is about to depart therefrom, by reason of which nonresidence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual." See *Boucicault v. Boucicault* (1880) 21 Hun (N. Y.) 431, 59 How. Pr. 131; *Gardiner v. Gardiner* (1877) 3 Abb. N. C. (N. Y.) 1; *Taber v. Taber* (1891) 28 Jones & S. 65, 21 N. Y. Civ. Proc. Rep. 340. See also *Collins v. Collins* (1880) 80 N. Y. 24.

Before the enactment of the statute abolishing the writ, Chancellor Kent had held in the leading case of *Denton v. Denton* (1815) 1 Johns. Ch. (N. Y.) 364, that the writ might be granted prior to the rendition of a decree for alimony, saying: "The great difficulty in these applications, when a suit is pending for alimony, is, that the right to alimony, and the amount of it, is uncertain; and there is no certain sum for which to mark the writ. This court has always expressed an inclination to interfere in favor of the wife, if that difficulty could be surmounted.

It does not appear to me that the difficulty of fixing on a sum is absolutely insurmountable. Courts of law always surmount it, when the writ is marked for bail in actions founded on torts. The amount of alimony will have a material reference to the rank of the parties, and the property of the

husband. The case will always be governed by a sound discretion, arising out of its special circumstances; and the court will take care that the writ be not used for oppression or extortion. Under this limitation, the process in cases like this, when the intended departure of the husband is clearly made out, appears to me to be essential to justice." The rule laid down in *Denton v. Denton* was followed in several other New York decisions. Thus, in *Forrest v. Forrest* (1850) 10 Barb. (N. Y.) 50, 2 Edm. Sel. Cas. 171, an action for a separation, the plaintiff secured in the lower court a writ of ne exeat to prevent her husband from leaving the state. The appellate court, while concurring in the rule that the writ might be issued before a decree for alimony was granted, held that the facts proven did not sufficiently show that the defendant intended to leave the jurisdiction and that the writ of ne exeat should be discharged. In *Bushnell v. Bushnell* (1852) 7 How. Pr. (N. Y.) 389, an action for a separation, the plaintiff obtained a writ of ne exeat to prevent the defendant from leaving the state. It was contended that the court did not have the power to issue the writ, as the Code enacted in 1831 provided that "no person shall be arrested in a civil action except as prescribed by this act; but the provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831, or any act amending the same, nor shall it apply to proceedings for contempt." The court, after considering the various sections relating to arrest, said: "In view, therefore, of the fact that the Code has not expressly abolished the writ, nor given anything as a substitute therefor, and deeming the power of awarding such process essential to the exercise of the legitimate powers of a court of equity, and not to be taken away by implication, I am constrained to hold that this court still possesses the authority to retain a suitor by ne exeat." In *Hammond v. Hammond* (1839) Clarke, Ch.

(N. Y.) 151, it appeared that the plaintiff, on filing a bill for a separation, secured a writ of ne exeat. The defendant moved to dissolve the writ, alleging that he had no intention of leaving the state. It was held that the writ should not be dissolved, as, if the defendant's contentions were true, the writ would not annoy him, and if the writ was dissolved and the defendant should leave the state, the plaintiff would be remediless. In *Kirby v. Kirby* (1828) 1 Paige (N. Y.) 261, it was held that, in denying a motion to discharge the writ, if it appeared that the writ required bail in too large a sum, the amount would be reduced.

In Washington, in *Holcomb v. Holcomb* (1908) 49 Wash. 498, 95 Pac. 1091, pending an appeal from a judgment granting the plaintiff a divorce, an application was made to the appellate court for an allowance of alimony pendente lite and for a writ of ne exeat to restrain the defendant from leaving the state without the order of the court. The appellate court decreed that part of the application asking for a writ of ne exeat, saying: "We do not think there is any sufficient showing that the appellant is about, or threatening, to leave the jurisdiction of the court; and in view of the fact that a considerable portion of the property is real estate, which it would be difficult for him to pass title to without the consent of respondent, and having in mind also the stay bond, we do not think that an order or writ of this kind is justified."

In Wisconsin it is held in the reported case (*EX PARTE GRBIC*, ante, 325) that the court has jurisdiction, under its general statutory powers in divorce cases, to issue a writ of ne exeat, so that its judgment, when rendered, may not be ineffective. The decision, in referring to the rendition of judgment, apparently means a final judgment for alimony, since at the time the writ of ne exeat was issued in that case an order for temporary alimony had actually been made.

E. C. B.

OGDEN-HOWARD COMPANY, Plff. in Err.,  
v.  
JOHN H. BRAND.

*Delaware Supreme Court — November 26, 1919.*

(— Del. —, 108 Atl. 277.)

**Damages — for wrongful discharge from employment.**

1. The measure of damages recoverable by a wrongfully discharged employee is the stipulated salary for such period as he may be entitled to recover damages, less any amount he actually received or might have received by due and reasonable diligence during such period after discharge.

[See note on this question beginning on page 338.]

**Action — for breach of contract of hiring — single or successive.**

2. But one action can be maintained for the wrongful discharge of one employed under seal to render services for a term of years, although provision is made in the contract for termination of the contract only upon the giving of notice for a specified time.

[See 1 R. C. L. 353-355.]

**— form — debt — breach of contract for services.**

3. An action for debt will not lie to recover damages for wrongful breach of a contract under seal to employ plaintiff's services for a specified term.

**ERROR** to the Superior Court for New Castle County (Conrad and Heisel, JJ.) to review judgments in favor of plaintiff in actions of debt, brought to recover damages for wrongful breach of a contract under seal to employ his services for a specified term. *Reversed.*

**Statement by Rice, J.:**

Actions of debt by John H. Brand against the Ogden-Howard Company, an incorporation, before a justice of the peace. Judgments for the plaintiff. Defendant brings appeals to the superior court (Judges Conrad and Heisel sitting.) Verdicts and judgments for plaintiff. Defendant brings error.

John H. Brand, the plaintiff below and defendant in error, was employed by the Ogden-Howard Company, the defendant below and plaintiff in error, as buyer and manager, under the terms of a written contract under seal, for the period from February 1, 1914, to January 1, 1919, at a salary of \$100 a week. The contract provided that the employment might be terminated at any time by either party to the contract giving to the other six months' notice in writing of such intention to terminate, and after the expiration of the six months' notice the agreement should termi-

nate and be void. The contract provided that Brand should devote the whole of his time, attention, and energy to the performance of his duties under the contract during the time of the agreement. On February 27, 1918, the Ogden-Howard Company discharged Brand from its employ as buyer and manager without giving him prior notice in writing, and thereafter Brand performed no services for the company, although ready and willing to do so until April 1st following.

Brand brought the five suits now before this court on a writ of error, together with several other suits, before a justice of the peace against the Ogden-Howard Company for salary subsequent to the date of his discharge and prior to the expiration of the term of notice, each suit being for the sum of \$100 salary claimed under the contract for the week mentioned in the particular suit. The judgments before the

justice of the peace in favor of Brand were appealed to the superior court, and by the consent of both parties the five suits now in this court and two others were tried together. Judgments were entered in the superior court in favor of Brand for \$100 each in the five suits. By a stipulation filed in the supreme court, counsel agreed that the record and briefs filed in the first of the cases on the docket of the supreme court should be considered as having been filed in the remaining four cases on the docket. In the superior court the plaintiff filed a *pro narr.* in debt. At the trial the defendant introduced evidence to show that Brand did not devote the whole of his time and energy to the performance of his duties as buyer and manager, refused to obey the company's orders, and in other ways neglected and failed to perform his duties.

There are four assignments of error. We will consider only the first, which is as follows:

That the court erred in declining to give binding instructions to the jury to return a verdict for the defendant, on the grounds as prayed for by the defendant below, namely, that the only damages recoverable by a wrongfully discharged employee for the unexpired period of the contract are unliquidated, and not recoverable in an action of debt on contract under seal.

Mr. Charles F. Curley, for plaintiff in error:

An action of debt on a contract under seal will lie only where the sum to be recovered is certain, or capable of being reduced to a certainty by calculation, and will not lie where the quantum of damages is uncertain and in the jury's discretion.

13 Cyc. 406; 1 Chitty, Pl. \* 106; Love v. Pusey & J. Co. 3 Penn. (Del.) 577, 52 Atl. 542.

The measure of damages of a discharged employee is the amount of wages he would have earned under the contract of employment, deducting, however, such sums as he earned or by reasonable diligence might have earned elsewhere.

Spahn v. Willman, 1 Penn. (Del.)

125, 39 Atl. 787; Carroll v. Cohen, 5 Boyce (Del.) 235, 91 Atl. 1001; 2 Sedgw. Damages, 9th ed. p. 1348; 3 Sutherland, Damages, 4th ed. p. 2555; 26 Cyc. 999; Howay v. Going-Northrup Co. 6 L.R.A. (N.S.) 82, note.

A discharged employee cannot recover for constructive service.

Elderton v. Emmens, 6 C. B. 160, 136 Eng. Reprint, 1213, 17 L. J. C. P. N. S. 307, affirmed in 13 C. B. 495, 138 Eng. Reprint, 1292, 4 H. L. Cas. 624, 10 Eng. Reprint, 606, 18 Jur. 21; Smith v. Hayward, 7 Ad. & El. 544, 112 Eng. Reprint, 575; Goodman v. Pocock, 15 Q. B. 576, 117 Eng. Reprint, 577, 19 L. J. Q. B. N. S. 410, 14 Jur. 1042; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821, 6 N. E. 246; Jones v. Dunton, 7 Ill. App. 580; Olmstead v. Bach, 78 Md. 182, 22 L.R.A. 74, 44 Am. St. Rep. 273, 27 Atl. 501; Hamilton v. Love, 152 Ind. 642, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437; Stone v. Bancroft, 112 Cal. 653, 44 Pac. 1069; Lichenstein v. Brooks, 75 Tex. 196, 12 S. W. 975; Doherty v. Schipper & Block, 250 Ill. 128, 34 L.R.A. (N.S.) 557, 95 N. E. 74, Ann. Cas. 1912B, 364.

If Brand's discharge was justified by misconduct, he was entitled to no damages whatever.

1 Labatt, M. & S. p. 1087; 26 Cyc. 987; Hitchens v. School Dist. 5 Penn. (Del.) 325, 62 Atl. 897.

Messrs. Robert Pennington and Samuel H. Baynard for defendant in error.

Rice, J., delivered the opinion of the court:

The question presented by the first assignment of error is whether, under a contract of hiring, such as the one before us, an action of debt will lie, where an employee has been wrongfully dismissed during the term of employment, for the recovery of damages for wages after dismissal, nothing being due for wages actually earned.

The plaintiff in error contends that the damages recoverable are not for a sum certain, or capable of being reduced to a certainty by calculation, and therefore an action of debt will not lie.

The defendant in error claims that under the terms of the contract there were two distinct periods of

time involved; to wit, the first six months after his discharge without notice as provided in the contract, during which time he was entitled to the sum of \$100 per week, as liquidated damages, and second, the period between the expiration of said six months and the end of the term provided in the contract, during which time the damages were unliquidated. The defendant in error contends that the damages were liquidated and the action of debt was the proper action to bring in each of the five cases now before this court, for the reason that they were brought to recover weekly wages due within the period provided in the contract for notice of its termination, and in support of this contention cites *Shea v. Kerr*, 1 Penn. (Del.) 530, 43 Atl. 843; *Love v. Pusey & J. Co.* 3 Penn. (Del.) 577, 52 Atl. 542.

The principle of law for which the defendant in error contends is generally known as the "constructive service" doctrine, and he claims that the doctrine has been recognized in this state in *Shea v. Kerr*. This doctrine has been recognized in some jurisdictions with approval, but by the great weight of authority in this country it has not been approved.

In the case of *Shea v. Kerr*, supra, the court stated the measure of damages to be "the amount the defendant agreed to pay her as salary for the two weeks," covering the period of notice in the agreement; yet in considering the *Shea* Case the fact must be taken into consideration that there was no evidence introduced at the trial to show that the plaintiff earned, or by reasonable diligence could have earned, anything during that time. In fact, there was no evidence introduced for the defense, therefore the charge of the court on the law was in conformity with the facts of the case, and we think that this case does not support the contention of the defendant in error.

In the case of *Love v. Pusey & J. Co.* supra, it was held that an ac-

tion of debt may be maintained in this state against a stockholder in a Kansas corporation to enforce the individual liability of such stockholder under the constitutional and statutory provisions of the state of Kansas, to an amount equal to the par value of defendant's stock, on account of the unpaid balance of plaintiff's judgment obtained in Kansas against the corporation. We do not consider this case an authority in support of Brand's contention in the case now before us, as the cases are not analogous in any respect.

Other cases in this state, brought by an employee against an employer, to recover damages for wrongful dismissal under a contract of hiring, are: *Spahn v. Willman*, 1 Penn. (Del.) 125, 39 Atl. 787; *Hitchens v. School Dist.* 5 Penn. (Del.) 325, 62 Atl. 897; *Carroll v. Cohen*, 5 Boyce (Del.) 235, 91 Atl. 1001.

In the case of *Spahn v. Willman*, the defendant at the trial offered evidence to show that the plaintiff had refused work of a similar character offered by a third person during the term of the alleged contract after plaintiff's dismissal. Objection was made to the testimony on the ground that plaintiff, if he had been wrongfully discharged during the term of the contract, was not obliged to look for other work, but could wait until the end of the period covered by the contract and then sue for his wages. The court overruled the objection and admitted the evidence, stating that such evidence went to the measure of damages. In the charge to the jury the court stated the measure of damages to be such amount as the plaintiff would have been entitled to under the terms of the contract, less any amount he may have earned in the time which he would have given to his work if he had continued in the defendant's employ.

In *Hitchens v. School Dist.* the defense was that the employee had broken the contract, and the employer, therefore, was justified in dismissing the plaintiff. There was

no evidence introduced at the trial to show that the plaintiff earned or reasonably might have earned anything during the term of the contract. The court stated the measure of damages to be what the plaintiff would have earned under the contract, and said nothing relative to what he might have earned elsewhere, as there was no evidence on this point.

In the case of Carroll v. Cohen, the court stated the plaintiff's measure of damages to be "the amount of his wages, as contracted for, for the unexpired portion of the term of employment, less the amount he has earned or might, by reasonable effort, have earned in other employment during such unexpired term." It does not appear in the report of the case that the employee earned anything elsewhere, yet from the language employed by the court in stating the measure of damages it is reasonable to assume that such evidence was introduced at the trial.

We think it may reasonably be said that whatever difference there appears to be as to the measure of damages in the Delaware cases is due to the nature of the evidence introduced, or to the lack of evidence at the trial.

The contract now before the court is one of hiring, under seal, under the terms of which the plaintiff was employed and entered the service of the defendant company as buyer and manager of their business. The employment was for a definite period, from the 1st day of February, 1914, to the 1st day of January, 1919, with the right reserved by either party to terminate the agreement upon six months' written notice. There was but one contract between the parties, and the discharge of Brand was a single act constituting but one breach, and damages for such

Action—for breach of contract of hiring—single or successive.

a breach can be recovered in but one action. That the right was reserved

to either party to terminate the con-

8 A.L.R.—22.

tract upon notice would not be a sufficient reason for holding that there was a dismissal at the beginning of the period of notice and another dismissal at the end of that period, thereby constituting two distinct and separate breaches of the contract.

In the few states which recognize the "constructive service" doctrine, an employee who has been wrongfully discharged under a contract of employment for a definite term, and who is ready to perform his part of the contract, may possibly recover in damages the exact amount of his wages as stipulated in the agreement, for such time as he holds himself ready and willing to perform his duties under the contract. In these states an action of debt may be the proper action in such cases, because the damages would be for a sum certain.

From our observation with respect to the Delaware cases it will be seen that the "constructive service" doctrine has never been recognized in this state, neither is it approved by the overwhelming weight of authority in this country. In this state and the other jurisdictions where the constructive service doctrine is not recognized, the discharged employee can recover damages only for the breach of the contract, and the measure of damages is uniformly held to be the stipulated salary for such period as he may be entitled to recover damages, less any amount he actually earned or might, by due and reasonable diligence, have earned during such period after discharge. The measure of damages in this state being as stated, the conclusion must be reached that the damages recoverable in such an action are not for a sum certain, or capable of being reduced to a certainty by calculation, such as would admit of the action of debt as a proper or maintainable one.

Damages—for wrongful discharge from employment.

We are therefore of the opinion

that the court below was in error in declining to give binding instructions to the jury to return a verdict

**Action—form—  
debt—breach of  
contract for  
services.**

for the defendant, on the ground that the damages recoverable by a wrongfully discharged employee for the unexpired period of the contract

are unliquidated, and not recoverable in an action of debt.

Finding error in the proceedings below, as specified by the first assignment of error, the court directs that the judgments below be reversed and the cases remanded to the court below for further proceedings.

## ANNOTATION.

### Wrongful discharge of servant—doctrine of "constructive service."

- I. Scope and introduction, 338.
- II. Origin and theory of doctrine, 338.
- III. Adoption, 340.
- IV. Repudiation:
  - a. In general, 342.

#### *I. Scope and introduction.*

The purpose of the present annotation is to treat merely the theory, origin, and development of the doctrine of constructive service as applied to a wrongfully discharged servant, and to determine the present status of that doctrine in the various jurisdictions which have either adopted or rejected it, without going into the more specific questions with respect to its effect upon the form of action, the measure of damages, etc.

Generally speaking, it may be said that the result of a somewhat extended investigation shows that the doctrine of "constructive service" arose in England; that it is now the law in Alabama, Arkansas, Georgia, Massachusetts, Michigan, Mississippi, Montana, Pennsylvania, and South Carolina; that decisions in Colorado and Iowa contain dicta favorable to its application, and that Rhode Island and Wyoming have decisions which possibly might be regarded as favorable; and that the doctrine has been definitely repudiated in the land of its origin, as well as in Alaska, Arizona, California (one qualification), Delaware, Illinois, Indiana, Maryland, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Vermont, Virginia, and West Virginia, while decisions in Kentucky, Washington, and Wisconsin are seemingly adverse. It is also of in-

#### IV.—continued.

- b. Jurisdictions repudiating doctrine, 343.
- c. Rationale of repudiation, 347.
- V. Statutory provisions, 349.

terest that, like England, a number of other jurisdictions which now repudiate the doctrine at one time accepted it.

#### *II. Origin and theory of doctrine.*

A decision by Lord Ellenborough in the case of *Gandall v. Pontigny* (1816) 4 Campb. (Eng.) 375, 1 Starkie, 198, is generally credited with the creation of the doctrine of "constructive service." In this case it was held that a servant who was wrongfully discharged before the end of his term could recover the wages for the full term under a count in indebitatus assumpsit for work and labor, the theory of the decision being that, having served a part of the term, and being willing to serve the balance thereof, the servant, in contemplation of law, could be regarded as having served the whole term.

Thus arose in England the so-called "doctrine of constructive service," the essential feature of which is recovery of wages on the ground of readiness and willingness to perform, the theory of the doctrine being that where one is ready and willing to perform his contract, and so holds himself, but is wrongfully prevented from doing so, he should be regarded in law as having actually performed it. To illustrate, it has been said (*James v. Allen County* (1886) 44 Ohio St. 226, 58 Am. St. Rep. 821, 6 N. E. 246) that the theory of the doctrine of constructive

service is that, inasmuch as the employee holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. And in the Arkansas case of *Gardenhire v. Smith* (1882) 39 Ark. 280, it was said that readiness to perform and tender of performance are equivalent to performance. And in *Cox v. Bearden* (1889) 84 Ga. 304, 20 Am. St. Rep. 359, 10 S. E. 627, Bleckley, Ch. J., discussed the recognition and adherence by the Georgia courts to the doctrine of "constructive service" as follows: "The state of our law on the subject seems to be this: that where a servant is wrongfully discharged after rendering a portion of the services contracted for, he can, by waiting until the expiration of the term, bring his action for wages as though he had actually performed his contract. . . . The doctrine of constructive service recognized by Lord Ellenborough in *Gandall v. Pontigny* (Eng.) *supra*, still prevails in Georgia." So, in *Allen v. Colliery Engineers' Co.* (1900) 196 Pa. 512, 46 A. 899, Fell, J., in delivering the opinion of the court, said that "the generally recognized rule is that an employee for a fixed period who has been wrongfully discharged may either treat the contract as existing, and sue for his salary as it becomes due, not on a quantum meruit, but by virtue of the special contract, his readiness to serve being considered as equivalent to actual service, or he may sue for the breach of contract at once, or at the end of the contract period;" but, as is shown *infra*, and as is commented on by Labatt in his work on *Master and Servant*, at page 1223, the court was not warranted in referring to this rule as being one which is "generally recognized." It has also been said that the right to recover the full amount of the stipulated wages rests upon the fact that the contract is entire and the services personal. *Ramey v. Holcombe* (1852) 21 Ala. 567.

It follows from the fact that the doctrine of constructive service is based on the theory that the contract has remained in force and the services contracted for have been constructive-

ly performed, that the investigator must keep clearly in mind the essential distinction between such an action founded upon performance and an action for damages caused by a wrongful dismissal, based on the breach of contract; or, as it might be stated, actions for wages as damages and actions for wages as wages. This, of course, is essential to a proper classification of the cases, and is often difficult of determination, especially in cases where the measure of damages is the same under both rules and the courts have not exercised precision in the language used. A case illustrative of this distinction is *Trustees v. Shaffer* (1872) 63 Ill. 243, where the court rejected the doctrine of constructive service, stated the rule of damages to be that when a servant is hired for a fixed period and is discharged without cause during the term, he may recover for the whole time, deducting any amount obtained for work obtained elsewhere, or which might have been obtained by reasonable effort, and spoke of the nature of the action to be brought as follows: "But the action must be special, and not for work and labor done. The damages result from a breach of the contract, in consequence of the wrongful dismissal. The services have never been performed, and, therefore, *indebitatus assumpsit* cannot be maintained." And in *Olmstead v. Batch* (1893) 78 Md. 182, 22 L.R.A. 71, 44 Am. St. Rep. 273, 27 Atl. 501, a much cited case, the court, in rejecting the theory of constructive service and distinguishing between actions for wages as such and actions for wages as damages, said: "But it is insisted the pending suit is not for damages for dismissing the plaintiff, but that it is an action on the contract to recover the plaintiff's salary for the five weeks following the one for which a recovery had been had before the justice of the peace. And the right to recover this salary as salary, and not as damages for a breach of the contract, is based upon the plaintiff's readiness and willingness to perform his work, and not upon his actual performance of it. In other words, he seeks to recover instalments of salary



for work which he never performed, and to recover them merely because he was willing to perform it, but was prevented from doing so. As thus presented, under a contract that is indivisible, and which covers a hiring for a whole year, at a salary payable in weekly instalments, it is a claim to recover for constructive services. Had the action been *indebitatus assumpsit*, it is conceded the doctrine of constructive service would be involved; but as the suit is on an express contract prescribing the amount of each instalment of the compensation, it is urged that the defendants are liable for the stipulated price of the services the plaintiff agreed to perform, but never did perform, and that they are liable because the plaintiff was not permitted to perform them, though ready and willing to do so. In both *indebitatus assumpsit* and in an action on an express contract to recover wages for services which have not been performed, a recovery is sought for the amount that the plaintiff would have been entitled to recover had the services in fact been rendered; and such recovery is sought, not because the services have been rendered, but because the plaintiff was ready and willing to render them and the defendant prevented him. In both instances, therefore, the readiness of the plaintiff to perform and the refusal of the defendant to allow a performance constitute, when unearned wages are sued for, the ground of the actions, though the forms and the allegations of the pleadings are widely different. That which is sought to be recovered in both cases is the same thing, viz., wages as wages, though in the one case it is under the allegation of work and labor done, which allegation is attempted to be supported by the proof of a readiness and willingness to perform; and in the other it is under an allegation of a refusal to allow that work to be done which the plaintiff had agreed to do, and continues ready and willing to do. Salary as salary, definitely fixed and agreed to, and not a sum of money as unliquidated damages for a broken contract of hiring, is what is sued for under the declara-

tion in the case at bar. It is a suit to recover wages though no services have been rendered at all, and, if maintainable in that form, would preclude the defendants from showing by evidence that the plaintiff could have secured other similar employment during the time covered by the contract; because if wages, distinctively as wages, can be recovered under such conditions, instead of damages for a wrongful discharge or dismissal, they must be recovered as specific, ascertained debts, the amount of which is fixed by the contract, and is in no way subject to abatement by circumstances which would reduce the damages in a suit founded on a refusal by the defendant to allow the plaintiff to perform his part of an indivisible contract of hiring. In other words, if, under such a contract, the plaintiff is entitled to recover wages as wages upon a mere offer to perform, he must be entitled to recover just precisely the wages named in the contract, even though he might have obtained other work of the same kind at the same price during the period for which he claims his wages under the contract. This would be recovering for constructive services. That doctrine has been altogether repudiated both in England and in this country." And see *Heim v. Wolf* (1850) 1 E. D. Smith (N. Y.) 70.

### III. Adoption.

In accordance with the theory of *Gandall v. Pontigny* (1816) 4 Campb. (Eng.) 375, 1 Starkie, 198, as set out supra, II., later English cases for a time adhered to and applied the doctrine of "constructive service." To this effect are the following cases: *Beeston v. Collyer* (1827) 4 Bing. 309, 130 Eng. Reprint, 786, 12 J. B. Moore, 552, 5 L. J. C. P. 180, 29 Revised Rep. 576; *Collins v. Price* (1828) 5 Bing. 132, 130 Eng. Reprint, 1011, 2 Moore & P. 233, 6 L. J. C. P. 244, 30 Revised Rep. 542; *Aspdin v. Austin* (1844) 5 Q. B. 671, 114 Eng. Reprint, 1402, Dav. & M. 515, 8 Jur. 355, 13 L. J. Q. B. N. S. 155. And see *Pagani v. Gandolfi* (1826) 2 Car. & P. (Eng.) 370, 31 Revised Rep. 671; *Buckingham v. Surrey & H. Canal Co.* (1882) 46 L. T.

N. S. (Eng.) 885, 46 J. P. 774; and *Lindsay v. Queens Hotel Co.* (1918) 35 Times L. R. (Eng.) 101, 63 Sol. Jo. 136, [1918] W. N. 352, 146 L. T. Jo. 60 (set out *infra*, IV. b).

And this doctrine was also adopted by the Canadian case of *Rice v. Boscovity* (1874) 23 Lower Can. Jur. 141. (This decision seems to have overlooked the English cases which have repudiated the doctrine.) And see *McGuffin v. Cayley* (1846) 2 U. C. Q. B. 308. But see the later Canadian cases which are set out *infra*, IV. b.

So the doctrine of "constructive service," as established by the earlier English cases, seems to have been adopted by the Scotch case of *Armstrong v. Bainbridge* (1847) 5 Sc. Sess. Cas. 2d series, 1198. But see *Cameron v. Fletcher* (1872) 10 Sc. Sess. Cas. 3d series, 801, as cited *infra*, IV. b.

And a considerable number of the states of the Union have squarely adopted and seemingly still adhere to the doctrine of constructive service as established by the earlier English decisions. Jurisdictions which the adjudications show to be in this class are as follows:

**Alabama.** — *Beckwith v. Baldwin* (1848) 12 Ala. 720; *Ramey v. Holcombe* (1852) 21 Ala. 567; *Fowler v. Armour* (1854) 24 Ala. 194; *Strauss v. Meertief* (1879) 64 Ala. 299, 38 Am. Rep. 8; *Holloway v. Talbot* (1881) 70 Ala. 389; *Wilkinson v. Black* (1885) 80 Ala. 329; *Liddell v. Chidester* (1887) 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426; *Hartsell v. Masterson* (1902) 132 Ala. 275, 31 So. 616; *Marx v. Miller* (1901) 134 Ala. 347, 32 So. 765.

**Arkansas.** — *Gardenhire v. Smith* (1882) 39 Ark. 280; *Van Winkle v. Satterfield* (1894) 58 Ark. 617, 23 L.R.A. 853, 25 S. W. 1113; *Blumenthal v. Bridges* (1909) 91 Ark. 212, 24 L.R.A.(N.S.) 279, 120 S. W. 974.

**Georgia.** — *Rogers v. Parham* (1850) 8 Ga. 190; *Britt v. Hays* (1857) 21 Ga. 157; *Tyler Cotton Press Co. v. Chevalier* (1876) 56 Ga. 494; *Isaacs v. Davies* (1881) 68 Ga. 169; *Cox v. Bear-den* (1889) 84 Ga. 304, 20 Am. St. Rep. 359, 10 S. E. 627; *Beck v. Thompson & T. Spice Co.* (1899) 108 Ga. 242, 33

S. E. 894; *Moore v. Kelly & J. Co.* (1900) 111 Ga. 371, 36 S. E. 802.

**Massachusetts.** — *Allen v. Chicago Pneumatic Tool Co.* (1910) 205 Mass. 569, 91 N. E. 887.

**Michigan.** — *Hinchman v. Matheson Motor Car Co.* (1908) 151 Mich. 214, 115 N. W. 48.

**Mississippi.** — *Armfield v. Nash* (1856) 31 Miss. 361; *Williams v. Luckett* (1899) 77 Miss. 394, 26 So. 967.

**Montana.** — *Isaacs v. McAndrew* (1872) 1 Mont. 437, 9 Mor. Min. Rep. 690.

**Pennsylvania.** — *Kirk v. Hartman* (1869) 63 Pa. 97, 11 Mor. Min. Rep. 450; *Allen v. Colliery Engineers Co.* (1900) 196 Pa. 512, 46 Atl. 899; *Heyer v. Cunningham Piano Co.* (1898) 6 Pa. Super. Ct. 504. And see *Donaldson v. Fuller* (1817) 3 Serg. & R. 505; *Algeo v. Algeo* (1823) 10 Serg. & R. 235; *Stewart v. Walker* (1850) 14 Pa. 293; *King v. Steiren* (1862) 44 Pa. 99, 84 Am. Dec. 419; *Emery v. Steckel* (1889) 126 Pa. 171, 12 Am. St. Rep. 857, 17 Atl. 601; and *Clay Commercial Teleph. Co. v. Root* (1886) 1 Sadler, 485, 17 W. N. C. 200, 4 Atl. 828.

**South Carolina.** — *Sistare v. People's Supply Co.* (1910) 87 S. C. 171, 69 S. E. 152. And see *Clancey v. Robertson* (1818) 9 S. C. L. (2 Mill, Const.) 404; *Cox v. Adams* (1818) 10 S. C. L. (1 Nott. & M'C.) 284; *Byrd v. Boyd* (1827) 15 S. C. L. (4 M'Cord) 246, 19 Am. Dec. 740; *Rye v. Stubbs* (1834) 19 S. C. L. (1 Hill) 384; *Saunders v. Anderson* (1834) 20 S. C. L. (2 Hill) 486; *Watts v. Todd* (1840) 26 S. C. L. (1 McMull.) 26; *Craig v. Pride* (1843) 29 S. C. L. (2 Speers) 121; *Bradshaw v. Branan* (1851) 39 S. C. L. (5 Rich.) 465; *Union Bank v. Heyward* (1881) 15 S. C. 296; and *Russell v. Arthur* (1882) 17 S. C. 477.

And the doctrine of "constructive service" seems to have been accepted in Colorado and Iowa (see *Saxonia Min. & Reduction Co. v. Cook* (1884) 7 Colo. 569, 4 Pac. 1111, which contains dicta to this effect; and *Weeksman v. Powell* (1916) 178 Iowa, 991, 160 N. W. 377, wherein the court in its argument clearly recognized the right of a wrongfully discharged servant to bring an "action on the theory of con-

structive service"), and possibly in Rhode Island and Wyoming (see *Frost v. International Rubber Co.* (1915) 37 R. L. 406, 92 Atl. 1022, and *Dunn v. Hereford* (1875) 1 Wyo. 206).

For decisions in other jurisdictions which have adopted the doctrine of constructive service, but which have later been repudiated, see *infra*, IV. b.

#### IV. Repudiation.

##### a. In general.

The doctrine of constructive service upon which theory suit could be lawfully brought at one time in England and even at present in some of the United States seems to have been overturned as the law of England and mainly so in the states of the Union. For express declarations to the effect that such a repudiation has been made, see the following cases:

**Alaska.** — *Chase v. Alaska Fish & Lumber Co.* (1903) 2 Alaska, 82.

**Illinois.** — *Doherty v. Schipper & Block* (1911) 250 Ill. 128, 34 L.R.A. (N.S.) 557, 95 N. E. 75, Ann. Cas. 1912B, 364; *Jones v. Dunton* (1880) 7 Ill. App. 580.

**Indiana.** — *Ricks v. Yates* (1854) 5 Ind. 115.

**Maryland.** — *Keedy v. Long* (1889) 71 Md. 385, 5 L.R.A. 759, 18 Atl. 704; *Olmstead v. Batch* (1893) 78 Md. 132, 22 L.R.A. 74, 44 Am. St. Rep. 273, 27 Atl. 501.

**Minnesota.** — *McMullan v. Dickinson Co.* (1895) 60 Minn. 156, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120.

**New Jersey.** — *Smith v. Gilbert Lock Co.* (1881) 4 N. J. L. J. 312.

**New York.** — *Moody v. Leverich* (1873) 4 Daly, 401.

**Oklahoma.** — *Ditzler Dry Goods Co. v. Sanders* (1915) 44 Okla. 678, 146 Pac. 17.

**Vermont.** — *Sherman v. Champlain Transp. Co.* (1858) 31 Vt. 162.

**Washington.** — *Carmean v. North American Transp. & Trading Co.* (1907) 45 Wash. 446, 8 L.R.A. (N.S.) 595, 122 Am. St. Rep. 930, 88 Pac. 834, 13 Ann. Cas. 110.

**West Virginia.** — *Jameson v. Board of Education* (1915) 78 W. Va. 612, L.R.A. 1916F, 926, 89 S. E. 255.

**Canada.** — *Hayes v. Harshaw* (1913)

30 Ont. L. Rep. 157, 18 D. L. R. 619, 5 Ont. Week. Rep. 571.

So it has been said that the fiction of a "constructive service," which was resorted to in some of the earlier cases whereby a servant discharged without cause was allowed to recover wages, has been discarded in the later decisions and has been disapproved by text-writers. *Old Dominion Copper Min. & Smelting Co. v. Andrews* (1899) 6 Ariz. 205, 56 Pac. 969; *Howard v. Daly* (1875) 61 N. Y. 362, 19 Am. Rep. 285. And admitting that there has been and is a conflict of authority, it has been maintained that recent authorities tend to a rejection of the doctrine. See *East Tennessee, V. & G. R. Co. v. Staub* (1881) 7 Lea (Tenn.) 397. And in *Jones v. Dunton* (1880) 7 Ill. App. 580, in answering the contention that an employee wrongfully discharged during a term of service is entitled to recover his stipulated wages upon the principle of "constructive service," or, in other words, that he can treat the contract as continuing and sustain an action thereon for services not actually performed, upon an averment of readiness to perform, *Wilson, J.*, summed up the law as follows: "Upon a review of the authorities on this subject, our conclusion is that the better rule and sounder reason is, that an employee wrongfully discharged by his employer cannot wait till the expiration of the term for which he was hired, and then sue for his whole wages on the ground of constructive service; that his remedy in such cases is an action to recover such damages as he has sustained by reason of the breach of the contract of hiring; and that he can recover on the contract for wages only for the period during which he actually served. There are many cases in which the tender of performance is deemed equivalent to a performance, such as agreements for the sale and purchase of lands, where the vendor has tendered a conveyance; also, for goods sold where delivery has been tendered. But there is an obvious distinction between such cases, when, as has been said, the thing agreed to be sold has an independent existence, and

the corpus not being perishable or changeable, the title has so far passed that the vendor remains but the trustee in respect to it, and cases of master and servant, where the contract is for personal and individual services. Nor is there any hardship or injustice in rejecting the doctrine of constructive service in a suit upon the contract to recover wages. The servant may have his action for damages for the breach of the contract, and recover full compensation for all losses he has sustained by reason of his wrongful discharge; and just compensation should, after all, be the end aimed at in suits for the breach of contracts. It may be that the measure of damages is an action for the breach of a contract of hire for the wrongful discharge of a servant would, *prima facie*, be the amount of wages agreed upon; but the determination of that question is not necessary to the decision of the present suit."

In fact the "great weight of authority" now is that a suit for constructive services under such conditions as are presented in the cases under consideration cannot be maintained. *Chase v. Alaska Fish & Lumber Co.* (1903) 2 Alaska, 82. And in Tennessee it has been said that its courts have rejected the doctrine of constructive service and adopted a rule which is in accord with the majority of the courts of other jurisdictions. *Menihan Co. v. Hopkins* (1913) 129 Tenn. 24, 164 S. W. 775, Ann. Cas. 1916A, 470. So it has been said that the "weight of authority and sound reasoning" is against the theory of constructive service (*Peterson v. Drew* (1905) 2 Alaska, 560); that the "great majority of the states, as well as the better considered cases," reject the doctrine (*Jameson v. Board of Education* (1915) 78 W. Va. 612, L.R.A.1916F, 926, 89 S. E. 255); that in England, and generally in the United States, the current of authority rejects the doctrine and supports the more logical conclusion (*Jacksonville v. Allen* (1887) 25 Ill. App. 54); and that the rejection of the doctrine "harmonizes with the weight of the more modern and better reasoned

cases from other states, and accords with what we regard as the better rule" (*Jameson v. Board of Education* (W. Va.) *supra*).

It also has been said that while it formerly was held that where the servant treated the contract as continuing in force after the wrongful discharge, he could recover what was denominated constructive wages for the unexpired part of his term, what then might have been denominated constructive wages is now included under the general head of damages resulting from the master's breach of the contract of hiring. It was so declared in *Richardson v. Eagle Mach. Works* (1881) 78 Ind. 422, 41 Am. Rep. 584, which decision was quoted with seeming approval in *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802.

*b. Jurisdictions repudiating doctrine.*

As shown in the next preceding subdivision (IV. a) the later English decisions repudiate the doctrine of constructive service. See *Archard v. Horner* (1828) 3 Car. & P. (Eng.) 349; *Smith v. Hayward* (1837) 7 Ad. & El. 544, 112 Eng. Reprint, 575, 2 Nev. & P. 432, W. W. & D. 635, 7 L. J. Q. B. N. S. 3, 2 Jur. 232 (*Archard v. Horner* (Eng.) *supra*, said to have been grounded on better reason than *Gandall v. Pontigny* (1816) 4 Campb. (Eng.) 375, 1 Starkie, 198); *Broxham v. Wagstaffe* (1841) 5 Jur. (Eng.) 845, following *Smith v. Hayward* (Eng.) *supra*; *Fewings v. Tisdal* (1847) 11 Jur. (Eng.) 977, 5 Dowl. & L. 196, 17 L. J. Exch. N. S. 18, 1 Exch. 295; *Goodman v. Pocock* (1850) 15 Q. B. 576, 117 Eng. Reprint, 577, 19 L. J. Q. B. N. S. 410, 14 Jur. 1042; *Wood v. Moyes* (1852) 1 Week. Rep. (Eng.) 166; *Emmens v. Elderton* (1853) 4 H. L. Cas. 624, 10 Eng. Reprint, 606, 13 C. B. 495, 138 Eng. Reprint, 1292, 18 Jur. 21, affirming (1848) 6 C. B. 160, 186 Eng. Reprint, 1213, 17 L. J. C. P. N. S. 307 (see especially the opinion of *Crompton, J.*); *Barnsley v. Taylor* (1867) 37 L. J. Q. B. N. S. (Eng.) 39. And see *Beckham v. Drake* (1849) 2 H. L. Cas. 579, 9 Eng. Reprint, 1213, 18 Jur. 921; *East Anglian R. Co. v. Lythgoe* (1851) 10 C. B. 726, 138 Eng. Reprint, 287,

2 Lowndes, M. & P. 221, 20 L. J. C. P. N. S. 87; and Clossman v. Lacoste (1854) 28 Eng. L. & Eq. Rep. 140, 23 L. T. 91. But compare Buckingham v. Surrey & H. Canal Co. (1882) 46 L. T. N. S. (Eng.) 885, 46 J. P. 774; and Lindsay v. Queens Hotel Co. [1918] W. N. 352, 35 Times L. R. (Eng.) 101, 63 Sol. Jo. 136, 146 L. T. Jo. 60, wherein the action seems to have been for "wages," but in which the court seems to have treated the question from the viewpoint of what "damages" the servant was entitled to because of the wrongful dismissal.

And in Canada it has been declared that the constructive-service theory of Lord Ellenborough in *Gandall v. Pontigny* (1816) 4 Campb. (Eng.) 375, 1 Starkie, 198, is no longer recognized as law. *Hayes v. Harshaw* (1913) 30 Ont. L. Rep. 157, 18 D. L. R. 619, 5 Ont. Week. N. 571. And see *Gregory v. Williams* (1916) 44 N. B. 204, 30 D. L. R. 279; and *Malherbe v. Orkin* (1918) Rap. Jud. Quebec 54 C. S. 274. But see *Rice v. Boscovitz* (1874) 23 Lower Can. Jur. 141, and *McGuffin v. Cayley* (1846) 2 U. C. Q. B. 308, which are cited *supra*, III.

And in Scotland the doctrine of constructive service seems to have been regarded as doubtful in *Cameron v. Fletcher* (1872) 10 Sc. Sess. Cas. 3d series, 301. But see the earlier Scotch case of *Armstrong v. Bainbridge* (1847) 5 Sc. Sess. Cas. 2d series, 1198.

And as stated *supra*, I., the majority of the American states which have passed upon the question have definitely rejected or repudiated the doctrine of "constructive service." The following jurisdictions may be so classed:

**Alaska.**—*Chase v. Alaska Fish & Lumber Co.* (1903) 2 Alaska, 82; *Peterson v. Drew* (1905) 2 Alaska, 560.

**Arizona.**—*Old Dominion Copper Min. & Smelting Co. v. Andrews* (1899) 6 Ariz. 205, 56 Pac. 969; *Little Butte Consol. Mines Co. v. Girand* (1912) 14 Ariz. 9, 123 Pac. 309.

**Connecticut.**—*Viall v. Lionel Mfg. Co.* (1916) 90 Conn. 694, 98 Atl. 329.

**Delaware.**—*OGDEN-HOWARD Co. v. BRAND* (reported herewith) ante, 334.

**Illinois.**—*Trustees v. Shaffer* (1872)

63 Ill. 243; *Doherty v. Schipper & Block* (1911) 250 Ill. 128, 34 L.R.A. (N.S.) 557, 95 N. E. 75, Ann. Cas. 1912B, 364, affirming (1910) 157 Ill. App. 413; *Jones v. Dunton* (1880) 7 Ill. App. 580; *Weill v. Fontanel* (1889) 31 Ill. App. 615; *Monarch Cycle Mfg. Co. v. Mueller* (1898) 83 Ill. App. 363 (reviews many cases).

**Indiana.**—*Ricks v. Yates* (1854) 5 Ind. 115; *Richardson v. Eagle Machine Works* (1881) 78 Ind. 422, 41 Am. Rep. 584; *Hamilton v. Love* (1899) 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437; *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Hamilton v. Love* (1896) — Ind. —, 43 N. E. 873. But see *Pennsylvania Co. v. Good* (1914) 56 Ind. App. 562, 103 N. E. 672.

**Maryland.**—*Keedy v. Long* (1889) 71 Md. 385, 5 L.R.A. 759, 18 Atl. 704; *Keedy v. Crane* (1889) 71 Md. 395, 18 Atl. 707; *Olmstead v. Batch* (1893) 78 Md. 132, 22 L.R.A. 74, 44 Am. St. Rep. 273, 27 Atl. 501; *Hippodrome Co. v. Lewis* (1917) 130 Md. 154, 100 Atl. 78.

**Minnesota.**—*McMullan v. Dickinson Co.* (1895) 60 Minn. 156, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120.

**Missouri.**—*Stone v. Vimont* (1879) 7 Mo. App. 277; *Soursin v. Salorgne* (1883) 14 Mo. App. 486; *Bennett v. St. Louis Car Roofing Co.* (1886) 23 Mo. App. 587; *Evans v. St. Louis, I. M. & S. R. Co.* (1887) 24 Mo. App. 114. But compare dicta in *Posey v. Garth* (1841) 7 Mo. 94, 37 Am. Dec. 183, to the effect that since an employer is bound to retain a servant or pay him his wages, a wrongfully discharged servant is entitled to the wages for the whole term.

**New Jersey.**—*Smith v. Gilbert Lock Co.* (1881) 4 N. J. L. J. 312. And see *Potts v. Evans* (1895) 58 N. J. L. 384, 34 Atl. 4.

**New York.**—*Howard v. Daly* (1875) 61 N. Y. 362, 19 Am. Rep. 285 (expressly disapproving dicta to the contrary in *Thompson v. Wood* (1856) 1 Hilt. 93, and *Huntington v. Ogdensburg & L. C. R. Co.* (1867) 33 How. Pr. 416, and overruling by implication, at least so far as they conflict, *Wiseman v. Panama R. Co.* (1857) 1 Hilt. 300; *Colburn v. Woodworth* (1860) 31 Barb.

381; and Decker v. Hassel (1863) 26 How. Pr. 528; Weed v. Burt (1879) 78 N. Y. 191, affirming (1877) 7 Daly, 267; Milage v. Woodward (1906) 186 N. Y. 252, 78 N. E. 873; McCargo v. Jergens (1912) 206 N. Y. 363, 99 N. E. 838; Arnold v. Adams (1898) 27 App. Div. 345, 49 N. Y. Supp. 1041; Waldron v. Hendrickson (1899) 40 App. Div. 7, 57 N. Y. Supp. 561; Wieland v. Willcox (1899) 40 App. Div. 218, 57 N. Y. Supp. 1038; Heim v. Wolf (1850) 1 E. D. Smith, 70; Moody v. Leverich (1873) 4 Daly, 401; Parry v. American Opera Co. (1887) 19 Abb. N. C. 269; Elliott v. Miller (1892) 17 N. Y. Supp. 526; Fallon v. Farber (1900) 30 Misc. 626, 62 N. Y. Supp. 742; Durante v. Raimon (1909) 115 N. Y. Supp. 115; Jackson v. Stephens (1913) 83 Misc. 232, 145 N. Y. Supp. 827; Saunders v. Stern Bros. (1916) 158 N. Y. Supp. 878.

**North Carolina.**—Smith v. Cashie & C. R. & Lumber Co. (1906) 142 N. C. 26, 5 L.R.A.(N.S.) 439, 54 S. E. 788. Compare Madden v. Porterfield (1860) 53 N. C. (8 Jones, L.) 166, and Markham v. Markham (1892) 110 N. C. 356, 14 S. E. 963.

**Ohio.** — James v. Allen County (1886) 44 Ohio St. 226, 58 Am. St. Rep. 821, 6 N. E. 246; Tiffin Glass Co. v. Stocker (1896) 54 Ohio St. 157, 43 N. E. 279.

**Oklahoma.** — Ditzler Dry Goods Co. v. Sanders (1915) 44 Okla. 678, 146 Pac. 17.

**Oregon.**—Quick v. Swing (1909) 53 Or. 149, 99 Pac. 418.

**Tennessee.**—East Tennessee, V. & G. R. Co. v. Staub (1881) 7 Lea, 397; Menihan Co. v. Hopkins (1913) 129 Tenn. 24, 164 S. W. 775, Ann. Cas. 1916A, 470.

**Texas.** — Litchenstein v. Brooks (1889) 75 Tex. 196, 12 S. W. 975; Mudgett v. Texas Tobacco Growing & Mfg. Co. (1901) — Tex. Civ. App. —, 61 S. W. 149; G. A. Kelly Plow Co. v. London (1910) 59 Tex. Civ. App. 208, 125 S. W. 974. And see Hearne v. Garrett (1878) 49 Tex. 619; Porter v. Burkett (1886) 65 Tex. 383; and Efron v. Clayton (1896) — Tex. Civ. App. —, 35 S. W. 424.

**Vermont.** — Sherman v. Champlain

Transp. Co. (1858) 31 Vt. 162; Derosia v. Ferland (1910) 83 Vt. 372, 28 L.R.A.(N.S.) 577, 138 Am. St. Rep. 1092, 76 Atl. 153, on subsequent appeal in (1912) 86 Vt. 15, 83 Atl. 271.

**Virginia.** — Willoughby v. Thomas (1874) 24 Gratt. 521; Virginia Talc & Soapstone Co. v. Hurkamp (1919) — Va. —, 98 S. E. 681.

**West Virginia.**—Jameson v. Board of Education (1916) 78 W. Va. 612, L.R.A.1916F, 926, 89 S. E. 255.

And in California the doctrine of constructive service has been repudiated where there was an actual discharge from future employment, as distinguished from wrongfully preventing an employee from performing services under the contract, it having been held that in the former case the action is not upon the contract for agreed compensation, but that in the latter case such an action may be maintained upon the theory that the contract need not be treated as broken. Stone v. Bancroft (1902) 139 Cal. 82, 70 Pac. 1017, affirmed on rehearing in (1903) 139 Cal. 78, 72 Pac. 717. Also of interest is the decision in this case on a former appeal (1896) 112 Cal. 653, 44 Pac. 1069, wherein the court, in connection with the dictum in Webster v. Wade (1861) 19 Cal. 291, 79 Am. Dec. 218, to the effect that the action of a wrongfully discharged servant is on the contract for the stipulated wages, said that "in later years the true rule has been recognized to be that an action in damages for the breach is the proper remedy in such a case," which, of course, is in effect a repudiation of the "constructive service" doctrine.

And the inference to be drawn from the Kentucky decisions (one exception noted *infra*) which have touched upon the question seems to indicate a rejection of the theory of constructive service. See Chamberlin v. McCallister (1838) 6 Dana (Ky.) 352, wherein it was said that in the opinion of the court the offer to perform and the wrongful refusal to accept should not be deemed equivalent to actual performance. Whitaker v. Sandifer (1864) 1 Duv. (Ky.) 261 (holding that where an employee is wrongfully dis-

charged before the expiration of his term, an allegation of readiness and an offer to continue his services does not authorize recovery of the entire conventional price for the full term, since "readiness to perform and prevention by the employer are not equivalent to full performance, but only entitle the employee to the actual damages he sustained in his disappointment and loss of equally profitable employment"); *Wood v. Morgan* (1869) 6 Bush (Ky.) 507 (holding that refusal to permit performance of stipulated services for the full term was not equivalent to performance, so as to entitle the discharged employee to recover the conventional price for full performance, but only to entitle him to such damages as he had actually sustained); and *William Tarr Co. v. Kimbrough* (1896) 17 Ky. L. Rep. 1284, 34 S. W. 528 (holding the same as *Whitaker v. Sandifer* and *Wood v. Morgan* (Ky.) supra). But, as indicated above, the doctrine of constructive service seems to have been recognized in *Wheatley v. Covington* (1874) 11 Bush (Ky.) 13, the court having included the following obiter statement in its opinion: "If one party to a contract offers to perform his agreement, but is prevented by the other, the offer will be treated as performance, or as excusing performance by the party so offering, and he may recover the whole compensation agreed to be given or the damages sustained in consequence of not being allowed to perform his part."

And in Washington the supreme court seems to have inclined to a rejection of the doctrine of constructive service. See *Carneau v. North American Transp. & Trading Co.* (1907) 45 Wash. 446, 8 L.R.A. (N.S.) 595, 122 Am. St. Rep. 930, 88 Pac. 834, 13 Ann. Cas. 110.

And the more recent decisions in Wisconsin seemingly have rejected the doctrine of constructive service, and have confined the discharged servant to a remedy by action for damages for the breach of the contract of employment. See *Kennedy v. South Shore Lumber Co.* (1899) 102 Wis. 284, 78 N. W. 567; *Ornstein v. Yahr & L. Drug*

*Co.* (1903) 119 Wis. 429, 96 N. W. 826; and *Green v. Somers* (1916) 163 Wis. 96, 157 N. W. 529. However, *Gordon v. Brewster* (1858) 7 Wis. 355, has sometimes been cited as supporting the doctrine.

In connection with the statement in *Viall v. Lionel Mfg. Co.* (1916) 90 Conn. 694, 98 Atl. 329, supra, that "the fiction that, upon breach of contract for salary or wages, an action for constructive service would lie, has never been adopted by us, and its recognition would be at variance with the doctrine of *Perry v. Simpson Waterproof Mfg. Co.* (1871) 37 Conn. 520, and *Grant v. New Departure Mfg. Co.* (1912) 85 Conn. 421, 83 Atl. 212," it is of interest that *Champion v. Hartshorne* (1833) 9 Conn. 564, has often been cited as favorable to the doctrine of constructive service.

Likewise the reported case (*OGDEN-HOWARD Co. v. BRAND*, ante, 334) disposes of the contention which has been made that the earlier Delaware case of *Hitchens v. School Dist.* (1905) 5 Penn. (Del.) 325, 62 Atl. 897, implies an acceptance of the doctrine, and is in accord with the argument that the court in *Greer v. Arlington Mills Mfg. Co.* (1899) 1 Penn. (Del.) 581, 43 Atl. 609, rejected the doctrine.

And *Doherty v. Schipper & Block* (1911) 250 Ill. 128, 34 L.R.A. (N.S.) 557, 95 N. E. 75, Ann. Cas. 1912B, 364, seems to definitely take Illinois out of the doubtful column and dispose of the decisions in *Leyenberger v. Rebanks* (1894) 55 Ill. App. 441; *Trawick v. Peoria & Ft. C. Street R. Co.* (1896) 68 Ill. App. 158; and *American Glucose Co. v. Lubitz* (1897) 71 Ill. App. 638, which clearly adopted the doctrine, as well as the controversy over *Chiles v. Belleville Nail Mill Co.* (1873) 68 Ill. 123; *School Directors v. Reddick* (1875) 77 Ill. 628; and *Hamlin, H. & Co. v. Race* (1875) 78 Ill. 422, all of which sometimes have been regarded as impliedly evidencing an acceptance thereof.

The Tennessee cases of *East Tennessee, V. & G. R. Co. v. Staub* (1891) 7 Lea (Tenn.) 397, and *Menihan Co. v. Hopkins* (1913) 129 Tenn. 24, 164

S. W. 775, Ann. Cas. 1916A, 470, cited *supra*, in effect overrule the earlier Tennessee cases of *Jones v. Jones* (1853) 2 Swan (Tenn.) 605, and *Children of Israel v. Peres* (1866) 2 Coldw. (Tenn.) 620, both of which applied the doctrine of constructive service.

*c. Rationale of repudiation.*

The doctrine of constructive service is neither sound in reason nor just in principle. *Little Butte Consol. Mines Co. v. Girand* (1912) 14 Ariz. 9, 123 Pac. 309; *Howard v. Daly* (1875) 61 N. Y. 362, 19 Am. Rep. 285 (see case as quoted *infra*). And in *McMullan v. Dickinson Co.* (1895) 60 Minn. 156, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120, the court argued as follows: "The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by instalments. The original breach is not total, but the failure to pay the successive instalments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the instalments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial." For other statements of similar import, see *supra*, IV. a.

Perhaps the reason most generally assigned for the rejection of the doctrine of constructive service is that it

is wholly irreconcilable with the rule of law that a person discharged from service must not remain idle, but must accept employment elsewhere if offered. *Little Butte Consol. Mines Co. v. Girand* (1912) 14 Ariz. 9, 123 Pac. 309; *Doherty v. Schipper & Block* (1911) 250 Ill. 128, 34 L.R.A. (N.S.) 557, 95 N. E. 75, Ann. Cas. 1912B, 364; *McMullan v. Dickinson Co.* (1895) 60 Minn. 156, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120; *Howard v. Daly* (1875) 61 N. Y. 362, 19 Am. Rep. 285; *Smith v. Cashie & C. R. & Lumber Co.* (1906) 142 N. C. 26, 5 L.R.A. (N.S.) 439, 54 S. E. 788; *James v. Allen County* (1886) 44 Ohio St. 226, 58 Am. St. Rep. 821, 6 N. E. 246. In *Howard v. Daly* (1875) 61 N. Y. 362, 19 Am. Rep. 285, *supra*, the court discussed this reason for rejecting the doctrine of constructive service as follows: "This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for dam-



ages, which were prima facie a sum equal to the stipulated amount, unless the defendant should give evidence in mitigation of damages." And in *Doherty v. Schipper & Block* (1911) 250 Ill. 128, 34 L.R.A.(N.S.) 557, 95 N. E. 75, Ann. Cas. 1912B, 364, in arguing that it is the duty of a discharged employee to find and accept employment, and that it cannot be said that while he is in the actual employment of one person he is constructively engaged in the employ of the employer who discharged him, the court said: "We think the doctrine of constructive service . . . where used as a basis of recovery is illogical and unsound. This court has universally held that the proper measure of damages in a case like this is the contract price, less what the employee earned or could have earned. That being so, if the discharged employee can find employment, it is his duty to accept it. How can it then be said that while he is performing service for another person he is constructively engaged in the employ of the employer by whom he was discharged? The result of this doctrine would be that the employee was actually performing service for one person while he was constructively performing service for another. The only true basis upon which an action like this can rest is for damages for breach of contract; and as the breach of contract occurs at the time of the discharge, the cause of action is then complete, and such cause of action cannot be split up, but all the damages must be recovered in one judgment and in the first action." And in *McMullen v. Dickinson Co.* (1895) 60 Minn. 166, 27 L.R.A. 409, 51 Am. St. Rep. 511, 62 N. W. 120, the doctrine of constructive service was said to be unsound and inconsistent with itself, in that it assumed that the discharged servant had, since his discharge, remained ready, willing, and able to perform the services for which he was hired, while sound principles required him to seek employment elsewhere and thereby mitigate the damages caused by discharge. And the doctrine of construc-

tive service, requiring, as it does, that the discharged servant keep himself in readiness at all times to perform the required service, was, in *Smith v. Cashie & C. R. & Lumber Co.* (1906) 142 N. C. 26, 5 L.R.A.(N.S.) 439, 54 S. E. 788, declared inconsistent with the rule as to the measure of damages which permits the master to show, in diminution of the servant's recovery, that the latter obtained or could have obtained other employment, inasmuch as, to be always strictly ready he must be always idle. The court also said that the two requirements of the law could not reasonably and logically co-exist, and that for this reason the doctrine of constructive service had been repudiated. So, in *James v. Allen County* (1886) 44 Ohio St. 226, 58 Am. St. Rep. 821, 6 N. E. 246, the court discussed the doctrine of constructive service as affected by its tendency to cause idleness, as follows: "In order to recover upon the strength of this doctrine, the employee must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person injured by the act of another is bound to use ordinary diligence to make the damage as light as may be, the discharged employee must use ordinary care to obtain employment. He may not be required to seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity; at least, if such employment is offered, he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar service, is entitled to full compensation the same as though he performed full labor. This rule stands squarely across the path of 'constructive service.' For if the workman is bound to accept employment of another employer, how can he continue ready to resume work under his former employer? A learned writer, whose valued paper in support of the doctrine of

'constructive service' is cited by counsel, uses this language: 'The doctrine of constructive service, however, does not permit an employee who has been wrongfully discharged to remain willfully idle during the period for which he had been engaged,'—a most singular conception of the groundwork of the doctrine, it seems to us. Being actually at work for B, how can he be constructively at work for A? Being required to hold himself in readiness to resume his work for A, how can he engage with B? Engaging with B, how can he be ready to resume work with A? 'Constructive service,' as here sought to be applied, never had, as we think, support in principle, and the support derived from authority is at least very considerably impaired."

Another reason assigned for the rejection of the doctrine of constructive service is that the theory upon which it is founded, namely, that when the servant has held himself ready to do the work he has performed it, is that the averments necessary to set out the cause of action are necessarily untrue and incapable of proof. This view was presented in *James v. Allen County* (1886) 44 Ohio St. 226, 58 Am. St. Rep. 821, 6 N. E. 246; and *Derosia v. Ferland* (1910) 83 Vt. 372, 28 L.R.A. (N.S.) 577, 138 Am. St. Rep. 1092, 76 Atl. 153; and *Emmens v. Elderton* (1853) 13 C. B. 495, 138 Eng. Reprint, 1292, 4 H. L. Cas. 624, 10 Eng. Reprint, 606, 18 Jur. 21. In the *James Case* the court said: "For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong, but how can it be said, in truth, that he has done the work? That he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received, and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed

to sell? The doctrine of 'constructive service,' as applied to a case of this character, is one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he has rendered no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in *indebitatus assumpsit*, that the defendant is indebted to him for work and labor done?"

It has also been declared that, "to sustain the doctrine of 'constructive service' would be in effect to hold that the contract is one which could be enforced specifically, for if, after discharge, and after the employer had repudiated the contract on his part and laid himself liable to full damages for its breach, the employee could treat the contract as subsisting in such sort as to recover upon instalments as wages earned, when in fact they were not earned, and recover as each came due, the result would be a specific performance of the contract, and that, too, by a multiplicity of suits. Surely no lawyer would seriously ask a court of equity to specifically enforce a contract which, in its nature, gives to the aggrieved party so plain and full a remedy at law, in an action for damages." *Ibid.*

#### V. Statutory provisions.

In a few instances statutes have been enacted which recognize or in effect restate the doctrine of "constructive service."

For instance, it is provided by statute in Louisiana that if, without any serious ground of complaint, a man should send away a laborer whose services he had hired for a certain time, before that time had expired, he would be bound to pay such laborer the whole of the salary which he would have been entitled to receive had the full term of his services arrived. See *Chevalier v. Borie* (1832) 3 La. 299 (holding that the right of action accrues immediately upon the discharge, unless the employee and the master become reconciled); *Orphan Asylum v. Mississippi M. Ins. Co.* (1835) 8 La. 181 (holding generally that, upon wrongful discharge during

the term, the discharged employee may recover the salary for the full term); *Beckman v. New Orleans Cotton Press Co.* (1838) 12 La. 67 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Sherburne v. Orleans Cotton Press* (1840) 15 La. 360 (holding that the right of action accrues as soon as the servant is discharged, subject to no imposition of conditions by the employer); *Shea v. Schlatre* (1842) 1 Rob. (La.) 319 (holding that the right to recover accrues as soon as the servant is discharged); *Lartigue v. Peet* (1843) 5 Rob. (La.) 91 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Decamp v. Hewitt* (1845) 11 Rob. (La.) 290, 43 Am. Dec. 204 (holding same as preceding case); *Angelloz v. Rivollet* (1847) 2 La. Ann. 652 (holding same as *Shea v. Schlatre* (La.) supra); *DePuilly v. Church of St. Louis* (1852) 7 La. Ann. 443 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Shoemaker v. Bryan* (1857) 12 La. Ann. 697 (holding that the statute applies to all persons who work for compensation except menial servants); *Trefethen v. Locke* (1861) 16 La. Ann. 19 (holding that the statute does not apply where the contract is entirely unperformed); *Word v. Winder* (1861) 16 La. Ann. 111 (holding same as preceding case); *Jones v. Jackson* (1870) 22 La. Ann. 112 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Bormann v. Thiele* (1871) 23 La. Ann. 495 (holding same as preceding case); *Woodward v. Gross* (1872) 24 La. Ann. 109 (holding that where the salary or pay is dependent upon results which can be determined before the end of the term of employment, judgment cannot be given until the amount is actually determined); *Hewitt v. Roudebush* (1872) 24 La. Ann. 254 (holding that the discharge must be wrongful); *Leche v. Clavierie* (1873) 25 La. Ann. 308 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Taylor v. Kehlor* (1874) 26 La. Ann. 369 (holding that the discharge must be wrongful); *Alba v. Moriarty* (1884) 36 La. Ann. 680 (holding same as preceding case);

*Tete v. Lanaux* (1893) 45 La. Ann. 1343, 14 So. 241 (holding same as preceding case); *Woods v. M. A. Shumard & Co.* (1905) 114 La. 451, 38 So. 416 (holding same as preceding case); *Berlin v. P. L. Cusachs* (1905) 114 La. 744, 38 So. 539 (holding that the employer, although liable for the wages for the full term, is not liable for collateral damages such as arise from unjust or unauthorized adverse inferences or conclusions which the public may draw against him from the mere fact itself of the discharge); *Curtis v. Lehmann* (1905) 115 La. 40, 38 So. 889 (holding that the right to recover accrues at the moment of the discharge and becomes a vested right which cannot be affected by the subsequent conduct of the employer); *Thurmond v. Skannal* (1907) 118 La. 6, 42 So. 577 (holding same as *Orphan Asylum v. Mississippi M. Ins. Co.* (La.) supra); *Daspit v. D. H. Holmes Co.* (1907) 120 La. 86, 44 So. 993 (holding that the right of action accrues immediately upon the discharge, and by the fact of the discharge); *Camp v. Baldwin Melville Co.* (1909) 123 La. 257, 48 So. 927 (holding that the fact that the discharged employee has elsewhere earned money during the unexpired part of the term does not affect his right to recover his full salary for the contract term); and *Dunbar v. Orleans Metal Bed Co.* (1919) 145 La. —, 82 So. 889 (holding that the right of action to recover the entire salary accrues immediately upon the discharge; that the employer cannot afterward require him to work out the term as a condition precedent to recovery; that the employee's rights are not affected by the fact that he engaged his services for the unexpired term to another employer; and that the employee need neither tender his services after his discharge nor put his employer in default).

And in Arkansas by special statute it is provided that as to future contracts a railroad company, on discharging an employee without paying all wages then earned, continues liable for wages at the contract rate until paid, but not, however, to exceed sixty days unless an action therefor

is commenced within that time. St. Louis, I. M. & S. R. Co. v. Paul (1897) 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705, affirmed in (1899) 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, holding that such damages are exemplary and reasonable. G. J. C.

MARY E. MERCER, Admx., etc., of Charles Mercer, Deceased, Appt.,  
v.  
FREDERICK E. MEINEL.

*Illinois Supreme Court—December 17, 1919.*

(290 Ill. 395, 125 N. E. 288.)

**Nuisance — unsafe premises — liability of vendor.**

1. Any unsafe condition of property which will render one selling it liable to subsequent occupants must exist at the time of the sale, and not arise subsequently.

[See note on this question beginning on page 356.]

**Trial — overruling of demurrer — effect on motion for directed verdict.**

2. The overruling of a demurrer to the declaration in an action to recover damages for negligent killing does not prevent the entertaining of a motion to direct a verdict at the close of the evidence.

**Negligence — basis of liability.**

3. Any liability for negligence must rest upon the existence of a duty which must arise out of a relation be-

tween the parties and a negligent failure to perform the duty.

[See 20 R. C. L. 10.]

**— unsafe property — failure to comply with ordinance — liability.**

4. No liability for injuries due to failure to make the installation of a gas heater comply with the municipal ordinance rests upon the owner responsible for the installation after he has parted with title to the property.

[See 20 R. C. L. 53, 73.]

APPEAL by plaintiff from a judgment of the Second Branch of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County (Walker, J.) in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Chilton P. Wilson, for appellant:

Defendant's demurrer to the declaration was overruled, he filed the general issue, and thereby waived any error in overruling the demurrer.

Shreffler v. Nadelhoffer, 133 Ill. 536, 23 Am. St. Rep. 626, 25 N. E. 630; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Pittsburg, C. C. & St. L. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468.

The sufficiency of the declaration is thereby admitted.

Russell v. Whiteside, 5 Ill. 7; Stearns v. Cope, 109 Ill. 340; Fish v. Farwell, 160 Ill. 236, 43 N. E. 367.

Independent of any contract liability, and independent of ordinary neg-

ligence, defendant is liable for his failure to make the heater comply with the ordinance.

20 R. C. L. 38, § 33; East St. Louis Connecting R. Co. v. Eggmann, 170 Ill. 538, 62 Am. St. Rep. 400, 48 N. E. 981; Wabash R. Co. v. Kamradt, 109 Ill. App. 203; Chicago & E. I. R. Co. v. Mochell, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028.

Liability for a nuisance is not based on negligence.

20 R. C. L. 880, §§ 1-3; Cutter v. Hamlen, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 397; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Joseph Schlitz Brewing Co. v. Compton, 142

Ill. 511, 18 L.R.A. 390, 34 Am. St. Rep. 92, 32 N. E. 693.

The duty owing by the one who creates a nuisance, or manufactures a defective article, does not arise out of a contractual relation with the person injured; it arises out of the principle of law to so use your own property as not to injure others.

Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800; Groff v. Ankenbrandt, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; Stephani v. Brown, 40 Ill. 428; Griffin v. Jackson Light & P. Co. 92 Am. St. Rep. 526, note; Reichenbacher v. Pahmeyer, 8 Ill. App. 217; Van Winkle v. American Steam Boiler Co. 52 N. J. L. 240, 19 Atl. 472; State use of Hartlove v. M. Fox & Son, 79 Md. 514, 24 L.R.A. 679, 47 Am. St. Rep. 424, 29 Atl. 601; 20 R. C. L. 391, §§ 1415, 1416, 1419; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; Central Consumers' Co. v. Pinkert, 122 Ky. 720, 92 S. W. 957, 13 Ann. Cas. 105; Cutter v. Hamlen, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 397; Leahan v. Cochran, 86 Am. St. Rep. 508, note; Skinn v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, 15 Am. Neg. Rep. 86; Wilcox v. Hines, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297; 16 R. C. L. p. 1076, § 594; Lewis v. Terry, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Barman v. Spencer, — Ind. —, 44 L.R.A. 815, 49 N. E. 9; Cristadora v. Von Behren, 119 La. 1025, 17 L.R.A. (N.S.) 1161, 44 So. 852; Patten v. Bartlett, 111 Me. 409, 49 L.R.A. (N.S.) 1120, 89 Atl. 375; Ella v. Boyce, 112 Mich. 552, 70 N. W. 1106, 2 Am. Neg. Rep. 719; Illinois C. R. Co. v. Carraher, 47 Ill. 338.

The one who owns property and creates a nuisance thereon, or constructs a defective article of his own, is not released from liability by the single act of leasing the property or by transferring the title, or by sale of the article.

Illinois C. R. Co. v. Carraher, *supra*; Groff v. Ankenbrandt, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 47 C. C. A. 237, 120 Fed. 865; Lewis v. Terry, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Kern v. Myll, 80 Mich. 525, 8 L.R.A. 682, 45 N. W. 587; Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039; Wegner v.

Meyer, 95 Ill. App. 68; Ella v. Boyce, 112 Mich. 552, 70 N. W. 1106, 2 Am. Neg. Rep. 719; 20 R. C. L. p. 392, § 14; Central Consumers' Co. v. Pinkert, 122 Ky. 720, 92 S. W. 957, 13 Ann. Cas. 105; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Skinn v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, 15 Am. Neg. Rep. 86; Statler v. George A. Ray Mfg. Co. 125 App. Div. 69, 109 N. Y. Supp. 172; Clement v. Crosby & Co. 148 Mich. 293, 10 L.R.A. (N.S.) 588, 111 N. W. 745, 12 Ann. Cas. 265; Lufkin v. Zane, 157 Mass. 117, 17 L.R.A. 251, 34 Am. St. Rep. 262, 31 N. E. 757; Palmore v. Morris, 182 Pa. 82, 61 Am. St. Rep. 693, 37 Atl. 995, 3 Am. Neg. Rep. 597; Tetherington v. St. Louis, T. & E. R. Co. 226 Ill. 129, 12 L.R.A. (N.S.) 571, 80 N. E. 697; 20 R. C. L. 56, § 52; Stephani v. Brown, 40 Ill. 428; Van Winkle v. American Steam B. Co. 52 N. J. L. 240.

It is not necessary that the one who created the nuisance should anticipate the particular injury that occurred.

Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A. (N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368; Yeates v. Illinois C. R. Co. 241 Ill. 205, 89 N. E. 338; Dixon v. Scott, 181 Ill. 116, 54 N. E. 897; Ford v. Hine Bros. Co. 237 Ill. 463, 86 N. E. 1051.

It is not necessary to show knowledge of defendant further than that he created the dangerous condition.

Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021; Wilcox v. Hines, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297; Timlin v. Standard Oil Co. 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; Ahern v. Steele, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193; Ingwersen v. Rankin, 47 N. J. L. 18, 54 Am. Rep. 109; Griffin v. Jackson Light & P. Co. 128 Mich. 653, 55 L.R.A. 318, 92 Am. St. Rep. 532, 87 N. W. 888; Reichenbacher v. Pahmeyer, 8 Ill. App. 217; Riley v. Simpson, 83 Cal. 217, 7 L.R.A. 622, 23 Pac. 293; Guinn v. Delaware & A. Teleph. Co. 72 N. J. L. 276, 3 L.R.A. (N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412, 19 Am. Neg. Rep. 389.

Messrs. Beach & Beach for appellee.

Cartwright, J., delivered the opinion of the court:

This is an action on the case instituted by the appellant, Mary E. Mercer, administratrix of the es-

tate of Charles Mercer, deceased, in the circuit court of Cook county, against the appellee, Frederick E. Meinel, to recover damages for the death of Charles Mercer. An issue was formed by the plea of not guilty, and at the conclusion of the evidence for the plaintiff the court, on motion of the defendant, directed a verdict of not guilty. Judgment was entered on the verdict, and on appeal to the appellate court for the first district the judgment was affirmed, and the court granted a certificate of importance and allowed an appeal to this court.

The declaration contained three counts, the first of which alleged that on January 1, 1914, the defendant owned and controlled the premises at 535 North Albany avenue, in Chicago, and prior thereto installed a water heater in the bathroom of said premises, with a burner to be lighted to heat water for bath and other purposes and with a ventilating pipe running up in the corner of the bathroom behind a flush box and below the ceiling, so that one entering the bathroom could not see that the pipe ended inside of the bathroom; that when the heater was lighted it gave off carbon and other material in the bathroom; that the defendant occupied the premises for several months prior to January 1, 1914, when the heater was installed, and knew its dangerous condition; that on July 23, 1914, the defendant sold the premises to Charles Kocher without informing him of the manner in which the heater was installed, or that the exhaust pipe ended in the bathroom, or the dangerous condition thereof; that Kocher never occupied the premises, but on October 12, 1914, leased them to plaintiff and her family, who thereafter occupied them as a dwelling, and that while said heater was lighted and heating water, Charles Mercer, son of the plaintiff, was with due care and caution taking a bath in the bathroom, and was then and there poisoned and killed by carbon monoxid gas generated in the bathroom by reason of the care-

less and negligent manner in which the heater was installed. The second count made the same allegations, with the further averment that at the time the heater was installed by the defendant there was an ordinance of the city of Chicago, requiring a ventilating pipe not less than 2 inches in diameter extending to a chimney flue or open air, with a cap or cowl to the outer air opening, to carry off escaping gases or fumes, and that the heater was installed by the defendant contrary to the provisions of the ordinance. The third count made the same allegations as the first, but averred that after the heater was installed the ordinance was passed, and provided that water heaters that had been installed should be made to comply with the ordinance, and that the defendant occupied the premises for several months after the ordinance was in force and effect without making the heater comply with it.

It is assigned for error that the trial court erred in entertaining a motion to direct a verdict because a demurrer to the declaration had been overruled, and the defendant had filed a plea of the general issue, so that the question raised by the motion had already been determined. The demurrer admitted the material averments of the declaration, and the question raised thereby was whether such averments were sufficient to constitute a cause of action, but on the motion to direct a verdict the question presented was whether the evidence offered by the plaintiff, with all legitimate inferences to be drawn from it, would be sufficient to sustain a verdict. If the declaration stated a cause of action, the motion raised an entirely different question, whether the evidence fairly tended to sustain its averments. The court did not err in entertaining the motion.

Trial—overruling of demurrer—effect on motion for directed verdict.

The evidence introduced by the plaintiff was to the following effect: The bathroom was very small,

measuring 4 feet 6 inches by 5 feet 6 inches. The bathtub occupied the north side, and, owing to a slanting roof, the wall was only 3 feet high on that side. The roof sloped up over the bathtub to near the south side of the ceiling, leaving a small part of a flat ceiling about 8 feet high. There was a small glass window in the sloping part of the roof, opening out on the roof, and a door on the south side. At the east wall the heater in question was placed, and at the southeast corner there was a toilet seat, over which there was a flush box near the ceiling. Next to the heater and near the east wall there was a sewer pipe 6 inches in diameter, which ran from the basement through the bathroom and out through the roof, and next to the sewer pipe there was a  $\frac{3}{4}$  inch gas pipe. The exhaust pipe ran from the top of the heater along the east wall along the sewer pipe and ended behind and above the flush box. The Mercer family, consisting of the plaintiff, her husband, five children, and other persons, making a large family, moved into the building on November 4, 1914, and used the bathroom and heater for family use until August 29, 1915. Some of the time the hot water for the bathtub was supplied from pipes attached to the coal range in the kitchen on the first floor, but the bathroom was in general use with that exception. The plaintiff almost invariably prepared the water for the bath for each member of her family, but did not remember of any of the family taking a bath while the heater was going. On August 29, 1915, the plaintiff lighted the heater and turned on the water, and her son Charles Mercer, fourteen years old, went into the bathroom to take a bath. He closed the window and the bathroom door, and soon afterward his mother, the plaintiff, heard water dripping in the room on the floor below. She went up to the bathroom, and found Charles sitting in the tub, dead, with water running from the cold and hot water

faucets, the heater going, and the water up to the overflow pipe, which leaked and caused the water to drop below.

The death of Charles was caused by the escape of carbon monoxid gas from the exhaust pipe, and that gas is odorless, of a heavier specific gravity than air, and a deadly poison when breathed into the lungs. The defendant had installed the heater and occupied the premises with his family for several years before he sold the property to Kocher, and after that sale until November 4, 1915, when the plaintiff and her family moved in. There never had been an opening into a chimney flue or through the roof of the building, and there never had been any bad results from the use of the heater and bathroom during the time the defendant occupied the premises nor the ten months during which the plaintiff and her family occupied them up to the time of the accident. The evidence as to the condition of the pipe when the defendant sold to Kocher was given by Kocher as a witness, and he testified there was never any talk between him and the defendant about the heater. He described the sewer pipe, the small gas pipe, the exhaust pipe, and the flush box over the toilet seat, and a hole in the ceiling above the flush box. He said he saw the heater and the pipe leading up to the ceiling; that the pipe ran straight up to the ceiling to the hole in the wall; that he could not see whether it ran into the ceiling or through the ceiling, but he did not think it ended in the bathroom, or he would have noticed it, and that the hole was a little larger than the pipe as he remembered it, and the pipe went all the way up to the ceiling. After the accident an examination was made, which showed the hole in the ceiling above the end of the exhaust pipe, but the pipe did not reach the hole or ceiling. The plaintiff's husband testified that the pipe from the heater led up straight and ran along the slant of the roof behind and above the flush box, and

he stood on the toilet and looked along and felt with his hand, and found that the end of the pipe then pointed south to a short distance of the south wall of the bathroom and ended pointing south; that it did not reach up to the hole in the ceiling; and that the Mercer family never moved the pipe. The ordinance took effect April 12, 1911, and the heater was not thereafter made to conform to the ordinance.

There have been cases where it was held that a manufacturer of a machine or article designed and fitted for a particular use is liable to a third person who, in the natural and intended use, suffers an injury as the natural and probable consequence of the negligence of the manufacturer in its construction and sale. The case of *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, is an example of that class. There have been other cases in which it has been held that where there are concealed defects in demised premises, attended with danger to an occupant which a careful examination would not disclose, but which are known to the landlord, the latter is under obligation to make them known to the tenant, and upon his failure to perform that duty he will become liable for whatever damages result to the tenant therefrom. *Sunasack v. Morey*, 196 Ill. 569, 63 N. E. 1039; 1 *Thomp. Neg.* §§ 1131-1158. A large number of cases of both kinds are cited and made the basis of an argument that the defendant remained liable after he parted with the title and control of the premises and sustained no contract relation either with Kocher or his tenant, but no case has been found where such a liability has been declared.

Negligence—  
basis of  
liability.

The liability, if any,  
must rest upon the  
existence of a duty

which must arise out of a relation between the parties and a negligent failure to perform the duty. There is a material difference between the relation between a manufacturer or vendor of a machine or article pur-

chased for a specific use and one using the machine or article for the contemplated purpose, or between a landlord occupying a contractual relation with his tenant and the tenant, and the situation of one who has ceased to have any connection whatever with property which he has conveyed, or his grantee. Whether or not there is a liability in case of an existing dangerous condition, it cannot be true that the grantor assumes a duty to see that the premises remain in a safe condition. In this case there was an entire failure of any evidence fairly tending to prove either the averment of the declaration that the heater, at the time of the sale to Kocher, was in a defective or dangerous condition, or that the defendant had any knowledge of such condition, if it existed. Kocher testified, as before stated, that at the time of the sale, as far as he could see, the pipe extended up to the ceiling, and as far as he remembered it ran through the ceiling, and that it did not end in the bathroom, otherwise he would have noticed it. The only other testimony was that after the accident the end of the pipe pointed to the south and was horizontal, and did not point upward to the hole or the ceiling. The evidence was that it could not then be seen by one entering the bathroom door, and the reasonable conclusion is that the pipe is jointed and the position of the upper end had been changed in some way. The heater had not been made to comply with the ordinance, but the bathroom had been used by the defendant for several years without any bad effects or any accident, which makes it quite clear there was no dangerous defect. If there was any liability of the defendant it arose at the time of the sale to Kocher, and there was no evidence from which an inference could fairly be drawn that a dangerous condition existed at that time. The conclusion that it did not is strengthened

Nuisance—  
unsafe premises  
—liability of  
vendor.



by the fact that the bathroom was used thereafter for ten months by the members of a large family without any deleterious effect.

The fact that the ordinance had not been complied with during the ownership of the defendant created no liability of the defendant to any person, because no damage or injury resulted from the failure. If the defendant would have been liable to a penalty in a prosecution under the ordinance, any duty to make the heater comply with the ordinance rested on Kocher after the sale, and not on the defendant, and

if any injury resulted from such failure the liability would rest upon Kocher, if anyone. We do not say

*Negligence—unsafe property—failure to comply with ordinance—liability.*

whether the declaration stated a cause of action or not, but, if it did, there was no evidence tending to prove its averments that a dangerous condition existed at the time of the sale to Kocher, or, if it did exist, that the defendant knew or from any fact or circumstance ought to have known of it.

The judgment of the Appellate Court is affirmed.

### ANNOTATION.

#### Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises.

No cases other than the reported case (*MERCER v. MEINEL*, ante, 351) have been found in which an owner of premises who had conveyed the same was sought to be held liable for a violation by him prior to the conveyance of statute or ordinance relating to the condition of the premises.

It has been held that a vendor who had surrendered possession to his vendees was not liable for an injury occurring the next day from a negligently maintained gate on a building on the premises adjoining a public sidewalk. *Palmore v. Morris, T. & Co.* (1897) 182 Pa. 82, 61 Am. St. Rep. 693, 37 Atl. 995, 3 Am. Neg. Rep. 597. The court, after stating that the authorities on the exact question were very meager, referred to the case of landlord and tenant, and continued: "But this is not a letting of the land by a landlord to a tenant; it is an absolute sale whereby the owner divests himself of title and all right to possession or of re-entry for repairs or for any other purpose. Any future possession in face of his deed, unless there be an independent stipulation to the contrary, would be a palpable trespass, and with his surrender of possession all the duties incident to ownership as to him were at an end. . . . The learned judge of the court below adopts a different event for the com-

mencement of liability on the part of the grantee than possession taken under the deed; he says: 'He ought within a reasonable time to see that the property which he had purchased, if it was in dangerous condition to the public, was put in repair.' That is, he imports into the deed an implied covenant on the part of the grantors that they will be answerable to third parties for defects in the building for a reasonable time after the grantee takes possession. Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction; nor does the law warrant such an implication. Before he purchased the real estate the law presumes the grantee examined the property and was cognizant of its situation, surroundings, the character of the structures upon it, and their condition of repair. Without an express covenant by the grantors as between them and the grantee, there was no duty on the grantors to repair. The purchaser thereafter assumed that duty because he then became the owner and occupant. If the grantors, after possession by Lodge, the grantee, owed no duty to him, why should there be neglect in performance on their part as to the public? It is not even the case of no actual occupancy, where the law

casts the duty on the owner, but one where the owner and actual occupant were the same. If the accident did not happen during the ownership and occupancy of Morris, Tasker, & Company, and the evidence showed that it happened after Lodge took possession, the question for the jury was not whether there was negligence on part of defendants in maintaining a defective gate; the real question on the evidence was, Did Lodge take possession of the property described in his deed on Friday, the 10th of May? If he did, then the accident which occurred on the 11th must be imputed to the negligence of the owner and occupant of the premises, and not to Morris, Tasker, & Company, who, before that time, were owners and occupants. . . . There may be a case where the

grantor conceals from the grantee a defect in a structure known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession; but that is not this case. The rotten gate, the testimony shows, was as obvious before the accident as afterwards, and the reasonable time for the purchaser to discover it was not limited to the twenty hours after he took possession, but to the weeks and months pending the negotiations, before the delivery of the deed."

Where a nuisance has been created upon property it has been stated to be the general rule that the owner thereof does not relieve himself from liability therefor by conveying the premises. 20 R. C. L. p. 392, § 15.

W. A. E.

## PEOPLE OF THE STATE OF ILLINOIS

v.

TIM JONES, Plff. in Err.

*Illinois Supreme Court — December 17, 1919.*

(290 Ill. 603, 125 N. E. 256.)

### Robbery — taking money from pocket of drunken man.

1. The taking of money from the pocket of a drunken man, which requires no force or violence, is not robbery, although, upon being accused of the theft, the thief assaults his victim.

[See note on this question beginning on page 359.]

#### — definition.

2. Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation.

[See 23 R. C. L. 1139.]

#### — necessity of force.

3. The crime of robbery is not committed unless the property stolen is taken from the person by force or intimidation.

[See 23 R. C. L. 1144.]

**ERROR to the Circuit Court for Montgomery County (Jett, J.) to review a judgment convicting defendant of robbery. *Reversed.***

The facts are stated in the opinion of the court.

Mr. John E. Hogan, for plaintiff in error:

The facts in this case do not constitute robbery.

People v. Ryan, 239 Ill. 410, 88 N. E. 170; Burke v. People, 148 Ill. 70, 35 N. E. 376; Hall v. People, 171 Ill. 540, 49 N. E. 495; Schroeder v. People, 196 Ill. 211, 63 N. E. 678; People v.

Campbell, 234 Ill. 391, 128 Am. St. Rep. 107, 84 N. E. 1035, 11 Ann. Cas. 186.

The verdict is manifestly against the weight of the evidence, and insufficient to establish guilt beyond a reasonable doubt.

People v. Freeland, 234 Ill. 190, 119 N. E. 928; People v. McMahon, 254 Ill. 62, 98 N. E. 239.

Messrs. Edward J. Brundage, Attorney General, Sumner S. Anderson, Assistant Attorney General, J. Earl Major, and J. D. Wilson, for defendant in error:

While it is true that the gist of the crime of robbery consists in the force or intimidation used in taking from the person assaulted, against his will, an article of value, yet the degree of force used is immaterial.

34 Cyc. 1799; *People v. Campbell*, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186; *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176; *Burke v. People*, 148 Ill. 70, 35 N. E. 376.

The sufficiency of the evidence in the first instance is a matter for the jury's determination, and unless the reviewing court can say that the jury has been manifestly swayed by passion or prejudice, and that its determination is manifestly against the weight of the evidence, it will not reverse the case upon the ground of the sufficiency of the evidence.

*Bromley v. People*, 27 Ill. 20; *Steffy v. People*, 130 Ill. 98, 22 N. E. 861; *Rafferty v. People*, 72 Ill. 37; *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Gore v. People*, 162 Ill. 259, 44 N. E. 500; *People v. Lutzow*, 240 Ill. 612, 88 N. E. 1049; *People v. Williams*, 240 Ill. 633, 88 N. E. 1053; *People v. Nall*, 242 Ill. 284, 89 N. E. 1012.

Dunn, Ch. J., delivered the opinion of the court:

At the November term, 1918, of the circuit court of Montgomery county, the grand jury returned an indictment against Tim Jones and Charles Peppard, charging them in two counts with assaulting William Kehl and by force and intimidation robbing him of \$70. The indictment also contained two counts for larceny. The defendants were placed on trial, and at the close of the people's evidence a nolle was entered as to Peppard. At the close of all the evidence the court required the state's attorney to elect upon which counts he would ask a conviction, and he elected the counts charging robbery. The jury found the defendant Tim Jones guilty of robbery, and he has sued out a writ of error to reverse the judgment entered on the verdict.

The plaintiff in error contends that the evidence is insufficient to prove his guilt beyond a reasonable doubt, and that if any crime was proved to have been committed it was not robbery but larceny.

The evidence shows that the prosecuting witness, William Kehl, who was a concrete worker and had come to Illinois from Michigan in March, 1918, and had afterward worked for periods varying from a few days to a few weeks at Peoria, Bloomington, Hudson, and Raymond, in this state, having previously arranged for work on an elevator being constructed in Nokomis, came to that place on September 16, 1918, arriving about 10 o'clock in the morning. He soon afterward went to Sam Lapaski's saloon and spent most of the rest of the day and evening there until 9 or 10 o'clock, drinking whisky, wine, and beer, treating the crowd, matching half dollars, giving money to a man and a boy, buying chances in a raffle, and becoming very drunk. Jones, Peppard, and Lon De Witt, who were all strangers to Kehl, were in the saloon after supper and drank with him at his expense. He finally fell on the floor, and as he had procured no lodging place, these three went with him to a hotel to get a room. He sat down or fell down on the porch and did not get a room. The four then started back across the railroad, De Witt on one side of Kehl and Jones on the other, helping him, and at the railroad track Kehl again fell down or sat down. Kehl testified that at the railroad crossing Jones slipped his hand in Kehl's hip pocket and took the latter's pocketbook, in which was his money; that Kehl said to Jones, "You have my pocketbook," and then Jones hit him over the eye and "knocked him out." De Witt testified that Kehl sat down on a pile of ties and was going to lie down. De Witt and Jones went to pick him up, Jones taking hold of one side and De Witt the other, and as they started to raise him up Jones put his hand in Kehl's pocket, took the

latter's pocketbook out, and shoved it in Jones's pocket. Then Kehl said, "You have got my pocket-book," and Jones called Kehl a liar and hit him. Jones denied taking the pocketbook or money, and Peppard did not see him take the pocketbook or put his hand in Kehl's pocket, though there was a scuffle at the railroad crossing, where Kehl lay down. The evidence discloses nothing further as to the pocketbook or money.

"Robbery" is the felonious and violent taking of money, goods, or other valuable thing

Robbery—  
definition.

from the person of another by force or intimidation, and is punishable by imprisonment in the penitentiary not less than one year nor more than fourteen years. Private stealing from the person is declared by the statute to be deemed larceny, and is punishable, if the property stolen exceed \$15 in value, by imprisonment in the penitentiary not less than one year nor more than ten years. The statute makes the distinction, and it is the duty of the courts to enforce the statute. The distinction is that, while any felonious stealing of the personal goods of another is larceny, it is necessary, to constitute robbery, that the taking be by force or intimidation. The force or intimidation is the gist of the offense, and the crime of robbery is not committed

unless the property stolen is taken from the person by force or intimidation. *Burke v. People*, 148 Ill. 70, 35 N. E. 376; *Hall v. People*, 171 Ill. 540, 49 N. E. 495.

—necessity of  
force.

In the latter case Hall unbuttoned his victim's vest and took the pocketbook from his inside vest pocket, using no more force than the mere physical effort of taking the pocketbook from the victim's pocket and transferring it to his own, and the court said that if that is robbery, then no practical distinction between that crime and larceny from the person exists. The owner's power to retain his property must be overcome by the use of actual violence or by fear. *People v. Ryan*, 239 Ill. 410, 88 N. E. 170. In *People v. Campbell*, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186, 84 N. E. 1035, it was held that the force required to tear a diamond stud from the wearer's shirt front, to which it was attached by a spiral pin, and the struggle to retain the pin, constituted the taking robbery. In the present case the incriminating evidence tended to show only a stealthy taking of the pocketbook from Kehl's pocket and transferring of it to Jones's pocket. The evidence excluded any attempt to use violence. There was no evidence of a struggle to retain possession of the pocketbook, but only an accusation of the theft after it occurred, which the plaintiff in error resented by assaulting the accuser. The actions of the plaintiff in error as testified to were those of a pickpocket, and not of a highwayman.

—taking money  
from pocket of  
drunken man.

Under the evidence, the plaintiff in error was not guilty of the crime of robbery, and the judgment must be reversed.

## ANNOTATION.

### Taking property from the person by stealth as robbery.

- I. In general, 359.
- II. From drunken persons, 361.
- III. Victim deceived as to purpose of force, 361.
- IV. Miscellaneous, 362.

#### I. In general.

"Open and violent larceny from the

person, or robbery, the rapina of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear." 4 Bl. Com. 241.

Taking property from the person by stealth is not robbery.

Arizona.—*Ramirez v. Territory* (1905) 9 Ariz. 177, 80 Pac. 391.

Georgia.—*Fanning v. State* (1880) 66 Ga. 167, 4 Am. Crim. Rep. 561.

Idaho.—*Territory v. McKern* (1891) 3 Idaho, 15, 26 Pac. 123.

Illinois.—*Hall v. People* (1898) 171 Ill. 540, 49 N. E. 495; *People v. Ryan* (1909) 239 Ill. 410, 88 N. E. 170.

Indiana.—*Brennon v. State* (1865) 25 Ind. 403.

Kentucky.—*Dawson v. Com.* (1903) 25 Ky. L. Rep. 5; *Jones v. Com.* (1903) 115 Ky. 592, 103 Am. St. Rep. 340, 74 S. W. 263, 14 Am. Crim. Rep. 580; *Bibb v. Com.* (1908) 33 Ky. L. Rep. 726, 112 S. W. 401.

Missouri.—*State v. Parker* (1914) 262 Mo. 169, L.R.A.1915C, 121, 170 S. W. 1121.

New York.—*Norris's Case* (1821) 6 N. Y. City Hall Rec. 86; *PEOPLE v. JONES* (reported herewith) ante, 357.

In *Territory v. McKern* (Idaho) *supra*, a charge as to robbery, "that if a man stealthily flich from the pocket of another, the force necessary to remove the property is all the force that the statute required," was held error.

Stealthily putting one's hand in another's pocket and pulling out his pocketbook or money before the latter is aware of what is being done is not robbery. *Bibb v. Com.* (1908) 33 Ky. L. Rep. 726, 112 S. W. 401; *Jones v. Com.* (1903) 115 Ky. 592, 103 Am. St. Rep. 340, 74 S. W. 263, 14 Am. Crim. Rep. 580; *Dawson v. Com.* (1903) 25 Ky. L. Rep. 5.

And merely inserting one's hand into another's pocket and abstracting therefrom loose change, with intent to steal it, does not come within a statute making everyone guilty of robbery who feloniously takes the property of another from his person and against his will, by violence to his person. *State v. Parker* (Mo.) *supra*. The court distinguished cases which sustained a conviction of robbery where the facts showed that there was a sudden snatching or jerking of the property from the person of another.

In *People v. Ryan* (Ill.) *supra*, it was held that the offense is not rob-

bery where the evidence tends to prove the removal of a stud by stealth and adroitness only.

But jerking a diamond pin or stud out of a shirt was held to be robbery in *People v. Campbell* (1908) 284 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186.

After money has been stealthily removed from the pocket of another, the force used to prevent its recapture or to effect an escape does not relate back, so as to constitute the original taking a robbery. *Colbey v. State* (1903) 46 Fla. 112, 110 Am. St. Rep. 87, 35 So. 189; *Jones v. Com.* (1903) 115 Ky. 592, 103 Am. St. Rep. 340, 74 S. W. 263, 14 Am. Crim. Rep. 580.

Where a man slyly put his hand into another's pocket and took his purse without knowledge of the latter until just as it was drawn from the pocket, it was held merely larceny from the person. *Norris's Case* (1821) 6 N. Y. City Hall Rec. 86.

It was held not to be robbery where the defendant slipped his hand into a lady's outside pocket, and furtively took therefrom a purse of money. Before he got the purse entirely out, she felt the hand and tried to seize it, but the thief had succeeded and the purse was gone. In extracting hand and purse, the pocket was torn, and when the lady turned she saw the thief looking unconcernedly at the houses on the street. She rushed upon him and caught him by the coat, which, in his struggle to escape, was left torn in her possession. *Fanning v. State* (1880) 66 Ga. 167, 4 Am. Crim. Rep. 561.

In *Dawson v. Com.* (1903) 25 Ky. L. Rep. 5, 74 S. W. 701, it was held not to be robbery where the accused stealthily placed her hand in prosecutor's pocket and took therefrom some money, nor did the fact that accused drew a pistol when the loss of the money was learned and prosecutor demanded its return make the act of taking robbery.

But where accused, who was endeavoring stealthily to take money from prosecutor's pocket, was caught by the latter while his hand was in the pocket, and a struggle ensued, accused

endeavoring to get the money and prosecutor to prevent him, and the money was finally taken violently by inflicting physical injuries, the offense was robbery, and not larceny from the person. *Carter v. State* (1907) 3 Ga. App. 477, 60 S. E. 216. The court distinguished the case at bar from *Fanning v. State* (Ga.) *supra*, stating that in the latter case the force used to keep possession of the property was after accused had surreptitiously taken it from the prosecutor's pocket.

## II. From drunken persons.

Taking property from an unresisting drunken man who does not know he is being robbed is not robbery. *Ramirez v. Territory* (1905) 9 Ariz. 177, 80 Pac. 391; *Hall v. People* (1898) 171 Ill. 540, 49 N. E. 495; *Brennon v. State* (1865) 25 Ind. 403; *PEOPLE v. JONES* (reported herewith) *ante*, 357.

Where one merely filches money from the pocket of another who is drunk, the mere force necessary to remove the property is not all the force required by the statute to constitute robbery. *Ramirez v. Territory* (Ariz.) *supra*.

Unbuttoning his pocket, possibly by pulling at it, and taking a pocketbook from a drunken man who does not know what is being done and makes no resistance, is not robbery. *Hall v. People* (1898) 171 Ill. 540, 49 N. E. 495.

It will be seen that it is held in the reported case (*PEOPLE v. JONES*) that stealthily taking a pocketbook from a drunken man is not robbery, though the loser immediately discovers the loss.

But the jury are authorized to conclude that terrible injuries which have been inflicted upon the person of the owner of property indicate active resistance on his part and the use of force on the part of one accused of robbery in removing the property from his person, even though resistance may have been blindly offered, and the force exercised against a man practically unconscious from drink or drugs, who is unable to recall the facts when finally restored to reason.

*Bowen v. State* (1915) 16 Ga. App. 110, 84 S. E. 730.

And producing unconsciousness by means of a drug for the purpose of obtaining money in custody of the person rendered unconscious has been held to be an exercise of force within the meaning of the statute against robbery. *State v. Snyder* (1918) 41 Nev. 453, L.R.A.1918E, 933, 172 Pac. 364.

## III. Victim deceived as to purpose of force.

It is robbery when force is used in its consummation, although the victim does not know what is being done. *Seymour v. State* (1860) 15 Ind. 238; *Snyder v. Com.* (1900) 21 Ky. L. Rep. 1538, 55 S. W. 679; *Blanton v. Com.* (1900) 139 Ky. 411, 58 S. W. 422, 14 Am. Crim. Rep. 588; *State v. Gorham* (1875) 55 N. H. 162; *Mahoney v. People* (1874) 3 Hun (N. Y.) 202, affirmed in (1875) 59 N. Y. 659; *Com. v. Snelling* (1812) 4 Binn. (Pa.) 379; *Anonymous* (1825) 1 Lewin, C. C. (Eng.) 308.

Thus it is robbery when the prosecutor thought the thief simply meant to beat him. *Com. v. Snelling* (1812) 4 Binn. (Pa.) 379. So, putting an arm around one's neck, ostensibly to whisper to him, and then picking his pocket, is robbery. *State v. Gorham* (1875) 55 N. H. 152. So, it is robbery to pick one's pockets while scuffling with him (*Blanton v. Com.* (1900) 139 Ky. 411, 58 S. W. 422, 14 Am. Crim. Rep. 588); or while jostling him (*Snyder v. Com.* (1900) 21 Ky. L. Rep. 1538); or while running against him (*Anonymous* (1825) 1 Lewin, C. C. (Eng.) 300); or while pushing him (*Seymour v. State* (1860) 15 Ind. 238); or while crowding and putting one's arms around him (*Mahoney v. People* (1874) 3 Hun (N. Y.) 203).

But it was held a taking in an artful, secret manner, and not robbery, where a man accosted a country boy as an acquaintance, at the same time seizing him around the waist and by fumbling around him at length succeeded in picking his pocket of an empty pocketbook. *Davis's Case* (1817) 2 N. Y. City Hall Rec. 32.

In a case where it does not appear

whether the victim knew the purpose of the force or not, in holding that throwing an arm around a person and taking his pocketbook is robbery, the court said: "The evidence in this case discloses the fact that the defendant, Burke, made an assault on Schultz, and used force to take from his person, against his will, his pocketbook containing his money, and this is sufficient to constitute the offense." *Burke v. People* (1893) 148 Ill. 70, 35 N. E. 376.

And whether there was such force as to constitute robbery, where one put her arms around another and took money from his pocket, was held in *State v. Spivey* (1918) — Mo. —, 204 S. W. 259, to be a question for the jury.

#### IV. *Miscellaneous.*

It does not constitute robbery to take money from an open drawer, although the owner of the money had been tied by accused, where the tying was for another purpose, and the taking of the money was an afterthought. *United States v. Birueda* (1905) 4 Philippine, 229.

It has been held that if the violence to the person in a case of snatching was accidental and unintentional, it is not robbery, as in *Reg. v. Edwards* (1848) 1 Cox, C. C. (Eng.) 32, where a woman was returning from market in a wagon with a basket tied onto the seat by her side, and the prisoner and another, both armed with broom knives, endeavored to lift off the basket by stealth, but, seeing the string, cut it through with the knife just at the same moment when the woman perceived their intention and stretched out her arm to lay hold of the basket and thus received a wound on the wrist from the knife, which caused her to withdraw her hand and leave the thieves in possession of the basket. This was held to be simply larceny, for in robbery force must not only be employed by the party charged, but it is necessary to show that the force was used with the intent to accomplish the robbery, while in this case the wound seemed to have been inflicted undesignedly and by mere accident.

The taking of property was held in

*People v. Pasqueria* (1916) 30 Cal. App. 625, 159 Pac. 173, to have been accompanied by all the elements constituting the crime of robbery where accused entered a Chinaman's store, and, claiming to be a detective, accused the Chinaman of having lottery tickets in his possession, and stated that he wanted to search his place, and, under the pretense of making a search for lottery tickets, put his hand in the Chinaman's pocket and took therefrom a pocketbook and purse from which he abstracted \$30 in money, a diamond ring valued at \$65, and a stick pin, and putting them in his own pocket, struck the Chinaman upon the jaw and ran out of the store.

In construing a statute providing that "robbery is . . . the sudden snatching, taking, or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof," the court stated that formerly violence of some kind was essential to the offense of robbery, but that under this act, in order to prove a case of robbery by suddenly taking or carrying away the property of another without his consent, it is necessary to show only that the person robbed was conscious that something was being taken from him, and that for any reason he was unable to prevent it; that the only difference between robbery of this class and larceny from the person is that in the latter case property is abstracted without the knowledge of the possessor; but if the possessor becomes conscious, even in the taking, that his property is being taken from him, and the knowledge is obtained before the taking is complete, it is robbery. And so, in that case, it was held that, as there was evidence that the prosecuting witness was conscious that something was being taken from his pocket before, or at least at the same time that, an outcry was made that his money was taken from him, the jury was authorized to find that his money was suddenly taken away from him without his consent, but with his knowledge,

and that the offense was robbery, and not larceny from the person, or secret theft. *Williams v. State* (1911) 9 Ga. App. 170, 70 S. E. 890.

A conviction under the same statute was sustained where the defendants followed the prosecutor to a train, and one of them mounted the train and came to the platform as the prosecutor was about to enter, and pressed him against the other, and the prosecutor felt the hand of one of them go into his pocket, and exclaimed, "I am being robbed." The defendants quickly disappeared, and the prosecutor felt for his pocketbook, and it was gone.

*Hickey v. State* (1906) 125 Ga. 145, 53 S. E. 1026.

But in *Morris v. State* (1906) 125 Ga. 36, 53 S. E. 564, it was held that the evidence was insufficient to warrant a conviction under this act, where the prosecutor's purse was taken from his pocket without his knowledge, and without resort to any violence in the taking, the court stating that the offense proved, if any, was that of larceny from the person, the distinction between this and the preceding cases being the fact that the property was taken without the owner's knowledge.

B. B. B.

ANDREW BRIGGS, Sr., et al., Appts.,

v.

COMMONWEALTH OF KENTUCKY.

J. B. IRVIN et al., Appts.,

v.

SAME.

*Kentucky Court of Appeals—June 20, 1919.*

(185 Ky. 340, 214 S. W. 975.)

**Bail — soldier in United States Army.**

1. Bail is released by the fact that the principal was a soldier in the United States Army and was denied a furlough to attend the trial.

[See note on this question beginning on page 371.]

— insane principal — release of surety.

2. The surety in a bail bond is released if the principal is confined in an insane asylum or has been adjudged insane, but not if the principal escapes without adjudication of insanity.

[See 3 R. C. L. 56.]

— arrest in other state.

3. Bail is not released by the arrest and confinement of the principal in another state.

[See 3 R. C. L. 53.]

— arrest for other offense.

4. Bail is released by the commonwealth taking the principal into custody for another offense.

[See 3 R. C. L. 51.]

— arrest by Federal government.

5. Bail is released by the arrest and

removal of the principal from the county by an officer of the United States government.

— infant principal.

6. Bail is not discharged by the fact that the principal is an infant who was removed by his mother from the jurisdiction of the court.

— death of principal.

7. Bail is released by death of the principal.

[See 3 R. C. L. 55.]

— illness of principal.

8. Bail is not released by the confinement of the principal in a hospital by incapacitating illness on the day of trial.

[See 3 R. C. L. 56.]

— soldier — refusal to accept pass.

9. Bail is not released where the



principal accused of felony is in the United States Army, located within two hours' ride of the place of trial, and a pass would have been granted him on request to enable him to attend the trial.

[See 3 R. C. L. 54.]

**Appeal — discrepancy in stating amount of bail bond — absence of prejudice.**

10. Reversal of a judgment on a bail bond will not be granted because of discrepancy in the summons in stating the amount of the bond, if the surety was not prejudiced thereby.

**APPEALS** by the sureties from judgments of the Circuit Court for Nelson County against them for the respective amounts of their bail bonds in proceedings for forfeiture of said bonds. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Nat. W. Halstead and Frank E. Daugherty, for appellants:

The judgment, findings, and determination of the local board under the Selective Service Act in placing the defendants in class 1A were conclusive.

United States ex rel. Bartalini v. Mitchell, 248 Fed. 997; Ex parte Platt, 253 Fed. 413; United States v. Miller, 249 Fed. 985; United States ex rel. Brown v. Commanding Officer, 248 Fed. 1005.

The evidence of the inferior military officers at Camp Zachary Taylor, to the effect that defendants Andrew Briggs, Jr., and Lud Bodine, could have obtained passes for a few days' absence, and thereby have attended the Nelson circuit court, was wholly incompetent and improper.

Franke v. Murray, L.R.A.1918E, 1015, 160 C. C. A. 623, 248 Fed. 866, Ann. Cas. 1918D, 98; Ex parte King, 246 Fed. 868.

Whenever sureties on a criminal bail bond are prevented by a declaration of martial law, or draft law, by the Federal government, from enforcing the attendance of their principal so they cannot perform their obligations, they are discharged as such sureties.

Ex parte King, supra; Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471; Com. v. Webster, 1 Bush, 616; United States ex rel. Brown v. Commanding Officer, 248 Fed. 1005; 6 C. J. § 284; State v. Herber, — Okla. —, L.R.A.1918F, 396, 173 Pac. 651.

The court erred to the prejudice of the substantial rights of appellants in refusing to allow them, as sureties on the bonds of these soldiers, the benefit of the Federal statute known as the Soldiers' and Sailors' Civil Relief Act.

Belond v. Guy, 20 Wash. 161, 54 Pac. 995; Jackson v. Davis, 4 Mackey, 202;

Leary v. United States, 224 U. S. 567, 56 L. ed. 889, 32 Sup. Ct. Rep. 599, Ann. Cas. 1913D, 1029.

The court had no authority to render judgment in the Bodine case, as the bond was taken by the police court of Bardstown, and never certified by that court to the Nelson circuit court as a part of the minutes of the examining court, or filed in the case.

Morgan v. Com. 12 Bush, 84.

On Petition for Rehearing.

Messrs. Hobson & Hobson, also for appellants:

If the bail were released when the accused were taken out of their custody, they were under no obligation to incur expenses or spend time and effort to have the accused in court.

Com. v. Bronson, 14 B. Mon. 361; Smith v. Com. 91 Ky. 590, 16 S. W. 532; Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471; Yarbrough v. Com. 89 Ky. 153, 25 Am. St. Rep. 524, 12 S. W. 143; Alford v. Irwin, 84 Ga. 25; McCluskey v. Brock, 84 Ga. 206; Robertson v. Patterson, 7 East. 405, 103 Eng. Reprint, 157; Hargis v. Begley, 23 L.R.A. (N.S.) 139, note; 3 Am. & Eng. Enc. Law, 2d ed. p. 717; 3 R. C. L. p. 58, § 69; Medlin v. Com. 11 Bush. 607; Com. v. Webster, 1 Bush, 616.

Even on the voluntary enlistment of the accused in the Army of the United States the bail is released.

People v. Cushney, 44 Barb. 118; People v. Cook, 80 How. Pr. 110; McFarland v. Wilbur, 85 Vt. 842.

The voluntary acts of the accused in declining to accept a furlough when out of the custody of the bail could not revive a liability which did not exist.

Reese v. United States, 9 Wall. 13, 54 L. ed. 541; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287.

The bail stands like any other surety, and is released by any material

change made by the government without his consent, which affects his liability or rights under the contract.

*Reese v. United States*, supra; *Cross v. Allen*, 141 U. S. 537, 35 L. ed. 849, 12 Sup. Ct. Rep. 67; *United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States)* 191 U. S. 423, 43 L. ed. 245, 24 Sup. Ct. Rep. 142; *United States v. Freil*, 92 Fed. 301.

If defendants were taken out of the custody of the sureties and taken charge of by the Federal law, although it may have been erroneously done, it was done by a tribunal that had power and authority to do so, and because of that fact, appellants are discharged as such sureties.

*Smith v. Com.* 91 Ky. 589, 16 S. W. 532; 8 R. C. L. § 65; *Lamphire v. State*, 73 N. H. 463, 62 Atl. 786, 6 Ann. Cas. 615; *Harrington v. Dannie*, 18 Mass. 98; *State v. Scott*, 20 Iowa, 66; *Com. v. Skaggs*, 152 Ky. 268, 44 L.R.A. (N.S.) 1064, 153 S. W. 422; *Miller v. State*, 158 Ala. 73, 20 L.R.A. (N.S.) 861, 48 So. 360; *Com. v. Skaggs*, 44 L.R.A. (N.S.) 1065, note; *St. Louis v. Smith*, 235 Mo. 64, 138 S. W. 11; *People v. Pugliese*, 80 Misc. 75, 140 N. Y. Supp. 849.

Messrs. Ernest N. Fulton, John S. Keeley, John A. Fulton, J. Lewis Williams, and Charles H. Morris, Attorney General, for the Commonwealth.

Quin, J., delivered the opinion of the court:

Lud Bodine and Andrew Briggs, Jr., were indicted by a grand jury of Nelson county for the offense condemned by § 1155, Ky. Stat., and were released on bail furnished by appellants and another. Bodine's bail was fixed at \$2,500, and that of Briggs at \$2,000. We shall designate the accused as defendants, and the sureties as appellants. After having been twice continued on defendants' motion, the cases were called for trial June 5, 1918, when a similar motion by the defendants was overruled. Defendants failing to answer when called, the bonds were forfeited, and summons issued against appellants, returnable the first day of the October term, 1918, to show cause, if any they could, why judgment should not be rendered against them on said forfeitures. November 13th the court rendered separate judgments

against the appellants for the respective amounts of the bonds, and to reverse said judgments these appeals have been prosecuted.

The proceedings in the two cases are identical. In the answer it is alleged: (1) That defendants registered on June 5, 1917, under the Selective Service Act (Act Cong. May 18, 1917, chap. 15, 40 Stat. at L. 76, Comp. Stat. §§ 2019a, 2019b, 2044a-2044k, 9 Fed. Stat. Anno. 2d ed, pp. 1136, 1156, 1157, 1159-1163), they were duly classified and placed in class 1A, and on May 25, 1918, they were called by the local board and inducted into the National Army; (2) defendants and appellants alike were deprived by the regulations of the Army from defending the indictments, and because of the detention of defendants in the Army the court had no jurisdiction over the defendants or appellants; (3) under the act of Congress, known as the "Soldiers' and Sailors' Civil Relief Act" (Act Cong. March 8, 1918, chap. 20, 40 Stat. at L. 440, Comp. Stat., §§ 3078½a-3078½ss, Fed. Stat. Anno. Supp. 1918, pp. 812-825), the court was without jurisdiction to proceed or to enter judgment on the obligations of appellants, and they asked that the order forfeiting the bonds be set aside and held for naught.

The allegations of the answers were controverted by a reply. On the motion to set aside the order forfeiting the bonds the appellants introduced no proof, but the testimony on behalf of appellee may be summed up as follows: The defendants were eligible for service under the Selective Service Act. They registered June 5, 1917. Later their questionnaires were properly executed. They were classified and placed in class A1. It is provided in rule 13 of the Selective Service Regulations that "any registrant . . . at large on bail under criminal process shall first be classified and recorded as any other registrant; but, pending his discharge from confinement, or the final disposition of his case, he shall be treated as

standing at the bottom of class IV. and so recorded by entering in red ink next to and in the same column with his name on the classification list (form 1,000) the figure IV."

The county attorney was insisting before the local board that this rule should be followed in the case of the two defendants, while counsel for the defendants was claiming they should be left in class A1, and taken in the order of their call. Being in doubt as to the proper procedure in the matter, members of the local board of Nelson county communicated with the chief of selective service for Kentucky, at Frankfort, informing him of the nature of the charge against defendants, and the board was advised to leave them out of the regular call. After these instructions were received by the local board, attorneys representing defendants went to Frankfort, and following said visit, and within about two days after receiving orders to leave the defendants out of the call, the local board received instructions rescinding the former order, and were told to take the defendants in the order of call in class A1. They were so placed, and on May 25, 1918, were inducted into the military service of the United States government and stationed at Camp Zachary Taylor, Kentucky.

Before their induction, the local board received a request by telephone from a naval recruiting office in Louisville to release the defendants from the order of their call, so that they could be enlisted in the Navy, and, after insistence upon the part of this recruiting office, a consultation was held among the members of the local board, and the recruiting office having been advised of the status of the defendants and of the charge against them, the request for their release was withdrawn.

About two weeks before June 5, 1918, the day of trial, appellants called upon the circuit judge at Munfordsville in behalf of the defendants, and he referred them to the commonwealth's attorney at Glasgow. Appellants told the com-

monwealth's attorney they wanted to get the defendants in the Army, and that they could get them in if he, the commonwealth's attorney, would be willing to grant a continuance of their cases at the next term. They were advised this could not be done, and, if the witnesses for the prosecution were present, the commonwealth would insist upon a trial. When the commonwealth's attorney reached Bardstown to attend the June term of court, he was advised by the county attorney that the defendants had been inducted into the military service of the government. Thereupon he immediately communicated with the officer at Camp Zachary Taylor in charge of defendants, informing him of the trial, and requested said officer to issue passes or grant furloughs to the defendants to enable them to attend the trial. This the officer promised to do. About 8 o'clock on the morning of the trial the commonwealth's attorney received a telephone message from one of the officers at the camp in charge of the defendants, that in compliance with his request he had tendered a pass to one of the defendants, and he would not accept it, and said he did not want to come to Bardstown to stand trial.

The captain commanding the company to which the defendants had been assigned, the adjutant of the battalion, and the sergeant major testify that a request was received from the commonwealth's attorney for a leave of absence for the defendants, and that the officer having authority to issue passes immediately made a search for the defendants. He located the defendant Bodine, told him they wanted him to attend trial at Bardstown the next day, and offered him a pass for himself and for the defendant Briggs. Bodine declined to receive a pass; said he did not want it, and that he could answer the same for Briggs. Under the regulations of the Army passes can be granted by the company officers for any period under nine days, and at the expira-

tion of this limit they have authority to extend the time not exceeding an additional nine days. A furlough which is for a period of ten days or over can be granted only by higher authorities. It is also in evidence that the morning train leaving Louisville reaches Bardstown about 10:30, which would have been in time for the trial, and Bardstown is about 40 miles from Camp Zachary Taylor.

Had defendants been placed at the bottom of class IV. as provided in rule 13, they would never have been called into the service.

As to the release of bail: In this state, where the principal is actually confined in an insane asylum, being thus in the custody of the state, and beyond the power of the sureties to produce him, the latter is discharged. Wood v. Com. 17 Ky. L. Rep. 1076, 33 S. W. 729. Likewise where the principal has been adjudged to be of unsound mind. Com. v. Fleming, 15 Ky. L. Rep. 491.

But where the principal, though insane, has not been so adjudged, the bail is liable if he permits the accused to escape beyond the jurisdiction, and, the court being in law the custodian of the principal, his surety must produce him either for trial or for surrender as provided by statute. Com. v. Allen, 157 Ky. 6, 50 L.R.A.(N.S.) 252, 162 S. W. 116.

The arrest and confinement of the principal for crime in another state does not relieve the bail. Withrow v. Com. 1 Bush, 17; Yarbrough v. Com. 89 Ky. 151, 25 Am. St. Rep. 524, 12 S. W. 143; Hall v. Com. 20 Ky. L. Rep. 99, 45 S. W. 458.

Where the commonwealth has taken the principal into its custody for another offense, and thereby prevents his appearance and discharge of the recognizance, it presents a good defense for the sureties when proceeded against

for forfeiture. Alquire v. Com. 3 B. Mon. 349; Kirby v. Com. 1 Bush, 113. And, overruling Com. v. House, 13 Bush, 680, the court, in Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471, held that where accused had been convicted by the Federal court for the same offense charged against him in the state court, the effect was the same as if his non-presence was caused by the commonwealth; for the authority of neither can be resisted by the bail or by the defendant, and in both cases, the bail being deprived of the aid and protection of the commonwealth, to which under the contract he is entitled, he was released.

Where the principal was arrested and removed from the county by order of an official of the United States government, and the surety thereby deprived of the power to surrender him, he cannot be made responsible on the bail bond for the failure of the principal to appear in answer to the charge. Com. v. Webster, 1 Bush, 616.

And, if the principal on the day fixed for his appearance was a soldier in the Federal Army, at a remote distance from the court, and was refused a furlough, which he solicited, to enable him to attend in the discharge of his recognizance this was held a good defense; it being alleged that he would have been in court had the furlough not been denied him, and his attendance was prevented without fault on his part and against his will. Com. v. Terry, 2 Duv. 383.

That the cognizor was an infant under the control of his mother, who removed him out of the state, and thus prevented his surrender, is insufficient to discharge the bail. Starr v. Com. 7 Dana, 243.

Death of the principal will relieve the bail. But in Bonner v. Com. 27 Ky. L. Rep. 652, 85 S. W. 1196, where accused was con-

Bail-insane  
principal-release  
of surety.

-arrest by  
Federal govern-  
ment.

-soldier in  
United States  
Army.

-arrest in other  
state.

-infant prin-  
cipal.

-arrest for  
other offense.

-death of  
principal.

financed in a hospital with a serious illness, physically incapacitating him from appearing on the day the indictment was returned, the bail was not released. However, in *Hargis v. Begley*, 129 Ky. 477, 23 L.R.A. (N.S.) 136, 112 S. W. 602, it is held that where defendants were prevented from appearing in answer to their recognizance, not on account of any wrongful act or dereliction on their part, but on account of unavoidable accident or sickness, over which they had no control, they were entitled to a new trial under § 518 of the Civil Code.

In *Com. v. Rowland*, 4 Met. (Ky.) 225, an allegation that at the time stipulated in the bond for the appearance of the accused he was held and retained by authority of the government of the United States as a prisoner in another state, and therefore unable to appear and answer said charge in compliance with the term of his bond, was held insufficient.

The question for our decision might thus be stated: Where a person indicted for a felony has been inducted into the military service of the United States government, either voluntarily or by draft under the Selective Service Act, where the defendant and his surety were instrumental in securing his induction, and at the time of trial is stationed at a camp within 40 miles of the place of trial,—a 2-hours' ride by rail,—and upon application to the proper officer, by the accused or his bail, a pass or furlough would be granted to enable defendant to attend court, but such request is not made, should the bond for his appearance be forfeited?

We answer in the affirmative. There is not the least doubt that both defendants could have attended court June 5, 1918, had they so desired. The undertaking of the bond is that accused shall be in court on the day fixed to answer the charge against him, and shall at all times render himself

amenable to the orders and process of the court. Failing so to do, the amount of the bond shall be paid to the commonwealth. Crim. Code, § 82.

Not the slightest attempt was made to comply with this obligation, hand was not turned, nor the scratch of a pen, in an effort to have the defendants in court. Appellants had been warned that a continuance would not be granted, and had any portion of the diligence exercised in the endeavor to get defendants in the Army been directed toward the obtention of a brief leave of absence, the forfeiture could have been prevented.

Those who gave up their positions, left home and loved ones, and entered the Army or Navy, and unselfishly offered their lives, if need be, to protect and defend those rights and privileges for which our forefathers fought, are deserving of our highest praise and commendation,—real patriots these. But, obedience being one of the chief characteristics of a true soldier, it seems that a sense of honor and duty would have constrained defendants to have done everything in their power to have been on hand when their cases were called.

As to Bodine, he was offered a pass, but declined it. Briggs's status is not far different. He could have received the pass had he requested it. This he neglected to do.

A good statement of the law on the subject is found in *Vincent v. Com.* 1 Ky. Ops. 452, wherein it is said: "Construed fairly, the answer prima facie imparts that the principal in the recognizance was not delinquent at the term at which he was recognized to appear, but during that term was forced by military power, against his will, from Kentucky into the Confederate lines, and in like manner was prevented from appearing or being surrendered by the appellant as his bail before the adjudged forfeiture. And, thus interpreted, the answer presents a good defense to scire facias, and the circuit court erred in sustaining the demurrer and adjudg-

—illness of  
principal.

—soldier—  
refusal to  
accept pass.

ing the penalty against the appellant."

Measured by this rule, and one that accords with the weight of authority, we do not think appellants have shown themselves entitled to the relief sought.

It is earnestly insisted the court erred in refusing to allow appellants the benefit of the Federal statute known as the Soldiers' and Sailors' Civil Relief Act. 40 Stat. at L. 440, chap. 20, Comp. Stat. §§ 3078½a-3078½ss, Fed. Stat. Anno. Supp. 1918, pp. 812-825. As stated in the act itself, it is intended as a protection for those in the military service of the United States in order to prevent prejudices or injury to their civil rights. No civil rights of the defendants are involved here, but, even so, Congress could hardly have intended to extend protection in a case presenting facts such as this, where the parties affected could have prevented the default had they made any effort so to do.

By § 3078½b of said act, the entry or enforcement of any order, writ, judgment, or decree or the stay, suspension, or postponement of any suit or proceeding, may, in the discretion of the court, likewise be granted to sureties, guarantors, and indorsers. We do not think the lower court abused its discretion in refusing to stay the proceedings in the case at bar.

This conclusion renders unnecessary a decision as to the liability of defendants to reimburse appellants for any sum the latter may be required to pay because of the nonappearance of accused. There is much conflict of authority as to the right of bail in criminal cases to recover reimbursement.

In 82 Cyc. 257, note 90, it is stated that the better opinion is against the right to recover. We find countervailing opinions by United States Supreme Court, able dissenting opinions in many cases, and the text-writers are not in accord. See *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. Rep. 196; *Leary v. United States*, 224 U.

S. 567, 56 L. ed. 880, 32 Sup. Ct. Rep. 599, Ann. Cas. 1913D, 1029; *Ratcliffe v. Smith*, 13 Bush, 172; *Ellis v. Norman*, 19 Ky. L. Rep. 1798, 44 S. W. 429; *Carr v. Davis*, 64 W. Va. 522, 20 L.R.A. (N.S.) 58, 63 S. E. 826, 16 Ann. Cas. 1031; *Littleton v. State*, 46 Ark. 413; *Jackson v. Davis*, 4 Mackey, 202; *Belond v. Guy*, 20 Wash. 161, 54 Pac. 995; 3 R. C. L. p. 60, § 73; *United States v. Simmons* (C. C.) 14 L.R.A. 78, 47 Fed. 575, id. 47 Fed. 723; *Highmore, Bail*, 204.

We find no case holding that the nonappearance of the accused, due merely to the fact that he was in the military service, releases the surety, where it was within the power of the defendant and his sureties to have the former present at the trial of the indictment; but no attempt was made by either to have the accused on hand.

A splendid statement of the rule governing the case at bar is found in 8 R. C. L. § 65, under the head of *Bail*, which is as follows: "The imprisonment of a citizen by legitimate orders of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal. And therefore, if the principal in a bail bond is arrested and imprisoned by military or naval authorities, and the sureties are prevented thereby from procuring his appearance at the trial, they will be excused from complying with the conditions of the bond; and the enforced military or naval service of the principal will be a sufficient excuse for his nonappearance in accordance with his recognizance. Where the principal is at the time of the execution of his bail enlisted in the Federal Army and is refused a furlough which he asks for in order to be present at his trial, the bail are exonerated. There is some difference of opinion as to whether the voluntary enlistment of a principal in the Army or Navy after the entry of bail, whereby it is made impossible for him to appear in accordance with the condition of the

recognizance, will relieve the sureties from their obligation. It is held in some of the cases that, where the principal enlists without the knowledge or consent of his sureties, their consequent inability to retake him into custody is ground either for their release or at least for a continuance where it is shown that they were reasonably diligent in their endeavor to secure the appearance of the principal. The better authorities hold, however, that voluntary enlistment, being the act of the obligor, cannot release either him or his sureties from his obligations. The reason for not exonerating the bail will be still stronger if the enlistment was with the advice and consent of the surety, and where this is the case it seems that the detention of the principal is not a good defense even in those jurisdictions where the decisions have treated the sureties most leniently. In every case where such a defense is advanced, it should be shown that proper effort has been made to secure the person of the principal from the military authorities. The fact that the principal has been captured by foreign soldiers and detained in another country may be advanced as a defense by his sureties, and, if the taking is not connived at by the principal, will relieve against a forfeiture for his failure to appear at the time specified."

To the same effect is 6 C. J. p. 1028; note in 6 Ann. Cas. 616. The text found in these books finds support in the following cases: *People v. Cushney*, 44 Barb. 118; *Belding v. State*, 25 Ark. 318; *Lamphire v. State*, 73 N. H. 463, 62 Atl. 786, 6 Ann. Cas. 615; *Winniger v. State*, 23 Ind. 228; *People v. Cook*, 30 How. Pr. 110; *State v. Scott*, 20 Iowa, 63; *Way v. Wright*, 5 Met. 380; *Gingrich v. People*, 34 Ill. 448.

It is further urged by counsel for appellant that the judgment, findings, and determination of the local board under the Selective Service Act in placing defendants in class A1 are conclusive, and a number of Federal cases are cited in support

of this proposition. We have examined all these cases, and others, and find that in almost every one of them the real question involved was as to whether the Selective Draft Act applied to the person involved; most of them growing out of petitions for writs of habeas corpus. The courts held that the decisions of the draft boards are final where the board has proceeded in due form and the party involved was given a fair opportunity to be heard and present his evidence. See *Angelus v. Sullivan*, 158 C. C. A. 280, 246 Fed. 54; *United States ex rel. Bartalini v. Mitchell* (D. C.) 248 Fed. 997; *United States ex rel. Brown v. Commanding Officer* (D. C.) 248 Fed. 1005; *Ex parte Platt* (D. C.) 253 Fed. 413; *Brown v. Spelman* (D. C.) 254 Fed. 215; *Ex parte Tinkoff* (D. C.) 254 Fed. 222.

*Ex parte King* (D. C.) 246 Fed. 868, relied upon by appellant, was a case of a soldier who, after the declaration of war, killed a policeman in Newport, Kentucky, while in the performance of his duty as a soldier, and the court held that the military authorities had superior jurisdiction of the offense, and the jailer was directed to deliver the prisoner to the military authorities.

There is nothing in the present suit that brings in question any judgment, proceedings, or determination of the local or district draft board. Whether the board should have followed rule 13 of the Selective Service Regulations in the placement of the defendants is not involved here.

In the Bodine case the bond was executed before the police court of Bardstown, and it is pointed out by counsel that the bond was never certified to the circuit court or filed in the case. It is apparent, however, the parties throughout the trial of the cases treated the bond as having been properly filed; indeed, the suretyship of appellants is admitted in the answer, in which no irregularity as to the filing is pleaded. In appellants' brief we find reference to the fact that the bond was

put in evidence. The bill of exceptions shows it was filed in the circuit court, though appellants objected to incorporating the same therein.

There is a discrepancy in the amount of the bond, as stated in the summons, but this is not material, and appellants were in no wise prejudiced thereby. Appellants are not entitled to a reversal on this ground.

The uncontradicted evidence shows that after the induction of the defendants into the military service they were so situated, both as to time and distance, that they

could have been present at the calling of the indictment against them on June 5, 1918. Passes or furloughs would have been given upon request of either of accused or sureties. As to one of the accused a pass was actually offered, and when the defendants and the appellants failed and neglected to comply with the obligations of the bond, it was proper for the lower court to order a forfeiture thereof.

Finding no error in the judgment appealed from, same is accordingly affirmed.

Petition for rehearing denied October 31, 1919.

### ANNOTATION.

**Induction of principal into military or naval service as exonerating his bail for his nonappearance.**

#### **Voluntary enlistment.**

In several cases it has been held that a voluntary enlistment in the military or naval service by the principal in a bail bond does not exonerate the sureties, though it is thereby rendered impossible for them to produce him. State use of Elder v. Reaney (1858) 13 Md. 230; Sayward v. Conant (1814) 11 Mass. 146; Harrington v. Dennie (1816) 13 Mass. 93; Lamphire v. State (1906) 73 N. H. 463, 62 Atl. 786, 6 Ann. Cas. 615. See also State v. Scott (1865) 20 Iowa, 63.

In Sayward v. Conant (1814) 11 Mass. 146, supra, it was held that the voluntary enlistment of the principal was no defense to a scire facias against bail. That decision was followed in State use of Elder v. Reaney (Md.) supra, and Harrington v. Dennie (1816) 13 Mass. 93, supra, the court saying in the case last cited: "The bail bond constitutes a contract, the essence of which is that the principal shall be brought into court, that he may be taken in execution, or that he shall be otherwise found within the precinct of the sheriff; and the legal penalty for the breach of this contract is a satisfaction of the judgment by the bail themselves. To admit that a principal, by a voluntary assumption

of a duty or office which may exempt him from arrest, may defeat this contract, or enable his surety to do it, without the consent of the party interested, would be to violate the common principles of justice, as well as the faith of engagements."

In Lamphire v. State (1906) 73 N. H. 463, 62 Atl. 786, 6 Ann. Cas. 615, it was held that the enlistment of the principal in the United States Navy, whereby the sureties were prevented from surrendering him, was not ground for discharging the sureties, under a statute providing as follows: "When the sureties in a recognizance, without their fault, are prevented from surrendering their principal by the act of God, or of the government of the state or of the United States, or by sentence of law, the supreme court, on petition and notice thereof to the county commissioners and state's counsel, may discharge them on such terms as may be deemed just."

In State v. Scott (Iowa) supra, it appeared that the principal in a bail bond voluntarily enlisted in the Army. After a forfeiture the surety sought to arrest the principal, but was prevented by the military authorities from surrendering him. The court said that if the surety had arrested



the principal before forfeiture and had been prevented from surrendering him, it might perhaps have been a defense, but with respect to an arrest after forfeiture said: "Inasmuch, therefore, as the surety after forfeiture cannot, as a matter of right, be discharged on surrendering the principal, it logically and necessarily follows that the mere fact that he was prevented, by whatever cause, from making such surrender, will not exonerate him."

In other jurisdictions it is held that the voluntary enlistment of the principal is a defense, provided it is shown that by reason thereof it is impossible for him to appear or for the surety to produce him. *Com. v. Terry* (1866) 2 Duv. (Ky.) 383; *People v. Cushney* (1865) 44 Barb. (N. Y.) 118; *McFarland v. Wilbur* (1862) 35 Vt. 342.

In *Com. v. Terry* (Ky.) *supra*, it was said: "To a *scire facias* on a forfeited recognizance for the appearance of Willis Field to answer an indictment against him, the appellees, proceeded against as his sureties, answered that, on the day fixed for his appearance, he, being a soldier in the Federal Army, at a remote distance from the court, was refused a furlough, which he solicited, to enable him to attend in discharge of his recognizance, which he would have done had he not been thus prevented without his fault and against his will. This, if true, was a sufficient defense."

So, in *People v. Cushing* (1865) 44 Barb. (N. Y.) 118, it appeared that the principal had enlisted in the United States Army. At the time fixed for his appearance he applied to his commanding officer for a leave of absence and was refused. It was held that a demurrer to a plea by the sureties setting up these facts was improperly sustained, the court saying that the performance of the obligation of the recognizance was prevented by an act of the law.

In *McFarland v. Wilbur* (1862) 35 Vt. 342, the enlistment of the principal in the Army was held to constitute a good defense to *scire facias* against the sureties, the court saying: "It is

worthy of notice that the act of the extra session, under which the arrest and imprisonment of volunteers in the militia in the United States service, on civil process, was prohibited, was passed after the bail contract was entered into by the defendants, and before the plaintiff obtained his judgment, and issued his execution. In this respect the case differs from those in Massachusetts. If this makes no real difference between them, we think those cases are not supported by sound principle, and we cannot follow them. It seems to us that the whole question hinges upon this: If the defendants had surrendered their principal, could the plaintiff legally have held his body till he satisfied his debt, or would he have been entitled to an immediate discharge, so that such surrender would have been wholly unavailing to the creditor? As before stated, the plaintiff does not claim he could legally have held the body of the principal, if surrendered to be taken in execution by him, and any other construction would render the act of the legislature a mere nullity."

The bare fact of enlistment is not enough to discharge the surety. It must appear that it is impossible for the principal to appear. *Winninger v. State* (1864) 23 Ind. 228. And see the reported case (*BRIGGS v. COM. ante*, 363).

In *Winninger v. State* (Ind.) *supra*, the court said: "To a complaint upon a forfeited recognizance taken in a criminal case, alleging for breach the failure of the principal to appear according to the terms of the condition, an answer was filed by the surety, alleging that, after the recognizance was forfeited, and before the commencement of the suit, the principal enlisted as a volunteer in the Army; wherefore the surety could not surrender him. This is no defense. For aught that appears, the principal enlisted by the surety's advice; nor do we know that the military authorities would not at any time surrender him to the surety on application."

In the reported case (*BRIGGS v. COM.*) the fact that the principal could have obtained a furlough in order to

appear at the time fixed by his recognition, and failed to request it, is held to prevent a discharge of the sureties.

In one case the absence of the principal in the military service under a voluntary enlistment was held to be ground for a continuance of proceedings against the sureties. *Gingrich v. People* (1864) 34 Ill. 448, wherein it was said: "Under the peculiar circumstances of this case and the conditions of the country, the cause should have been continued on the affidavits on behalf of the defendants. It seems from them, they did all that could be expected of them, to take and surrender the principal to answer the indictment. He had enlisted in the Army without the knowledge or consent of his sureties, and they had used reasonable diligence to arrest and surrender him. They seem to have acted in good faith in their efforts to take him. We are inclined to think the fifth and sixth pleas presented no good defense, but show ground for a continuance merely. Under such facts it would be unjust to condemn the defendants

without giving them the fullest time to produce their principal."

#### **Involuntary induction into service.**

The involuntary induction of the principal in a bail bond into military or naval service exonerates the surety, this being a contingency which could not be prevented or provided against. In *Robertson v. Patterson* (1806) 7 East, 405, 103 Eng. Reprint, 157, 3 Smith, 556, there was an application to have an "exoneration" entered as to the defendant's bail, because after arrest and giving bail, and before the bail was fixed, the defendant was forced into service as a seaman. The court held that, since the surrender of the principal would be of no avail to the plaintiff, as he would be entitled to an immediate discharge if surrendered, the surety was exonerated. Since the principal's induction into service was not a voluntary act on his part, but was an act of law which could not be prevented, the sureties cannot be held liable, for nothing in their power could have prevented his entrance into service. See also dictum in the reported case (*BRIGGS v. COM.*). M. J. Q.

B. R. BIAS, Trustee, Plff. in Err.,  
v.

GLOBE & RUTGERS FIRE INSURANCE COMPANY.

*West Virginia Supreme Court of Appeals—November 18, 1919.*

(— W. Va. —, 101 S. E. 247.)

#### **Insurance — vacancy of premises — effect.**

1. A covenant or stipulation in a policy of fire insurance that the entire policy shall be void in case the premises shall become vacant, and so remain longer than a certain period of time, is a reasonable and valid provision, and in case such insured premises are destroyed by fire while vacant, after having so remained for a longer time than allowed by the terms of the policy, the insured, in the absence of a waiver of such condition, will not be entitled to recover the indemnity provided in the policy.

[See note on this question beginning on page 395.]

#### **— waiver by insurer.**

2. The waiver by the insurer of one of the conditions or warranties in a policy of insurance is not evidence

that another condition or warranty therein contained is also waived. Ordinarily a condition, stipulation, or warranty contained in a policy of in-

insurance applicable to the subject-matter can only be waived in the manner provided in the policy, or by some act or conduct upon the part of the insurer, after being informed of the facts constituting a breach of the warranty or stipulation, from which it may reasonably be inferred that such insurer intends the policy to remain in force notwithstanding such breach.

[See 14 R. C. L. 1181.]

— indorsement as to interest — effect on vacancy.

3. Where a policy of fire insurance provides that the entire policy shall be void, unless otherwise provided by

indorsement thereon or attached thereto, if the interest of the insured shall be other than that of unconditional sole ownership, or if the property shall become vacant and unoccupied, and so remain for a period longer than ten days, an indorsement attached to said policy, stating that the interest of the insured is that of fee simple in remainder, after a certain life estate therein mentioned, will not make inapplicable or waive the condition or warranty rendering the policy void in case the premises are vacant at the time of the fire, and had been so vacant for a longer period than that provided in the policy.

**ERROR** to the Circuit Court for Mingo County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Wade H. Bronson and Wiles & Bias, for plaintiff in error:

The effect of the written rider showing the interest of plaintiff to be that of remainderman in fee was, in effect, a waiver of the printed vacancy provision, showed that the insurer knew plaintiff was not and could not be in possession, but that the life tenant was in possession, and therefore the insured is entitled to recover.

16 Cyc. 618; Wright v. Stice, 173 Ill. 571, 51 N. E. 71; Buck v. Binniger, 3 Barb. 391; McCall v. McCall, 2 Walk. (Pa.) 202; Jones v. Freed, 42 Ark. 357; Hugg v. Augusta Ins. & Bkg. Co. Taney, 159, Fed. Cas. No. 6,838; Gunther v. Liverpool & L. & G. Ins. Co. 34 Fed. 501; Hagan v. Scottish Union & Nat. Ins. Co. 98 Fed. 129; Phoenix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; Yoch v. Home Mut. Ins. Co. 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189; Russell v. Manufacturers' & Builders' F. Ins. Co. 50 Minn. 409, 52 N. W. 906; Moore v. Perpetual Ins. Co. 16 Mo. 98; Archer v. Merchants' & Mfrs. Ins. Co. 43 Mo. 434; Wall v. Howard Ins. Co. 14 Barb. 383; Hayward v. Northwestern Ins. Co. 19 Abb. Pr. 116; Sullivan v. Spring Garden Ins. Co. 34 App. Div. 128, 54 N. Y. Supp. 629; Arnold v. Pacific Mut. Ins. Co. 78 N. Y. 7; Chadsey v. Guion, 97 N. Y. 333, affirming 16 Jones & S. 267; Mascott v. First Nat. F. Ins. Co. 69 Vt. 116, 37 Atl. 255; Dole v. New England Mut.

Marine Ins. Co. 2 Cliff. 394, Fed. Cas. No. 3,966; Liscom v. Boston Mut. F. Ins. Co. 9 Met. 205; Pierce v. Charter Oak L. Ins. Co. 138 Mass. 151; Cowles v. Continental L. Ins. Co. 63 N. H. 300; Swinnerton v. Columbia Ins. Co. 37 N. Y. 174, 93 Am. Dec. 560; Burt v. Brewers' & M. Ins. Co. 9 Hun, 383; Patch v. Phoenix Mut. L. Ins. Co. 44 Vt. 481; St. Paul, F. & M. Ins. Co. v. Kidd, 5 C. C. A. 88, 14 U. S. App. 201, 55 Fed. 238; Palatine Ins. Co. v. Ewing, 34 C. C. A. 236, 92 Fed. 111; German Ins. Co. v. Churchill, 26 Ill. App. 206; Jackson v. British American Assur. Co. 106 Mich. 47, 30 L.R.A. 636, 63 N. W. 899; Mascott v. Granite State F. Ins. Co. 68 Vt. 253, 35 Atl. 75; 1 Cooley, Briefs on Ins. pp. 636, 642; Phoenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; Henton v. Farmers & M. Ins. Co. 1 Neb. (Unof.) 425, 95 N. W. 670; McMaster v. New York L. Ins. Co. 78 Fed. 33; Hanover F. Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772; McCollum v. Niagara F. Ins. Co. 61 Mo. App. 352; Logsdon v. Supreme Lodge, F. U. 34 Wash. 666, 76 Pac. 292.

Messrs. Goodykoontz & Scherr and Sexton & Roberts, for defendant in error:

The vacancy and unoccupation of the buildings covered by the policy sued on for a period of twenty-six days, without the knowledge or consent of the defendant, rendered the policy contract null and void under the terms and conditions thereof.

Bond v. National F. Ins. Co. 77 W.

Va. 742, 88 S. E. 389; 19 Cyc. 709, 710; *Alston v. Greenwich Ins. Co.* 100 Ga. 282, 29 S. E. 266; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Duncan v. Sun F. Ins. Co.* 6 Wend. 488, 22 Am. Dec. 539; *Gunther v. Liverpool & L. & G. Ins. Co.* 134 U. S. 110, 83 L. ed. 857, 10 Sup. Ct. Rep. 448; *Rockford Ins. Co. v. Storig*, 137 Ill. 646, 24 N. E. 674; *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Maupin v. Scottish Union & Nat. Ins. Co.* 53 W. Va. 557, 45 S. E. 1003; *L. Rosenthal Clothing & Dry Goods Co. v. Scottish Ins. Co.* 55 W. Va. 238, 46 S. E. 1021; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; *Joyce, Ins.* 2d ed. 1918, §§ 2225, 2280; 2 *Cooley, Briefs on Ins.* pp. 1679, 1681, 1683; *Burner v. German-American Ins. Co.* 103 Ky. 370, 45 S. W. 109; *Patterson v. American Ins. Co.* 164 Mo. App. 157, 148 S. W. 448; *Herriman v. Adriatic F. Ins. Co.* 85 N. Y. 162, 39 Am. Rep. 644; *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 487, 52 Am. St. Rep. 877, 43 N. E. 1093; *Schmidt v. Williamsburgh City F. Ins. Co.* 95 Neb. 43, 51 L.R.A. (N.S.) 261, 144 N. W. 1044; *Dennison v. Phoenix Ins. Co.* 52 Iowa, 457, 3 N. W. 500; *Moore v. Phoenix F. Ins. Co.* 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27.

Ritz, J., delivered the opinion of the court:

On August 26, 1916, the defendant issued to the plaintiff a policy of fire insurance covering for one year a house in the city of Williamson, West Virginia; and providing for indemnity in the sum of \$1,500. The policy was issued on what is known as the New York standard form, and provides that the same shall be void, unless otherwise provided by agreement indorsed thereon or attached thereto, if the interest of the insured be other than unconditional sole ownership, and further, that the said policy shall be void if the building described becomes vacant or unoccupied, and so remains for ten days. There are many other stipulations, conditions, and warranties contained in the policy, but these are the ones that are

particularly involved in this litigation. The plaintiff owned the remainder in the property after the life estate of Sylvania Wolford, and for the purpose of showing his real interest in it an indorsement was attached to the policy as follows: "This policy covers the fee-simple interest of B. R. Bias, trustee, in the remainder of the property insured after the life estate of Sylvania Wolford in house and improvements on lot 7, block 13, Williamson, West Virginia."

At the time the policy was issued, and at the time of the fire, the life tenant was living. The house was destroyed by fire on the 19th of May, 1917. It had been vacant and unoccupied from the 23d of April preceding. It is agreed that neither the insured nor the insurer knew that the premises were vacant during this period. Because of the fact that the house was vacant and unoccupied at the time of the fire, and had been so vacant and unoccupied for more than ten days, the insured refused to pay the indemnity provided in the policy, and this suit was brought for the purpose of recovering the same.

It is very uniformly held that a condition or stipulation in a policy of fire insurance, providing that the same shall be rendered void if the premises insured shall remain vacant and unoccupied for a specific length of time, is a reasonable and binding condition, and should such premises be destroyed by fire while vacant and unoccupied, and after the same had so remained for a longer time than that provided in the policy, the insurer will be discharged from paying the indemnity therein provided. *Joyce, Ins.* § 2229; 2 *Cooley, Briefs on Ins.* pp. 1652 et seq.; 19 Cyc. 726; 14 R. C. L. title "Insurance," §§ 281 et seq. Indeed, it is not contended by the insured that this stipulation is not a reasonable and binding one, but he insists that when the company placed the indorsement thereon, showing that he was the owner of

Insurance—  
vacancy of  
premises—effect.

the remainder after the life estate of Sylvania Wolford, it thereby had information that he was not entitled to the possession of the property, and could not control the same, and, having this information, it waived the condition in the policy requiring the premises to be occupied. His contention is that when the insurer wrote the policy, with the knowledge that he was a remainderman, and did not have the right to the possession of the property, it thereby waived the performance upon his part of all promissory warranties, which could only be performed by one having the possession, or the right to the possession, and because of the fact that only one having the possession, or the right to the possession, could control the occupancy of the premises, this condition avoiding the policy in case the same became vacant and unoccupied did not apply to the estate covered by this policy of insurance.

Counsel in argument admit that they can find no authority on either side of this proposition, and after a careful search we are likewise unable to find any case directly in point, or even any authority from which a reasonable analogy can be drawn. There are many cases which hold that, where one insures his property and assigns the policy to a mortgagee, the mortgagee will not be permitted to collect the indemnity provided in the policy, unless the owner could have collected it in case there had been no assignment; but these cases furnish no authority for the proposition here, for the reason that the estate insured in that class of cases is that of the owner, and the mortgagee is simply the party appointed to receive the money in case of loss. There is another class of cases which arises under what is known as the "union mortgage clause." This clause provides that the mortgagee, to whom the policy is assigned, is not to be affected by the defaults of any other party, and under such a provision it has been very uniformly held that

the mortgagee could collect the insurance in a case in which the insured would be barred because of the breach of some condition on his part; but this right to recover is based upon the fact that by agreeing to that stipulation the insurer makes a new contract with the mortgagee, agreeing with him to pay the indemnity, even though the insured should be guilty of a breach of some of the conditions of the policy, and the right to recover in these cases is based upon this special agreement. It has also been held that, where a mortgagee insures his own interest in real estate as such, he may recover upon the policy of insurance, notwithstanding the property may have been treated in such manner by the owner as to avoid the insurance if it had been procured by him. For instance, it is held that, where a mortgagee insures his interest in real estate, the policy will not be avoided because the owner of the equity of redemption sells or encumbers his interest; but this throws no light upon the question we have here, for the reason that the covenant in the policy is not against alienation of any interest except that which is insured, and so long as the interest insured is not alienated or encumbered that condition of the policy is not broken.

Can it be said that by placing the indorsement upon the policy above referred to the insurer in this case waived the condition in the policy relied upon to defeat recovery, or made that condition inapplicable to the estate insured? It must be borne in mind that there are many conditions and promissory warranties contained in this policy, and if it should be held that by indorsing the policy, so as to show the real interest of the insured, the company thereby made inapplicable to the estate insured the condition avoiding it in case of vacancy, it would also make inapplicable the covenants and conditions in regard to the use of the premises for various purposes, such as having inflammables stored therein, or being

(— W. Va. —, 101 S. E. 217.)

occupied by certain kinds of businesses, or covenants in regard to other conditions which are required to be kept, looking to greater safety from destruction by fire. None of these covenants would be applicable, if the plaintiff's contention is correct. It cannot be contended that the indorsement expressly waives the performance of any of these conditions. In construing this indorsement we must bear in mind that there is a condition in the policy rendering it absolutely null and void if the interest of the insured is other than unconditional sole ownership, so that without this indorsement upon the policy it would have been void from the beginning. The insurance company was willing to accept the risk even though the interest of the insured was only a remainder; but can it be said that the obligation was not upon the insured to perform and keep all of the other covenants contained in the contract? The policy contemplates that all of these conditions and stipulations shall be applicable unless otherwise provided by an indorsement attached to the policy, and it seems to us that it would be straining construction past the breaking point to say that by

—waiver by insurer.

waiving one condition and stipulation

the insurer thereby waived every other one in any wise connected with the one waived by the indorsement.

It is true the insured did not have the possession or the right to the possession of the premises, but that does not make the covenant inapplicable. It simply made the right of the insured to recover depend upon what a third party might do with his property, and there is no reason why a contract depending for its validity upon such a contingency should not be held as binding as any other. The insured may not have as absolute protection as though he were in possession of the premises

himself, but he is offered the protection provided by the policy so long as the premises are used and occupied in the manner that such property is ordinarily used by the owners thereof. It is not very different from the case in which the insured has the premises leased, and some of his tenants, without his knowledge and against his commands, violate some of the promissory warranties contained in the policy of insurance. It is uniformly held in such cases that the insured cannot recover, even when such violations are entirely unknown to him. 19 Cyc. 727 and authorities there cited. As we said in the case of Bond v. National F. Ins. Co. 77 W. Va. 736-750, 88 S. E. 389, the fact that the insurer waived one condition or stipulation in the policy of insurance does not necessarily mean that he waived another. The company may be entirely willing that one covenant or warranty shall not be applicable as between it and the insured; but it does not, by waiving the performance of that condition or covenant upon the part of the insured, make inapplicable any other covenant or condition contained in the policy which would, in the absence of such waiver, apply to the subject-matter of the insurance.

—indorsement as to interest—  
effect on vacancy.

We are of opinion that the findings of the court below in favor of the defendant are correct, and the judgment rendered upon such findings will be affirmed.

#### NOTE.

The reported case (BIAS v. GLOBE & R. F. INS. CO. ante, 373) seems to be a case of first impression as to liability of an insurance company under a policy issued to a remainderman, for loss to property which had been vacant for a longer period than that provided for in the policy.

EUNICE HAYCOCK, Appt.,

v.

## SOVEREIGN CAMP, WOODMEN OF THE WORLD.

*Wisconsin Supreme Court — December 9, 1915.*

(162 Wis. 116, 155 N. W. 928.)

**Insurance — automatic suspension for nonpayment of assessments.**

1. Under a provision of a mutual benefit certificate that suspension of a member for nonpayment of assessments occurs on the first day of the month following default in such payment, no recovery can be had on a certificate where the death of the member occurs while default continues beyond the first of the month following that in which the assessment became due.

[See note on this question beginning on page 395.]

— **mutual benefit — provision against effect of knowledge of collector.**

2. A mutual benefit society may provide that notice to the clerk of a local camp of matters not necessarily involved in or part of his duty of collection and remittance of assessments will not be notice to the supreme lodge.

— **provisions for insurance for term.**

3. A mutual benefit society may provide for a benefit covering only such

period as is covered by each successive payment of assessments, and terminating at the end of such period, to be revived for a like period by a new payment or reinstatement of the member.

— **duty to continue advancement.**

4. The secretary of a local camp of a mutual benefit society does not, by advancing assessments for a member, become bound to continue making such advancements.

APPEAL by plaintiff from a judgment of the Circuit Court for Sauk County (O'Neill, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bentley, Kelley, & Hill for appellant.

Messrs. V. H. Cady and Grotphorst, Evans, & Thomas for respondent.

Timlin, J., delivered the opinion of the court:

This action is by the beneficiary named in a death benefit certificate issued by a Nebraska corporation called "Sovereign Camp of the Woodmen of the World." The defendant is organized on the plan of having one principal or head lodge or camp with numerous local or subordinate camps, to each of which it issues what is called a charter. In the certificate and in the by-laws each member is called a sovereign, and he is also entitled, in case he has complied with all the conditions of the beneficiary certificate and by-laws, to a death benefit ranging

from \$1,000 to \$3,000. The certificate in this case was dated August 26, 1911, and the husband of the plaintiff, "Sovereign Harry C. Haycock," died September 21, 1912. Local lodges or camps apparently attend to the business of collecting and remitting assessments to the defendant, and also securing members, largely through their social and fraternal features. Assessments are made monthly. Among the by-laws is one which provides that the suspension of a member for nonpayment of assessments occurs on the first day of the month following default. No notice of assessment is given by the principal lodge to the member, and the local camps have no power of suspension of members. The mere failure to pay an assessment ipso facto causes sus-

pension, and thereupon the certificate becomes void until the member is reinstated. A suspended member may, if he is in good health, be reinstated on payment within ten days. After that time, only on certain proof being made, etc. The by-laws also provide that no officer or employee or agent of the sovereign camp, nor of any camp, has the power, right, or authority to waive any of the conditions upon which the beneficiary certificates are issued, or to change, vary, or waive any of the provisions of the constitution or by-laws. "The clerk of a camp shall not, by acts, representations, waivers, or by vote of his camp, have any power or authority not delegated to him or to the camp by the constitution and laws of the order to bind the sovereign camp or his camp." The organization is quite similar to that noticed in *Jones v. Modern Brotherhood*, 153 Wis. 223, 140 N. W. 1059; *Knoebel v. North American Acci. Ins. Co.* 135 Wis. 424, 20 L.R.A. (N.S.) 1037, 115 N. W. 1094. The controversy here must be disposed of under the rules of law established by these cases and other complementary cases. We find no statute of this state, and we are cited to none, prohibiting the enactment of such laws or the making of such a contract by fraternal or mutual benefit corporations.

Deceased defaulted nearly every month from the date of the certificate, but payments were for a time advanced for him by the clerk of the local camp, whom he repaid. Assessment No. 260 for May, 1912, was unpaid, and the local clerk advanced this for deceased. Deceased also defaulted on the June assessment, No. 261, and this was not advanced. On July 12, 1912, deceased was, by the local clerk, reported for suspension on this last default. Two days after, the local clerk collected from deceased the amount of assessments Nos. 260 and 261, including the latter by mistake. The secretary thought he had, since last payment by assured, advanced two assessments for deceased, but he

had in fact advanced only the May assessment, No. 260. The secretary did not remit to the chief lodge assessment No. 261, nor report any payment, nor report deceased for reinstatement. But deceased also defaulted in July and August, and made no attempt to pay, and no inquiry concerning his membership after July 14, 1912.

We need not in this case decide how far the defendant might go in authorizing the local clerk to collect from members, and at the same time limit the scope of his agency so that in making and remitting such collection he did not act as agent of the defendant. In the state of defendant's domicile (*Henton v. Sovereign Camp*, W. W. 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869) and elsewhere (*Murphy v. Independent Order*, S. D. J. A. 77 Miss. 830, 50 L.R.A. 111, 27 So. 624; *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369; *Knights of Columbus v. Burroughs*, 107 Va. 671, 60 S. E. 40, with notes in 17 L.R.A. (N.S.) 246 et seq.) all seem to considerably limit the power. The defendant could at least provide that notice to the local clerk of

Insurance—  
mutual benefit—  
provision  
against effect of  
knowledge of  
collector.

matters not necessarily involved in, or part of, his duty of collection and remittance, would not be notice to the supreme lodge. *Jones v. Modern Brotherhood*, 153 Wis. 223, 140 N. W. 1059. It could also provide for a death benefit covering only such period as was covered by each successive payment, and terminating at the end of such period, to be revived for a like period by a new payment and reinstatement of the member. This it seems to have done.

—provisions for  
insurance for  
term.

When the local secretary advanced the assessments for deceased he did so as the agent of the deceased. He was not bound to continue making such advances. He failed to advance for June and the plaintiff became suspended

—duty to con-  
tinue advance-  
ment.



July. 1st. On July 14th, more than ten days after default, he paid the June assessment to the local secretary, and the latter by mistake failed to bring this to the notice of the defendant. The suspension therefore continued. Had the member paid for July and August the continuation of this suspension might perhaps be challenged; but the ipso facto provisions above alluded to would make default for July and August conclusive, even if the defendant were estopped to take advantage of the June default. This makes it unnecessary to consider rulings on evidence, for the foregoing facts are undisputed.

—automatic suspension for nonpayment of assessments.

Judgment affirmed.

#### NOTE.

The reported case (*HAYCOCK v. SOVEREIGN CAMP*, W. W. ante, 378) is illustrative of one of the many forms of provisions suspending insurance during delinquency in payment of premiums or assessments which have been held to be automatic or self-operative. This case, together with others which involve other provisions which have been held of the same effect, is treated in II. a, of the annotation following *CONTINENTAL INS. CO. v. STRATTON*, post, 398, upon the general question "Provisions suspending insurance during default in payment of premiums or assessments as affected by failure of insured to declare a suspension before loss."

FLORA A. VALENTINE, Resp.,

v.

HEAD CAMP, PACIFIC JURISDICTION, WOODMEN OF THE WORLD, Appt.

*California Supreme Court (In Banc) — April 4, 1919.*

(— Cal. —, 180 Pac. 2.)

**Insurance — acceptance of past-due assessments — effect.**

1. Failure of a member of a mutual benefit society to pay his assessments promptly, the consequence of which under the laws of the association is to remove him from good standing, will prevent recovery on his certificate in case of his death, notwithstanding the clerk of the local camp accepted his overdue assessments from time to time, and failed to report him as delinquent, if the clerk had no power to waive the laws of the order.

[See note on this question beginning on page 395.]

— mutual benefit — power of local camp officers to waive constitutional provisions.

2. Under provisions of a mutual benefit society making clerks of local camps the agents of such camps and members, and not of the head camp, and declaring that no officer has any power to change, alter, modify, or waive the requirements of the constitution, a local clerk cannot reinstate a delinquent member by receiving payment of his assessment without his complying with the requirements of the constitution as to furnishing a certificate of health.

[See 19 R. C. L. 1244.]

— reinstatement after suffering broken neck.

3. A delinquent member of a mutual benefit society cannot be reinstated after meeting with an accident which results in a broken neck, which caused his death, if the conditions of the order relating to reinstatement require an express warranty of present sound bodily health.

[See 19 R. C. L. 1244.]

— knowledge of local clerk — effect.

4. Knowledge by the local camp clerk of the condition of a member of a mutual benefit society who applies for reinstatement after suffering a broken neck does not estop the society

(— Cal. —, 180 Pac. 2.)

from contesting liability on his certificate because of falsity of warranty in the required application for reinstatement that he was in sound health, where the local clerk had no power to waive any provision of the laws of the society.

[See 14 R. C. L. 1191; 19 R. C. L. 1244, 1245.]

— retention of overdue assessment — effect.

5. The retention by the local camp

clerk of money paid to reinstate a member who has suffered a broken neck, until his death, which occurs a few days later, does not estop the society from contesting liability on his certificate because of failure to secure reinstatement, if the local clerk has no authority to waive any provision of the laws of the society, and no knowledge of the attempted reinstatement comes to the officers of the head camp until after the member's death.

**APPEAL** by defendant from a judgment of the Superior Court for Alameda County (Arnot, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a benefit certificate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Robinson & Robinson & Price, for appellant:

Under the conditions of the benefit certificate and the provisions of the constitution, Valentine stood a suspended and delinquent member,—a member not in good standing by reason of his failure to pay his assessments and dues and his being reported as delinquent to the head camp.

Butler v. Grand Lodge, A. O. U. W. 146 Cal. 172, 79 Pac. 861; Marshall v. Grand Lodge, A. O. U. W. 133 Cal. 686, 66 Pac. 25; Carlson v. Supreme Council, A. L. H. 115 Cal. 466, 35 L.R.A. 643, 47 Pac. 375; Valentine v. Grand Lodge, A. O. U. W. 17 Cal. App. 317, 119 Pac. 671; Neto v. Conselho Amor Da Sociedade, 18 Cal. App. 234, 122 Pac. 973; Niblack, Ben. Soc. § 289.

Mr. Valentine and his beneficiary, the plaintiff, in connection with the execution and delivery by the insured of a reinstatement application, were guilty of such a breach of warranty and of such fraud as to prevent a valid reinstatement, and to preclude any recovery.

Elliott v. Frankfort Marine, Acci. & Plate Glass Ins. Co. 172 Cal. 261, L.R.A.1916F, 1026, 156 Pac. 481; Madsen v. Maryland Casualty Co. 168 Cal. 204, 142 Pac. 51; Iverson v. Metropolitan L. Ins. Co. 151 Cal. 746, 13 L.R.A. (N.S.) 866, 91 Pac. 609; Caldwell v. Grand Lodge, U. W. 148 Cal. 195, 2 L.R.A. (N.S.) 653, 113 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas. 356; Scoles v. Universal L. Ins. Co. 42 Cal. 523; Security L. Ins. Co. v. Booms, 81 Cal. App. 119, 159 Pac. 1000; McEwen v. New York L. Ins. Co. 23 Cal. App. 694, 139 Pac. 242; Porter v. General Acci. Fire & Life Assur. Corp. 30 Cal. App.

198, 157 Pac. 825; Westphall v. Metropolitan L. Ins. Co. 27 Cal. App. 734, 151 Pac. 159; Hogins v. Supreme Council, C. R. C. 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125; McKenzie v. Scottish Union & Nat. Ins. Co. 112 Cal. 548, 44 Pac. 922; Mutual L. Ins. Co. v. Hilton-Green, 241 U. S. 613, 60 L. ed. 1202, 36 Sup. Ct. Rep. 676; 2 Bacon, Life & Acci. Ins. 4th ed. § 496, note 700; Hartman v. National Council, 76 Or. 153, L.R.A.1915E, 152, 147 Pac. 931; Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A. (N.S.) 421, 92 N. W. 206; Crosse v. Supreme Lodge, K. L. H. 254 Ill. 80, 45 L.R.A. (N.S.) 162, 98 N. E. 261; Loehr v. Supreme Assembly, E. F. U. 132 Wis. 436, 112 N. W. 441; Mudge v. Supreme Court, I. O. F. 149 Mich. 467, 14 L.R.A. (N.S.) 279, 119 Am. St. Rep. 686, 112 N. W. 1130; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297; Hoagland v. Modern Woodmen, 157 Mo. App. 15, 137 S. W. 900; Knights of Maccabees v. Shields, 156 Ky. 270, 49 L.R.A. (N.S.) 858, 160 S. W. 1043; Mutual L. Ins. Co. v. Robinson, 115 Md. 408, 80 Atl. 1085; Smith v. Bankers Life Asso. 157 Ill. App. 286; Davis v. Catholic Order of Foresters, 165 Ill. App. 137; Supreme Ruling, F. M. C. v. Hansa, — Tex. Civ. App. —, 153 S. W. 351; Bertrand v. Franklin L. Ins. Co. 119 La. 423, 44 So. 186; Powell v. Prudential Ins. Co. 153 Ala. 611, 45 So. 208; Mutual L. Ins. Co. v. Allen, 174 Ala. 511, 56 So. 568; Sovereign Camp, W. O. W. v. Jones, 11 Ala. App. 433, 66 So. 834; Kennedy v. Grand Fraternity, 36 Mont. 325, 25 L.R.A. (N.S.) 73, 92 Pac. 971.

Insured, after he stood suspended for failure to pay dues and assessments, failed to comply with the laws

of the order as to reinstatement, and hence never was reinstated in said order.

*Supreme Lodge, F. B. v. Price*, 27 Cal. App. 607, 150 Pac. 803; *Marshall v. Grand Lodge, A. O. U. W.* 133 Cal. 686, 66 Pac. 25; *Locomotive Engineers' Mut. L. & Acci. Ins. Asso. v. Thomas*, 124 C. C. A. 291, 206 Fed. 409; *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L. ed. 879, 83 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

Since there was no proper pleading of waiver, the judgment for plaintiff on the theory of a waiver was error.

*Burk v. Santa Cruz*, 163 Cal. 807, 127 Pac. 154; *Chapman v. Hughes*, 134 Cal. 641, 66 Pac. 982, 60 Pac. 974; *Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258; *Modern Woodmen v. Angle*, 127 Mo. App. 117, 104 S. W. 297; *Flickinger v. Wrenn Invest. Co.* 172 Cal. 132, 155 Pac. 627; *Goorberg v. Western Assur. Co.* 150 Cal. 519, 10 L.R.A. (N.S.) 876, 119 Am. St. Rep. 346, 89 Pac. 130, 11 Ann. Cas. 801; *Newhall v. Hatch*, 134 Cal. 269, 55 L.R.A. 673, 66 Pac. 266; *Etcheborne v. Auzeais*, 45 Cal. 122; *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 157; *Clarke v. Huber*, 25 Cal. 594; *Fritz v. Mills*, 12 Cal. App. 113, 106 Pac. 725; 8 Am. & Eng. Enc. Law, 9; 31 Cyc. 459; *Morton v. Bartning*, 68 Cal. 306, 9 Pac. 146; *Harney v. Applegate*, 57 Cal. 205; *Scott v. McPherson*, 168 Cal. 783, 145 Pac. 529.

Even conceding, for the sake of argument, that the pleading and evidence upon waiver should be allowed to stand, such evidence is insufficient to prove waiver.

*Lavin v. Grand Lodge, A. O. U. W.* 104 Mo. App. 1, 78 S. W. 325; *Schmidt v. Modern Woodmen*, 84 Wis. 101, 54 N. W. 264; *Mutual L. Ins. Co. v. Girard L. Ins. Annuity & T. Co.* 100 Pa. 172; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671.

Plaintiff, having relied upon Valentine's reinstatement, assumed the burden of proof upon that question.

2 Bacon, Ben. Soc. 3d ed. § 469; *Brun v. Supreme Council, A. L. H.* 15 Colo. App. 538, 63 Pac. 796; *Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A. (N.S.) 78, 92 Pac. 971.

Waiver and estoppels are not favored.

*Wheaton v. North British & M. Ins. Co.* 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758; *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129; *McCarthy v. Mu-*

*tual Relief Asso.* 81 Cal. 584, 22 Pac. 983.

Waiver or estoppel can only be predicated upon a clear statement of fact by insurer.

*Supreme Lodge, F. B. v. Price*, 27 Cal. App. 607, 150 Pac. 803; *McKeen v. Naughton*, 88 Cal. 467, 26 Pac. 354; *Wheaton v. North British & M. Ins. Co.* supra; 11 Am. & Eng. Enc. Law, 425.

There can be waiver only by one having power to waive.

*Marshall v. Grand Lodge, A. O. U. W.* 133 Cal. 686, 66 Pac. 25; *Borgraefe v. Supreme Lodge, K. L. H.* 22 Mo. App. 127; *Harvey v. Grand Lodge, A. O. U. W.* 50 Mo. App. 472; *Bacon, Ben. Soc.* § 148; *Butler v. Grand Lodge, A. O. U. W.* 146 Cal. 172, 79 Pac. 861; *Carlson v. Supreme Council, A. L. H.* 115 Cal. 466, 35 L.R.A. 643, 47 Pac. 375; *Iverson v. Metropolitan L. Ins. Co.* 151 Cal. 746, 13 L.R.A. (N.S.) 866, 91 Pac. 609; *Fidelity & C. Co. v. Fresno Flume & Irrig. Co.* 161 Cal. 466, 87 L.R.A. (N.S.) 322, 119 Pac. 646; *Sharman v. Continental Ins. Co.* 167 Cal. 117, 52 L.R.A. (N.S.) 670, 138 Pac. 708; *Belden v. Union Cent. L. Ins. Co.* 167 Cal. 740, 141 Pac. 370; *Madsen v. Maryland Casualty Co.* 168 Cal. 204, 142 Pac. 51; *Elliott v. Frankfort Marine Acci. & Plate Glass Ins. Co.* 172 Cal. 261, L.R.A. 1916F, 1026, 156 Pac. 481; *Westphall v. Metropolitan L. Ins. Co.* 27 Cal. App. 734, 151 Pac. 159; *Browne v. Commercial Union Assur. Co.* 30 Cal. App. 547, 158 Pac. 765; *Porter v. General Acci. Fire & Life Assur. Corp.* 30 Cal. App. 193, 157 Pac. 825; *Northwestern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Aetna L. Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186.

Payment to the local camp officer, while making an express or implied false representation to the order that the member was in good health, will not effect reinstatement or restoration of rights, or amount to a waiver, even though the local camp officer was acquainted with the fact of ill health.

*Royal Highlanders v. Scovill*, 66 Neb. 213, 4 L.R.A. (N.S.) 421, 92 N. W. 206; *Mudge v. Supreme Court, I. O. F.* 149 Mich. 467, 14 L.R.A. (N.S.) 279, 119 Am. St. Rep. 686, 112 N. W. 1180; *Hartman v. National Council*, 76 Or. 153, L.R.A. 1915E, 152, 147 Pac. 931; *Day v. Supreme Forest, W. C.* 174 Mo. App. 269, 156 S. W. 721; *Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.

(— Cal. —, 180 Pac. 2.)

(N.S.) 78, 92 Pac. 971; Schmidt v. Modern Woodmen, 84 Wis. 101, 54 N. W. 264; Sovereign Camp, W. W. v. Jones, 11 Ala. App. 433, 66 So. 884; Bixler v. Modern Woodmen, 112 Va. 678, 88 L.R.A. (N.S.) 571, 72 S. E. 704; Marshall v. Women's Mut. Ins. & Acci. Co. 26 Jones & S. 406, 11 N. Y. Supp. 700; Koehler v. Modern Brotherhood, 160 Mich. 180, 136 Am. St. Rep. 424, 125 N. W. 49; Eaton v. Supreme Lodge, 29 N. E. 1123, note; Miles v. Mutual Reserve Fund Life Asso. 108 Wis. 421, 84 N. W. 159; Driscoll v. Modern Brotherhood, 77 Neb. 282, 109 N. W. 158; Ronald v. Mutual Reserve Fund Life Asso. 132 N. Y. 378, 30 N. E. 739; McCoy v. Roman Catholic Mut. Ins. Co. 152 Mass. 272, 25 N. E. 239; United Moderns v. Pike, — Tex. Civ. App. —, 76 S. W. 774; Kocher v. Supreme Council, C. B. L. 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 637, 48 Atl. 544; Woodmen of World v. Jackson, 80 Ark. 419, 97 S. W. 673; Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 328, 109 Pac. 81; Supreme Lodge, K. P. v. Quinn, 78 Miss. 525, 29 So. 826; Hay v. People's Mut. Benev. Asso. 143 N. C. 256, 55 S. E. 623; Bennett v. Sovereign Camp, W. W. — Tex. Civ. App. —, 168 S. W. 1023; Sovereign Camp, W. W. v. Wagon, — Tex. Civ. App. —, 164 S. W. 1062; Brotherhood of Railroad Trainmen v. Dee, 101 Tex. 597, 111 S. W. 396; Lyon v. Supreme Assembly, R. S. G. F. 153 Mass. 83, 26 N. E. 236; Supreme Lodge, K. H. v. Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084; Day v. Supreme Forest, W. C. 174 Mo. App. 260, 156 S. W. 721; Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 13 L.R.A. (N.S.) 856, 89 Pac. 929; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 773; Matkin v. Supreme Lodge, K. H. 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306; Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; McLendon v. Woodmen of World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36; Borgraefe v. Supreme Lodge, K. L. H. 22 Mo. App. 127; State ex rel. Young v. Temperance Benev. Asso. 42 Mo. App. 485; Supreme Lodge, K. L. D. v. Anderson, 146 Ky. 481, 142 S. W. 1069; Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Madsen v. Maryland Casualty Co. 168 Cal. 204, 142 Pac. 51; Elder v. Grand Lodge, A. O. U. W. 79 Minn. 468, 82 N. W. 987; Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Toelle v. Cen-

tral Verein, 97 Wis. 322, 72 N. W. 630; Sterling v. Head Camp, P. J. W. W. 28 Utah, 508, 90 Pac. 875; Clair v. Supreme Council, R. A. 172 Mo. App. 709, 155 S. W. 892; Order of United Commercial Travelers v. Young, 128 C. C. A. 648, 212 Fed. 132; Supreme Council, R. A. v. Taylor, 57 C. C. A. 406, 121 Fed. 66; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 773; National Council, J. O. U. A. M. v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 132; Brown v. Great Camp, K. M. M. 167 Mich. 123, 132 N. W. 562; Odd Fellows Ben. Asso. v. Smith, 101 Miss. 332, 58 So. 100.

The retention of dues by the local officer, when such action has not been ratified by the head camp with full knowledge of the facts, cannot constitute waiver or estoppel.

Swett v. Citizens' Mut. Relief Soc. 78 Me. 541, 7 Atl. 394; Sovereign Camp, W. W. v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553; Ronald v. Mutual Reserve Fund Life Asso. 132 N. Y. 378, 30 N. E. 739; Thompson v. Travelers' Ins. Co. 11 N. D. 274, 91 N. W. 75, 13 N. D. 444, 101 N. W. 900; Blaeser v. Milwaukee Mechanics' Mut. Ins. Co. 37 Wis. 31, 19 Am. Rep. 747; Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358; United States L. Ins. Co. v. Smith, 84 C. C. A. 506, 92 Fed. 503; Busta v. Court of Honor, 172 Ill. App. 71; Lewis v. Phoenix Mut. L. Ins. Co. 39 Conn. 100; Lyon v. Supreme Assembly, R. S. G. F. 153 Mass. 83, 26 N. E. 236; Mulrey v. Shawmut Mut. F. Ins. Co. 4 Allen, 116, 81 Am. Dec. 689; Busby v. North American L. Ins. Co. 40 Md. 572, 17 Am. Rep. 634; Provident Sav. Life Assur. Soc. v. Whayne, 181 Ky. 84, 93 S. W. 1049.

There is no waiver where the supreme body receives and retains the dues, where it has no knowledge of the fact that the dues were received in contravention of its laws, even though the subordinate officers who received such dues did have such knowledge.

National Council, J. O. U. A. M. v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 132; Brown v. Great Camp, K. M. M. 167 Mich. 123, 132 N. W. 562; Modern Woodmen v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806; Royal Highlanders v. Scovill, 66 Neb. 218, 4 L.R.A. (N.S.) 421, 92 N. W. 206; Garbutt v. Citizens' Life & Endowment Asso. 84 Iowa, 293, 51 N. W. 148; Mutual Reserve Fund Life Asso. v. Lovenberg, 24 Tex. Civ. App. 355, 59 S. W. 314; Conway v.

Minnesota Mut. L. Ins. Co. 62 Wash. 37, 40 L.R.A. (N.S.) 148, 112 Pac. 1106; Grand Lodge, A. O. U. W. v. Cressey, 47 Ill. App. 616; *Kempe v. Modern Woodmen*, — Tex. Civ. App. —, 44 S. W. 688; *Pauley v. Modern Woodmen*, 118 Mo. App. 473, 87 S. W. 990; Supreme Council, R. L. v. Moerschbaecher, 88 Ill. App. 89, affirmed in 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17; *Knights of Columbus v. Burroughs*, 107 Va. 671, 17 L.R.A. (N.S.) 246, 60 S. E. 40; *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358; *Goorberg v. Western Assur. Co.* 150 Cal. 510, 10 L.R.A. (N.S.) 876, 119 Am. St. Rep. 246, 89 Pac. 130; *McCormick v. Orient Ins. Co.* 86 Cal. 260, 24 Pac. 1008; *McCormick v. Springfield F. & M. Ins. Co.* 66 Cal. 361, 5 Pac. 617.

Where the by-laws in existence at the time the member joined an order do not contain an express limitation to the effect that only those by-laws are binding, and where such by-laws contain provision for their amendment, any change subsequently made, and not unfair or unreasonable, is valid and binding upon such member.

*Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Valentine v. Grand Lodge, A. O. U. W.* 17 Cal. App. 317, 119 Pac. 671; *Caldwell v. Grand Lodge, U. W.* 148 Cal. 195, 2 L.R.A. (N.S.) 653, 118 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas. 356; *Hass v. Mutual Relief Asso.* 118 Cal. 6, 49 Pac. 1056; *Lawson v. Hewell*, 118 Cal. 618, 49 L.R.A. 400, 50 Pac. 763; *Neto v. Conselho Amor Da Sociedade*, 18 Cal. App. 234, 122 Pac. 973; *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; *Bowie v. Grand Lodge, L. W.* 99 Cal. 392, 34 Pac. 108; *Thomas v. Knights of Maccabees*, 85 Wash. 665, L.R.A. 1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804.

Waiver must be manifested in some unequivocal manner, and there must be an intention to waive, in order to establish an effective waiver.

*First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; *Thompson v. Gorner*, 4 Cal. Unrep. 606, 36 Pac. 434; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Aronson v. Frankfort Acci. & Plate Glass Ins. Co.* 9 Cal. App. 473, 99 Pac. 537; *Maloney v. Northwestern Masonic Aid Asso.* 8 App. Div. 575, 40 N. Y. Supp. 918; *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App.

548, 83 Fed. 631; *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19; *Thompson v. Metropolitan L. Ins. Co.* 99 N. Y. Supp. 1006.

Mr. J. C. Nichols also for appellant. Messrs. Stanley Moore, George K. Ford, and Wilder Wight for respondent.

Angellotti, Ch. J., delivered the opinion of the court:

This action was brought by plaintiff to recover upon a fraternal benefit certificate issued by defendant to her husband, Clarence A. Valentine, which provided for payment to her upon his death, if then in good standing, of the sum of \$3,000. Judgment was given in favor of the plaintiff by the trial court, and we have here an appeal by defendant from such judgment.

The defendant is a mutual fraternal organization maintained on the lodge plan, purely for the mutual benefit of its members, and, among other things, to provide and maintain, by means of assessments on its members, a benefit fund from which is paid to designated relatives or dependents of each deceased member who is in good standing at the time of his death, such sum, either \$1,000, \$2,000, or \$3,000, as is specified in his benefit certificate. It consists of a national or supreme body known as the head camp, and local organizations or lodges, known as camps. As is usual in this kind of association, the supreme authority of the association is vested in the supreme body, the head camp, which, at its head camp sessions, composed of the officers of the supreme body, delegates from the local camps, and past head consuls, made its laws, elected its officers, etc. The matters of the issuance of benefit certificates, levy of assessments, etc., were in the hands of the head camp; the business relative thereto, being conducted by the officers of the head camp in accord with the provisions of the constitution and by-laws adopted by the head camp sessions. The collection of the assessments was in the hands of the local camps, and

particularly of the clerks of the local camps, who received from the members of their respective camps amounts due for assessments and local camp dues, forwarding the former, as collected, to the proper head camp officers, who were required to keep the accounts showing the situation as to each member.

Mr. Valentine became a member of defendant association in the year 1901, his benefit certificate being dated January 16, 1901, and subsequently affiliated with the local camp at Oakland, California, known as "Bay Tree Camp, No. 640." He died on August 22, 1912. The controversy in this case is as to his good standing as a member of defendant association at the time of his death, the terms of his benefit certificate expressly providing, as required by the constitution of the order, that the beneficiary is entitled to "participate in its benefit fund after his death when in good standing, and not otherwise," and that the certificate will not be in force at any time when the member stands suspended and is not in good standing pursuant to the constitution and by-laws "now in force or hereafter regularly adopted and in force at the time of his death." To remain in good standing it was imperatively required by the constitution and by-laws of the order that the member pay to the clerk of his camp every assessment levied and called during the month in which it is payable; failure to do this ipso facto putting the member out of good standing. This requirement, which was one essential to the maintenance of the mutual benefit fund from which assessments were to be paid, was emphasized by repeated provisions in the constitution and by-laws of defendant, as well as in the benefit certificates issued by it. Apparently the only exception provided was one for the benefit of a member who, while in good standing, becomes sick or disabled, and, while still in good standing, prop-

erly notified the clerk of the local camp thereof. Such a member may be carried by such local camp for a limited time; the latter remitting to the head camp from the local camp funds the amount of his assessments as the same accrue. This provision, however, has no materiality here. From May, 1911, until two days before his death, Mr. Valentine was continuously delinquent in his payments on account of assessments to the clerk of the local camp, making small payments on account thereof from time to time to the clerk of the local camp to some time in June, 1912. The clerk of the local camp, in violation of the laws of the order, had continued to carry him as in good standing to August 1, 1912, at which time several assessments remained unpaid by him, the amount of all of which, however, except that due for July, 1912, had been advanced for him by the clerk of the local camp, and forwarded by such clerk to the head camp to his credit, with the result that, in so far as the head camp was informed, he was regularly paying his assessments as required by the laws of the order. The amount of the assessment due in July, 1912, was not so advanced by the clerk, nor forwarded to the head camp. On August 14, 1912, such clerk, in his report sent to the head camp, reported Mr. Valentine as delinquent for failure to pay the July assessment. So far as appears in the record, this was the first intimation to the head camp of any delinquency at any time on the part of Mr. Valentine; the reports theretofore received showing him as regularly paying all assessments. On August 17, 1912, while engaged in his trade as a carpenter, he fell from a ladder a distance of about 20 feet. His neck was broken by this fall. The full extent of his injury was not at once known, and, in view of the findings of the trial court, it will be assumed that it was not known until after August 20, 1912. He was taken to a hospi-

tal, where he remained until August 22, 1912, when he died as a result of the injury. On August 19, 1912, Mrs. Valentine paid to the clerk of the local camp all amounts accruing for assessments and dues to September 1, 1912, including the July assessment, the total so paid being \$23.20. On August 20, 1912, she paid such clerk the further sum of \$2.95 as advanced assessment for September, 1912. The law of the order provided that a suspended benefit member could become reinstated within a limited time after his suspension by complying with certain specified conditions, and not otherwise, one of which was the delivery by the member to the clerk of the local camp of an application for reinstatement, certifying, warranting, and representing that he was then "in good, sound bodily health," and another of which was the payment of all arrearages. The benefit certificate in terms provided, as required by the laws of the order, that if any assessment was not paid within the time allowed, "then this certificate shall be null and void and continue so until he is reinstated as required by the head camp constitution and by-laws of his camp." When the payment of August 19th was made by Mrs. Valentine, the clerk of the local camp informed her that a reinstatement application must be signed by Mr. Valentine and delivered to him, and he furnished Mrs. Valentine a form for that purpose, which he himself had filled in with name and date. It was not the form prescribed by the laws of the order, the difference being in the omission of a final paragraph to the effect that the member agreed that the representation of present sound bodily health is a strict warranty, and that, if his death occurred within one year as the result of any disease with which he was then afflicted, no beneficiary shall be entitled to receive benefits. The constitution provided in effect that no reinstatement could be accomplished except by the

presentation of an application in the exact form required thereby. Mrs. Valentine procured Mr. Valentine's signature to this application so furnished and delivered it to the clerk the next day. This application, as required by the law of the order, stated: "I, C. A. Valentine, a delinquent and suspended benefit member, hereby request to be reinstated, and offer herewith all arrearages of benefit assessments, equalization payment, and camp dues. I certify, warrant, and represent that I am in sound bodily health. . . ."

When the payments were made and the application for reinstatement was delivered by Mrs. Valentine to the clerk of the local camp, the latter was informed by her of the accident and that Mr. Valentine was seriously injured. The evidence fairly shows that there was then no attempted concealment of any of the facts from the clerk, and that no one then knew that the neck was "broken." But the clerk did know from the information given him that Mr. Valentine was not in "sound bodily health." Unquestionably his sympathies were with Mrs. Valentine in the effort to put Mr. Valentine in good standing. The amounts paid by Mrs. Valentine in August, 1912, were never forwarded to the head camp by the local clerk, but appear to be still in his custody. This was doubtless due to the almost immediate death of Mr. Valentine. His statement that he informally offered to return the money is disputed by Mrs. Valentine. However, he did within a day or two of Mr. Valentine's death advance Mrs. Valentine \$50, none of which has been returned. No head camp officer had any notice or knowledge of any attempted reinstatement until after the death of Mr. Valentine. At the time Mr. Valentine became a member of the order the constitution of defendant provided in express terms, as it has ever since, that "camp clerks and bankers are by this constitution expressly made agents of the camp

and of the several members thereof, and not agents of the head camp." As amended and revised at the head camp session in 1910, which, it will be observed, was prior to any delinquency on the part of Mr. Valentine, the constitution was made to provide with relation to "every benefit certificate" "that no agent or representative of this society nor any officer or member of a local camp has the right or power, by any statement, agreement, or promise, or by any method of transacting business with its members, to waive a strict observance and compliance with the laws, rules, and regulations of this society as set forth in this constitution, and by-laws of his camp, and such amendment or alteration therein as may be hereafter made." It was expressly declared in the section including this provision, among others, that the conditions enumerated "shall apply to every benefit certificate, and shall be binding on both members and this order." Section 118. At the same time it was provided in § 130 that noncompliance with any of the conditions named in the laws of the society shall be an absolute bar to any claim on the benefit fund thereof "under or by virtue of any benefit certificate that may have been issued, or that may hereafter be issued to an applicant, or by reason of any steps taken by an applicant to entitle him to the same, or by a subordinate camp or member thereof, and no officer or member of the head camp has any authority to change, alter, modify, or waive the foregoing requirements, or the consequences thereof in any manner."

The theory upon which the trial court awarded judgment to plaintiff was twofold, being: First, that the imperative conditions and provisions of the laws of the order and the benefit certificate in the matter of the payment of assessments, etc., were waived by defendant by the course of conduct in receiving payments from Mr. Valentine from May, 1911, notwithstanding his de-

linquency, with the result that he was in good standing at all times up to the time of his death; and, second, that, if out of good standing because of nonpayment of assessments, he was reinstated August 20th, and died in good standing.

It cannot be doubted that the laws of the defendant constituted a part of the contract between Valentine and defendant (see *Butler v. Grand Lodge, A. O. U. W.* 146 Cal. 172, 175, 79 Pac. 861), or that Valentine was charged with full knowledge of the provisions of the constitution of defendant (see *Supreme Lodge, F. B. v. Price*, 27 Cal. App. 607, 616, 150 Pac. 803). These propositions are so well settled as to require no citation of authority. In this connection it must further be held that the express provisions written into the constitution of defendant in 1910, to the effect that no officer or member of a local camp or of the head camp has any power or authority to waive any of the requirements of the constitution or the consequences thereof, in any way, were applicable. As we have seen, under the terms of the original contract, the power to amend the constitution and by-laws was expressly reserved, and the question of good standing at the time of death was to be determined in accord with the provisions of the constitution and by-laws as they then were or might be subsequently amended. The amendments, as applied to Valentine's case, were prior to any delinquency, and were not such as to impair any vested right. They were mere regulations of the internal affairs of the society, in no degree affecting any right of the insured under his contract, or in any way impairing the substance of his contract. They simply put into clear and unambiguous express provisions of the constitution a limitation upon the power and authority of any officer or member of a local camp, or any officer of the head camp, to waive any of the requirements of the contract. Perhaps this



limitation was fairly inferable before, but in view of the amendments we need not discuss that question. The power of the head camp to make such amendments applicable to those already members and to the benefit certificates of such members, in so far as all future conduct was concerned, cannot be doubted. We have in mind the rule enunciated in many states, including this state (see *Bornstein v. District Grand Lodge*, 2 Cal. App. 624, 628, 84 Pac. 271), to the effect that alterations in the laws will not be construed to operate retrospectively unless the intent that they shall so operate clearly appears. But we give to these amendments, in applying them to Valentine's case, no real retrospective or retroactive operation. And we further are of the opinion that the intent to make the amendments applicable to every benefit certificate outstanding was clearly and definitely expressed. In addition to these express provisions of the amendments we have the provision of the constitution that was in force when the benefit certificate of Valentine was issued, to the effect that camp clerks are not agents of the head camp, but only agents of their local camps and of the several members thereof.

In view of these provisions it cannot be held that the local camp clerk was, to use the language of *Marshall v. Grand Lodge, A. O. U. W.* 133 Cal. 686, 692, 66 Pac. 25, 27, "anything more than a special agent of defendant, with defined powers which were known to the members." Whatever force there may be in the theory that, notwithstanding a provision declaring a local camp officer to be the agent of the members, and not of the head camp, the law will nevertheless hold him to be the agent of the head camp for the transmission of money properly paid him by a member in accord with the law of the society (see *Supreme Lodge, K. P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611), both principle and the great weight of

authority preclude a conclusion that, in the face of the provisions of the constitution we have quoted, the local camp clerk could waive any requirement of the law, or, by any act or course of conduct, create any estoppel against defendant (see *Hartman v. National Council*, 76 Or. 153, L.R.A.1915E, 152, 147 Pac. 931). As was held in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, it is competent for parties to provide in an insurance policy that the power of agents of the company be limited, and where a limitation is expressed it is binding in the absence of waiver or ratification by the company with knowledge of the facts. This is the settled doctrine in California both as to ordinary life insurance companies (see *Elliott v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 172 Cal. 261, L.R.A.1916F, 1026, 156 Pac. 481), and as to fraternal insurance societies (*Marshall v. Grand Lodge, A. O. U. W.* 133 Cal. 686, 66 Pac. 25).

The local camp clerk having no power by any course of conduct to waive the requirements of the law of the society as to the time of the payment of the assessments or the consequences thereof, the failure of Valentine to pay assessments as required operated ipso facto to remove him from good standing, and consequently as a suspension of his benefit certificate. See *Butler v. Grand Lodge, A. O. U. W.* 146 Cal. 172, 79 Pac. 861; *Marshall v. Grand Lodge, A. O. U. W. supra.* This was the situation when he was injured on August 17, 1912. Unless reinstated prior to his death, he was not in good standing at the time of his death, with the result that, under the terms of his benefit certificate, his beneficiary could not participate in the benefit fund. The question, then, is whether there was an ef-

Insurance—  
mutual benefit—  
power of local  
camp officers to  
waive  
constitutional  
provisions.

—acceptance of  
past due  
assessments—  
effect.

(— Cal. —, 180 Pac. 2.)

fective reinstatement. It seems perfectly clear to us that this question must be answered in the negative.

—reinstatement  
after  
suffering  
broken neck.

Such a reinstatement could be accomplished only by a full compliance with the law of the society relative to reinstatement. Ibid. The law in force at all times required as a condition precedent to reinstatement the presentation of an application including an express warranty of present sound bodily health. As we have seen, the local camp clerk had no power by any act or course of conduct to waive the presentation of the application required by the law. The required application was one in which the member was not only made to declare, "I certify, warrant, and represent that I am in good sound bodily health," but also that "I agree that this representation is a strict warranty." The latter provision was not in fact contained in the application presented on behalf of Valentine, with the result that the precise application required by the law was not presented. The law providing that "no attempted reinstatement by the clerk of the camp without such reinstatement application shall reinstate a suspended member or entitle his beneficiaries to receive any benefit," it may well be claimed that for this reason alone there was no reinstatement here. Certainly this claim is good if the part omitted was at all material. But we think that the application as presented contained such a warranty in the statement, also required by law, that "I certify, warrant, and represent that I am in good sound bodily health." This statement clearly was one upon the literal truth or fulfilment of which the validity of the contract depended, and amounted to a warranty. See *Hogins v. Supreme Council, C. R. C.* 76 Cal. 109, 112, 9 Am. St. Rep. 173, 18 Pac. 125, 127; *Caldwell v. Grand Lodge, U. W.* 148 Cal. 195, 199, 2 L.R.A. (N.S.) 653, 113 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas.

356. This warranty, as we have seen, was absolutely false. "By a warranty the insured stipulates for the absolute truth of the statement made" (*Hogins v. Supreme Council, C. R. C. supra*), and its falsity is necessarily a defense to the contract procured by the making thereof. There could be no effective reinstatement based upon an application containing a warranty that was in fact false, in the absence of an effective waiver of the falsity by the defendant head camp. Plaintiff relies upon the fact that the local camp clerk had knowledge of the falsity of the warranty. In view of what we have said as to the limitations on the power of the camp clerk, it is clear that this knowledge on the part of that officer is an immaterial factor. He could not, by any course of conduct or possession of knowledge, bind defendant in such a manner as to estop it from defending upon the ground that the warranty was false. This is substantially the effect of what is said in *Elliott v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 172 Cal. 261, 266, L.R.A. 1916F, 1026, 156 Pac. 481. In view of his limited powers, his knowledge was not the knowledge of defendant. See *Iverson v. Metropolitan L. Ins. Co.* 151 Cal. 746, 751, 13 L.R.A. (N.S.) 866, 91 Pac. 609. No officer of the head camp had any knowledge whatever as to the matter; no information even that there had been an attempted reinstatement, until after the death of Valentine. To our minds there is no escape from the conclusion that the attempted reinstatement was ineffective for any purpose, and that Valentine was not in good standing on August 22, 1912, when he died as the result of the injury received on August 17, 1912.

—knowledge  
of local clerk  
—effect.

Some reliance is placed upon the retention by the local camp clerk of the money paid by Mrs. Valentine upon the attempted reinstatement, as constituting a waiver of all objections by defendant, or an estop-

pel on it to dispute its effectiveness. In view of the circumstances of this case we do not see the materiality of this fact. He cannot be held to have received or to hold possession of this

—retention of  
overdue  
assessment—  
effect.

money as a representative of the head camp; for, in view of his limited authority, he had no power, under the circumstances, to so receive or hold it. Before information or knowledge came to any officer of the head camp, upon which any claim of waiver or estoppel might be based, Valentine had died. As held in *Thompson v. Travelers' Ins. Co.* 11 N. D. 274, 277, 91 N. W. 75, 77, the rights of the parties became fixed upon the death, and thereafter "no new contract between the parties by a waiver or estoppel could be created, as one of the contracting parties was dead." Subsequent conduct could not operate so as to affect the right to recover on the benefit certificate. This question is practically decided by what is said in *Butler v. Grand Lodge, A. O. U. W.* 146 Cal. 178, 179, 79 Pac. 861. It is proper to add that it does not appear that subsequent to the death of Valentine any Head Camp officer ever did anything or said anything which could by any possibility serve as a basis for a claim of waiver or estoppel, assuming that the necessary waiver or estoppel could be based on matters occurring after the death of the insured, or upon the acts or conduct of individual head camp officers.

Our conclusion upon the points we have discussed renders unnecessary a discussion of many other

claims of appellant. As is said by appellant's counsel in their brief, the fundamental basis upon which respondent must rest her reliance for an affirmance is that the local camp clerk was the agent of the head camp, with power to waive the requirements of its constitution. This basis not existing, her case must necessarily fail.

There was an attempted appeal from the order denying a new trial, but the order was not made until after the change in our law abolishing the right of appeal from such orders. The order, however, may be reviewed upon the appeal from the judgment. In view of what we have said, the motion for a new trial should have been granted.

The judgment is reversed.

We concur: Shaw, J.; Lennon, J.; Melvin, J.; Wilbur, J.; Lawlor, J.

#### NOTE.

The reported case (*VALENTINE v. HEAD CAMP*, P. J. W. W. ante, 380) is illustrative of those cases wherein provisions in insurance contracts and premium notes, declaring the insurance suspended during default in payment of such a note, have been held to be self-operative. This, together with other cases of like character, is treated in II. b, 1, of the annotation following *CONTINENTAL INS. Co. v. STRATTON*, post, 403, which treats the general question of "Provisions suspending insurance during default in payment of premiums or assessments, as affected by failure of insured to declare a suspension before loss."

CONTINENTAL INSURANCE COMPANY OF NEW YORK, Appt.,  
v.  
T. C. STRATTON.

*Kentucky Court of Appeals — October 28, 1919.*

(185 Ky. 523, 215 S. W. 416.)

**Insurance — lapse of policy — effect.**

1. No recovery for a fire occurring while a premium is unpaid can be had under a policy providing for its lapse until the premium is paid.

[See note on this question beginning on page 395.]

**Payment — by mail — when effected.**

2. A payment of an overdue insurance premium by mailed check is not effected until the check reaches the insurer and is cashed and applied to the overdue premium, under a policy providing for payment at the office of the insurer and for lapse of policy during default.

**Insurance — payment after loss — effect.**

3. Payment of premium after loss does not revive a policy so as to permit recovery upon it, which provides for lapse during default in payment of premiums.

[See 14 R. C. L. 1192.]

**— custom to waive default.**

4. A custom on the part of an in-

surance company of accepting payment of premiums after they were due is not shown by a single accommodation of the holder of a policy, in permitting him to make a payment after it was due.

[See 14 R. C. L. 1184.]

**— duty to return premium note.**

5. An insurance company holding a premium note to secure instalments of premiums, under a contract that it may collect such portion of it as equals the earned premiums to the date of lapse of the policy, is not bound to return the note to the maker to be entitled to rely on suspension of policy before loss, for nonpayment of an instalment when due.

APPEAL by defendant from a judgment of the Circuit Court for Ohio County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Woodward & Kirk for appellant.

Messrs. Heavrin & Martin, for appellee:

The provision of the policy that the company shall not be liable for loss during the period of time that any of the instalments shall be due and unpaid is not a void provision, but only voidable at the option of the company, and may be waived by the company by its acts or conduct, either expressed or implied.

Thum & C. Ins. Law (Ky.) p. 675; Louisville Underwriters v. Pence, 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10; Stevenson v. Phoenix Ins. Co. 83 Ky. 7, 4 Am. St. Rep. 120; New York L. Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; Home Ins. Co. v. Holder, 24 Ky. L. Rep. 2483, 74 S. W. 267; Blackerby v. Continental Ins. Co. 83

Ky. 580; Home Ins. Co. v. Ballew, 24 Ky. L. Rep. 1059, 96 S. W. 878; Continental Ins. Co. v. Browning, 114 Ky. 183, 70 S. W. 660; Robinson v. Western Assur. Co. 211 Fed. 749; Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; West v. National Casualty Co. 61 Ind. App. 479, 112 N. E. 115.

Defendant waived its forfeiture clause by its prior custom in dealing with the insured, in this: in its admitted acceptance of premiums paid by plaintiff before the loss, after maturity, without objection, both in 1916 and 1917, and by its admitted custom of sending notice to the policyholder fifteen days before the maturity of instalment and fifteen days after the maturity of instalment.

New York L. Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; Elgutter v. Mutual Reserve Fund Life Asso. 52

pel on it to dispute its effectiveness. In view of the circumstances of this case we do not see the materiality of this fact. He cannot be held to have received or to hold possession

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assessment—  
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779, 160 S. W. 201, NATIONAL COUNCIL,  
O. U. A. M. v. Thomas, 163 Ky. 364,  
O. U. A. M. v. Elliott, Contr. p. 2392;  
s. Co. v. Evans, 136 Ky.  
376; Palmer v. Conti-  
132 Cal. 68, 64 Pac. 97;  
n Standard L. Ins. Co.

Sims v. 18 Ga. App. 347, 89 S. E. 445.

Defendant waived its forfeiture clause by accepting plaintiff's check on October 15, 1917, after maturity of instalment, without protest or objection.

National Council, J. O. U. A. M. v. Thomas, 163 Ky. 376, 173 S. W. 813; Shawnee Mut. F. Ins. Co. v. Cannedy, 36 Okla. 733, 44 L.R.A. (N.S.) 376, 129 Pac. 866.

Where a case is tried on an agreed statement of facts, no separation of law and facts is necessary by the court.

Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; Cincinnati, N. O. & T. P. R. Co. v. Hansford, 125 Ky. 37, 100 S. W. 251.

Sampson, J., delivered the opinion of the court:

The insurance company issued and delivered to Stratton on September 14, 1915, a policy of fire insurance covering a certain dwelling house situated in Ohio county,

claim

insuring the property loss by fire between 12 noon on that date and 12 noon of September 14, 1920, consideration of a premium of \$34.55, divided into five equal instalments of \$6.91 each, the first of which was paid at the time the policy was issued, and the others were to become due and be payable on the 1st day of October of each succeeding year through the life of the policy. The second premium was not paid on the 1st of October, in compliance with the contract, but it was paid about the 9th of that month by check sent to the New York office of the company. The third premium of \$6.91 due on October 1, 1917, was not paid when due, but a check for the proper amount, dated September 26th, was received at the office of the company in New York on October 15, 1917, credited to the account of Stratton, and deposited in the bank by the company on that date. A few days later the company received notice from Stratton that the house which the policy covered had been destroyed by fire on October 12th, which was three days before the premium was received at the office of the company. The company declined to pay the policy, \$350, and Stratton instituted this action on the 13th of February, 1918, to recover on the policy. A judgment having been entered in favor of Stratton, the company appeals. An agreed statement of facts is filed in lieu of evidence. By said statement it is agreed that the policy contains this provision: "And it is hereby agreed that, in case of nonpayment of any one of the instalments herein named at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to this company in New York, or to its western department at Chicago, and in the event of such nonpayment the whole amount of instalments earned, due, and payable, and may be collected by law. The said policy may

be canceled at any time by compliance with its provisions."

The note for \$27.64, signed by Stratton, which was to cover the deferred payments of \$6.91 on the premiums, contains this statement: "I promise to pay to said company [appellant] or order, at their office in Chicago or New York, . . . twenty-seven and  $\frac{64}{100}$  dollars in instalments, . . . and it is hereby agreed that, in case of nonpayment of any one of the instalments herein named at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to this company in New York, or to its western department at Chicago, and in the event of such nonpayment the whole amount of instalments remaining unpaid on said policy may be declared earned, due, and payable, and may be collected by law. The said policy may be canceled at any time by compliance with this provision."

The insurance company is defending upon the ground that the premium, \$6.91, which was due October 1, 1917, was not paid at that time, nor received nor credited in the office of the company until October 15th, which was three days after the fire occurred that destroyed the building insured; and it is insisted this caused the policy to lapse for nonpayment of the premium, and, the premium not being paid until after the fire, there was no property to be insured and the policy could not, therefore, be revived.

Appellee Stratton insists that the policy was in full force at the time of the fire, and that such a provision in the policy as quoted above does not cause the policy to lapse by nonpayment of the premium on the day fixed, but only renders such contract voidable at the option of the insurance company, and as this option of the company to render the policy inoperative was not exercised by the company before the happening of the fire, it was too late to claim exemption from liability on

account of the nonpayment of the premium. While it is alleged in the pleading of Stratton that the check for the premium due October 1, 1917, was made out and signed by him on the 26th of September, and duly posted to the company at its office in New York, the agreed statement of fact does not fully support this averment, the statement being "that the third instalment, due October 1, 1917, was not paid when due, but was paid by check dated September 26, 1917, and mailed to the defendant company, and received and cashed by it on October 15, 1917."

It will be noticed that the agreement goes only to the extent of showing that the check was dated September 26th, and does not show that it was mailed on that day. However, it shows that it was received and cashed in the office of the company on October 15th, which was some nineteen days later. From the date of other letters passing between the parties, we learn that it takes from two to three days for a letter to go from the postoffice address of Stratton to the office of the company in New York. It is interesting to note the absence of proof of the date the letter was posted by Stratton. However this may be, a payment by check of an overdue premium is not made, under a contract similar to the

Payment—by  
mail—when  
effected.

one under consideration, until the check is received at the office of the company, cashed, and applied to the extinguishment of the premium note. Continental Ins. Co. v. Hargrove, 131 Ky. 837, 116 S. W. 256. A fair construction of the clause of the policy and promissory note above quoted would give them this meaning: The insurance company shall not be liable for loss occurring after the premium on the policy becomes due and while it remains unpaid, and the policy shall be inoperative and its binding force suspended during such delinquency of the insured; but on the

Insurance—  
lapse of policy  
—effect.

payment of the overdue premium and acceptance by the company the policy shall immediately revive and become effective, eo instante.

Applying this construction to the facts before us, we are forced to the conclusion that Stratton, through his neglect, forfeited his rights under the policy sued on. Admitting that he posted the check to the company for the premium on October 11, 1917, as is his contention, it was not received at the office until the 15th of the month, which was after the fire. Had it been received at the company's office on the 11th of October, or at any time before the fire actually occurred, and the company had accepted the check in payment of the premium, and cashed the same, it would have been bound upon the policy, because such acceptance would have immediately revived the policy in favor of Stratton. At the time the premium was received and accepted at the office of the company in New York, the house had been destroyed by fire, and, as stated in the case of *Continental Ins. Co. v. Hargrove*, supra: "The contract was no longer executory, for, as the subject-matter [the house] had been destroyed, it was no longer possible for the insurer to indemnify against its future loss, and there was nothing to support the undertaking in the policy to do so."

A revival of the contract of insurance can be operative only from the instant that it took effect, and the policy became rejuvenated and alive. It could not relate back, because a contract of insurance can only look forward, and never retrospectively.

Appellee Stratton relies upon the waiver by the company of the forfeiture clause of the policy. The waiver, he asserts, results from the company's admitted acceptance of premiums paid by Stratton, before the loss, but after maturity, without objection, in the years 1916 and 1917, and a further fact that the

company admits that it was its custom to send a notice to each policyholder fifteen days before maturity of instalments, and another notice fifteen days after the maturity of each instalment. The only deferred instalment paid was the one due October 1, 1916, and which was paid about the 9th of that month. True, an instalment was paid at the time the policy was issued. We are of opinion that a single prior instance of accommodation and indulgence granted by the company to Stratton on the payment of a premium is not sufficient to establish a custom of accepting instalments after they are due. However this may be, it would have little or no effect upon the case at bar, under the construction we have placed upon the contract embraced in the note and policy.

By the terms of the policy and note, the insurance company had the right to retain the notes and to collect such part of them as equaled the earned premium to the date of the lapsing of the policy. The company was, therefore, not under the necessity of returning the notes to Stratton before the policy became suspended in order to avoid liability. Stratton had contracted with the company that, in case he defaulted in the payment of a premium instalment or allowed the instalment to become overdue, the policy should become inoperative during such default on Stratton's part, and we know of no principle of public policy that would prevent persons sui juris from entering into a binding obligation of this kind upon sufficient consideration.

The unusual situation which the facts present makes this a hard case, but the neglect of Stratton alone is responsible for his loss. Under the agreed state of facts it appears that the judgment of the court, to whom both questions of

—custom to  
waive default.

—duty to return  
premium note.

—payment after  
loss—effect.

fact and law were submitted, should have been for appellant company. The appeal prayed is grant-

ed, and the judgment is therefore reversed, for proceedings consistent with this opinion.

### ANNOTATION.

**Provision suspending insurance during default in payment of premiums or assessments as affected by failure of insurer to declare a suspension before loss.**

I. Necessity in general for affirmative action, 395.

II. Automatic or self-operating provisions:

a. In general, 398.

b. Where premium note given:

1. Provisions in both policy and note, 403.

2. Provisions in policy only, 406.

3. Provisions in note and not in policy, 407.

4. Under statute, 408.

III. Provisions requiring affirmative action, 409.

IV. Where whole subordinate body or branch suspended, 413.

*I. Necessity in general for affirmative action.*

While there is an apparent conflict of authority as to whether or not provisions suspending insurance during default in payment of premiums or assessments work automatically, i. e., are self-operating, or self-executing, so as to dispense with notice to the insured or declaration of suspension by the insurer, the well-settled rule is that, in the absence of special provisions which distinguish the case and call for a contrary conclusion, the operation of provisions of the character under consideration is not affected by the failure of the insurer to declare a suspension before loss.

The following cases uphold the non-liability of the insurer for loss occurring after default in payment of premiums or assessments, although the insurer took no affirmative action, such as declaring a suspension before loss:

**United States.**—Modern Woodmen v. Tevis (1902) 54 C. C. A. 293, 117 Fed. 369; Cardwell v. Republic F. Ins. Co. (1875) 12 Nat. Bankr. Reg. 253, Fed. Cas. No. 2,396; Stanley v. Northwestern Life Asso. (1888) 36 Fed. 75.

**Arkansas.**—Jefferson Mut. Ins. Co. v. Murry (1905) 74 Ark. 507, 86 S. W. 813; Driver v. Planters' Mut. Ins. Asso. (1906) 78 Ark. 127, 93 S. W. 752; American Ins. Co. v. Hornbarger (1908) 85 Ark. 337, 108 S. W. 213.

**California.**—Palmer v. Continental Ins. Co. (1900) 6 Cal. Unrep. 455, 61 Pac. 984, reversed on other grounds on rehearing in (1901) 132 Cal. 68, 64 Pac. 97; Marshall v. Grand Lodge, A. O. U. W. (1901) 133 Cal. 686, 66 Pac. 25; VALENTINE v. HEAD CAMP, P. J. W. W. (reported herewith) ante, 380; Valentine v. Grand Lodge, A. O. U. W. (1911) 17 Cal. App. 317, 119 Pac. 671.

**Colorado.**—Brown v. Knights of Protected Ark (1908) 43 Colo. 289, 96 Pac. 450; New Zealand Ins. Co. v. Maaz (1899) 13 Colo. App. 493, 59 Pac. 213.

**Georgia.**—Hipp v. Fidelity Mut. L. Ins. Co. (1907) 128 Ga. 491, 12 L.R.A. (N.S.) 319, 57 S. E. 892; Sovereign Camp, W. W. v. Shaw (1915) 143 Ga. 559, 85 S. E. 827.

**Illinois.**—Carlock v. Phoenix Ins. Co. (1891) 138 Ill. 210, 28 N. E. 53; Hansen v. Supreme Lodge, K. H. (1892) 140 Ill. 301, 29 N. E. 1121, affirming (1890) 40 Ill. App. 216; National Union v. Hunter (1901) 99 Ill. App. 146, affirmed in (1902) 197 Ill. 478, 64 N. E. 356; Grand Lodge, A. O. U. W. v. Lachmann (1902) 101 Ill. App. 213, affirmed in (1902) 199 Ill. 140, 64 N. E. 1022; Lenz v. German F. Ins. Co. (1898) 74 Ill. App. 341 (see this case as quoted *infra*, II. b, 1); Independent Order of Foresters v. Haggerty (1899) 86 Ill. App. 31; National Union v. Shipley (1900) 92 Ill. App. 355; National Council, K. L. S. v. Burch (1906) 126 Ill. App. 15; Catholic Order of Foresters v. Lynch (1906) 126 Ill. App. 439; Dillon v. National Council, K. L. S. (1909) 148 Ill. App. 121, affirmed in (1910) 244 Ill. 202, 91 N.



E. 417; *Glaspay v. United Brotherhood* (1911) 163 Ill. App. 78; *Wall v. Brotherhood of Painters* (1911) 165 Ill. App. 59; *Neenan v. National Council, K. L. S.* (1914) 188 Ill. App. 490; *Kraus v. National Council, K. L. S.* (1916) 198 Ill. App. 345; *Thompson v. Ancient Order of Gleaners* (1916) 200 Ill. App. 200.

**Indiana.**—*American Ins. Co. v. Henley* (1878) 60 Ind. 515; *Continental Ins. Co. v. Dorman* (1890) 125 Ind. 189, 25 N. E. 213; *Michigan Mut. L. Ins. Co. v. Custer* (1890) 128 Ind. 25, 27 N. E. 124; *Supreme Council, C. B. L. v. Grove* (1911) 176 Ind. 356, 36 L.R.A. (N.S.) 913, 96 N. E. 159; *Continental Ins. Co. v. Miller* (1891) 4 Ind. App. 553, 30 N. E. 718; *Continental Ins. Co. v. Chew* (1894) 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417.

**Iowa.**—*Watrous v. Mississippi Valley Ins. Co.* (1872) 35 Iowa, 582; *Nedrow v. Farmers' Ins. Co.* (1876) 43 Iowa, 24; *Shakey v. Hawkeye Ins. Co.* (1876) 44 Iowa, 540; *Garlick v. Mississippi Valley Ins. Co.* (1876) 44 Iowa, 553; *Critchett v. American Ins. Co.* (1880) 53 Iowa, 404, 36 Am. Rep. 230, 5 N. W. 543; *Beeman v. Farmers Pioneer Mut. Ins. Co.* (1897) 104 Iowa, 83, 65 Am. St. Rep. 424, 73 N. W. 597.

**Kansas.**—*Continental Ins. Co. v. Daly* (1885) 33 Kan. 601, 7 Pac. 158.

**Kentucky.**—*Blackerby v. Continental Ins. Co.* (1886) 83 Ky. 574; *Home Ins. Co. v. Karn* (1897) 19 Ky. L. Rep. 273, 39 S. W. 501; *Potter v. Continental Ins. Co.* (1899) 107 Ky. 326, 53 S. W. 669; *Mudd v. German Ins. Co.* (1900) 22 Ky. L. Rep. 308, 56 S. W. 977; *Continental Ins. Co. v. Browning* (1902) 114 Ky. 183, 70 S. W. 660; *Walls v. Home Ins. Co.* (1903) 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650; *CONTINENTAL INS. CO. v. STRATTON* (reported herewith) ante, 391.

**Louisiana.**—*Maginnis v. New Orleans Cotton Exch. & Mut. Aid Asso.* (1891) 43 La. Ann. 1136, 10 So. 180; *Feiber v. Supreme Council, A. L. H.* (1904) 112 La. 960, 36 So. 818.

**Maine.**—*Nash v. Union Mut. Ins. Co.* (1857) 43 Me. 343, 69 Am. Dec. 65; *Gifford v. Workmen's Benefit Asso.* (1908) 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173.

**Massachusetts.**—*Hollister v. Quincy Mut. F. Ins. Co.* (1875) 118 Mass. 478.

**Michigan.**—*Williams v. Albany City Ins. Co.* (1870) 19 Mich. 451, 2 Am. Rep. 95 (see this case as quoted *infra*, II. b, 1); *McIntyre v. Michigan State Ins. Co.* (1883) 52 Mich. 188, 17 N. W. 781; *Robinson v. Continental Ins. Co.* (1889) 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647; *Hill v. Farmers' Mut. F. Ins. Co.* (1901) 129 Mich. 141, 88 N. W. 392; *Hale v. Michigan Farmers' Mut. F. Ins. Co.* (1907) 148 Mich. 453, 111 N. W. 1068; *Burnham v. Michigan Mut. L. Ins. Co.* (1907) 149 Mich. 84, 112 N. W. 704.

**Minnesota.**—*Scheufler v. Grand Lodge, A. O. U. W.* (1891) 45 Minn. 256, 47 N. W. 799; *Backdahl v. Grand Lodge, A. O. U. W.* (1891) 46 Minn. 61, 48 N. W. 454.

**Missouri.**—*American Ins. Co. v. Klink* (1877) 65 Mo. 78; *Smith v. Sovereign Camp, W. W.* (1903) 179 Mo. 119, 77 S. W. 862; *Borgraefe v. Supreme Lodge, K. L. H.* (1886) 22 Mo. App. 127 (see this case as quoted *infra*, III.); *Barnes v. Continental Ins. Co.* (1888) 30 Mo. App. 539; *Dircks v. German Ins. Co.* (1888) 34 Mo. App. 31; *Sauner v. Phoenix Ins. Co.* (1890) 41 Mo. App. 480; *Harvey v. Grand Lodge, A. O. U. W.* (1892) 50 Mo. App. 472; *Mooney v. Home Ins. Co.* (1897) 72 Mo. App. 92, on subsequent appeal in (1899) 80 Mo. App. 192; *Lavin v. Grand Lodge, A. O. U. W.* (1904) 104 Mo. App. 1, 78 S. W. 325; *Bange v. Supreme Council, L. H.* (1907) 128 Mo. App. 461, 105 S. W. 1092, on subsequent appeal in (1910) 153 Mo. App. 154, 132 S. W. 276, and in (1913) 179 Mo. App. 21, 161 S. W. 652; *Burchard v. Western Commercial Travelers Asso.* (1909) 139 Mo. App. 606, 123 S. W. 973; *Coil v. Continental Ins. Co.* (1913) 169 Mo. App. 634, 155 S. W. 872; *Knode v. Modern Woodmen* (1918) 171 Mo. App. 377, 157 S. W. 818 (see this case as quoted, *infra*, II. a); *Day v. Supreme Forest, W. C.* (1913) 174 Mo. App. 260, 156 S. W. 721; *Griffith v. Supreme Council, R. A.* (1914) 182 Mo. App. 644, 166 S. W. 324.

**Montana.**—*Kennedy v. Grand Fra-*

ternity (1907) 36 Mont. 325, 25 L.R.A. (N.S.) 78, 92 Pac. 971.

**Nebraska.**—Phenix Ins. Co. v. Bachelder (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217, affirmed on rehearing in (1894) 39 Neb. 95, 57 N. W. 996 (see this case as quoted, *infra*, II. b, 2); National Masonic Acci. Asso. v. Burr (1895) 44 Neb. 256, 62 N. W. 466; Home F. Ins. Co. v. Garbacz (1896) 48 Neb. 827, 67 N. W. 864; Antes v. State Ins. Co. (1900) 61 Neb. 55, 84 N. W. 412; Chapple v. Sovereign Camp, W. W. (1902) 64 Neb. 55, 89 N. W. 423; Houston v. Farmers & M. Ins. Co. (1902) 64 Neb. 138, 89 N. W. 635; Field v. National Council, K. L. S. (1902) 64 Neb. 226, 89 N. W. 773; Farmers' Mut. Ins. Co. v. Kinney (1902) 64 Neb. 808, 90 N. W. 926; Hooker v. Continental Ins. Co. (1903) 69 Neb. 754, 96 N. W. 663; Belk v. Capital F. Ins. Co. (1918) 102 Neb. 702, 169 N. W. 262.

**New Hampshire.**—Blanchard v. Atlantic Mut. F. Ins. Co. (1856) 33 N. H. 9; Lamarch v. L'Union St. Jean Baptiste Soc. (1894) 68 N. H. 229, 38 Atl. 1045; Labranche v. St. Jean Baptiste Soc. (1911) 76 N. H. 237, 81 Atl. 698.

**New York.**—Wall v. Home Ins. Co. (1867) 36 N. Y. 157, affirming (1861) 8 Bosw. 597; Evans v. Supreme Council, R. A. (1918) 223 N. Y. 497, 1 A.L.R. 163, 120 N. E. 93, reversing (1917) 181 App. Div. 916, 168 N. Y. Supp. 550; Paster v. Nagelsmith (1900) 30 Misc. 791, 63 N. Y. Supp. 154; Giniso v. Calabrian American Citizens' Mut. Ben. Asso. (1910) 66 Misc. 162, 121 N. Y. Supp. 209.

**North Dakota.**—J. P. Lamb & Co. v. Merchants' Nat. Mut. L. Ins. Co. (1908) 18 N. D. 253, 119 N. W. 1048.

**Ohio.**—McEvoy v. Michigan Mut. L. Ins. Co. (1889) 2 Ohio C. D. 329.

**Oklahoma.**—St. Paul F. & M. Ins. Co. v. Cooper (1909) 25 Okla. 38, 105 Pac. 198; Modern Brotherhood v. Bethesda (1914) 42 Okla. 684, 142 Pac. 1014.

**Pennsylvania.**—Fogle v. Lycoming Mut. Ins. Co. (1860) 3 Grant, Cas. 77; Hummel & Co's Appeal (1875) 78 Pa. 320 (see this case as quoted *infra*, II. b, 2); Lycoming F. Ins. Co. v. Rought (1881) 97 Pa. 415; Beeman

v. Supreme Lodge, S. H. (1905) 29 Pa. Super. Ct. 387 (see this case as quoted *infra*, II. a); Young v. Æolian Council (1915) 59 Pa. Super. Ct. 174.

**South Carolina.**—Sparkman v. Supreme Council, A. L. H. (1899) 57 S. C. 16, 35 S. E. 391; Hagins v. Ætna L. Ins. Co. (1905) 72 S. C. 216, 51 S. E. 683.

**Tennessee.**—Dale v. Continental Ins. Co. (1895) 95 Tenn. 38, 31 S. W. 266; Kimbro v. Continental Ins. Co. (1898) 101 Tenn. 245, 47 S. W. 413; McCullough v. Home Ins. Co. (1907) 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626 (see this case as quoted, *infra*, II. b, 1); Johnson v. Continental Ins. Co. (1907) 119 Tenn. 598, 107 S. W. 688; Gleason v. Prudential F. Ins. Co. (1912) 127 Tenn. 8, 151 S. W. 1030; Davis v. Home Ins. Co. (1913) 127 Tenn. 330, 44 L.R.A. (N.S.) 626, 155 S. W. 131; Henegar v. National Council, J. O. U. A. M. (1914) 5 T. C. C. A. 225 (see this case as quoted, *infra*, II. a).

**Texas.**—East Texas F. Ins. Co. v. Perky (1893) 5 Tex. Civ. App. 698, 24 S. W. 1080 (see this case as quoted, *infra*, II. b, 1); Supreme Lodge, K. H. v. Keener (1894) 6 Tex. Civ. App. 267, 25 S. W. 1084; Sovereign Camp, W. W. v. Hicks (1904) 37 Tex. Civ. App. 424, 84 S. W. 425; Moore v. Supreme Assembly, R. S. G. F. (1906) 42 Tex. Civ. App. 366, 93 S. W. 1077; Fletcher v. Supreme Lodge, K. L. H. (1911) — Tex. Civ. App. —, 135 S. W. 201; Grayson v. Grand Temple & Tabernacle, K. D. O. T. I. O. T. (1914) — Tex. Civ. App. —, 171 S. W. 489; Cole v. Knights of Maccabees (1916) — Tex. Civ. App. —, 188 S. W. 699.

**Washington.**—Proebstel v. State Ins. Co. (1896) 14 Wash. 669, 45 Pac. 308.

**Wisconsin.**—Joliffe v. Madison Mut. Ins. Co. (1875) 39 Wis. 111, 20 Am. Rep. 35; Gorton v. Dodge County Mut. Ins. Co. (1875) 39 Wis. 121; Freckmann v. Supreme Council, R. A. (1897) 96 Wis. 133, 70 N. W. 1113; Stutzman v. Cicero Mut. F. Ins. Co. (1912) 150 Wis. 254, 136 N. W. 604; HAYCOCK v. SOVEREIGN CAMP, W. W. (reported herewith) ante, 378.

**England.**—See *Tarleton v. Stanforth* (1796) 1 Bos. & P. 471, 126 Eng. Reprint, 1015, 5 T. R. 695, 101 Eng. Reprint, 386, 3 Anstr. 707, 145 Eng. Reprint, 1014, 4 Revised Rep. 845.

**Canada.**—*Wells v. Supreme Council*, I. O. F. (1889) 17 Ont. Rep. 317. And see *Meagher v. Home Ins. Co.* (1860) 10 U. C. C. P. 313, and *Meagher v. Aetna Ins. Co.* (1860) 19 U. C. Q. B. 530.

And the following cases, while in the main distinguishable (see *infra*, III.) from those cited *supra*, reach a contrary conclusion:

**United States.**—*Order of United Commercial Travelers v. McAdam* (1903) 61 C. C. A. 22, 125 Fed. 353 (see case as quoted *infra*, III.); *Scheu v. Grand Lodge*, O. D. I. F. (1883) 17 Fed. 214.

**Alabama.**—*District Grand Lodge, U. O. O. F. v. Hill* (1911) 3 Ala. App. 483, 57 So. 147.

**California.**—*Osterman v. District Grand Lodge*, I. O. B. B. (1896) 5 Cal. Unrep. 237, 43 Pac. 412; *Wilson v. District Council*, S. M. W. (1916) 30 Cal. App. 190, 157 Pac. 629.

**Georgia.**—*Warwick v. Supreme Conclave*, K. D. (1899) 107 Ga. 115, 32 S. E. 951.

**Illinois.**—*Tourville v. Brotherhood of Locomotive Firemen* (1894) 54 Ill. App. 71; *Flicke v. High Court*, C. O. F. (1900) 90 Ill. App. 344; *Plattdutsche Grot Gilde v. Ross* (1904) 117 Ill. App. 247 (see case as quoted *infra*, III.); *Stiefel v. Amalgamated Street Metal Workers' Local Union* (1917) 208 Ill. App. 121.

**Iowa.**—*Jelly v. Muscatine City & County Mut. Aid Soc.* (1903) 120 Iowa, 689, 98 Am. St. Rep. 378, 95 N. W. 197 (see case as quoted *infra*, III.); *Brooks v. Conservative L. Ins. Co.* (1906) 132 Iowa, 377, 119 Am. St. Rep. 560, 106 N. W. 913, 11 Ann. Cas. 339 (see case as quoted *infra*, III.).

**Kentucky.**—*Rogers v. Union Benev. Soc.* (1901) 111 Ky. 598, 55 L.R.A. 605, 64 S. W. 444.

**Michigan.**—*Olmstead v. Farmers' Mut. F. Ins. Co.* (1883) 50 Mich. 200, 15 N. W. 82 (see case as quoted *infra*, III.); *Petherick v. General Assembly*,

O. A. (1897) 114 Mich. 420, 72 N. W. 262.

**Minnesota.**—*Scheufler v. Grand Lodge*, A. O. U. W. (1891) 45 Minn. 256, 47 N. W. 799; *Backdahl v. Grand Lodge*, A. O. U. W. (1891) 46 Minn. 61, 48 N. W. 454.

**Mississippi.**—See *Murphy v. Independent Order*, S. D. J. A. (1900) 77 Miss. 830, 50 L.R.A. 111, 27 So. 624.

**Missouri.**—*Lewis v. Western Funeral Ben. Asso.* (1898) 77 Mo. App. 586; *Bange v. Supreme Council*, L. H. (1907) 128 Mo. App. 461, 105 S. W. 1092, reaffirmed on subsequent appeal in (1910) 153 Mo. App. 154, 132 S. W. 276, and again in (1913) 179 Mo. App. 21, 161 S. W. 652; *Burchard v. Western Commercial Travelers Asso.* (1909) 139 Mo. App. 606, 123 S. W. 973 (see case as quoted *infra*, III.).

**Ohio.**—See *Schwartz v. St. Elizabeth Roman & G. Catholic Union* (1907) 21 Ohio C. C. N. S. 165.

**Texas.**—*Supreme Lodge, K. H. v. Wickser* (1888) 72 Tex. 257, 12 S. W. 175; *Grand Lodge, F. A. M. v. Dillard* (1913) — Tex. Civ. App. —, 162 S. W. 1173.

**Canada.**—See *Dale v. Weston Lodge* (1897) 24 Ont. App. Rep. 351.

## II. Automatic or self-operating provisions.

### a. In general.

It seems to be unquestioned that where the contract of insurance provides that, upon default in the payment of a premium or assessment, the delinquent shall "stand suspended without notice," and that "no action" upon the part of the insurer "shall be required as essential to such suspension," the provision is self-executing so that the insurer need not declare a suspension. At least, it has been so assumed. See *Dillon v. National Council*, K. L. S. (1909) 148 Ill. App. 121; *Neenan v. National Council*, K. L. S. (1914) 188 Ill. App. 490; *Kraus v. National Council*, K. L. S. (1916) 198 Ill. App. 345; *Scheufler v. Grand Lodge*, A. O. U. W. (1891) 45 Minn. 256, 47 N. W. 799; and *Backdahl v. Grand Lodge*, A. O. U. W. (1891) 46 Minn. 61, 48 N. W. 454.

Likewise, provisions to the effect

that upon default the insured "shall stand suspended," and that no action on the part of the insurer shall be required as essential to such a suspension, have been held to be self-executory. *Marshall v. Grand Lodge, A. O. U. W.* (1901) 133 Cal. 686, 66 Pac. 25; *Valentine v. Grand Lodge, A. O. U. W.* (1911) 17 Cal. App. 317, 119 Pac. 671; *Grand Lodge, A. O. U. W. v. Lachmann* (1902) 101 Ill. App. 213, affirmed in (1902) 199 Ill. 140, 64 N. E. 1022; *Field v. National Council, K. L. S.* (1902) 64 Neb. 226, 89 N. W. 773.

And the same has been held under a provision that a delinquent member shall, "by the fact of such nonpayment, stand suspended without notice, and no act on the part of the council or any officer thereof . . . shall be required as essential to such suspension." *National Council, K. L. S. v. Burch* (1906) 126 Ill. App. 15.

So, a provision in the by-laws of a mutual benefit society that one indebted for dues "shall stand suspended," and that a vote of the local union is not necessary to a suspension, is automatic, and ipso facto suspends a delinquent member. *Wall v. Brotherhood of Painters, D. P. H.* (1911) 165 Ill. App. 59.

Of like effect and operation is a provision in the by-laws of a fraternal benefit association that a member failing to pay an assessment "shall stand suspended" from all rights, benefits, and privileges of this association, "without further notice." *Gifford v. Workmen's Ben. Asso.* (1908) 105 Mc. 17, 72 Atl. 680, 17 Ann. Cas. 1173; *Borgraefe v. Supreme Lodge, K. L. H.* (1886) 22 Mo. App. 127 (see this case as quoted *infra*, III.); *Fletcher v. Supreme Lodge, K. L. H.* (1911) — Tex. Civ. App. —, 135 S. W. 201; *Cole v. Knights of Maccabees* (1916) — Tex. Civ. App. —, 188 S. W. 699.

And a similar conclusion has been reached where the provision was merely that the insured "shall stand suspended by his own act," and "not be entitled to any benefits . . . during the time of such suspension." *Independent Order of Foresters v. Hagerty* (1899) 86 Ill. App. 31. Likewise, where it was provided that

any member who failed to pay an assessment should "by that fact stand suspended." *Catholic Order of Foresters v. Lynch* (1906) 126 Ill. App. 439. So, under a provision that the insured shall "thereupon become suspended by his own act," and that his benefit certificate shall be void and all benefits forfeited, it has been held that a mere failure to pay dues ipso facto works a forfeiture. *Kennedy v. Grand Fraternity* (1907) 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971.

Or it is sufficient if the provision be that the insured shall ipso facto stand suspended. *Glaspy v. United Brotherhood* (1911) 163 Ill. App. 78; *Burchard v. Western Commercial Travelers Asso.* (1909) 139 Mo. App. 606, 123 S. W. 973. Especially where it is also expressly provided that no act on the part of the insurer or any officer is essential to such suspension. *Lavin v. Grand Lodge, A. O. U. W.* (1903) 104 Mo. App. 1, 78 S. W. 325. Or that, "during such suspension, his benefit certificate shall be absolutely null and void." *Modern Woodmen v. Tevis* (1902) 54 C. C. A. 293, 117 Fed. 369; *Knodel v. Modern Woodmen* (1918) 171 Mo. App. 377, 157 S. W. 818. In reaching this conclusion, the court in the *Knodel Case* (Mo.) *supra*, said: "We do not agree with counsel for plaintiff that his suspension could not become effective until he had received notice of it from defendant. The by-laws did not require defendant to give notice of suspensions or forfeitures, but, on the contrary, provided that a failure to pay assessments and dues at stated times should, ipso facto, constitute a suspension and forfeiture. Provisions in the laws of a fraternal society for the prompt payment of benefit assessments are of the substance and essence of its insurance contracts, and a law of the order, prescribing a self-executory suspension of the member and forfeiture of his insurance as a penalty for his failure to make prompt payments is reasonable, and will be enforced by the courts. . . . Where the contract, as evidenced by the certificate, constitution, and by-laws of the order, does not make the provisions insuring the

prompt payment of dues and assessments self-executing, but merely provides that a failure to pay shall constitute a ground for suspension and forfeiture, it does not become effective until the forfeiture and suspension are declared by the order and notice of such action given the delinquent member. . . . But the parties have a right to stipulate in their contract that a failure of the insured to pay as agreed, of itself, shall terminate the insurance without notice, and such we find to be the character of the contract under consideration." And where the penalty for nonpayment is ipso facto suspension, the rule is not changed by another provision to the effect that a subordinate council may pay the assessment as a loan or a gift, it also being provided that an agreement by a subordinate council to pay an assessment is not binding upon the supreme council, unless it is complied with, and that no claim shall be recognized or valid unless payment has been made. *Griffith v. Supreme Council, R. A.* (1914) 182 Mo. App. 644, 166 S. W. 324.

So, under a provision that a delinquent "shall stand suspended," and that "during such suspension his or her benefit certificate shall be void," suspension occurs automatically when there is a default in payment. *Day v. Supreme Forest, W. C.* (1913) 174 Mo. App. 260, 156 S. W. 721; *Modern Brotherhood v. Beshara* (1914) 42 Okla. 684, 142 Pac. 1014.

And a by-law of a beneficial life insurance association to the effect that a delinquent member "shall stand suspended, and shall not thereafter be entitled to any benefits of the order, and his certificate canceled and void," is self-operative. *Chapple v. Sovereign Camp, W. W.* (1902) 64 Neb. 55, 89 N. W. 423.

And it has been held that a provision in a contract of insurance to the effect that if the insured default in payment of premium or assessment he "shall stand suspended" from all benefits, etc., is, without more, self-executing, so that no affirmative action on the part of the insurer is essential to a suspension.

**United States.**—*Stanley v. Northwestern Life Asso.* (1888) 36 Fed. 75.

**Georgia.**—*Sovereign Camp, W. W. v. Shaw* (1915) 143 Ga. 559, 85 S. E. 827.

**Illinois.**—*Hansen v. Supreme Lodge, K. H.* (1892) 140 Ill. 301, 29 N. E. 1121, affirming (1891) 40 Ill. App. 216; *National Union v. Hunter* (1901) 99 Ill. App. 146, affirmed in (1902) 197 Ill. 478, 64 N. E. 356; *National Union v. Shipley* (1900) 92 Ill. App. 355; *Thompson v. Ancient Order of Gleaners* (1916) 200 Ill. App. 200.

**Louisiana.**—*Feiber v. Supreme Council, A. L. H.* (1904) 112 La. 960, 36 So. 818.

**New York.**—*Evans v. Supreme Council, R. A.* (1918) 223 N. Y. 497, 1 A.L.R. 163, 120 N. E. 93, reversing (1917) 181 App. Div. 916, 168 N. Y. Supp. 550; *Paster v. Nagelsmith* (1900) 30 Misc. 791, 63 N. Y. Supp. 154.

**Pennsylvania.**—*Beeman v. Supreme Lodge, S. H.* (1905) 29 Pa. Super. Ct. 387.

**Texas.**—*Supreme Lodge, K. H. v. Keener* (1894) 6 Tex. Civ. App. 267, 25 S. W. 1084; *Moore v. Supreme Assembly, R. S. G. F.* (1906) 42 Tex. Civ. App. 366, 93 S. W. 1077.

**Wisconsin.**—*Freckmann v. Supreme Council, R. A.* (1897) 96 Wis. 133, 70 N. W. 1118.

**Canada.**—*Wells v. Supreme Council, I. O. F.* (1889) 17 Ont. Rep. 317.

In *Beeman v. Supreme Lodge, S. H.* (Pa.) *supra*, in discussing the effect of the provision, "shall stand suspended," upon the rights of the parties to a contract of insurance, the court said: "If we construe the law to the utmost in favor of the appellee, *Beeman* was suspended by force of the law of the order, ipso facto, at midnight on March 30, because of the nonpayment of his assessment. 'Each member shall pay the amount according to age, as per table, and any member failing to pay the same on or before the last meeting night of each month shall stand suspended from the order and all benefits therefrom.' We think it a proper construction of this language, under the law of the order, to say that, when the meeting adjourned on the evening of March 30,

Beeman was suspended and not entitled to benefits as a matter of law, without any action on the part of the lodge. It is the member himself who, by violating the laws of the order, works his own suspension through the nonpayment of his assessment. The words, 'shall stand suspended,' when used in respect to policies of insurance and death benefit certificates, would seem to be equivalent, in their legal effect, to 'cease and determine' and 'null and void.' And in *Supreme Lodge, K. H. v. Keener (Tex.) supra*, the court said that the provision, "shall stand suspended," is "self-executing, and requires no action on the part of a subordinate lodge, or of any other judicatory of the order, to put it in operation. The words of the Constitution are mandatory, not that a member may be 'suspended' for not paying his assessments, but he 'shall stand suspended.'"

So, it has been held that a provision of a mutual benefit society that the failure to pay an assessment, when due, shall suspend a member and all rights under his benefit certificate, is self-operative. *Supreme Council, C. B. L. v. Grove (1911) 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 159.* And that a constitutional provision and by-law to the effect that for failure to pay dues the insured stands suspended, and is not entitled to any benefits, is self-operative, and suspends the member without any action upon the part of the insurer, was the holding in *Smith v. Sovereign Camp, W. W. (1903) 179 Mo. 119, 77 S. W. 862.* And in *Brown v. Knights of Protected Ark (1908) 43 Colo. 289, 96 Pac. 450*, where the contract provided that the delinquent member "shall stand suspended," and also that all benefits "shall be liable to forfeiture," it was held that, reading the two provisions together, the intent was clear that they were self-operative, so that no affirmative action upon the part of the insurer was necessary.

And a by-law of a mutual insurance company, providing that upon default in the payment of any premium or assessment "the risk of the company on the policy shall be suspended until

the same is paid," has been regarded as self-operative. *Nash v. Union Mut. Ins. Co. (1857) 43 Me. 343, 69 Am. Dec. 65; Hollister v. Quincy Mut. F. Ins. Co. (1875) 118 Mass. 478; Blanchard v. Atlantic Mut. F. Ins. Co. (1856) 33 N. H. 9.* And the same has been held under a charter providing that upon default the "insurance shall be suspended," and that the insured "shall thenceforth have no claim . . . for losses sustained until" the assessment is paid. *Hill v. Farmers' Mut. F. Ins. Co. (1901) 129 Mich. 141, 88 N. W. 392.* Also, where the provision merely was that "the insurance should stand suspended" during the default. *Coil v. Continental Ins. Co. (1913) 169 Mo. App. 634, 155 S. W. 872.*

Under a by-law of a benefit society, providing that suspension of a member for nonpayment of assessments occurs on the first day of the month following default, the mere failure to pay an assessment "ipso facto causes suspension," and the certificate is rendered void until the member is reinstated. *HAYCOCK v. SOVEREIGN CAMP, W. W. (reported herewith) ante, 378.*

And provisions in the contract of a mutual fire insurance association that if there be default for thirty days in payment of premium the "policy shall be and remain suspended until the payment" and acceptance of the amount, that during the period of suspension the policy shall be unenforceable, and that if it remains suspended for sixty days "it shall be canceled without notice," have been held self-executing. *Lamb v. Merchants Nat. Mut. F. Ins. Co. (1908) 18 N. D. 253, 119 N. W. 1048.*

And it has been held that a charter provision of a mutual life insurance association to the effect that upon failure of a member to pay an assessment he "shall be suspended and treated as" a nonmember, and that "the holder of the benefit certificate shall be without right against the association" in case of the death of the delinquent member, is self-operative. *Maginnis v. New Orleans Cotton Exch. Mut. Aid Asso. (1891) 43 La. Ann. 1136, 10 So. 180.*

And a by-law of a mutual insurance

company, providing that it shall not be liable for any loss sustained during the time the policy lapses by reason of nonpayment of assessment, is self-operative and bars recovery for loss occurring during such a default. *Farmers' Mut. Ins. Co. v. Kinney* (1902) 64 Neb. 808, 90 N. W. 926.

And under a by-law of a mutual benefit society, providing that a delinquent member "loses his benefits until he shall have paid what he owes," such a member loses benefits during the period of delinquency, although the society has taken no affirmative action toward ruling him from its lists. *La Marsh v. L'Union St. Jean Baptiste Soc.* (1894) 68 N. H. 229, 38 Atl. 1045.

So, under a provision of the constitution of a fraternal beneficial organization that a member indebted for dues for a specified time "shall not be entitled to benefits until" a specified time after all arrearages shall have been paid in full, it has been held that a member by default automatically suspends himself, and forfeits his right to benefits accruing during the period of suspension. *Young v. Æolian Council* (1915) 59 Pa. Super. Ct. 174.

And a by-law of a fraternal beneficiary society, providing that a member who shall fail to pay his dues shall "forfeit" his right "to the benefits as long as he shall continue to be in arrears," has been held to be self-operative. *Labranche v. St. Jean Baptiste Soc.* (1911) 76 N. H. 237, 81 Atl. 698. *Peaslee, J.*, said: "No action by the society was necessary to create a suspension, and members who were in arrears for dues were suspended by virtue of that fact alone. While suspended their names were properly kept on the books. They were still members, though not members in good standing."

And a provision of a contract of insurance to the effect that on default in payment of premiums or assessments the policy or certificate shall be null and void, and continue so until payment thereof is made, is self-operative, and suspends the insured without any affirmative action upon the part of the insurer. *Smith v. Sov-*

*ereign Camp, W. W.* (1903) 179 Mo. 119, 77 S. W. 862; *Sovereign Camp, W. W. v. Hicks* (1904) 37 Tex. Civ. App. 424, 84 S. W. 425.

And a provision in an accident policy that "no claim for injuries sustained during any period" for which the premium has not been paid shall be valid has been held automatic in its operation. *Hagins v. Ætna L. Ins. Co.* (1905) 72 S. C. 216, 51 S. E. 683.

It has also been held that where the constitution and by-laws of a mutual benefit society provide that no member who is in arrears for dues "shall be entitled" to benefits, and that a delinquent member "shall not be entitled to any benefit until all arrearages shall have been paid," the suspension is automatic. *Henegar v. National Council, J. O. U. A. M.* (1914) 5 Tenn. C. C. A. 225. *Hall, J.*, in delivering the opinion of the court, among other things, said: "It was not necessary for the local council to first have suspended the insured in order to deprive him of the benefit. The by-law was self-executing, and operated to suspend the member from the benefits conferred by the funeral department. In other words, under said by-laws, he forfeited all right to said funeral benefit by reason of being in arrears with his dues. This did not affect his membership in the council for other purposes. Under the constitution and by-laws of the council, he remained a member for other purposes, but was not entitled to the benefit conferred by the funeral department of the national council. The laws of a benevolent society, when pertinent and not in conflict with the statute laws of the state or the recognized rules of public policy, become part of its contracts with members, and are binding on the parties."

And provisions of a fraternal benefit society that death certificates shall not be paid unless the member was in good standing at the time of his death, and that when an assessment is overdue the delinquent "stands unfinancial . . . until the same is paid," have been regarded as self-executing. *Grayson v. Grand Temple & Tabernacle, K.*

D. T. I. O. T. (1914) — Tex. Civ. App. —, 171 S. W. 489.

Where the contract of insurance provides that on default in payment of an assessment the delinquent member's certificate and membership shall cease until reinstated, and that no benefits shall be paid between the time when the delinquent payment became due and the time when the same is received, delinquency alone has been held to work a suspension. *National Masonic Acci. Asso. v. Burr* (1895) 44 Neb. 256, 62 N. W. 466.

So, it has been held that the provisions of a mutual fire insurance contract that on failure to pay assessments the directors "may annul the policy," and that "no person shall receive any benefit" under the policy "until all assessments" are paid, are "self-executing" so that "no affirmative action" on the part of the insurer was necessary. *Stutzman v. Cicero Mut. F. Ins. Co.* (1912) 150 Wis. 254, 136 N. W. 604.

And construing a constitutional provision of a mutual benefit association which provided that a member who does not pay his regular monthly dues or fines for a specified time is considered in arrears, and that, if this arrearage continue for a certain additional length of time, "the member will be declared suspended from the society," it has been held that being in arrears for the full specified length of time "operated ipso facto, and without any further action on the part of the defendant [insured], as a suspension" of the delinquent. *Giniso v. Calabrian American Citizens' Mut. Ben. Asso.* (1910) 66 Misc. 162, 121 N. Y. Supp. 209. This decision seems to go about as far as any in holding that the default automatically suspends the member and his rights. In fact, the decision can hardly be reconciled with some of the cases set out *infra*, III., which construe language of similar import as requiring affirmative action by the insurer in order to work a suspension.

*b. Where premium note given.*

*1. Provisions in both policy and note.*

Where both the policy and a pre-

mium note provide that if any installment shall not be paid promptly when due the policy "shall be suspended, inoperative, and of no force or effect until" paid, no affirmative action by the insurer is essential to a suspension, and no recovery can be had for a loss occurring during a default. *McCullough v. Home Ins. Co.* (1907) 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626; *Davis v. Home Ins. Co.* (1913) 127 Tenn. 330, 44 L.R.A.(N.S.) 626, 155 S. W. 131. In the *McCullough Case* (Tenn.) *supra*, the court said: "The stipulation for a suspension of liability under a policy in case of default in payment of the premium is a reasonable one, made to enforce prompt payment of that part of the premium for which credit is given. It violates no principle of public policy or rule of the common or statute law, and is valid. Such a stipulation only becomes effective and injurious to the insured upon their own default in a matter of which they have full notice, and about which they cannot be mistaken. These being the terms of the contract, the decision of the case is without difficulty. The well-settled rule, as stated and enforced in the adjudged cases of all courts of last resort to which we have had access, and laid down in the textbooks of authority upon this subject, is that provisions of this character in insurance policies are valid and enforceable, and that if a loss occurs while the insured is in default, within the terms of his policy, no recovery can be had."

And where the policy provides that, on the failure of the assured to pay the note when due, the policy "shall lapse and the liability of the company thereon shall be suspended . . . during the period of such lapse caused by arrearage," and the note stipulates that default will render the policy void, failure to pay as provided defeats recovery for loss occurring during default. *Gleason v. Prudential F. Ins. Co.* (1912) 127 Tenn. 8, 151 S. W. 1030.

So, under provisions in an application and policy that if a premium note shall not be paid when due the policy "shall cease to insure," and the "company shall not be liable for any loss



or damage which may accrue . . . during such default, nor until such policy shall be revived," and a provision in a premium note that the "company shall not be liable for any loss that may occur during the time this note remains overdue and unpaid," the obligation of the risk is automatically suspended during the default. *East Texas F. Ins. Co. v. Perky* (1893) 5 *Tex. Civ. App.* 698, 24 S. W. 1080. Finley, J., argued as follows: "By the terms of the contract, it was provided that if default was made in the payment of either of the premium notes the policy should cease to insure, and the insurance company should not be liable during such default. There is an independent provision in the contract, authorizing either party to it to have the policy canceled at any time, upon certain notice, and adjustment of the premiums paid. Considering all of these provisions together,—giving to each of them its legitimate force and effect,—we think the fair and reasonable interpretation is that it was the intention that the nonpayment of the premium notes at maturity should have the effect to suspend the obligation of risk during the continuance of default in the payment of the premium. The provision that the 'company shall not be liable for any loss or damage which may accrue to the property insured thereunder during such default,' we think, evidences the intention that the policy should not become utterly extinguished by failure to pay the note at maturity. . . . The failure on the part of the assured to pay the premium note at maturity relieved the company of liability under the policy while default in such payment continued, unless that provision in the contract was waived by the company, or unless the company was guilty of such conduct in relation thereto as to render it unfair to the assured that it should insist upon exemption from liability under such clause, and thereby became estopped from denying the continued binding force of the obligation of risk. . . . The fact that the policy also provided that the company should not again become liable, after default, 'until such policy shall be re-

vived by written consent of the managers of said company's instalment department, or by an officer of said company, on payment of all amounts due thereon,' we do not think stands in the way of the construction of the contract which we have given to it. That provision stands upon no higher plane of binding force than the other provisions of the policy."

And where both the policy and a note given for a premium provide that the policy shall become void "while," or "so long as," or "during the time" the note remains due and unpaid, or "until" paid, it has been held that the insurer is not liable for a loss occurring while the policy remained suspended by a default, although the insurer took no affirmative action.

**United States.**—*Cardwell v. Republic F. Ins. Co.* (1875) 12 *Nat. Bankr. Reg.* 253, *Fed. Cas. No.* 2,396.

**Arkansas.**—*Jefferson Mut. Ins. Co. v. Murry* (1905) 74 *Ark.* 507, 86 S. W. 813; *Driver v. Planters' Mut. Ins. Asso.* (1906) 78 *Ark.* 127, 93 S. W. 752; *American Ins. Co. v. Hornbarger* (1908) 85 *Ark.* 337, 108 S. W. 213.

**California.**—*VALENTINE v. HEAD CAMP, P. J. W. W.* (reported herewith) ante, 380.

**Illinois.**—*Carlock v. Phoenix Ins. Co.* (1891) 138 *Ill.* 210, 28 N. E. 53; *Lenz v. German F. Ins. Co.* (1898) 74 *Ill. App.* 341.

**Indiana.**—*American Ins. Co. v. Henley* (1878) 60 *Ind.* 515; *Continental Ins. Co. v. Dorman* (1890) 125 *Ind.* 189, 25 N. E. 213; *Michigan Mut. L. Ins. Co. v. Custer* (1890) 128 *Ind.* 25, 27 N. E. 124.

**Iowa.**—*Beeman v. Farmers Pioneer Mut. Ins. Asso.* (1897) 104 *Iowa*, 83, 65 *Am. St. Rep.* 424, 73 N. W. 597.

**Kansas.**—*Continental Ins. Co. v. Daly* (1885) 33 *Kan.* 601, 7 *Pac.* 158.

**Kentucky.**—*Blackerby v. Continental Ins. Co.* (1886) 83 *Ky.* 574; *Potter v. Continental Ins. Co.* (1899) 107 *Ky.* 326, 53 S. W. 669.

**Michigan.**—*Williams v. Albany City Ins. Co.* (1870) 19 *Mich.* 451, 2 *Am. Rep.* 95.

**Missouri.**—*Barnes v. Continental Ins. Co.* (1888) 30 *Mo. App.* 539; *Dircks v. German Ins. Co.* (1889) 34

Mo. App. 31; *Sauner v. Phoenix Ins. Co.* (1890) 41 Mo. App. 480.

Canada.—See *Meagher v. Home Ins. Co.* (1860) 10 U. C. C. P. 313, and *Meagher v. Aetna Ins. Co.* (1860) 19 U. C. Q. B. 530.

In *Lenz v. German F. Ins. Co.* (Ill.) supra, the court said: "Under the terms of the note and policy, the latter was suspended during the period of nonpayment of the premium note, after its maturity, August 4, 1894, and would be revived only upon payment, and then only from the time of such payment. By the terms of the contract there could be no forfeiture for nonpayment of the premium note, for the insured, at all times, had the right to pay, and it was the duty of the insurer to receive payment, thereby reviving the policy. According to the terms of the contract, the policy was suspended at the time the loss occurred, in consequence of which appellee was relieved of liability. That which counsel insist was a forfeiture was not, but only a suspension of the policy during the period of nonpayment of the note after it was due, and which was effected by operation of the contract made by appellant himself. If the facts relied upon had the effect of reviving the policy, it would take effect only after the loss, and would therefore be unavailing to appellant."

And in *Williams v. Albany City Ins. Co.* (Mich.) supra, in discussing the proper interpretation to give provisions declaring a policy void while premium notes remain overdue and unpaid, the court said: "Was it the intention that the policy should become utterly and finally extinguished on failure to pay the note at maturity? If the provision had stopped with the clause, 'and this policy becomes void,' such would have been the true interpretation. But the whole instrument, and especially the whole provision upon the same identical subject, must be construed together to ascertain the intent; and the clause last cited is but a part of one entire provision, but one branch or member of the same compound sentence, and is immediately followed by the qualifying clause, showing just how long

the policy is to be void by reason of the default,—'while said past-due notes or obligations, or any part thereof, shall remain overdue and unpaid.' This shows just as clearly the intent to limit the period during which the policy shall be void, as the previous words do to make it void at all or for any period or purpose. In other words, it shows that, notwithstanding the use of the term, 'void,' the intention clearly was only to suspend its operation as a policy while the note or obligation should remain overdue and unpaid, and that, upon payment after default, the policy should again take effect from the time of the payment, and continue for the remainder of the period originally fixed; and that, by reason of such default, it should only become wholly void, or cease to be capable of revival as a policy, in case that default should continue to the end of the period first fixed for the insurance. The provision, therefore, is but a stipulation, in another form of words, that the company shall not be liable for any loss which may occur during the continuance of the default."

And where both the policy and the note provide that failure to pay a premium note when due shall avoid the policy "until duly reinstated," a policy automatically becomes inoperative with the delinquency, and so continues until reinstated. *Hipp v. Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

And of the same effect are provisions in both an insurance policy and a premium note that the insurer shall not be liable for any loss or damage that may occur to the property while any instalments of the premium remain due and unpaid.

Indiana.—*Continental Ins. Co. v. Miller* (1891) 4 Ind. App. 553, 3 N. E. 718; *Continental Ins. Co. v. Chew* (1894) 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417.

Kentucky.—*Mudd v. German Ins. Co.* (1900) 22 Ky. L. Rep. 308, 56 S. W. 977; *Continental Ins. Co. v. Browning* (1902) 114 Ky. 183, 70 S. W. 660; *Walls v. Home Ins. Co.* (1903) 114 Ky. 611, 102 Am. St. Rep. 298, 71 S. W. 650;

CONTINENTAL INS. CO. v. STRATTON (reported herewith) ante, 391.

**Michigan.**—*Robinson v. Continental Ins. Co.* (1889) 76 Mich. 641, 6 L.R.A. 95, 43 N. W. 647.

**Nebraska.**—*Hooker v. Continental Ins. Co.* (1903) 69 Neb. 754, 96 N. W. 663.

**Ohio.**—*McEvoy v. Michigan Mut. L. Ins. Co.* (1888) 2 Ohio C. D. 329.

**Oklahoma.**—*St. Paul F. & M. Ins. Co. v. Cooper* (1909) 25 Okla. 38, 105 Pac. 198.

**Tennessee.**—*Dale v. Continental Ins. Co.* (1895) 95 Tenn. 38, 31 S. W. 266; *Kimbrow v. Continental Ins. Co.* (1898) 101 Tenn. 245, 47 S. W. 413; *Johnson v. Continental Ins. Co.* (1907) 119 Tenn. 598, 107 S. W. 688.

## 2. Provisions in policy only.

A conclusion similar to that reached in the cases cited in the next preceding subdivision has also been reached where it seemingly was provided in the policy only that the insurer should not be liable for any loss or damage occurring while a premium note, or any part thereof, was past due or unpaid. *Watrous v. Mississippi Valley Ins. Co.* (1872) 35 Iowa, 582; *Nedrow v. Farmers Ins. Co.* (1876) 43 Iowa, 24; *Shakey v. Hawkeye Ins. Co.* (1876) 44 Iowa, 540; *Garlick v. Mississippi Valley Ins. Co.* (1876) 44 Iowa, 553; *Critchett v. American Ins. Co.* (1880) 53 Iowa, 404, 36 Am. Rep. 230, 5 N. W. 543; *Home Ins. Co. v. Karn* (1897) 19 Ky. L. Rep. 273, 39 S. W. 501; *McIntyre v. Michigan State Ins. Co.* (1883) 52 Mich. 188, 17 N. W. 781; *Burnham v. Michigan Mut. L. Ins. Co.* (1907) 149 Mich. 84, 112 N. W. 704; *Mooney v. Home Ins. Co.* (1897) 72 Mo. App. 92; *Proebstel v. State Ins. Co.* (1896) 14 Wash. 669, 45 Pac. 308.

Likewise, a provision in a policy of insurance, rendering it void during the continuance of default in payment of any instalment of a premium note, is self-operative during the period of such default, so as to release the insurer from liability for a loss occurring during the same. *American Ins. Co. v. Klink* (1877) 65 Mo. 78; *Phenix Ins. Co. v. Bachelder* (1891) 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217,

affirmed on rehearing in (1894) 39 Neb. 95, 57 N. W. 996; *Wall v. Home Ins. Co.* (1867) 36 N. Y. 157, affirming (1861) 8 Bosw. 597. In the *Phenix Ins. Co. Case* (Neb.) supra, the court said: "It is obvious that the failure to pay the premium note at maturity suspended the policy until payment was made. It could have been revived for the balance of the term, by making full payment at any time before the loss. This, as we have seen, he failed to do. True, after maturity of the note, he paid \$15 thereon, but this did not give him the right to avail himself of the benefits of the contract of insurance. Nothing short of full payment, or a waiver of the stipulation in the policy, could have the effect to remove the suspension caused by the failure to pay the note. The clause referred to is not unreasonable. It is but fair and just that while the insured is in default in the payment of his note the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to enforce the one they have made. To hold that the policy was in force at the time of the fire would be to set aside and disregard the plain stipulation of the parties."

And the same is true where the contract provides that the policy shall be void while a premium note remains overdue and unpaid. *Gorton v. Dodge County Mut. Ins. Co.* (1875) 39 Wis. 121.

And a by-law of a mutual insurance company, providing that if an assessment on a premium note is not paid within a specified time after notice the policy shall be "void until the said assessment be paid," has been held self-executing, so that the company need neither declare the policy void nor give notice of the suspension to the insured. *Fogle v. Lycoming Mut. Ins. Co.* (1860) 3 Grant, Cas. (Pa.) 77; *Hummel & Co's Appeal* (1875) 78 Pa. 320; *Lycoming F. Ins. Co. v. Rought* (1881) 97 Pa. 415. In the *Hummel & Co. Case* (1875) 78 Pa. 320, supra, the court, Per Curiam, said: "The effect of the . . . section is merely to suspend the benefit

of the policy, after thirty days' default in payment, until payment of the assessment is made either voluntarily or involuntarily, the company by the same section being authorized to retain the premium note to enforce collection. The mistake of the master is in treating the words 'null and void' as creating an absolute extinguishment of the contract; whereas the provision is only a contract mode of enforcing payment of the premium, by withholding the protection of the policy during the default, the contract itself remaining in life, and its operation only being suspended, by its own terms, until payment is made by the insured, or the assessment collected under the premium note. The moment payment was made the contract, which was still alive, became again operative in its protection. There was no option to be exercised by the company in order to put an end to the contract, but the contract, *propria vigore*, suspended the protection until the default was at an end. Clearly it is the right of the parties to make this condition in their contract, and especially in such a case, where by the policy the relation of membership is created."

And under a provision in a fire policy that the company shall not be liable for any loss occurring at a time when any premium note shall be due and unpaid, delinquency itself suspends the risk during the default. *Antes v. State Ins. Co.* (1900) 61 Neb. 55, 84 N. W. 412.

So, it has been held that a provision in a fire insurance policy that, in case any part of a premium note is not paid when due, "this policy shall lapse and the same shall be suspended, inoperative, and of no force or effect so long as" the default continues, is self-operative and may be enforced by the insurer. *Belk v. Capital F. Ins. Co.* (1918) 102 Neb. 702, 169 N. W. 262 (as ruled in the first headnote).

And a provision in a policy that if a premium note is not paid when due the policy shall lapse and cease to be in force, and remain inoperative while the note is past due and unpaid, and the insurer not liable during the de-

fault, is self-operative, and default in payment itself constitutes a suspension and a defense to a claim based on a loss following default and preceding payment. *Home F. Ins. Co. v. Garbacz* (1896) 48 Neb. 827, 67 N. W. 864.

And a provision that the policy "shall be suspended, inoperative, and of no force or effect so long as" any premium note remains due and unpaid, and that the insurer shall not be liable for any loss while such default continues, is self-operative so as to excuse liability for a loss occurring after the maturity of a premium note, and while the same is unpaid. *Houston v. Farmers & M. Ins. Co.* (1902) 64 Neb. 138, 89 N. W. 635.

Likewise, default, under a provision in a policy that when default shall be made on a premium note "all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid," precludes a recovery unless the default be waived. *Joliffe v. Madison Mut. Ins. Co.* (1875) 39 Wis. 111, 20 Am. Rep. 35.

### *3. Provisions in note and not in policy.*

Under a provision in a premium note declaring the insurance void while such note remains due and unpaid, at least, where the note is expressly made a part of the contract of insurance, the mere failure to pay the note when due has been held to itself avoid the policy during the delinquency. *Hale v. Michigan Farmers Mut. F. Ins. Co.* (1907) 148 Mich. 453, 111 N. W. 1068.

And the same conclusion has been reached where it merely appeared that the stipulation for suspension of benefits so long as the delinquency continued was contained in the premium note. *New Zealand Ins. Co. v. Maaz* (1899) 13 Colo. App. 493, 59 Pac. 213.

On the other hand, in *Wilson v. Home Ins. Co.* (1879) 6 Ohio Dec. Reprint, 708, where the provisions of the policy are not reported, but it appeared that a note given for an insurance premium contained a stipulation that if not paid at maturity the insurance should not be binding upon the insurer while the default

continued, the court charged the jury that the mere fact that the note was not paid at maturity did not of itself avoid the policy, but simply gave the insurer the option of declaring a forfeiture, which option, it was said, "must be asserted by clear and unequivocal acts." It should be noted in connection with the fact that the reporter states that this decision follows strictly the decision in *Mutual L. Ins. Co. v. French* (1876) 30 Ohio St. 240, 27 Am. Rep. 443, that in that case the provisions provided for an absolute forfeiture rather than a mere suspension during default, which fact alone affords sufficient ground for distinguishing the cases.

And in *Shawnee Mut. F. Ins. Co. v. Cannedy* (1912) 36 Okla. 733, 44 L.R.A.(N.S.) 376, 129 Pac. 865, where the premium note provided that, if not paid at maturity, the policy should be "null and void, and so remain until the same shall be fully paid," which clause is really a suspension rather than a forfeiture clause, the court seems to have taken the same view as was expressed in the *Wilson Case*, it having cited with seeming approval *Mutual L. Ins. Co. v. French*, as holding "that a condition such as contained in the notes given for premiums in this case did not render the policy void until the company had, by affirmative action, declared the policy forfeited." However, the decision in the *Cannedy Case* may perhaps be distinguished from others which reached a contrary conclusion, on the ground that here the provision for suspension was in the note, but not in the policy. In fact the court points out that such a provision as the one before it in a premium note, but not in the policy, is nugatory, and also that where the provision for forfeiture is contained in the note equity will relieve against it, for the reason that its object is merely to secure prompt payment of the note, and, as the breach of the agreement to pay promptly can be compensated, equity will relieve against the forfeiture. It is of interest, in connection with this decision, that although there is a difference of opinion as to its validity, the contention has sometimes

been advanced that where the provision for suspension in case of nonpayment forms no part of the original contract, but is found only in the note itself, it is in the nature of a condition subsequent, which only becomes operative when the insurer elects to take advantage thereof. For an illustrative case, see *Columbian Nat. L. Ins. Co. v. Mulkey* (1913) 13 Ga. App. 508, 79 S. E. 482, which, however, does not fall within the scope of the present annotation.

#### 4. Under statute.

In a few instances, statutes relating to suspension and forfeiture of insurance for nonpayment of premium notes, etc., have been enacted, which control the decisions in cases falling within the scope of the present annotation.

For instance, it has been held that a provision ordinarily sufficient automatically to work a suspension does not have that effect where a statute regulating suspension of insurance policies for nonpayment of premium notes has not been complied with. Thus, in *Schultz v. Des Moines Mut. Hail & Cyclone Ins. Asso.* (1915) 35 S. D. 627, 153 N. W. 884, Ann. Cas. 1917D, 78, where the by-laws of a mutual insurance company provided that a member "should stand suspended," and that the association should not be liable for any loss occurring while any assessments were overdue and unpaid, it was held that such by-law did not, by reason of the nonpayment of an assessment, in law, suspend the policy, where the insurer had not given the notice required by S. D. Civ. Code, § 677, which provided that no policy of insurance should, by virtue of any condition or provision thereof, be suspended for nonpayment of any note or obligation taken for the premium unless the insurer should, among other things, give not less than thirty days' notice of the effect upon the policy of nonpayment, etc. It was said: "Inasmuch as respondent [insured] was not given the notice of assessment required by law, his policy of insurance was not, in point of law, suspended by reason of his nonpayment of his assessment, not-

withstanding the provisions of the by-laws of the company. By-laws in conflict with express provisions of statute cannot be sustained. The law requires the officers of the company to give a certain kind of notice. They did not do so. If they intended to suspend that policy, they should have given the notice pointed out in the statute. The fact that the policy was not suspended at the time of the loss, in 1912, was due to their negligence or ignorance of the provisions of our laws."

For another statutory provision which expressly requires that, where a note has been given for a premium on a fire policy, notice must be given the insured before cancellation of the policy for nonpayment, see *Antes v. State Ins. Co.* (1900) 61 Neb. 55, 84 N. W. 412, which cites an Iowa statute to this effect, but in which the court declined to pass upon the effect of the same upon a provision of the character under consideration in the present annotation, on the ground that the policy in suit was a Nebraska and not an Iowa contract.

### *III. Provisions requiring affirmative action.*

It has been said that "it is only in those cases where the language of the by-laws [contract of insurance] permits of no other construction that the courts hold that the mere failure to pay an assessment within the time, ipso facto, works a suspension or forfeiture. In such cases the member is summarily deprived of his rights in the order [insurance], and such action is not favored, and therefore such provisions are always strictly construed by the courts in favor of the member [insured], and against the order [insurer]." *Burchard v. Western Commercial Travelers Asso.* (1909) 139 Mo. App. 606, 123 S. W. 973.

However, it seems that few of the cases in which it has been held that the provisions under consideration were not self-operative have actually needed to invoke so broad a rule.

For instance, it has been held that affirmative action is required where the provision is that upon default in

payment of dues the delinquent "may be suspended," and that no member shall be suspended "without a fair and impartial trial," etc. *Rogers v. Union Benev. Soc.* (1901) 111 Ky. 598, 55 L.R.A. 605, 64 S. W. 444.

And it has been held that, even where the contract provides that a delinquent member "shall stand suspended," the provision is not self-operative, if the contract also provides a formal method by which a member may be suspended and his beneficiary certificate canceled. *Tourville v. Brotherhood of Locomotive Firemen* (1894) 54 Ill. App. 71; *Scheufler v. Grand Lodge, A. O. U. W.* (1891) 45 Minn. 256, 47 N. W. 799; *Backdahl v. Grand Lodge, A. O. U. W.* (1891) 46 Minn. 61, 48 N. W. 454.

And the fact that a provision that a delinquent member of a mutual benefit association "shall, by that fact, stand suspended" from membership and benefits, was followed by other clauses making provision whereby the lodge might appropriate funds for the payment of deficiencies, has been held to prevent the nonpayment of an assessment, operating ipso facto as a suspension without any action being taken by the lodge in that respect. *Flicek v. High Court, C. O. F.* (1900) 90 Ill. App. 344; *Bange v. Supreme Council, L. H.* (1907) 128 Mo. App. 461, 105 S. W. 1092, reaffirmed on subsequent appeal in (1910) 153 Mo. App. 154, 132 S. W. 276, and again in (1913) 179 Mo. App. 21, 161 S. W. 652. See also *Murphy v. Independent Order, S. D. J.* (1900) 77 Miss. 830, 50 L.R.A. 111, 27 So. 624. However, where the provision is that the association might pay, which privilege is confined to a specified period, it has been held that a refusal upon the part of the order to pay an assessment clearly results in a suspension of the delinquent member. *Bange v. Supreme Council, L. H.* (1907) 128 Mo. App. 461, 105 S. W. 1092.

And where the contract provides that upon default of the insured or his becoming in arrears he "shall be suspended," and also prescribes a formal method for such suspension, the rule is that default in payment does not

ipso facto operate as a suspension from benefits, and that action must be taken in the mode prescribed by the contract. *Osterman v. District Grand Lodge, I. O. B. B.* (1896) 5 Cal. (Unrep.) 237, 43 Pac. 412. It was further held in that case that under such provisions the failure of a subordinate lodge of a mutual benefit insurance association formally to suspend a delinquent member is not excused by the facts that the assured was secretary of such lodge, and that the failure to institute formal proceedings for suspension was the result of his failure to report his own delinquency.

So, where the charter of a mutual benefit insurance company provided that on default in payment of assessments the delinquent member's insurance "may be suspended or canceled by the secretary or board of directors, . . . provided that when the insurance is suspended or canceled by the secretary an appeal may be made to the board of directors," etc., it has been held that default itself will not work a suspension. *Olmstead v. Farmers' Mut. F. Ins. Co.* (1883) 50 Mich. 200, 15 N. W. 82. In the course of his argument, Graves, Ch. J., said: "Wherever a forfeiture, whether total or partial, is intended to be authorized on the happening of some state of facts, the provisions for it should never be administered in a form or mode more rigorous than a strict construction against the party seeking or insisting on the forfeiture will fairly justify, and where the question is whether it was the purpose that there should be no forfeiture unless ordered as the result of a hearing; or whether the design was that it should immediately arise from the occurrence of certain facts without any authentic finding of their existence; or, again, whether it was the intention that it might be produced by a mere ex parte and arbitrary determination, it is incumbent on the court to incline strongly towards the first construction. The rule is universal, and it rests upon natural equity, that where the real subject is whether one shall lose a right or another gain an advantage, it will always be intended, if the case

will in any wise admit of it, that the matter was meant to be settled by an exercise of judgment respecting the facts, after opportunity given to the parties to be heard. The principle applies. It is inferable from the charter that it was not intended that a forfeiture or suspension should come of itself on a neglect of payment, or be brought about without any hearing, or any considerate judgment on the existence of the necessary facts or the desirability of the thing itself. The secretary or board of directors may suspend or cancel the insurance. Here an act to accomplish the result is contemplated and discretion is distinctly implied, and whether this act is by the secretary or the board, the substantial form and the course of doing it are to be the same. But an appeal is authorized from the secretary. Why require the act referred to or allow the appeal, if the forfeiture or suspension was to result exclusively from a default, or from an ex parte decision? The appeal is not restricted to the company. It is allowed to the other party, and it would be absurd to say that a result subject to be appealed from by the parties was intended to be an ex parte result, or a result not amenable to judgment or discretion, but one inevitable in its nature. The charter provision supposes a determination capable of being appealed from by the parties, and on an occasion on which claims and objections could be urged and decided. It is needless to go further. There was neither any hearing nor any corporate declaration of forfeiture or suspension, and the defense failed wholly on its own theory."

And it has been held that a provision in an insurance policy that, upon failure to pay assessments, the insured "shall be suspended and his certificate become null and void, and all rights and benefits . . . forfeited," when followed by a clause to the effect that "a member who has been suspended for nonpayment of his dues and assessments may be reinstated," does not operate automatically, but requires some affirmative action on the part of the insured. *Brooks v. Conservative*

L. Ins. Co. (1906) 132 Iowa, 377, 119 Am. St. Rep. 560, 106 N. W. 913, 11 Ann. Cas. 339. In reaching this conclusion, the court said: "The provision in the original certificate with reference to suspension for nonpayment which has already been quoted is not, as we think, self-executing, but implies that to effect such suspension and the consequent forfeiture of all rights and benefits under the certificate, some affirmative action shall be taken by the association, and that only after proper action has been taken does the certificate become null and void. After suspension the member has the right to be reinstated on payment of back dues and assessments and the furnishing of a certificate of good health, and this provision evidently contemplates some act of suspension and notice thereof to the member, after which his privilege to secure reinstatement may be exercised. Under the general rules with reference to forfeitures, and construction of the contract of insurance most strongly against the company, we have no hesitation in reaching the conclusion that the provisions above quoted as to suspension imply an affirmative act on the part of the association or the duly authorized officers thereof." But that a provision relating to the reinstatement of a "suspended" member of a mutual benefit society, even when following a provision which, without qualification, declares that nonpayment of dues shall render the benefit certificate "null and void," does not prevent delinquency from ipso facto suspending and annulling a certificate, see *Munger v. Brotherhood of American Yeomen* (1915) 176 Iowa, 291, 154 N. W. 879.

And where the laws of a fraternal benefit association provide that a certificate of membership is annulled by the suspension of the beneficiary, it has been held that a forfeiture of benefits does not attach until the delinquent member is actually and legally suspended. *Lewis v. Western Funeral Ben. Asso.* (1898) 77 Mo. App. 586, citing to the same effect, the case of *Puhr v. Grand Lodge, G. O. H.*, said to be unreported (but see (1898) 77

Mo. App. 47, where a case so entitled is reported).

And it has been held that a provision to the effect that, upon default or failure to pay, the insured "shall be suspended," requires that the suspension be made by some affirmative action of the insurer, and that the mere nonpayment of an assessment does not of itself operate as a suspension, sufficient to cut off benefits. *Scheu v. Grand Lodge, O. D. I. F.* (1883) 17 Fed. 214; *Wilson v. District Council, S. M. W.* (1916) 30 Cal. App. 190, 157 Pac. 629; *Stiefel v. Amalgamated Sheet Metal Workers' Local Union* (1917) 208 Ill. App. 121; *Jelly v. Muscatine City & County Mut. Aid Soc.* (1903) 120 Iowa, 689, 98 Am. St. Rep. 378, 95 N. W. 197. In *Jelly v. Muscatine City & County Mut. Aid Soc.* (Iowa) *supra*, the court, after declaring that it was clear that the clause under consideration was not intended to be self-executing, continued as follows: "Some affirmative action on the part of the association was contemplated before the certificate holder should become suspended. The expression 'shall be suspended,' as the same appears in said article, is declaratory merely of the right of the association to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action." And the distinction between cases where the provision is merely "shall be suspended," and cases where the provision is that the insured shall "stand suspended . . . without further notice," was pointed out in the much-cited case of *Borgraefe v. Supreme Lodge, K. L. H.* (1886) 22 Mo. App. 127. *Thompson, J.*, in construing the latter provision, said: "It was argued in behalf of the plaintiff, at the bar, that there was no forfeiture in this case because the declaration of a forfeiture is a judicial act, and neither Ada lodge, nor any other judicatory having the power to



declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section three of law two, above quoted, it is not necessary that the lodge or any other judicatory of the order should adjudge a forfeiture against a delinquent member for nonpayment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constituting instruments of mutual insurance companies and other benevolent orders of this character, where the governing statute recites that, for the nonpayment of dues or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended until the lodge or other designated judicatory exercises the power of suspension. . . . The reason is that whatever right the lodge or the order may have against the member, for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. . . . But where, as in this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside, in conformity with the rules of the order, there can be no recovery upon his benefit certificate."

So, it has been held that a provision of a by-law of a mutual benefit society that upon the failure of a member to pay his dues the lodge "shall suspend him" does not, on failure of a member to pay, ipso facto suspend him without any action upon the part of the lodge. *Grand Lodge, F. A. M. v. Dillard* (1918) — *Tex. Civ. App.* —, 162 S. W. 1173.

And in *Order of United Commercial Travelers v. McAdam* (1903) 61 C. C. A. 22, 125 Fed. 358, in holding that, where it was provided that members, upon failure to pay dues or assessments when due, "shall be suspended

from the order at a regular meeting of the council, . . . and from all benefits derived therefrom," the mere failure to pay assessments did not in itself work a suspension, although the quoted provision was followed by another which provided that a defaulting member "shall immediately on the happening of such default, and by virtue thereof, forfeit his good standing . . . and all right to indemnity and benefits of whatsoever character," the court said: "The two provisions aforesaid, standing as they do in juxtaposition, must be read and construed together; and they must be so read in the light of the well-established rule that insurance contracts and other instruments of that nature, whereby an indemnity is promised in case of death or accident, must be construed most strongly against the insurer, and so as to avoid, if possible, a forfeiture of the rights of the insured, where the language employed in formulating the contract gives rise to doubt or uncertainty as to its proper interpretation. As contracts of that nature are formulated by the insurer, and generally with an eye singly to the protection of its own interests, it is the insurer's duty to see to it that the various provisions which they contain are harmonious, and that the intentions of the contracting parties are clearly expressed. . . . It is apparent, therefore, that the subject of suspending a member who is in default is one to be considered and acted upon at a regular meeting of the local council, and the exercise of this power involves the exercise of some discretion on the part of the local body." And see *Schwartz v. St. Elizabeth Roman & G. Catholic Union* (1907) 21 Ohio C. C. N. S. 165, wherein the court quoted with approval the following statement taken from note 1, page 1087, of 3 Am. & Eng. Enc. Law: "Where a suspension for nonpayment of dues is provided for in the laws of the association [referring to mutual benefit associations], and it is also provided that such suspension shall work a forfeiture of benefits, the fact of delinquency alone does not, ipso facto, work a forfeiture;

a suspension by formal proceedings is necessary."

Where the provisions of contracts of insurance between a mutual benefit association and its members merely indicate that delinquency as to dues and assessments is a ground of suspension, and provide that the insurer must in open conclave declare delinquent members suspended, mere non-payment of an assessment does not amount, ipso facto, to a forfeiture of insurance, in case of the death of the insured during the delinquency. *Warwick v. Supreme Conclave, K. D.* (1899) 107 Ga. 115, 32 S. E. 951.

Nor does a mere failure to pay dues in a mutual benefit society work a forfeiture of benefits, ipso facto, under constitutional provisions that "the financial secretary shall notify the president when a member has failed to pay the amount assessed in the required time, and the president shall announce the fact to the assembly, and the member shall stand suspended from the order and all benefits thereof," and that "it shall be the duty of the subordinate secretary to notify the general secretary of such suspension, and also notify the member suspended." *Petherick v. General Assembly O. A.* (1897) 114 Mich. 420, 72 N. W. 262.

And an actual suspension has been held necessary where the contract was that a member failing to pay dues "was to be suspended," and the time therefor was to be fixed by vote of the lodge. *Supreme Lodge, K. H. v. Wickser* (1888) 72 Tex. 257, 12 S. W. 175.

And it has been held that, where laws of a fraternal benefit society provide that when dues and assessments are three months in arrears, the delinquent members "are suspended in the meeting next following," and that "if they are six months in arrears they are expelled without further action of the guild," the provision first quoted is not self-executing, but requires affirmative action to be operative. *Plattdeutsche Grot Gilde v. Ross* (1904) 117 Ill. App. 247. In reaching this conclusion, the court said: "It does not appear that the guild ever

suspended appellee, or that any action was taken in that regard. The law was not self-executing as regards suspensions. A member, if in arrears for six months, might be 'expelled without further action of the guild;' but it is plain from the difference in phraseology that the framers of the law intended that he should not be suspended without affirmative action by the guild, such as giving notice to the member in default and passing a resolution of suspension."

And that a by-law of a mutual benefit society to the effect that on due report of the default of a member to the lodge he shall "be declared to be suspended from membership, he having been first notified of the action that would be taken," is not self-operative, see *Dale v. Weston Lodge* (1896) 24 Ont. App. Rep. 351.

For a decision which is controlled by statute and in which the provision was held not self-operative, see *Schultz v. Des Moines Mut. Hail & Cyclone Ins. Asso.* (1915) 35 S. D. 627, 153 N. W. 884, Ann. Cas. 1917D, 78, as set out and quoted supra, II. b, 4.

For decisions which require affirmative action, where the suspension clause was contained in a premium note and not in the contract of insurance itself, see supra, II. b, 3.

#### *IV. Where whole subordinate body or branch suspended.*

It has been held that where the constitution of a mutual benefit insurance association provides that any subordinate lodge in arrears for dues "shall be suspended," and notified thereof, and remain suspended until reinstated, and that the members of such a subordinate lodge are not insured during such period of disability, the provisions are not self-executing and cannot be asserted as a defense against the claim of a member of a subordinate lodge which is in arrears, as to dues to the grand lodge, in the absence of a showing of a literal and exact compliance with the constitutional provisions. *District Grand Lodge, U. O. O. F. v. Hill* (1911) 3 Ala. App. 483, 57 So. 147. G. J. C.

W. P. BEESON et al.

v.

DRAKE OIL COMPANY, Plff. in Err.

*West Virginia Supreme Court of Appeals—October 29, 1918.*

(— W. Va. —, 97 S. E. 414.)

**Mines — lease of gas from wells — effect on operations for oil.**

Where a lessee under an oil lease contracts with another to sell him the gas produced from oil wells on the premises, to be used in the manufacture of gasoline, he does not, in the absence of words indicating an intention to restrict his right to develop and exploit the oil field, debar himself from the use of such means for stimulating the flow of oil as science and experience have proved to be advantageous, even though as a result thereof the gas may lose some of its gasoline properties.

[See note on this question beginning on page 424.]

Headnote by LYNCH, J.

**ERROR** to the Circuit Court for Wood County to review a judgment in favor of plaintiffs in an action brought to recover damages alleged to have been sustained to their gasoline plant, and for alleged obstruction of their business by reason of defendant's acts. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Kreps, Russell, & Hiteshew, Clyde B. Johnson, and W. E. Sykes, for plaintiff in error:

The question of whether or not the defendant conducted its oil operations in a manner not contemplated by contract became an issue of fact to be decided by the jury; and the burden of proof was on the plaintiffs to prove that the defendant conducted its oil operations in a manner not contemplated by the gasoline contract.

11 Am. & Eng. Enc. Law, 2d ed. 335; Probst v. Braeunlich, 24 W. Va. 361; Robinson v. Kistler, 62 W. Va. 489, 59 S. E. 505; Rosenthal v. Fox, 70 W. Va. 752, 74 S. E. 959; Henderson v. Hazlett, 75 W. Va. 256, 83 S. E. 907.

The principle of law that before the jury could find for the plaintiffs the jury must believe that gasoline was being produced from the plant of the plaintiffs in paying quantities, having been laid down in the plaintiffs' instruction, in so far as they are concerned it must be considered as absolutely binding.

Denver & R. G. R. Co. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578; Benson v. Alwood, 13 Md. 20, 71 Am. Dec. 611; Brown v. Globe Printing Co. 213 Mo. 611, 127 Am. St. Rep. 627, 112 S. W. 462; Cicero & P. Street R. Co. v. Meixner, 160 Ill. 320, 31

L.R.A. 331, 40 N. E. 823; Hazell v. Bank of Tipton, 95 Mo. 60, 6 Am. St. Rep. 22, 8 S. W. 173; Benson v. Tacoma R. & Power Co. 51 Wash. 216, 130 Am. St. Rep. 1096, 98 Pac. 605; Tetherow v. St. Joseph & D. M. R. Co. 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310; Farish v. Reigle, 11 Gratt. 697, 62 Am. Dec. 666.

The evidence must be plainly and manifestly insufficient to warrant a court in setting aside a verdict.

State v. Sullivan, 55 W. Va. 597, 47 S. E. 267; Blosser v. Harshberger, 21 Gratt. 214; Pryor v. Com. 27 Gratt. 1010; Hilb v. Peyton, 21 Gratt. 386; Smith v. Com. 21 Gratt. 813; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 114; Johnson v. Com. 29 Gratt. 820; Dean v. Com. 32 Gratt. 917; Baccigalupo v. Com. 33 Gratt. 811, 36 Am. Rep. 795; Powell v. Tarry, 77 Va. 260; Priest v. Whitacre, 78 Va. 158; Montague v. Allan, 78 Va. 598, 49 Am. Rep. 384; Benn v. Hatcher, 81 Va. 33, 59 Am. Rep. 645; Noell v. Noell, 93 Va. 439, 25 S. E. 242; Nicholas v. Com. 91 Va. 813, 22 S. E. 507; Steptoe v. Flood, 31 Gratt. 342; Gwynn v. Schwartz, 32 W. Va. 494, 9 S. E. 880; Black v. Thomas, 21 W. Va. 713; Robertson v. Com. 2 Va. Dec. 142, 22 S. E. 359; Cash v. Com. 2 Va. Dec. 1, 20 S. E. 893; Campbell v. Lynn, 7 W. Va.

672; Sheff v. Huntington, 16 W. Va. 321; Welch v. County Ct. 29 W. Va. 63, 1 S. E. 341; Jones v. Singer Mfg. Co. 38 W. Va. 149, 18 S. E. 478; Howell v. Com. 26 Gratt. 1007; Great Falls Mfg. Co. v. Henry, 32 Gratt. 467; Danville Bank v. Waddill, 31 Gratt. 475; Blair v. Wilson, 28 Gratt. 175; Cluverius v. Com. 81 Va. 816; South West Improv. Co. v. Smith, 85 Va. 319, 17 Am. St. Rep. 59, 7 S. E. 365; Hill v. Com. 88 Va. 633, 29 Am. St. Rep. 744, 14 S. E. 330; Jones v. Rixey, 79 Va. 657; Kimball v. Friend, 95 Va. 125, 27 S. E. 901; Gravely v. Com. 86 Va. 396, 400, 10 S. E. 431; Clark v. Com. 90 Va. 360, 365, 18 S. E. 440; State v. Donohoo, 22 W. Va. 761.

The evidence was overwhelming to the effect that gasoline was not being produced in paying quantities from the plaintiffs' plant, and the court erred in setting aside the verdict, and would have erred had the evidence on this point been doubtful, as it was a matter for the jury.

Mays v. Callison, 6 Leigh, 230; Reed v. Com. 22 Gratt. 924; Vaiden v. Com. 12 Gratt. 717; Burch v. Hylton, 89 Va. 441, 16 S. E. 342; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489; Thornton v. Com. 24 Gratt. 657; Lawrence v. Com. 30 Gratt. 845; Sigler v. Beebe, 44 W. Va. 587, 30 S. E. 76; Probst v. Braeunlich, 24 W. Va. 361; Robinson v. Kistler, 62 W. Va. 489, 59 S. E. 505; Rosenthal v. Fox, 70 W. Va. 752, 74 S. E. 959; Henderson v. Hazlett, 75 W. Va. 256, 83 S. E. 907.

Messrs. Kimball & Sugden also for plaintiff in error.

Mr. F. P. Moats for defendants in error.

Lynch, J., delivered the opinion of the court:

The Drake Oil Company, a partnership, the predecessor in title of the defendant Drake Oil Company, a corporation, none of whose stockholders were members of the partnership, owned and operated oil wells upon lands leased for oil and gas purposes, and on February 8, 1911, sold unto W. C. Patterson, Jr., the right to take, pipe, and utilize gas from the oil wells, and out of it manufacture gasoline on the leased premises; he to furnish at his expense the instrumentalities necessary and usual in the process of producing gasoline, and to pay to the

owners of the wells a stipulated share of the profits derived from the business. The partnership sold its wells and leases to Hyde and others, who incorporated the Drake Oil Company, and plaintiffs, Beeson and others, acquired from Patterson his rights under the contract, the buildings erected, machinery installed, and pipe lines laid by him to convey the gas to the plant, and on May 17, 1913, began and continued to produce gasoline until May 30, 1916, when they abandoned the enterprise, wrecked the plant, sold its component parts, and from it realized approximately one fourth the original cost of the establishment. The abandonment and cessation of the business, plaintiffs allege in their declaration, necessarily resulted from defendant's installation and application of a patented process used to accelerate oil production from the wells by the forced injection of air at high pressure, whereby they further allege the vaporous properties of the gas were destroyed by absorption or combination with the air, and thereby unfitted for use in the manufacture of gasoline, to their great financial loss and damage, wherefore they brought this action. The Drake Oil Company assigns as erroneous the action of the court in setting aside the verdict for defendant and in granting plaintiffs another trial.

Upon the date of the grant to Patterson and his assignment to the plaintiffs, and thereafter and during the operation of the gasoline manufacturing plant, the partnership and its successors, the corporation of the same name, continually prosecuted the business of producing oil from the leased premises. The continuation of the productive operation for oil contemporaneously with the operation of the gasoline manufacturing plant seems certainly to have been in the contemplation of the parties at the date of the contract. Such unity and continuity of operation, it may be said, was essential to the prosecution of the

business enterprise pursued by the plaintiffs. The wells were drilled several years prior to the date of the Patterson contract, and though at first producing oil in large quantities, production later had materially diminished to such an extent, it appears, that their daily average then was about two and one half barrels for each of the nineteen wells, that average being maintained only by means of one or more vacuum pumps, a process commonly resorted to in order to stimulate the production of oil or gas, or both, in deteriorated or decadent wells. Such, it is agreed, and not denied, was the condition of the wells owned and controlled by the Drake Oil Company, the partnership, at the date of the contract involved, and its assignment to the plaintiffs, and during their ownership and exercise of the rights thereby conferred, until in lieu of the suction process defendant substituted the air compression process, a process more powerful and efficacious, and more modern, in invigorating and stimulating the oil production capacity of oil and gas wells. Such was the situation confronting the parties to this action, and those through whom they acquired their respective rights, at the time of their acquisition, and before the installation and operation of the substituted process.

If, as plaintiffs claim, the relation of landlord and tenant was established by the Patterson contract, and remained until interrupted by the acts complained of, nevertheless the circumstances detailed clearly indicate that the rights said to have been unlawfully impaired were subordinate to the rights of the defendant to extract oil from the premises which it owned and controlled through wells thereon, without liability, unless they wilfully interrupted or destroyed the subordinate rights and privileges of the plaintiffs. Wrongfulness and wilfulness are the charges preferred by the declaration; but the proof in support of averments in this respect falls far short of establishing as

true the facts so averred. On the contrary, defendant, through its chief officers, offered to purchase plaintiffs' plant before the installation of the air compressor apparatus, an offer which plaintiffs declined to accept, because, they say, it was inadequate to compensate them for the outlay and expenses of the plant, and in lieu thereof they later elected to dismantle, junk, and dispose of it for an amount in excess of the offer. The offer, though inadequate, is significant only as tending to negative an intentional injury to the plaintiffs; at least, not to warrant the conclusion of the existence of sinister motives, prompting the action and conduct of the defendant's officers and agents.

Before the installation of the air compressor plant the suction of the pumps used under the old process had ceased to be effective in stimulating the productive capacity of the wells, and though the effect of the former upon the gasoline properties of the gas is doubtfully questionable, as we shall later see, certainly according to the proof the quantity and volume of the gas was increased commensurately and correspondingly with the increased production of oil, due to the substituted process. Obviously, the difficulty thereafter confronting plaintiffs in the manufacture of gasoline was the want of a plant large enough and powerful enough to meet the changed conditions brought about by the new situation.

The proposition that the injection of air into oil and gas producing wells renders gas flowing therefrom unfit for the manufacture of gasoline is not established clearly by the proof addressed to that subject. The weight of the evidence shows the fact to be otherwise. Although the latter instance necessitates the use of a higher degree of power to solve the manufacturing problems so presented, operators skilled in the oil and gas business, and incidentally in the production of gasoline, testifying in the case and basing their opinions upon their own

personal experience, frankly, fairly, and unequivocally declare that the commingling of air with gas in an oil and gas well under pressure, to promote the production of oil therefrom, does not rob the gas of its gasolene qualities, but does require a more powerful compressive force to separate the lighter or vaporous element from the gas so burdened with air. Indeed, there seems to be a general concurrence of evidential opinion among the witnesses on this subject. Evidence to the contrary is slight and inconclusive.

Equally without merit is plaintiffs' contention, the one upon which they chiefly rely, that under the contract by which defendant sold to them all the gas produced from the oil wells on the leased premises, he may not now interfere with the supply or quality of such gas by the change of process from suction to compressed air. The pertinent part of the agreement between plaintiffs and defendant is: "The said Drake Oil Company by these presents does sell, assign, and transfer to said Patterson, his heirs and assigns, all gas produced from the oil wells now owned by the said Drake Oil Company on the leases hereafter described, and all gas produced from wells which said Drake Oil Company may hereafter drill thereon, reserving, however, to said Drake Oil Company enough gas to run the engines which it now has upon said leases, and such other engines as it from time to time may see fit to install or operate on said leases."

It evidently was the purpose and intention of the parties to the agreement that plaintiffs should become the purchaser of the gas produced merely as an incident of oil production. They did not deal with the wells as the subject-matter of the contract, but with the gas emanating from them. The ownership of the wells was not transferred to Patterson. Nothing in the agreement indicates that the right to use the gas was regarded otherwise than as incidental and subordinate

to the development for oil. It cannot be assumed that defendant or its grantors intended to waive any right they possessed to use reasonably appropriate means or methods to stimulate the flow of oil, and the contract contains no language which expressly or by implication constitutes such a waiver. Indeed, it was a duty which defendant owed to his lessor to use all reasonable means to maintain the flow of oil. That duty existed before the date of the contract under which plaintiffs claim, wherefore their rights necessarily are subordinate thereto.

Hence, where a lessee under an oil lease contracts with another to sell him

*Mines—lease of gas from wells—effect on operations for oil.*

for gasolene purposes all gas produced from oil wells on the leased premises, he does not, in the absence of words indicating an intention to restrict his right to develop and exploit the oil field, debar himself from the use of such means as science and experience have proved to be advantageous, even though as a result thereof the gas may lose some of its gasolene properties.

What has been said sufficiently disposes of the question whether the contract on which plaintiffs rely had or had not terminated because of their inability to operate their plant as a profit; the contract providing that it should continue "so long as said Patterson out of the gas is able to manufacture gasolene in paying quantities."

Judgment below reversed, and judgment for defendant entered here on the verdict.

#### NOTE.

No other case has been found that has construed a contract respecting oil wells like that in the reported case (BEESON v. DRAKE OIL CO. ante, 414) as to its effect in restricting the methods of operation of the wells.

RAY L. RILEY, Real Estate Commissioner of the State of California,  
v.

JOHN S. CHAMBERS, Comptroller of the State of California.

*California Supreme Court (In Banc) — November 29, 1919.*

(— Cal. —, 185 Pac. 855.)

**Statutes — part unconstitutional — separation.**

1. The provisions in an act regulating the licensing of real estate brokers, conferring power upon the licensing officer to revoke a license in case the licensee is guilty of certain acts, and providing for a review of his acts by the court, are separable from the balance of the statute so as not to defeat the whole act if they are unconstitutional because conferring judicial power.

[See note on this question beginning on page 424.]

**License — right to regulate lawful business.**

2. A lawful and useful occupation may be subjected to regulation in the public interest, the test being whether or not the limitation imposed is really by way of regulation only, and is one whose purpose and effect go no further than throwing reasonable safeguards around the exercise of the right.

[See 17 R. C. L. 541.]

**Broker — requiring certificate of good character.**

3. Requiring an applicant for a license to do business as a real estate broker to file with his application a certificate of good character is reasonable.

**— evidence of character — right to require.**

4. One may be required to furnish evidence of good moral character or reputation to secure a license to do business as a real estate broker.

**License — arbitrary power to refuse — construction.**

5. Arbitrary power to refuse licenses to engage in the business of real estate broker is not conferred upon the licensing officer, where he is required to issue the license upon the presentation by the applicant of a certificate of good character, unless the officer is not satisfied that he has, in fact, the required qualifications of honesty, truthfulness, and good reputation.

[See 17 R. C. L. 532.]

**Constitutional law — discrimination — power of head of one department.**

6. Conferring power upon the head of one department to fix the salaries of his assistants, which power is not conferred upon the heads of other departments, is not unconstitutional discrimination.

**— discrimination between collectors.**

7. Making a statute requiring licensing of real estate brokers apply to collectors of rent, when not applying to other collectors, is not an unconstitutional discrimination.

**Broker — licenses — exception of person having power of attorney.**

8. A provision in a statute requiring real estate brokers to secure licenses, that it shall not apply to persons holding a duly executed power of attorney from the owner, applies only to persons having authority to act for the principal in consummating the transaction as distinguished from merely negotiating it, and is not an unreasonable discrimination.

**— discrimination between brokers and salesmen.**

9. A larger fee and a different character of certificate may be required from a real estate broker, in order to secure a license to do business, than from a mere salesman in his employ.

**— discrimination between trustees.**

10. The express exception of a trustee selling under a deed of trust from a statute requiring real estate brokers to secure licenses does not discriminate against trustees leasing, renting, or collecting rents, where the latter are not included in the act.

APPLICATION by petitioner for a writ of mandate to compel respondent to authorize payment of expenses of the real estate department, incurred by petitioner as commissioner of such department, out of a certain fund in the state treasury. *Writ issued.*

The facts are stated in the opinion of the court.

Mr. Max J. Kuhl, for petitioner:

The statute is a valid exercise of the police power.

*Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 238; *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

The state has the right to regulate the business of buying and selling bonds and to forbid the dealing therein without the permit of some state official.

*Hall v. Geiger-Jones Co.* 242 U. S. 539, 61 L. ed. 480, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; *Caldwell v. Sioux Falls Stock Yards Co.* 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224; *Merrick v. N. W. Halsey & Co.* 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227.

The public welfare justifies the regulation of any business likely to harm the public, so long as that regulation is reasonably connected with the purpose of the act, and it is the function of the legislature exclusively to determine the need of the regulation.

*Hall v. Geiger-Jones Co.* and *Merrick v. N. W. Halsey & Co.* supra; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; *Musco v. United Surety Co.* 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; *Brodnax v. Missouri*, 219 U. S. 235, 55 L. ed. 219, 31 Sup. Ct. Rep. 238; *Re Home Discount Co.* 147 Fed. 538; *Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 178; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 61 L. ed. 472, L.R.A.1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594; *Hebe Co. v. Calvert*, 246 Fed. 711; *Ex parte Lorenzen*, 128 Cal. 431, 50 L.R.A. 55, 79 Am. St. Rep. 47, 61 Pac. 68; *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

Real estate brokers' statutes held valid in other states are:

*Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Com. v. Real Estate Trust Co.* 211 Pa. 51, 60 Atl. 551; *Com. v. Samuel Black Co.* 223 Pa. 74, 72 Atl. 261; 19 Cyc. 187; *Little Rock v. Barton*, 33 Ark. 436; *Denning v. Yount*, 62 Kan. 217, 50 L.R.A. 103, 61 Pac. 803; *Buckley v. Humason*, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 637, 52 N. E. 385; *Blackford v. State*, 8 Heisk. 538; *St. Louis v. McCann*, 157 Mo. 301, 57 S. W. 1016; *Braun v. Chicago*, 110 Ill. 186; *Banta v. Chicago*, 172 Ill. 204, 40 L.R.A. 611, 50 N. E. 233.

The statute does not confer arbitrary or judicial power upon the commissioner.

*Muskraat v. United States*, 219 U. S. 346, 55 L. ed. 246, 31 Sup. Ct. Rep. 250; *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702; *Frasher v. Rader*, 124 Cal. 132, 56 Pac. 797; *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; *Ex parte Gerino*, 143 Cal. 412, 66 L.R.A. 249, 77 Pac. 166; *Arwine v. Medical Examiners*, 151 Cal. 499, 91 Pac. 319.

Messrs. J. L. Atteridge and Wesley E. Marten for respondent.

Messrs. Fry & Wood, amici curiæ.

Olney, J., delivered the opinion of the court:

The legislature of 1919 passed an act (Stat. 1919, p. 1252) purporting to regulate the business of acting as a real estate broker or salesman in California, creating a state real estate department with an official having the title of real estate commissioner at its head, and providing for the payment of the expenses of the department out of a certain fund in the state treasury. The petitioner, Ray L. Riley, was appointed real estate commissioner, incurred certain expenses on account of his department, and sought their payment out of the state treasury in the manner provided by the act. The respondent, the state comptroller, re-



ipso facto operate as a suspension from benefits, and that action must be taken in the mode prescribed by the contract. *Osterman v. District Grand Lodge, I. O. B. B.* (1896) 5 Cal. (Unrep.) 237, 43 Pac. 412. It was further held in that case that under such provisions the failure of a subordinate lodge of a mutual benefit insurance association formally to suspend a delinquent member is not excused by the facts that the assured was secretary of such lodge, and that the failure to institute formal proceedings for suspension was the result of his failure to report his own delinquency.

So, where the charter of a mutual benefit insurance company provided that on default in payment of assessments the delinquent member's insurance "may be suspended or canceled by the secretary or board of directors, . . . provided that when the insurance is suspended or canceled by the secretary an appeal may be made to the board of directors," etc., it has been held that default itself will not work a suspension. *Olmstead v. Farmers' Mut. F. Ins. Co.* (1883) 50 Mich. 200, 15 N. W. 82. In the course of his argument, *Graves, Ch. J.*, said: "Wherever a forfeiture, whether total or partial, is intended to be authorized on the happening of some state of facts, the provisions for it should never be administered in a form or mode more rigorous than a strict construction against the party seeking or insisting on the forfeiture will fairly justify, and where the question is whether it was the purpose that there should be no forfeiture unless ordered as the result of a hearing; or whether the design was that it should immediately arise from the occurrence of certain facts without any authentic finding of their existence; or, again, whether it was the intention that it might be produced by a mere ex parte and arbitrary determination, it is incumbent on the court to incline strongly towards the first construction. The rule is universal, and it rests upon natural equity, that where the real subject is whether one shall lose a right or another gain an advantage, it will always be intended, if the case

will in any wise admit of it, that the matter was meant to be settled by an exercise of judgment respecting the facts, after opportunity given to the parties to be heard. The principle applies. It is inferable from the charter that it was not intended that a forfeiture or suspension should come of itself on a neglect of payment, or be brought about without any hearing, or any considerate judgment on the existence of the necessary facts or the desirability of the thing itself. The secretary or board of directors may suspend or cancel the insurance. Here an act to accomplish the result is contemplated and discretion is distinctly implied, and whether this act is by the secretary or the board, the substantial form and the course of doing it are to be the same. But an appeal is authorized from the secretary. Why require the act referred to or allow the appeal, if the forfeiture or suspension was to result exclusively from a default, or from an ex parte decision? The appeal is not restricted to the company. It is allowed to the other party, and it would be absurd to say that a result subject to be appealed from by the parties was intended to be an ex parte result, or a result not amenable to judgment or discretion, but one inevitable in its nature. The charter provision supposes a determination capable of being appealed from by the parties, and on an occasion on which claims and objections could be urged and decided. It is needless to go further. There was neither any hearing nor any corporate declaration of forfeiture or suspension, and the defense failed wholly on its own theory."

And it has been held that a provision in an insurance policy that, upon failure to pay assessments, the insured "shall be suspended and his certificate become null and void, and all rights and benefits . . . forfeited," when followed by a clause to the effect that "a member who has been suspended for nonpayment of his dues and assessments may be reinstated," does not operate automatically, but requires some affirmative action on the part of the insured. *Brooks v. Conservative*

L. Ins. Co. (1906) 132 Iowa, 377, 119 Am. St. Rep. 560, 106 N. W. 913, 11 Ann. Cas. 339. In reaching this conclusion, the court said: "The provision in the original certificate with reference to suspension for nonpayment which has already been quoted is not, as we think, self-executing, but implies that to effect such suspension and the consequent forfeiture of all rights and benefits under the certificate, some affirmative action shall be taken by the association, and that only after proper action has been taken does the certificate become null and void. After suspension the member has the right to be reinstated on payment of back dues and assessments and the furnishing of a certificate of good health, and this provision evidently contemplates some act of suspension and notice thereof to the member, after which his privilege to secure reinstatement may be exercised. Under the general rules with reference to forfeitures, and construction of the contract of insurance most strongly against the company, we have no hesitation in reaching the conclusion that the provisions above quoted as to suspension imply an affirmative act on the part of the association or the duly authorized officers thereof." But that a provision relating to the reinstatement of a "suspended" member of a mutual benefit society, even when following a provision which, without qualification, declares that nonpayment of dues shall render the benefit certificate "null and void," does not prevent delinquency from ipso facto suspending and annulling a certificate, see *Munger v. Brotherhood of American Yeomen* (1915) 176 Iowa, 291, 154 N. W. 879.

And where the laws of a fraternal benefit association provide that a certificate of membership is annulled by the suspension of the beneficiary, it has been held that a forfeiture of benefits does not attach until the delinquent member is actually and legally suspended. *Lewis v. Western Funeral Ben. Asso.* (1898) 77 Mo. App. 586, citing to the same effect, the case of *Puhr v. Grand Lodge, G. O. H.*, said to be unreported (but see (1898) 77

Mo. App. 47, where a case so entitled is reported).

And it has been held that a provision to the effect that, upon default or failure to pay, the insured "shall be suspended," requires that the suspension be made by some affirmative action of the insurer, and that the mere nonpayment of an assessment does not of itself operate as a suspension, sufficient to cut off benefits. *Scheu v. Grand Lodge, O. D. I. F.* (1883) 17 Fed. 214; *Wilson v. District Council, S. M. W.* (1916) 30 Cal. App. 190, 157 Pac. 629; *Stiefel v. Amalgamated Sheet Metal Workers' Local Union* (1917) 208 Ill. App. 121; *Jelly v. Muscatine City & County Mut. Aid Soc.* (1903) 120 Iowa, 689, 98 Am. St. Rep. 378, 95 N. W. 197. In *Jelly v. Muscatine City & County Mut. Aid Soc.* (Iowa) supra, the court, after declaring that it was clear that the clause under consideration was not intended to be self-executing, continued as follows: "Some affirmative action on the part of the association was contemplated before the certificate holder should become suspended. The expression 'shall be suspended,' as the same appears in said article, is declaratory merely of the right of the association to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action." And the distinction between cases where the provision is merely "shall be suspended," and cases where the provision is that the insured shall "stand suspended . . . without further notice," was pointed out in the much-cited case of *Borgraefe v. Supreme Lodge, K. L. H.* (1886) 22 Mo. App. 127. *Thompson, J.*, in construing the latter provision, said: "It was argued in behalf of the plaintiff, at the bar, that there was no forfeiture in this case because the declaration of a forfeiture is a judicial act, and neither Ada lodge, nor any other judicatory having the power to

declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section three of law two, above quoted, it is not necessary that the lodge or any other judicatory of the order should adjudge a forfeiture against a delinquent member for nonpayment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constituting instruments of mutual insurance companies and other benevolent orders of this character, where the governing statute recites that, for the nonpayment of dues or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended until the lodge or other designated judicatory exercises the power of suspension. . . . The reason is that whatever right the lodge or the order may have against the member, for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. . . . But where, as in this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside, in conformity with the rules of the order, there can be no recovery upon his benefit certificate."

So, it has been held that a provision of a by-law of a mutual benefit society that upon the failure of a member to pay his dues the lodge "shall suspend him" does not, on failure of a member to pay, ipso facto suspend him without any action upon the part of the lodge. *Grand Lodge, F. A. M. v. Dillard* (1918) — *Tex. Civ. App.* —, 162 S. W. 1173.

And in *Order of United Commercial Travelers v. McAdam* (1903) 61 C. C. A. 22, 125 Fed. 358, in holding that, where it was provided that members, upon failure to pay dues or assessments when due, "shall be suspended

from the order at a regular meeting of the council, . . . and from all benefits derived therefrom," the mere failure to pay assessments did not in itself work a suspension, although the quoted provision was followed by another which provided that a defaulting member "shall immediately on the happening of such default, and by virtue thereof, forfeit his good standing . . . and all right to indemnity and benefits of whatsoever character," the court said: "The two provisions aforesaid, standing as they do in juxtaposition, must be read and construed together; and they must be so read in the light of the well-established rule that insurance contracts and other instruments of that nature, whereby an indemnity is promised in case of death or accident, must be construed most strongly against the insurer, and so as to avoid, if possible, a forfeiture of the rights of the insured, where the language employed in formulating the contract gives rise to doubt or uncertainty as to its proper interpretation. As contracts of that nature are formulated by the insurer, and generally with an eye singly to the protection of its own interests, it is the insurer's duty to see to it that the various provisions which they contain are harmonious, and that the intentions of the contracting parties are clearly expressed. . . . It is apparent, therefore, that the subject of suspending a member who is in default is one to be considered and acted upon at a regular meeting of the local council, and the exercise of this power involves the exercise of some discretion on the part of the local body." And see *Schwartz v. St. Elizabeth Roman & G. Catholic Union* (1907) 21 Ohio C. C. N. S. 165, wherein the court quoted with approval the following statement taken from note 1, page 1087, of 3 *Am. & Eng. Enc. Law*: "Where a suspension for nonpayment of dues is provided for in the laws of the association [referring to mutual benefit associations], and it is also provided that such suspension shall work a forfeiture of benefits, the fact of delinquency alone does not, ipso facto, work a forfeiture;

a suspension by formal proceedings is necessary."

Where the provisions of contracts of insurance between a mutual benefit association and its members merely indicate that delinquency as to dues and assessments is a ground of suspension, and provide that the insurer must in open conclave declare delinquent members suspended, mere non-payment of an assessment does not amount, ipso facto, to a forfeiture of insurance, in case of the death of the insured during the delinquency. *Warwick v. Supreme Conclave, K. D. (1899) 107 Ga. 115, 32 S. E. 951.*

Nor does a mere failure to pay dues in a mutual benefit society work a forfeiture of benefits, ipso facto, under constitutional provisions that "the financial secretary shall notify the president when a member has failed to pay the amount assessed in the required time, and the president shall announce the fact to the assembly, and the member shall stand suspended from the order and all benefits thereof," and that "it shall be the duty of the subordinate secretary to notify the general secretary of such suspension, and also notify the member suspended." *Petherick v. General Assembly O. A. (1897) 114 Mich. 420, 72 N. W. 262.*

And an actual suspension has been held necessary where the contract was that a member failing to pay dues "was to be suspended," and the time therefor was to be fixed by vote of the lodge. *Supreme Lodge, K. H. v. Wickser (1888) 72 Tex. 257, 12 S. W. 175.*

And it has been held that, where laws of a fraternal benefit society provide that when dues and assessments are three months in arrears, the delinquent members "are suspended in the meeting next following," and that "if they are six months in arrears they are expelled without further action of the guild," the provision first quoted is not self-executing, but requires affirmative action to be operative. *Plattdeutsche Grot Gilde v. Ross (1904) 117 Ill. App. 247.* In reaching this conclusion, the court said: "It does not appear that the guild ever

suspended appellee, or that any action was taken in that regard. The law was not self-executing as regards suspensions. A member, if in arrears for six months, might be 'expelled without further action of the guild;' but it is plain from the difference in phraseology that the framers of the law intended that he should not be suspended without affirmative action by the guild, such as giving notice to the member in default and passing a resolution of suspension."

And that a by-law of a mutual benefit society to the effect that on due report of the default of a member to the lodge he shall "be declared to be suspended from membership, he having been first notified of the action that would be taken," is not self-operative, see *Dale v. Weston Lodge (1896) 24 Ont. App. Rep. 351.*

For a decision which is controlled by statute and in which the provision was held not self-operative, see *Schultz v. Des Moines Mut. Hail & Cyclone Ins. Asso. (1915) 35 S. D. 627, 153 N. W. 884, Ann. Cas. 1917D, 78, as set out and quoted supra, II. b, 4.*

For decisions which require affirmative action, where the suspension clause was contained in a premium note and not in the contract of insurance itself, see *supra, II. b, 3.*

#### *IV. Where whole subordinate body or branch suspended.*

It has been held that where the constitution of a mutual benefit insurance association provides that any subordinate lodge in arrears for dues "shall be suspended," and notified thereof, and remain suspended until reinstated, and that the members of such a subordinate lodge are not insured during such period of disability, the provisions are not self-executing and cannot be asserted as a defense against the claim of a member of a subordinate lodge which is in arrears, as to dues to the grand lodge, in the absence of a showing of a literal and exact compliance with the constitutional provisions. *District Grand Lodge, U. O. O. F. v. Hill (1911) 3 Ala. App. 483, 57 So. 147.* G. J. C.

distinguished from authority to consummate the transaction. If this be so, they argue in effect, and argue truly, any broker, while continuing to act solely as a broker, may yet escape from the restrictions of the act by always securing written authority, and there is no reason why any distinction should be made between brokers who always act under written authority and those who do not, so far as subjecting them to regulation is concerned.

Such a construction of the act, however, is not a reasonable one. It would not only render the act invalid, but, even if it did not do this, it would practically render it ineffective, since, as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by power of attorney is meant

Broker—  
license—except-  
tion of person  
having power  
of attorney.

written authority to act for and in place of the principal in consummating the transaction as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination; for such an agent is much more than a broker, and there is nothing unreasonable in not applying to him the regulations applicable to brokers.

A third distinction urged by amici curiæ as unreasonable is that between brokers and salesmen. The discriminations between the two made by the act are that brokers pay an annual license fee of \$10 and salesmen of \$2, and the former is required to furnish certificates of character by two landowners, while the latter furnish certificates by

their employers. But certainly a larger fee and a different certificate may reasonably be exacted from a broker engaged in business for himself than are exacted from a salesman working for another.

—discrimina-  
tion between  
brokers and  
salesmen.

The fourth point of amici curiæ is that trustees selling under a deed of trust are excepted, and no exception is made of trustees doing anything else than selling, such as leasing, or renting, or collecting rents. The reply is that trustees, whether selling or doing something else, do not come within the purview of the act. The express exception of trustees selling under a deed of trust adds nothing, and the act would be the same if it made no mention of trustees.

—discrimina-  
tion between  
trustees.

The fifth point made by amici curiæ is that officers of a corporation licensed to do business as real estate brokers may act as brokers or salesmen without being subject to the requirements of the act. Suffice it to say that we do not so read the act.

There are a number of other objections made, but, inasmuch as counsel themselves say that they are made not so much to impeach the validity of the act as to show its injustice, a consideration addressable to the legislature, but not to us, no discussion of them is required.

It is ordered that the writ issue as prayed.

We concur: Angellotti, Ch. J.; Lennon, J.; Shaw, J.; Wilbur, J.; Lawlor, J.

Petition for rehearing denied December 29, 1919.

## ANNOTATION.

### Constitutionality of statute or ordinance requiring real estate brokers to procure a license.

It has been held that the legislature may tax real estate brokers where that body is left unrestricted by the Consti-

tution as to the manner in which privileges shall be taxed. *Wiltzie v. State* (1873) 8 Heisk. (Tenn.) 544.

The power of a municipality to impose a license fee upon real estate brokers has generally been sustained. *Little Rock v. Barton* (1878) 33 Ark. 436; *Braun v. Chicago* (1884) 110 Ill. 186; *Covington v. Herzog* (1903) 116 Ky. 725, 76 S. W. 538; *St. Louis v. McCann* (1900) 157 Mo. 301, 57 S. W. 1016. Such an ordinance has been sustained as a valid exercise of the police power. *Little Rock v. Barton* (Ark.) supra; *Braun v. Chicago* (1884) 110 Ill. 186; *St. Louis v. McCann* (Mo.) supra. Such licenses have also been sustained upon the theory that they are a tax; the requirement as to uniformity is held to extend only to persons of the same class. *Braun v. Chicago* (1884) 110 Ill. 186.

A municipality which has power to tax brokers generally may tax certain brokers without taxing others. *Pittsburg v. Coyle* (1894) 165 Pa. 61, 30 Atl. 452. The tax in this case was imposed upon real estate and merchandise brokers. It was urged that the imposition of a tax upon the two designated classes of brokers, and not upon all other classes, violated a constitutional provision that taxation should be uniform upon the same class of objects within the territorial limits of the authority levying the tax. In denying this contention, the court states: "We are unable to see that there is any violation of that provision in this case. It is true that two classes of brokers only are named, to wit, merchandise brokers and real estate brokers, but all the members of each class are taxed alike. There might be very sufficient reasons for taxing the business of stockbrokers, either by an act of the legislature or by an authorized municipal ordinance, yet it could hardly be contended that such taxation would be void if all oth-

er classes of brokers were not included. . . . In this case, the subject of taxation being brokers, and there being many different kinds of brokers, we are of opinion that the classification of the different kinds, and the taxation of some of them, constitute a lawful exercise of the taxing power, although there may be other classes of brokers that are not taxed."

The statute sustained in the reported case (*RILEY v. CHAMBERS*, ante, 418) not only imposed a license fee upon real estate brokers, but required the broker to obtain a certificate of good character as a condition precedent to the issuing of the license.

Assuming that there is the right to impose a license fee upon real estate brokers, there is still the question where the provisions of the particular statute or ordinance are valid.

The exemption of real estate dealers and contractors whose business does not amount to \$1,000 per annum, from the operation of an ordinance imposing a license tax for the privilege of transacting business, has been held unconstitutional and void as class legislation, where such contractors and dealers are classified with other persons effecting sales, to whom a similar exemption is not allowed. *Com. use of Titusville v. Clark* (1900) 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 S. W. 236.

The power of the state to levy a tax upon real estate brokers who transact business in cities, graduating the tax according to the class of the city, has been denied. *Hager v. Walker* (1908) 128 Ky. 1, 15 L.R.A.(N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254. And see the reported case (*RILEY v. CHAMBERS*) as to requirements of the statute there involved. W. A. E.

STATE OF IOWA EX REL. MINNIE BURKHART  
v.

RALEIGH FERGUSON, Appt.

*Iowa Supreme Court—December 12, 1919.*

(— Iowa, —, 174 N. W. 934.)

**Bastardy — presumption of paternity from marrying mother.**

1. The presumption of paternity is not raised by marrying a woman during the period while she is giving nourishment to a child of which she is the mother.

[See note on this question beginning on page 427.]

— marriage by another as defense to  
bastardy proceedings.

2. One cannot avoid liability under  
a charge of paternity in a bastardy

proceeding by the fact that another  
man married the mother of the child  
while she was nursing it.

[See 3 R. C. L. 753-754.]

**APPEAL** by defendant from a judgment of the District Court for Harrison County (Wheeler, J.) in favor of plaintiff in a bastardy proceeding.  
*Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Burke & Tamisiea, for appellant:

The one whose relations are such that he stands in loco parentis the law esteems the father, and will not, for various reasons, inquire by whom the child was begotten.

State v. Shoemaker, 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589.

Messrs. Cochran & Wolfe and P. E. Roadifer, for appellee:

Defendant is primarily liable, and cannot in justice escape behind the fact of the subsequent marriage of her whom he seduced and debauched.

Wallace v. Wallace, 137 Iowa, 44, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761.

Stevens, J., delivered the opinion of the court:

Minnie Kuhlman, who was then unmarried, was on May 29, 1914, delivered of an illegitimate child, and on November 3, 1915, she married Paul Burkhardt. On February 2, 1916, a complaint charging defendant with the paternity of the child, and asking judgment in the sum of \$3,000, and an order charging the defendant with the maintenance thereof, was filed in the office of the clerk of the district court of Harrison county. A trial was had to a jury, resulting in a

verdict of guilty. The defendant on the trial denied that he at any time sustained illicit relations with the mother, and sought to show facts from which the jury might infer that Burkhardt was the father of the child. The evidence offered was, however, wholly insufficient for that purpose.

Mrs. Burkhardt testified that her husband came to see her about a week after the child was born, at which time a marriage between them was discussed. The sole reliance of defendant for reversal is his contention that Paul Burkhardt, by his marriage to the mother of the child, stands to it in the relation of a parent, and that, as the marriage occurred during the period while the child received nourishment from the mother, the doctrine of State v. Shoemaker, 62 Iowa, 343, 19 Am. Rep. 146, 17 N. W. 589, to the effect that a party marrying a pregnant woman is presumed to be the father of the child, is applicable. We fail to find any reason for applying the doctrine of that case to the case at bar. The reason of the rule announced in State v. Shoe-

**Bastardy—presumption of paternity from marrying mother.**

(— Iowa, —, 174 N. W. 934.)

maker, *supra*, is stated as follows: "One who marries a woman known by him to be enceinte is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother, upon its birth, would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child, receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child, then, is received into the family of the husband, who stands as to it in *loco parentis*. This being the law, it enters into the marriage contract between the mother and husband. When this relation is established, the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child. We must not be understood to hold that this rule prevails in cases involving questions of heirship and inheritance. In these cases the rights of others besides the husband and bastard arise. In this case, the rights and liabilities of the husband and child are alone involved; they rest upon the relations which impose upon the husband the duty of maintaining the child. Our conclusion is supported by public policy, and considerations which work for the peace and well-being of families. A husband who, in the manner we have indicated, has put himself in *loco parentis* of a bastard child of his wife, ought not to be permitted to disturb the family relation, and bring scandal upon his wife and her child, by establishing

its bastardy, after he has condoned the wife's offense by taking her in marriage."

But in this case no presumption under the facts could arise that Paul Burkhart is the father of the child, and the mere fact that at the time of the marriage the child received sustenance from the mother, and presumptively would become a member of the family, does not call for the application of the foregoing rule. No doubt, however, in making an order for the support of the child, this fact should be taken into consideration by the court; but it does not constitute a defense

to the charge contained in the information. The relation of the father to the child and society would remain; but, of course, the husband will not, on account thereof, be relieved of the burden assumed by the marriage to the mother of a wholly dependent infant, at least so long as it continues to be a member of the family. *Menefee v. Chesley*, 98 Iowa, 55, 66 N. W. 1038. As bearing upon the question above discussed, see *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721; *Wallace v. Wallace*, 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761. We have examined the record with care, but find no reversible error therein.

The judgment of the court below is therefore affirmed.

Ladd, Ch. J., and Gaynor and Weaver, JJ., concur.

—marriage by another as defense to bastardy proceedings.

## ANNOTATION.

### Presumption as to paternity of child conceived or born before marriage.

#### I. Antenuptial conception:

- a. View that presumption of legitimacy is not weakened by proof of antenuptial conception:

1. View stated, 428.
2. Illustrations, 429.
3. Rebuttal of presumption:
  - (a) In general, 430.

#### I. a, 3—continued.

- (b) Declaration or testimony of spouse, 431.
4. Effect of knowledge by husband of pregnancy, 431.
- b. View that presumption of legitimacy is weakened by proof of antenuptial conception, 432.

#### II. Antenuptial birth, 434.



### *I. Antenuptial conception.*

#### *a. View that presumption of legitimacy is not weakened by proof of antenuptial conception.*

##### *1. View stated.*

It has been held in a majority of jurisdictions that the presumption of legitimacy which obtains in favor of a child born in lawful wedlock (see 3 R. C. L. p. 726) is not weakened by proof of the fact that the child was conceived before the marriage of its mother.

**United States.** — *Stegall v. Stegall* (1825) 2 Brock. 256, Fed. Cas. No. 13,351.

**California.** — *Baker v. Baker* (1859) 13 Cal. 87.

**Connecticut.** — *Grant v. Stimpson* (1907) 79 Conn. 617, 66 Atl. 166.

**Illinois.** — *Zachmann v. Zachmann* (1908) 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256; *Hall v. Gabbert* (1904) 213 Ill. 208, 72 N. E. 806.

**Indiana.** — *Bailey v. Boyd* (1877) 59 Ind. 292; *Bailey v. Harshman* (1877) 60 Ind. 273.

**Iowa.** — *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761; *State v. Shoemaker* (1883) 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589; *State v. Romaine* (1882) 58 Iowa, 48, 11 N. W. 721; *Niles v. Sprague* (1862) 13 Iowa, 198.

**Kentucky.** — *Gibbins v. Gibbins* (1891) 13 Ky. L. Rep. 300 (abstract).

**Massachusetts.** — *Phillips v. Allen* (1861) 2 Allen, 453; *Reynolds v. Reynolds* (1862) 3 Allen, 605.

**Michigan.** — *Rabeke v. Baer* (1897) 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242.

**Mississippi.** — *McRae v. State* (1913) 104 Miss. 861, 61 So. 977.

**New York.** — *Montgomery v. Montgomery* (1848) 3 Barb. Ch. 132; *Re Mancini* (1919) 108 Misc. 102, 178 N. Y. Supp. 57.

**North Carolina.** — *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335; *State v. Herman* (1852) 36 N. C. (13 Ired. L.) 502.

**Ohio.** — *Miller v. Anderson* (1885) 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605.

**Pennsylvania.** — *Tioga County v. South Creek Twp.* (1874) 75 Pa. 433; *Page v. Dennison* (1857) 1 Grant, Cas. 379; *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644; *Com. v. Stricker* (1801) 1 Browne (Pa.) xlvii., appx.

**Texas.** — *McCulloch v. McCulloch* (1888) 69 Tex. 682, 5 Am. St. Rep. 96, 7 S. W. 593.

**Virginia.** — *Bowles v. Bingham* (1811) 2 Munf. 442.

**England.** — *Anonymous v. Anonymous* (1856) 23 Beav. 273, 53 Eng. Reprint, 107, 22 Beav. 481, 52 Eng. Reprint, 1193, 4 Week. Rep. 307; *Gardner v. Gardner* (1877) L. R. 2 App. Cas. 723; *Rex v. Luffe* (1807) 8 East, 198, 103 Eng. Reprint, 318, 9 Revised Rep. 406.

"But if the issue be born within a month or a day after marriage, between parties of full lawful age, the child is legitimate." 2 Co. Litt. 244a.

"Conception during wedlock is not essential to the presumption of legitimacy which arises from birth in wedlock." *Zachmann v. Zachmann* (1903) 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256.

In *Rex v. Luffe* (1807) 8 East, 193, 103 Eng. Reprint, 316, Mr. Justice Lawrence said: "By the civil law, if the parents marry any time before the birth of the child, it was legitimate; and our laws so far adopt the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own."

"The rule of the common law is that if a man marry a woman who is with child, it raises a presumption that the child with which she is pregnant was begotten by him. This presumption is founded on the supposed acknowledgment of paternity by the subsequent act of marriage, and although such presumption is liable to be rebutted, yet, in the absence of proof, it stands." *Reynolds v. Reynolds* (1862) 3 Allen (Mass.) 605.

"Born in wedlock, the presumption of the legitimacy of the child obtains, even though this happen so soon after marriage as to render it certain that it was the result of coition prior thereto." *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am.

St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761.

In *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502, Ruffin, Ch. J., said: "There seems to be no difference in point of law between a case where the conception was prior and posterior to the marriage, provided the birth be after wedlock, for that makes the legitimacy."

In *Dennison v. Page* (1851) 29 Pa. 420, 72 Am. Dec. 644, the court, after reviewing many decisions, said: "Whether it was begotten in or out of wedlock, where the marriage precedes the birth, the presumption of paternity is the same, and the like evidence is required to bastardize the issue. That evidence is proof of non-access. Where the husband, or he who subsequently becomes such, has access to the mother of the child, the presumption that he is its father is conclusive."

In *Rex v. Luffe* (Eng.) supra, Lord Ellenborough said: "With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage."

In *Anonymous v. Anonymous* (1856) 23 Beav. 273, 53 Eng. Reprint, 107, the court said: "Though I do not entirely adopt, to its full extent, the proposition that a husband admits, by his marriage, that the child subsequently born is his, yet I think that the presumption is, that he does so admit it, if he takes no step to repudiate it, but adopts toward it exactly the same course as if it were his own child, making no complaint of the premature birth of the child, or of his having married a woman not fit to be his wife."

## 2. Illustrations.

The rule stated in the preceding

subdivision has been applied apparently without regard to the precise period of time elapsing between the marriage and the birth of the child. Thus, in each of the following cases the child was presumed to be legitimate, the time of its birth after the marriage of the mother being as indicated:

—fifteen days (*Zachmann v. Zachmann* (1903) 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256);

—three weeks (*Com. v. Stricker* (1801) 1 Browne (Pa.) xlvii., appx.);

—six weeks (*McRae v. State* (1913) 104 Miss. 861, 61 So. 977);

—two months (*Gibbins v. Gibbins* (1891) 13 Ky. L. Rep. 300 (abstract); *Montgomery v. Montgomery* (1848) 3 Barb. Ch. (N. Y.) 132; *Gardner v. Gardner* (1877) L. R. 2 App. Cas. (Eng.) 723);

—three months (*Grant v. Stimpson* (1907) 79 Conn. 617, 66 Atl. 166; *Niles v. Sprague* (1862) 13 Iowa, 198; *State v. Romaine* (1882) 58 Iowa, 46, 11 N. W. 721; *Re Mancini* (1919) 108 Misc. 102, 178 N. Y. Supp. 57 [common-law marriage]; *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644; *Tioga County v. South Creek Twp.* (1874) 75 Pa. 433; *McCulloch v. McCulloch* (1888) 69 Tex. 682, 5 Am. St. Rep. 96, 7 S. W. 593; *Bowles v. Bingham* (1811) 2 Munf. (Va.) 442, (1812) 3 Munf. 599, 5 Am. Dec. 497; *Anonymous v. Anonymous* (1856) 23 Beav. 273, 53 Eng. Reprint, 107, 22 Beav. 481, 52 Eng. Reprint, 1193, 4 Week. Rep. 307);

—four months (*Baker v. Baker* (1859) 13 Cal. 87; *Wallace v. Wallace* (1908) 137 Iowa, 87, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761);

—five months (*Reynolds v. Reynolds* (1862) 3 Allen (Mass.) 605; *Rabeke v. Baer* (1897) 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242; *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502);

—six months (*Stegall v. Stegall* (1825) 2 Brock. 256, Fed. Cas. No. 13,351; *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335);

—eight months (*Phillips v. Allen* (1861) 2 Allen (Mass.) 453).

### 3. *Rebuttal of presumption.*

#### (a) *In general.*

The presumption of legitimacy which exists in favor of a child born in wedlock, although conceived before marriage, may be overcome by proof of nonaccess by the husband, or of his impotency.

**United States.** — *Stegall v. Stegall* (1825) 2 Brock. 256, Fed. Cas. No. 13,351.

**Iowa.**—*State v. Romaine* (1882) 58 Iowa, 46, 11 N. W. 721; *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761.

**Kentucky.** — *Gibbins v. Gibbins* (1891) 13 Ky. L. Rep. 300 (abstract).

**Massachusetts.** — *Phillips v. Allen* (1861) 2 Allen, 453.

**North Carolina.** — *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502; *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335.

**Pennsylvania.** — *Com. v. Stricker* (1801) 1 Browne xlvii., appx.; *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644.

**England.**—*Rex v. Luffe* (1807) 8 East, 198, 103 Eng. Reprint, 318.

In *State v. Romaine* (Iowa) *supra*, it was said that the presumption "may be rebutted by strong, satisfactory, and conclusive evidence" that the husband did not have access to the mother of the child when it was begotten.

In *Dennison v. Page* (Pa.) *supra*, the court said: "This presumption can only be rebutted by clearly proving that no sexual intercourse occurred between the two at any time when the child could have been begotten."

In *Stegall v. Stegall* (1825) 2 Brock. 256, Fed. Cas. No. 13,351, it was held that although probability of nonaccess by the husband was not enough to rebut the presumption of legitimacy, it was not necessary to prove that nonaccess was impossible. Chief Justice Marshall, writing for the court, said: "This presumption of law may be rebutted by testimony which places the negative beyond all reasonable doubt."

In *Rex v. Luffe* (1807) 8 East, 198, 103 Eng. Reprint, 318, 9 Revised Rep. 406, it was held that the presumption

of legitimacy could be overcome by proof of nonaccess of the husband; and that it was not necessary to prove nonaccess during the whole period of the wife's pregnancy, but it was sufficient if the circumstances of the case showed a natural impossibility that the husband could be the father.

In *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335, it was held that the presumption would obtain unless it was proven by irresistible evidence that the husband did not have sexual intercourse with the wife at the time when the child must have been begotten.

In *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761, it was held that the presumption might be rebutted by showing the husband to be impotent; or that he was entirely absent, so as to have no access to the mother; or was entirely absent at the period during which the child, in the course of nature, must have been begotten; or was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.

In *Zachmann v. Zachmann* (1903) 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256, it was held that the presumption was not overcome by proof of the fact that the mother was divorced from her former husband only twenty days before her second marriage, especially in view of the fact that the child was treated and cared for by the husband as his own child.

In *Phillips v. Allen* (1861) 2 Allen (Mass.) 453, it was held that the jury could not legally find against the legitimacy, except on facts which proved, beyond all reasonable doubt, that the husband could not have been the father; and that evidence that the mother's reputation for chastity was bad at the time of the marriage, and that for some time prior thereto she had been intimate with other men, if competent, would not rebut the presumption of legitimacy.

The admission by a third person that the child was begotten by him, and not by the husband of the mother, has been held to be insufficient to re-

but the presumption. *Montgomery v. Montgomery* (1848) 3 Barb. Ch. (N. Y.) 132.

In *Baker v. Baker* (1859) 13 Cal. 87, it was held that the presumption of legitimacy was outweighed, the evidence showing that as soon as the birth occurred, four months after the marriage, the husband repudiated the wife and child, sending them to the wife's relatives, and a confession by the wife also appearing.

(b) *Declaration or testimony of spouse.*

It is generally held that the testimony of the husband or of the wife is not admissible in evidence to prove nonaccess prior to the marriage, or impotence of the husband, in order to bastardize a child born in wedlock. *Rabeke v. Baer* (1897) 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242; *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502; *Com. v. Stricker* (1801) 1 Browne (Pa.) xlvii., appx.; *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644; *Tioga County v. South Creek Twp.* (1874) 75 Pa. 453; *Rex v. Luffe* (1807) 8 East, 198, 103 Eng. Reprint, 318, 9 Revised Rep. 406; *Anonymous v. Anonymous* (1856) 23 Beav. 273, 53 Eng. Reprint, 107, 22 Beav. 481, 52 Eng. Reprint, 1193, 4 Week. Rep. 307.

"Many reasons have been given for the rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this is not so much from the fact that it reveals immoral conduct on the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it." *Tioga County v. South Creek Twp.* (1874) 75 Pa. 433, *supra*.

In *Rex v. Luffe* (1807) 8 East, 198, 103 Eng. Reprint, 318, Lord Ellenborough said that the rule which forbade the wife to prove nonaccess "was founded upon a principle of public policy which prohibits the wife from being examined against her husband

in any matter affecting his interest or character."

"Declarations, as well as the evidence of either husband or wife, as to access or nonaccess, are excluded wherever the issue of legitimacy is involved, and this includes cases of antenuptial conception." *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761. And see *Niles v. Sprague* (1862) 13 Iowa, 198. Compare *Wright v. Hicks* (1854) 15 Ga. 160, 60 Am. Dec. 687, stated at length *infra*, I. b.

4. *Effect of knowledge by husband of pregnancy.*

It has been held that where a woman is pregnant at the time of marriage, and the fact of pregnancy is known to the husband, he is, where his rights only are concerned, conclusively presumed to be the father of the child. *Bailey v. Harshman* (1877) 60 Ind. 273; *Bailey v. Boyd* (1877) 59 Ind. 292; *State v. Shoemaker* (1883) 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589; *State v. Romaine* (1882) 58 Iowa, 48, 11 N. W. 721; *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335; *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502; *Miller v. Anderson* (1885) 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605; *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644. Compare *Roth v. Roth* (1871) 21 Ohio St. 646.

In *State v. Shoemaker* (1883) 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589, the court said: "One who marries a woman known by him to be enceinte is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother upon its birth would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child, receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child, then, is received into the family of the husband, who stands as to it in *loco parentis*. This being the law, it enters into the marriage contract between the mother and the husband. When this relation is es-

tablished, the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child." To the same effect, see *State v. Romaine* (1882) 58 Iowa, 46, 11 N. W. 721.

In *State v. Herman* (1852) 35 N. C. (13 Ired. L.) 502, the court, on an appeal from a conviction in a bastardy proceeding, said: "Where a child is born during wedlock, of which the mother was visibly pregnant at the marriage, it is a presumption juris et de jure, that it was the offspring of the husband." See to the same effect, *Dennison v. Page* (1857) 29 Pa. 420, 72 Am. Dec. 644.

In *Miller v. Anderson* (1885) 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605, a complaint in bastardy was made against the defendant, the complainant alleging that she had been delivered of a bastard child, and that the defendant was the father of the child. It appeared that about six months after the child was begotten, and while enceinte, the complainant was married to a man who had full knowledge of her condition of pregnancy, and who continued to live with her as her husband until his death. It was held that the defendant could not be held as the putative father of the child, and could not be required to contribute to its support; that the husband, in marrying the complainant under these conditions, knowing at the time that she was pregnant, consented to stand in loco parentis to, and was conclusively presumed to be the father of, the child. The court adopted the reasoning in the case of *State v. Shoemaker* (Iowa) supra, in all respects, and followed the holding in that case. In *Roth v. Roth* (Ohio) supra, however, it was held that the lower court erred in dismissing a bastardy proceeding because the complainant had, during the continuance of the cause, and while enceinte, married a man other than the defendant. In this connection the court said: "It cannot be conclusively presumed that the man who marries a pregnant woman is the father of the child with which she is pregnant. He may not have known that she was in that condition when he married her. And even if he did know it, he may

not be the father of the child. It may, therefore, if born alive, be a bastard. Notwithstanding the marriage, the question remained, whether the defendant was the father of the child or not."

In *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335, the court quoted with approval from 1 Rolle, Abr. 358, and 2 Bacon, Abr. 84, to the effect that if a woman be big with child by A, and marries B, and then the child is born, it is the legitimate child of B.

However, it has been said that the rule just stated does not prevail in cases involving questions of heirship and inheritance, where the interests of third persons are concerned. *State v. Shoemaker* (1883) 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589; *Miller v. Anderson* (1885) 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605.

But in *Bailey v. Boyd* (1877) 59 Ind. 292, an action was brought to recover possession of real estate, the plaintiff claiming through collateral, and the defendant through alleged lineal, descent from one Basil Bailey, Sr., by purchase from Basil Bailey, Jr. The determination of the controversy depended on the paternity of Basil Bailey, Jr. It appeared that the senior Bailey was married when the mother was visibly pregnant, and that the child was born shortly after the marriage. It was held that the father, by marrying the mother of the child, with knowledge of her pregnancy, acknowledged his paternity, and the child should be deemed his. See to the same effect, *Bailey v. Harshman* (1877) 60 Ind. 273.

*b. View that presumption of legitimacy is weakened by proof of antenuptial conception.*

In a few jurisdictions the courts take the view that the presumption existing in favor of the legitimacy of a child born in lawful wedlock is weakened by proof that the child was conceived before marriage. *Wright v. Hicks* (1854) 15 Ga. 160, 60 Am. Dec. 687; *Wilson v. Babb* (1882) 18 S. C. 59; *Jackson v. Thornton* (1915) 133 Tenn. 36, 179 S. W. 384. Compare *Wright v. Hicks* (1852) 12 Ga. 155, 56 Am. Dec. 451.

In *Wilson v. Babb* (1832) 18 S. C. 59, it appeared that a child was born about four and one-half months after marriage. It was held that the presumption was that the child was legitimate, but that this presumption could be overcome by less evidence than would be required in a case where the child was conceived in wedlock. The court said: "The true test is whether the husband of the wife who gives birth to the child is its father; and this must, of necessity, in every case, be a question of fact. Where the child is born after lawful wedlock, and after the lapse of the usual period of gestation, it should require a very strong state of circumstances to overthrow the presumption of legitimacy, such as impossibility of access, absolute nonaccess, abandonment, or something equally as conclusive. But where the birth is so soon after the marriage as to render it certain, according to laws of nature, that the child could not have been begotten during the wedlock, then it is more of an open question, depending on the weight of the testimony, aided in favor of the legitimacy, somewhat, by the marriage, but perhaps not to the extent of requiring such strong opposing evidence as in other cases. In every case, however, the question is still one of fact, to be determined in each special case by the principles hereinabove stated, to be administered and applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families."

In *Wright v. Hicks* (1854) 15 Ga. 161, 60 Am. Dec. 687, the court said: "While the law presumes every child legitimate which is born within wedlock, still, in questions of this sort, there is and should be a difference between past and antenuptial conceptions. In the latter, much slighter proof should be required to repel the presumption of legitimacy, arising from marriage. For here, it is the marriage only, and not the presumed sexual intercourse resulting from marriage, which creates the presumption. Every child begotten and born within wedlock is rightly presumed to be the offspring of the husband. But such

presumption does not necessarily arise where the child is begotten before marriage. Another man may as likely be the father as the future husband, as no one was entitled to sexual intercourse." In the earlier case of *Wright v. Hicks* (Ga.) supra, however, Lumpkin, J., speaking for the court, said: "The same rules apply whether the bastardy originates before or during marriage. If a man marries a woman pregnant by another person, the law presumes the child to be husband's; and whether she was a reputed virgin or grossment enceint, the books make no distinction. In both cases, the law says it is presumptively his child; still, he may show, by whatever proof he may command, that he has been made the innocent victim of fraud and artifice."

In *Jackson v. Thornton* (1915) 133 Tenn. 36, 179 S. W. 884, Williams, J., said: "Some of the courts hold that the presumption in such case must arise from the fact of the marriage, and not from sexual intercourse assumed to result from the marriage, and that the presumption of legitimate birth is therefore so far weakened as that it may be overcome by a less weight of evidence. . . . In other cases it is held that antenuptial conception does not weaken the presumption of legitimacy arising from birth after the marriage. . . . We think the better rule is that laid down in the first line of cases."

In these jurisdictions, while the evidence necessary to overcome the presumption need not be as great as if the child was conceived in wedlock, it must, nevertheless, be clear and convincing. Thus, in *Jackson v. Thornton* (Tenn.) supra, the court, after holding that proof of antenuptial conception weakened the presumption of legitimacy arising from birth after marriage, said: "But, even so, we hold that, in respect of the weight of the evidence required to override the presumption, clear, strong, and convincing testimony must be adduced by him who alleges illegitimacy. A mere preponderance in his favor is not enough; nor may testimony of mere rumor and suspicion among neighbors

touching the true paternity of the child avail to overcome the presumption."

In *Wright v. Hicks* (1854) 15 Ga. 160, 60 Am. Dec. 687, there was evidence that neither the husband nor the wife recognized the child as being legitimate; that the husband declared the child to be a bastard and treated it as such; and that neither the wife nor her friends ever ascribed the paternity of the child to the husband. It was held that all these circumstances should go to the jury, and that they might therefrom infer the illegitimacy of the child. In that case it was held further that the presumption of legitimacy could be rebutted by proof tending to show the physical impossibility of the child being legitimate, and for that purpose it was held that the declarations of the husband or wife, while not admissible during their lifetime to bastardize the issue, were admissible after their death, especially when the declarations were explanatory of the conduct of the parents.

## II. Antenuptial birth.

It has been held that marriage to the mother of an illegitimate child born before the marriage raises some presumption that the husband is the father of the child. *Stein v. Stein* (1908) 32 Ky. L. Rep. 664, 106 S. W. 860; *Hall v. Gabbert* (1904) 213 Ill. 208, 72 N. E. 806; *Gardner v. Gardner* (1877) L. R. 2 App. Cas. (Eng.) 723.

In *Stein v. Stein* (Ky.) supra, the question presented was whether the appellee was the legitimate heir of an intestate, and therefore entitled to his estate. It appeared that the appellee was born about one year previous to the marriage of his mother. In ruling on the question of presumption the court said: "The marriage of an unmarried man to an unmarried woman who has a child born out of lawful wedlock should create at least some presumption that it was his child, although the presumption is not as strong as when the child is born after marriage."

In *Gardner v. Gardner* (Eng.) supra, an appeal from the court of session to the House of Lords, the Lord Chancellor quoted with approval from

the opinion of Lord Gifford as follows: "A certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence, all that can be said is probably that it is more likely than not that he is the father."

In *Hall v. Gabbert* (1904) 213 Ill. 208, 72 N. E. 806, the question was presented as to the right of a bastard child to inherit from one who married the mother after the birth of the child. It appeared that the marriage took place after the intestate had been arrested on a bastardy complaint which charged him with the paternity of the child. The court said: "The courts will not indulge the presumption, in such case, that the marriage was entered into merely to avoid the possible consequences of the proceeding, but will rather assume that had the alleged father doubted his paternity of the child, he would have resisted the prosecution and refused the marriage."

But there is also authority to the effect that no presumption of legitimacy arises in such a case. *Jane's Estate* (1892) 147 Pa. 527, 23 Atl. 892. And see the reported case (*STATE EX REL. BURKHART v. FERGUSON*, ante, 426).

In *Jane's Estate* (Pa.) supra, the sole question for determination was the right of a child who was born before the marriage of his mother to share in the distribution of the husband's estate. In affirming the decision of the court below, denying the right, it was said: "There is no presumption that the man who marries the mother of a bastard child is the father of it."

In the reported case (*STATE EX REL. BURKHART v. FERGUSON*) it is held that there is no such presumption that a man marrying a woman who is nursing an illegitimate child is the father of the child as to bar a bastardy proceeding by the mother against another man, the rule laid down in *State v. Shoemaker* (Iowa) set out supra, I. a, 4, being held to be inapplicable to a case of antenuptial birth. W. F. F.

LEWIS J. MARSHALL, Plff. in Err.,  
v.  
WABASH RAILWAY COMPANY et al.

*Michigan Supreme Court — March 28, 1918.*

(201 Mich. 167, 167 N. W. 19.)

**Receiver — effect of appointment on pending suit.**

1. The appointment by a Federal court in one state of receivers pendente lite in a proceeding to foreclose a mortgage upon property of a railroad company does not affect a pending suit in a court of another state to recover damages for personal injuries caused by the negligence of the railroad company after the execution of the mortgage.

[See note on this question beginning on page 441.]

**Mortgage — effect of statute.**

2. A prior law imposing conditions and limitations upon mortgages determines their force and effect, whatever scope is attempted by the provisions they contain.

[See 19 R. C. L. 302.]

**Statute — construction — implied exclusion.**

3. In the construction of statutes the express mention of one thing implies the exclusion of other similar things.

[See 25 R. C. L. 981.]

**Lien — priority over mortgage — statute.**

4. The lien of a judgment against a railroad company for personal injuries

does not have priority over a pre-existing mortgage under a statute giving such lien priority over judgments, executions, and attachments levied upon the property.

**Equity — prayer for accounting — effect.**

5. A prayer for accounting does not confer jurisdiction upon a court of equity of an action to collect an unsatisfied judgment the amount of which is not open to question.

**— jurisdiction — enforcement of judgment.**

6. Equity has no jurisdiction of a suit to enforce a judgment lien.

[See 10 R. C. L. 357; 15 R. C. L. 813, 902.]

**ERROR** to the Circuit Court for Lenawee County (Hart, J.) to review an order dismissing a bill filed to enforce payment of a judgment obtained by plaintiff against defendants for personal injuries. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. N. Sampson and Frank M. Sala for plaintiff in error.

Messrs. Baldwin, Alexander, & Russell, for defendants in error.

No lien attached to the property of the Wabash Railroad Company by reason of plaintiff's judgment.

34 Cyc. 231; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 81 Fed. 439; Clyde v. Richmond & D. R. Co. 56 Fed. 539; Temple v. Glasgow, 25 C. C. A. 540, 42 U. S. App. 417, 80 Fed. 441; Moore v. Southern States Land & Timber Co. 83 Fed. 399; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Campau v. Detroit Driving Club, 130 Mich. 417, 90 N. W. 49.

If a lien did attach, it was subsequent to the mortgage, and the fore-

closure of the mortgage foreclosed the lien.

Provident Inst. for Sav. v. Jersey City, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612; Guardian Trust & D. Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186; Veatch v. American Loan & T. Co. 25 C. C. A. 39, 49 U. S. App. 191, 79 Fed. 471; Farmers' Loan & T. Co. v. Northern P. R. Co. 24 C. C. A. 511, 48 U. S. App. 324, 79 Fed. 227; Farmers' Loan & T. Co. v. Nestelle, 25 C. C. A. 194, 48 U. S. App. 326, 79 Fed. 748, 2 Am. Neg. Rep. 104; Hampton v. Norfolk & W. R. Co. 62 C. C. A. 388, 127 Fed. 662; For- dyce v. Omaha, K. C. & E. R. Co. 145 Fed. 544.



Steere, J., delivered the opinion of the court:

Plaintiff's bill of complaint is filed to have a judgment obtained by him against the Wabash Railroad Company for personal injuries declared a preferred lien upon the property of defendants, and that they be directed to pay the same, in default of which sufficient of their property found within the state be ordered sold to satisfy said judgment. His claim of right to such relief is based upon the provisions of Act No. 110, Public Acts of Michigan 1899 (2 Comp. Laws 1915, § 8340), which provides, so far as material here, as follows: "All claims arising out of the death or personal injury of any person, when such death or personal injury shall result from the negligence of any . . . steam railroad company, organized and doing business under the laws of this state, shall, after judgment is obtained therefor against any such corporation, constitute a lien upon all of the assets of said corporation, and all of the property thereof, and all of its rights and franchises, and over any and all other judgments, executions or attachments levied upon the said property, except such as may be issued in favor of persons having obtained judgments for personal work," etc.

Against this bill defendants filed a motion in the nature of a demurrer asking that the same be dismissed on various grounds, the substance of those calling for most serious consideration being that the statute relied upon and referred to in the bill of complaint does not, under the facts stated therein, give plaintiff's claimed lien priority over a previous mortgage, neither does it operate against or apply to foreclosure proceedings pending in the Federal court when all the property, rights, and franchises of the defendant railroad company were in possession and under control of receivers appointed by that court at the time plaintiff's judgment was rendered.

The history of this litigation between plaintiff and the Wabash Railroad Company, up to the time of securing the judgment to enforce which this bill is filed, will be found in *Marshall v. Wabash R. Co.* 163 Mich. 88, 127 N. W. 788, *id.*, 171 Mich. 180, 137 N. W. 89, and *id.*, 184 Mich. 593, 151 N. W. 696. Briefly summarized from the bill sufficiently for the questions involved, it appears that on February 2, 1908, plaintiff sustained serious injuries while a passenger on a train of the Wabash Railroad Company, in an accident which resulted from its negligence at a point on its line in Lenawee county, Michigan, and to recover compensatory damages for such tort he commenced an action in the circuit court for that county on September 15, 1908. The case was tried three times, resulting on each trial in a verdict and judgment in his favor, successively removed by the defendant to this court for review. The first two judgments were reversed and the case remanded for retrial. The third trial resulted in a verdict and judgment for plaintiff, on February 15, 1913, in the sum of \$11,255.75, which was affirmed by this court on March 18, 1915. That judgment is yet in force with no part paid, no execution has been taken out to recover the same, and demand of plaintiff for payment has been refused. Whether it became a paramount lien upon the property of the Wabash Railroad Company on February 15, 1913, the date of final judgment in the circuit court, is the chief issue here.

On January 29, 1912, the Wabash Railroad Company went into the hands of receivers by order of the United States district court for the eastern district of Missouri, upon application of the Equitable Trust Company of New York, trustee, as complainant in a suit against said railroad company and James B. Forgan, defendants, to foreclose a first refunding and extension mortgage given by the Wabash Railroad Company on July 1, 1906. A decree foreclosing this mortgage and order-

ing sale of the property covered by it to satisfy the same was rendered by that court on January 30, 1914, and sale under said foreclosure was had on July 31, 1915, followed by confirmation of the same on August 20, 1915, about one year and a half after plaintiff's judgment was rendered in the circuit court of Lenawee county. Under said foreclosure proceedings the property of defendant Wabash Railroad Company was transferred to a company known as Wabash Railway Company, which now claims to own the property and operate the road. The bill makes special reference to the records and files in the foreclosure and receivership proceedings before the United States district court, of Missouri, designated as "consolidated cause No. 3,977," and asks leave to use any portion thereof deemed material on the hearing of this case, and avers that "notice of all files and papers in said cause, and all orders and decrees made in said court, were filed in the district court of the United States for the southern district of Michigan, eastern division, at Detroit," which includes within its jurisdiction a portion of the line and other assets of the Wabash Railroad Company, and that no notice was ever given to plaintiff or his attorneys to appear in those proceedings and present his claim. No copies of any of the files and records of said cause in the Federal court appear in this record, but it is stated in the opinion of the circuit judge who heard the motion, and not disputed, that the receivers in that case were discharged some time before this bill was filed, and that "plaintiff had knowledge of these proceedings in the district court."

Referring to dates, upon the question of priority of lien, it is shown that the act upon which plaintiff relies was passed in 1899, the mortgage in question was given in 1906, the accident in which plaintiff was injured occurred February 2, 1908, he began his action for damages September 15, 1908, and recovered the judgment under which

he claims lien on February 15, 1913. Under the Act of 1899, "it is not until the judgment is obtained that the statutory lien attaches." *Kaiser v. Detroit & N. W. R. Co.* 169 Mich. 254, 135 N. W. 256.

Plaintiff contends that the fact the mortgage antedates his judgment is immaterial, because the statute antedates the mortgage, and its provisions must be read into and be regarded as a part of the mortgage—citing *Southern R. Co. v. Bouknight*, 30 L.R.A. 823, 17 C. C. A. 181, 25 U. S. App. 415, 70 Fed. 442; *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186; *Provident Inst. for Sav. v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612. These authorities and others which may be found of like import, sustain the rule that a prior law imposing conditions and limitations on mortgages Mortgage—  
effect of  
statute. determines their force

and effect, whatever scope is attempted by the provisions they contain. To the extent such limiting statutes are applicable they are held to enter into and become a part of such contracts to the same extent as if so provided in the instruments themselves. In the *Bouknight* and *Fisher* Cases, statutes were under consideration which in express terms designated mortgages as subordinate to the liens sought to be enforced. In the *Jersey City* Case, an act making water rents a charge and prior lien upon land in a municipality, to the same extent and to be collected in like manner "as other taxes assessed on real estate, which by law took priority over any mortgage or other encumbrance," was held to be constitutional and to give preference to liens for water rent over subsequent mortgages. The construction and application of the act plaintiff urges requires that the court go further, and by inference read into the act itself priority of judgment liens for personal injuries over mortgages, and, thus amplified, read the act in-

to mortgages given after the statute was enacted.

The provision relied on makes no mention of contract obligations, mortgages, or other securities voluntarily given by the corporation before such judgments are taken and become liens, but provides that, as against other liens established by adversary action, such judgment liens for personal injuries shall have preference "over any and all other judgments, executions, or attachments levied upon said property," and from those are excepted "such as may be issued" in favor of persons having judgments for personal labor. If it was the legislative intent to subordinate previously given mortgages to liens for torts, labor, or other claims against the delinquent corporation, there was no difficulty in so providing in plain words. Under the legal maxim of construction that express mention

Statute—  
construction—  
implied ex-  
clusion.

of one thing implies the exclusion of other similar things, there is reason in the contention that, the act having expressly named certain liens made subordinate, it by implication excludes others not mentioned, upon the presumption that, having designated some, the legislature designated all it was intended the act should include. In other acts both preceding and following this the legislature of this state, in providing liens upon the property of corporations for labor in dangerous vocations, has made plain its intent to include mortgages amongst subordinated liens by expressly naming them. 3 Comp. Laws 1915, §§ 14,840, 14,841. The inference from a failure to mention mortgages in an intervening act of kindred import has persuasive significance.

No right of lien obtains under plaintiff's judgment except as expressly provided and to the extent prescribed by statute. It is not in recognition of the underlying principles nor enlargement of the scope of a common-law lien. It involves no claim for labor upon, material

furnished for, or conservation of the property against which a lien is asserted. The legislation providing for it goes beyond liens previously recognized at common law or in equity. Its character and extent are fixed and limited by the terms of the statute creating it, which the court may not extend or add to, although the legislature might with equal or greater merit have done so.

Although the statute relied on makes plaintiff's judgment, when obtained, a lien on all assets of the defendant corporation, it gives the judgment lien in express terms priority only over other "judgments, executions, or attachments," and we think the learned circuit judge correctly held, when dismissing plaintiff's bill, that his judgment was not a prior lien to the previously given mortgage, and it could not be maintained upon that theory.

Lien—priority  
over mortgage—  
statute.

We are impressed, however, that plaintiff's judgment is valid as it stands, and, under the statute, constitutes a lien on all the property of the defendant Wabash Railroad Company against which the action ran, subject to any valid prior mortgage upon any of such property. His action was legally begun in the circuit court of Lenawee county before the receivers were appointed or suit begun in the foreclosure case. When the Federal court of another state later took jurisdiction in the foreclosure proceedings and appointed receivers pendente lite, presumably to conserve the mortgaged property for the purpose of the decree of foreclosure as between the parties to that suit, the state court was not deprived thereby of its right to proceed with this distinct personal action in which it had first taken jurisdiction.

Receiver—effect  
of appointment  
on pending suit.

By permission of the court appointing them the receivers could have appeared in the case and defended had they seen fit to do so. Its progress did not interfere with their possession of the mortgaged

property, or with the mortgage foreclosure. They did not represent the Wabash Railroad in its individual character, nor supersede it in the exercise of its corporate powers, beyond their temporary custody and control of its mortgaged property. The corporation was energetically and independently, so far as shown, pursuing an active defense of plaintiff's case to the court of last resort while the foreclosure proceedings were pending. There is nothing before us to indicate that the foreclosure suit in the Federal court was for the purpose of making equitable distribution of the assets of the corporation amongst its creditors, or had any object beyond the ordinary foreclosure of a mortgage and incidental conservation of the mortgaged property while the suit was in progress.

While authorities are cited by defendants sustaining extreme views as to the immunity afforded delinquent railroads from legal liability by appointment of receivers to conserve mortgaged property during foreclosure proceedings, we think there is respectable authority and better reason for the view that, so long as the presumably temporary possession by the receivers of the property they are appointed to conserve is not disturbed, other courts are not closed, by the foreclosure suit, to those desiring to pursue their legal remedies against the defaulting corporation.

"A receiver, says the Supreme Court of the United States, derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property. The ownership of the property is not changed by the appointment of a receiver. The possession of the re-

ceiver is merely that of the corporation." 5 Thomp. Corp. 2d ed., § 6373.

While not in all particulars analogous to the instant case, in *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238, involving a contention between two lienors, the court said, referring to *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322, upon which defendants rely: "If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser. But nothing was done by Lynde, after the institution of the foreclosure suits and pending proceedings therein, which was inconsistent with or tended to defeat the object of those suits."

In *Moore v. Southern States Land & Timber Co.* (C. C.) 83 Fed. 399, the court said: "It has, however, been held that when a decree appointing a receiver and awarding an injunction, so far as disclosed upon its face, was to provide for the safe-keeping of the property of the corporation, and to prevent any transfers thereof, and such decree did not state that the ulterior intent of the court was to make an equitable distribution of the funds, and contained no direction to the receiver to give notice to the creditors to file their claims, the decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor is as much a lien on the real estate of the corporation debtor as if the appointment of a receiver had never been made (citing authorities). I think this ruling is founded in reason, and my opinion is that until the court has made some decree showing that its ulterior intent is to make an equitable distribution

of the funds, and giving notice to the creditors to file their claims, such creditors may sue at law, and acquire a priority. Up to that time the complainant is permitted to dismiss the case and discharge the receiver."

Vide, also *Blair v. Walker* (C. C.) 26 Fed. 73; *Trust Co. v. Norfolk & S. R. Co.* (C. C.) 183 Fed. 803.

Upon the authority of the state court to now entertain jurisdiction and grant any portion of the relief asked, it is to be noted the bill indicates that by ancillary steps jurisdiction of the Federal court was extended over the mortgaged property of the defendant corporation in this state, and it is said in plaintiff's brief that no attack is made upon the foreclosure decree of that court, the jurisdiction of which is conceded, it only being insisted that the sale under the decree was subject to his lien, and, inferentially, that court should have seen his rights were protected; and not having done so before that litigation was ended and the receivers discharged, the state court may and should deal with the property according to the rights of the respective parties. In denial of the application of this decree to him, counsel for plaintiff contend that his judgment became a lien upon the property of the Wabash Railroad Company in this state before it changed its name, if not its spots, to the Wabash Railway Company, and, by a court proceeding, only stated in outline, legal title to its assets went with the name, and he then had rights in the property which could not be cut off without his day in court; but he was not in any manner made a party to the foreclosure suit before final decree, served with notice, or given opportunity to be heard. Of his right to such notice, § 721 of the United States Revised Statutes (Comp. Stat. § 1538, 5 Fed. Stat. Anno. 2d ed. p. 1123) is cited, which provides that, in the absence of Federal statutes, constitutional provisions, etc., prohibiting, "the laws of the several states . . . shall

be regarded as rules of decision in trials at common law, in the courts of the United States," which shall take judicial notice of them as taken by the state courts, and § 3 of said Act 110, Pub. Acts of Michigan 1899 (2 Comp. Laws 1915, § 8341), which provides that "it shall be the duty of all courts of this state, in which proceedings may be pending, for the foreclosure of any mortgage, trust deed or other lien upon any of the property of any . . . steam railroad company, doing business in this state, to cause said company, before final decree is entered in said cause, to file with said court, through the register thereof, a statement of all claims and demands made against said company by any and all persons for . . . damages resulting from death or personal injuries, and which claims shall have arisen within six years prior to the date of filing the same with said court. And it shall be the duty of said court, upon the filing of the same, to notify any and all persons interested in said claims, or their attorneys, to be and appear before said court upon a certain day to present their said claims, and the proof thereof, . . . and to inform said court in case of claims for personal injury or death, whether it is the desire of said claimants to prosecute the same to final judgment or not."

Reports of decisions by the Federal courts show that a "rule of decision," analogous in principle to this statute, has frequently been adopted when dealing with foreclosure of mortgages and enforcement of trust deeds given by railroads, as a fair and equitable measure irrespective of any statutory suggestion or requirement. While plaintiff's bill avers that the Federal court did not require a statement of claimants to be filed with it, and no notice of such proceeding was given to him or his attorneys, the details of the foreclosure suit are not in this record, and whether there was any substantial observance of that rule of decision, or general notice to claimants by publication or other-

wise, we are not advised. The trial court stated plaintiff did have "knowledge of these proceedings in the district court." The statute makes it "the duty of all courts of this state" to pursue the course outlined, which defendants contend applies only to state courts. We are not prepared, nor required upon this record, to determine it mandatory upon Federal courts located within this state.

Plaintiff's bill shows that he has a judgment upon which execution might issue at any time, but no execution has been taken out. His bill is therefore not filed in aid of execution. His prayer for an accounting cannot confer equity jurisdiction when the bill shows its only purpose is to collect an unsatisfied judgment, the amount of which is not open to question. The palpable purpose of the bill is to have the chancery court declare and

Equity—prayer  
for accounting  
—effect.

enforce collection of a statutory lien. Although there is some confusion of the law upon that subject in some jurisdictions, it has been determined in this state that while the equity court, having acquired jurisdiction for other purposes, may, as an incident to general relief granted, order property sold to satisfy a lien, it has no jurisdiction to enforce a lien, either common-law or statutory, upon a bill filed solely for that purpose (Aldine Mfg. Co. v. Phillips, 118 Mich. 162, 42 L.R.A. 531, 74 Am. St. Rep. 380, 76 N. W. 371), and such, we conclude, is manifestly the sole object of this bill.

—jurisdiction—  
enforcement of  
judgment.

The order granting defendant's motion and dismissing plaintiff's bill is therefore affirmed, with costs, but without prejudice.

Petition for rehearing denied, June 20, 1918.

### ANNOTATION.

**Right to bring action against corporation, or prosecute pending action, as affected by the appointment of a receiver for the corporation.**

- I. Where appointment does not destroy corporate existence:
  - a. General rule:
    1. In general, 441.
    2. Pending actions, 443.
    3. Actions commenced subsequently to appointment, 445.
  - b. Enforcement of judgment, 446.
- II. When the appointment in effect destroys the corporate existence:
  - a. In general, 449.
  - b. After judgment of dissolution, 450.
- III. When effect of suit would be to interfere with the receiver's possession of the property, 451.
- IV. Effect of collusion between the parties to the receivership proceedings, 453.
- V. What constitutes the destruction of the corporate existence:
  - a. In general, 453.
  - b. Appointment of a receiver in a mortgage foreclosure proceeding, 453.
  - c. Insolvency, winding up, or dissolution proceeding, 456.
- VI. Effect of appointment upon enforcement of existing liens:
  - a. Judgment, attachment, garnishment, or execution liens, 459.
  - b. Contract or mortgage liens, 460.

**I. Where appointment does not destroy corporate existence.**

**a. General rule.**

**1. In general.**

This note is confined to cases based upon the effect of the appointment of a receiver for a corporation or its

property pending actions against the corporation, or the right to commence and prosecute actions against it. It does not include cases involving the right to sue the receiver, or the right of the receiver to intervene in pending actions or to make him a party thereto, nor does it include cases involving

the right of the receiver, by proceedings in the court which appointed him, to enjoin or restrain the commencement or prosecution of actions against the corporation.

It is a general rule that a court which is administering property of a corporation in its custody through receivership proceedings may properly draw to itself all disputes as to liens and other rights to or pertaining to such property, and to this end it may restrain actions in other courts. The following cases sustain this rule, which, however, as pointed out, is beyond the scope of the note, and hence the note is not exhaustive of the cases on the subject: *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* (1890) 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Texas & P. R. Co. v. Cox* (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Porter v. Sabin* (1892) 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* (1899) 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564; *Wabash R. Co. v. Adelbert College* (1907) 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182.

In connection with the question as to the effect of the appointment of a receiver for a corporation on the rights of other creditors to commence or continue the prosecution of actions against the corporation, it is to be remembered that the appointment of a receiver for a corporation is generally either for the purpose of taking possession of the whole or a portion of the property of the corporation for some specific purpose, or as a step in dissolving and winding up the affairs of the corporation and administering its property. Where the appointment of a receiver is in effect merely to take possession of the whole or a portion of the property of the corporation for some specific purpose, the existence of the corporation as a body corporate is not thereby affected. On the other hand, where the receiver is appointed for an insolvent corporation for the purpose of winding up its affairs and administering its property by distributing the same among the creditors and stockholders, the effect may be to

extinguish the existence of the corporation as a body corporate except as it may be represented by the receiver in actions necessary in winding up its affairs. This distinction serves to harmonize and explain the cases passing upon the question under consideration.

As suggested, where a receiver is appointed to take charge of the whole or a portion of the property of a corporation for some specific purpose, the corporate existence of the corporation is not thereby affected, and it remains subject to actions at law to the same extent as it would if no receiver had been appointed for its property. Such appointment does not affect the progress of pending actions or the commencement of actions against the corporation, except as such actions may be restrained or enjoined in the receivership proceedings, and with the further exception that no action can be maintained which will in any way affect or embarrass the receiver in the possession of the property of the corporation to which his receivership entitles him.

**United States.** — *Bank of Bethel v. Pahquioque Bank* (1871) 14 Wall. 383, 20 L. ed. 840, affirming (1869) 36 Conn. 325, 4 Am. Rep. 80; *Calhoun v. Lanaux* (1888) 127 U. S. 634, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345; *Chemical Nat. Bank v. Hartford Deposit Co.* (1896) 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439, affirming (1895) 156 Ill. 522, 41 N. E. 225; *Blair v. Walker* (1886) 26 Fed. 73; *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* (1887) 29 Fed. 732; *Pine Lake Iron Co. v. La Fayette Car Works* (1893) 53 Fed. 853; *Scott v. Farmers' Loan & T. Co.* (1895) 16 C. C. A. 358, 32 U. S. App. 468, 63 Fed. 17; *Moore v. Southern States Land & Timber Co.* (1896) 83 Fed. 399; *Wilder v. New Orleans* (1898) 31 C. C. A. 249, 58 U. S. App. 109, 87 Fed. 843; *Metropolitan Trust Co. v. Lake Cities Electric R. Co.* (1900) 100 Fed. 897; *Trust Co. of America v. Norfolk & S. R. Co.* (1911) 183 Fed. 803, affirmed in (1911) 111 C. C. A. 465, 190 Fed. 737.

**Alabama.**—*Alabama Terminal R. Co.*

v. Bennis (1914) 189 Ala. 590, 66 So. 589.

**Colorado.** — Steinhauer v. Colmer (1898) 11 Colo. App. 494, 55 Pac. 291.

**District of Columbia.**—McDermott v. Crook (1902) 20 App. D. C. 465.

**Georgia.**—Citizens' Bank v. Hubbard (1883) 70 Ga. 411; American Nat. Bank v. Robinson (1913) 141 Ga. 78, 80 S. E. 555.

**Illinois.** — Toledo, W. & W. R. Co. v. Beggs (1887) 85 Ill. 80, 28 Am. Rep. 613; Mercantile Ins. Co. v. Jaynes (1877) 87 Ill. 199; Ohio & M. R. Co. v. Russell (1885) 115 Ill. 52, 3 N. E. 561.

**Indiana.**—J. W. Dann Mfg. Co. v. Parkhurst (1890) 125 Ind. 317, 25 N. E. 347.

**Iowa.** — Allen v. Central R. Co. (1876) 42 Iowa, 683; Weigen v. Council Bluffs Ins. Co. (1896) 104 Iowa, 410, 73 N. W. 862; Mankin v. Phoenix Loan Asso. (1903) — Iowa, —, 96 N. W. 982; O'Mara v. Newton & N. W. R. Co. (1912) 156 Iowa, 701, 137 N. W. 942.

**Kansas.**—Patrick v. Eells (1883) 30 Kan. 680, 2 Pac. 116; Kelly v. Union P. R. Co. (1897) 58 Kan. 161, 48 Pac. 843, 2 Am. Neg. Rep. 538.

**Louisiana.** — Spencer v. Welch (1899) 51 La. Ann. 753, 25 So. 405.

**Maryland.**—Ellicott v. United States Ins. Co. (1848) 7 Gill, 307.

**Massachusetts.** — Kittredge v. Osgood (1894) 161 Mass. 384, 37 N. E. 369; Coyle v. Taunton Safe Deposit & T. Co. (1911) 207 Mass. 441, 93 N. E. 791.

**Michigan.** — Rickman v. Rickman (1914) 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237; MARSHALL v. WABASH R. Co. (reported herewith) ante, 435.

**Missouri.**—Heath v. Missouri, K. & T. R. Co. (1884) 83 Mo. 617; St. Louis, C. G. & Ft. S. R. Co. v. Holladay (1895) 131 Mo. 440, 38 S. W. 49.

**New Jersey.** — Willink v. Morris Canal & Bkg. Co. (1843) 4 N. J. Eq. 377; Taylor v. Gray (1899) 59 N. J. Eq. 621, 44 Atl. 668; Ennis v. Eden Mills Paper Co. (1900) 65 N. J. L. 577, 48 Atl. 610.

**New York.** — Kincaid v. Dwinelle (1875) 59 N. Y. 548; Pringle v. Wool-

worth (1882) 90 N. Y. 502; Decker v. Gardner (1891) 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814; New York v. Illinois Surety Co. (1917) 180 App. Div. 513, 167 N. Y. Supp. 752; People v. Commercial Alliance L. Ins. Co. (1896) 5 App. Div. 273, 39 N. Y. Supp. 117, affirmed in (1896) 154 N. Y. 640, 45 N. E. 1133; Mickles v. Rochester City Bank (1844) 11 Paige, 118, 42 Am. Dec. 103; Knauer v. Globe Mut. L. Ins. Co. (1880) 14 Jones & S. 370; Del Valle v. Navarro (1887) 21 Abb. N. C. 136.

**North Carolina.** — Black v. Consolidated R. & Power Co. (1912) 153 N. C. 468, 74 S. E. 468.

**Ohio.**—Mather v. Cincinnati R. Tunnel Co. (1888) 2 Ohio C. D. 161; Monnett v. Columbus, S. & H. R. Co. (1904) 26 Ohio, C. C. 469.

**Pennsylvania.**—Wagner v. Keystone Mut. Ben. Asso. (1896) 8 Pa. Dist. R. 231.

**Texas.** — City Water Co. v. State (1895) 88 Tex. 600, 32 S. W. 1033; Kansas City, M. & O. R. Co. v. State (1914) 106 Tex. 249, 163 S. W. 582.

**Washington.** — Allen v. Olympia Light & P. Co. (1893) 13 Wash. 307, 43 Pac. 55.

It has been held that where a receiver is appointed without notice, in a proceeding against a corporation pending an appeal from the order of appointment, the court may properly maintain a proceeding by the same plaintiff for the appointment of a receiver upon notice. Butts v. Davis (1912) — Tex. Civ. App. —, 149 S. W. 741.

## 2. Pending actions.

The appointment of a receiver for a corporation does not abate or suspend the prosecution to judgment of actions pending at the time of the appointment. Mercantile Trust Co. v. Pittsburgh & W. R. Co. (1887) 29 Fed. 782; Alabama Terminal R. Co. v. Bennis (1914) 189 Ala. 590, 66 So. 589; Citizens' Bank v. Hubbard (1883) 70 Ga. 411; American Nat. Bank v. Robinson (1913) 141 Ga. 78, 80 S. E. 555; Toledo, W. & W. R. Co. v. Beggs (1877) 85 Ill. 80, 28 Am. Rep. 613; Mercantile Ins. Co. v. Jaynes (1877) 87 Ill. 199; Kittredge v. Osgood (1894) 161 Mass. 384, 37 N. E. 369; St. Louis, C. G. &



*Ft. S. R. Co. v. Holladay* (1895) 131 Mo. 440, 33 S. W. 49; *Cooper v. Philadelphia Worsted Co.* (1904) — N. J. Eq. —, 57 Atl. 733; *Tracy v. First Nat. Bank* (1868) 37 N. Y. 523; *Black v. Consolidated R. & Power Co.* (1912) 158 N. C. 468, 74 S. E. 468; *Wagner v. Keystone Nat. Ben. Asso.* (1896) 8 Pa. Dist. R. 231.

In *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* (Fed.) supra, it was held that the appointment of a receiver for a railroad corporation by one court did not prevent the continued prosecution of a pending action in another court for the assessment of damages against the corporation.

In *Cooper v. Philadelphia Worsted Co.* (1904) — N. J. Eq. —, 59 Atl. 733, it is held that a pending action against a corporation may be prosecuted to judgment, although, before the judgment is rendered, a receiver is appointed for the corporation in insolvency proceedings. The court said that this was true, even conceding that an action could not be brought against the corporation after the appointment of a receiver.

In *Citizens' Bank v. Hubbard* (1883) 70 Ga. 411, it appeared that a corporation had made an assignment of all of its effects for the benefit of its creditors, that assignees under creditors' bills had been appointed receivers and had taken possession of all the effects of the corporation, and these proceedings were still pending. These circumstances were held, however, not to preclude a creditor of the corporation from prosecuting an action against it to obtain judgment upon his claim against the corporation.

In *St. Louis, C. G. & Ft. S. R. Co. v. Holladay* (1895) 131 Mo. 440, 33 S. W. 49, it is pointed out that a receiver of a corporation is a stranger to proceedings instituted and in progress prior to his appointment, and this status remains until he has been made a party to the action by an order of the court; hence it follows that a receiver is a stranger to an action against a corporation pending at the time of his appointment, and there is no legal objection to the prosecution of the action in that form to final judgment,

and the court in which such action is pending may properly refuse, at the instance of the corporation, to make the receiver a party thereto.

In *Tracy v. First Nat. Bank* (1868) 37 N. Y. 523, it appeared that an action was commenced against the bank before the appointment of a receiver for it. In denying the right of the receiver to intervene in this proceeding, the court said that there was no legal objection to the action continuing in its original form until final judgment was obtained.

In *Wagner v. Keystone Nat. Ben. Asso.* (1896) 8 Pa. Dist. R. 231, it is held that a pending action against an insurance company is not abated by the appointment of a receiver to take over and administer its assets, where the decree appointing the receiver does not dissolve the corporation.

In *Patrick v. Eells* (1883) 30 Kan. 680, 2 Pac. 116, the receiver of a corporation, appointed in insolvency proceedings against it, was denied the right to intervene in an action against the corporation by trustees in a mortgage executed by the corporation upon its property, for the foreclosure of the mortgage. The right to continue the prosecution of the foreclosure proceeding is recognized, although not considered by the court.

In *Advance-Rumely Thresher Co. v. Moss* (1919) — Tex. Civ. App. —, 213 S. W. 690, it is said that, where a judgment against a corporation has been appealed from and the appeal is pending at the time a receiver is appointed for the property of the corporation in a Federal court, the plaintiffs are not compelled to abandon the judgment on which they had elected to try their suit, and resort to the Federal court for the prosecution of their claim. "The state and Federal courts were courts of concurrent jurisdiction, and the suit had been instituted in the district court of Hamilton county and carried to the appellate court before the jurisdiction of the Indiana Federal court had attached, and we can see no invasion of the jurisdiction of the latter court or of the Federal court at Dallas in the state court's having permitted appellees to institute and main-

tain this suit against appellant, based upon the judgment obtained against Rumely Products Company for a moneyed demand. We do not think this proceeding in any wise impairs the judgments or decrees of the Federal courts, or in any respect denies full faith and credit to them."

It has been held to be within the discretion of the court in which a suit was pending at the time of the appointment of a receiver, to make the receiver a party, and that it may refuse to do so and permit the case to continue against the corporation, notwithstanding the appointment of the receiver. *St. Louis, C. G. & Ft. S. R. Co. v. Holladay* (1895) 131 Mo. 440, 33 S. W. 49.

### 3. *Actions commenced subsequently to appointment.*

It is a general rule that, where the appointment of a receiver for a corporation does not have the effect of terminating the legal existence of the corporation, the appointment does not preclude the commencement and prosecution to judgment of actions against the corporation, the purpose and effect not being to acquire a lien upon the property of the corporation, or interfere with the receiver's possession of the property.

**United States.**—*Calhoun v. Lanaux* (1887) 127 U. S. 634, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345; *Chemical Nat. Bank v. Hartford Deposit Co.* (1895) 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439, affirming (1895) 156 Ill. 522, 41 N. E. 225.

**District of Columbia.**—*McDermott v. Crook* (1902) 20 App. D. C. 465.

**Illinois.**—*Ohio & M. R. Co. v. Russell* (1885) 115 Ill. 52, 3 N. E. 561.

**Kansas.**—*Kelley v. Union P. R. Co.* (1897) 58 Kan. 161, 48 Pac. 843, 2 Am. Neg. Rep. 538.

**Louisiana.**—*Spencer v. Welch* (1899) 51 La. Ann. 753, 25 So. 405.

**Massachusetts.**—*Coyle v. Taunton Safe Deposit & T. Co.* (1911) 207 Mass. 441, 93 N. E. 791.

**New York.**—*Pringle v. Woolworth* (1882) 90 N. Y. 502.

**Texas.**—*City Water Co. v. State* (1895) 88 Tex. 600, 32 S. W. 1033.

**Washington.**—*Allen v. Olympia*

*Light & P. Co.* (1895) 13 Wash. 307, 43 Pac. 55.

In *Calhoun v. Lanaux* (U. S.) *supra*, it was held that an action against a corporation to have canceled and discharged of record a mortgage running to the corporation, which the plaintiff had paid, could be maintained in the state court, notwithstanding a receiver had been appointed for the corporation in a Federal court. The court said that such proceeding would not have the effect of depriving the receiver of any property of the corporation in his possession.

In *McDermott v. Crook* (D. C.) *supra*, it is held that although the property of a city and suburban railway company is placed in the hands and control of a receiver, a suit may nevertheless be commenced against the company to recover damages for personal injuries alleged to have been caused by its negligence, at a time prior to the appointment of the receiver.

In *Ohio & M. R. Co. v. Russell* (Ill.) *supra*, the facts were that a landowner brought an action against a railroad company to recover a statutory penalty for the failure of the company to erect and maintain a line fence along its right of way adjoining the plaintiff's land. The statute authorized the adjoining owner to recover the penalty, in these circumstances, either of the railroad company or the party actually occupying or using the railroad. Under this statute, it was held no defense to the action that at the time of the failure to build the fence the corporation was in the hands of a receiver.

In *Kelley v. Union P. R. Co.* (Kan.) *supra*, it is held that the fact that the assets of a railroad company have been placed in the hands of a receiver does not change or affect the liability of the company for torts previously committed by it, and does not bar an action against the company to recover damages for such torts.

In *Spencer v. Welch* (La.) *supra*, it is held that an action to enforce notes given by a corporation and to secure the recognition of a mortgage securing the payment of the same may be maintained in a state court, not-

withstanding that the mortgaged property is in the hands of a receiver appointed by the Federal court, there being no dispute of the receiver's right of possession.

In *Coy v. Title Guarantee & T. Co.*, (1919) 257 Fed. 571, it is held that proceedings to foreclose a tax lien upon real estate, upon which a corporation whose property is in the custody of a receiver has a lien, may be maintained, notwithstanding such receivership.

In *Pringle v. Woolworth* (1882) 90 N. Y. 502, the facts were that an insurance company, as a condition to the right to do business in a state other than that of its domicil, consented to the service of process upon it by service upon the local state insurance commissioner. Under these circumstances, it was held that the fact that a receiver was appointed for the corporation in the state of its domicil did not preclude an action against the corporation in such other state by service of process upon the insurance commissioner, and the judgment rendered in such action against the insurance company was conclusive upon the receiver as to the amount and validity of the claim.

In *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* (1918) 165 C. C. A. 523, 254 Fed. 235, the facts that the property of a railway company is under receivership in another Federal court, and that the claim sued upon has been filed before a special master therein, have been held not to bar an action upon the claim in the Federal court having jurisdiction.

In *City Water Co. v. State* (1895) 88 Tex. 600, 32 S. W. 1038, it is held that the fact that the city waterworks system was in the custody of a receiver appointed by the Federal court does not preclude an action by the state in the state court to forfeit the charter of the company.

In *Black v. New Orleans R. & L. Co.* (1919) — La. —, 82 So. 81, it is held that an action by taxpayers, contesting the legality of an order permitting a street railway company to increase its fares, may be prosecuted, notwithstanding the appointment of a receiver

for the railway company in a Federal court.

In *Watson v. Jones* (1871) 13 Wall. (U. S.) 679, 20 L. ed. 666, the jurisdiction of the Federal court is sustained to determine questions involving the disposal of church property, although the property has been placed in the hands of the master of the state court as a receiver. The court expressly holds, however, that the possession of the receiver cannot be interfered with.

In *Mercantile Trust Co. v. Lamoille Valley R. Co.* (1879) 16 Blatchf. 324, Fed. Cas. No. 9,432, it appeared that a receiver had been appointed for the property of a railway company in a mortgage foreclosure proceeding in the state court. This fact was urged as an objection to a proceeding in the Federal court for the foreclosure of another mortgage upon the same property. In overruling this objection, the Federal court stated that, while it would make no order which would disturb the receiver appointed by the state court in his possession of the property, it would nevertheless order and determine questions concerning rights to the property not affecting the possession.

#### *b. Enforcement of judgment.*

Even though actions may be commenced or pending actions may be prosecuted against a corporation while in the hands of a receiver, it does not follow that judgments rendered in such actions may be collected while the property is in the hands of the receiver.

For example, in *Bank of Bethel v. Pahquioque Bank* (1871) 14 Wall. (U. S.) 383, 20 L. ed. 840, affirming (1870) 36 Conn. 325, 4 Am. Rep. 80, it appeared that a receiver was appointed for a national bank on the ground that it had failed to redeem its circulating notes. A claim against the bank was presented to the receiver for allowance, and, upon the latter's disallowing it, proceedings were commenced against the corporation to place it in judgment. This action was held maintainable. The court said: "Claims presented by creditors may be proved before the receiver, or they

may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association; but the judgment, when recovered, will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the Comptroller, according to the act of Congress in such case made and provided."

In *Blair v. St. Louis, H. & K. R. Co.* (1885) 25 Fed. 2, it appeared that at the time a receiver was appointed in a Federal court to take charge of the property of a railroad company in a mortgage foreclosure proceeding, there was pending in the state court a suit to enforce against the railway company a statutory lien. This suit was prosecuted to judgment and a lien decreed upon the property without leave of the Federal court. Thereafter the judgment plaintiff petitioned the Federal court for the right to intervene in the suit in that court and enforce its lien. Upon denying this petition, Justice Taft said that the plaintiff had preferred to proceed in the state court without leave of the Federal court, and he must lie in the bed which he had made.

So, in *Danforth v. National Chemical Co.* (1897) 68 Minn. 308, 71 N. W. 274, it is held that, where the plaintiff in an action on a simple contract against a corporation prosecutes the action to default judgment after a receiver has been appointed for the corporation in insolvency proceedings against it, he cannot file a complaint in intervention in the receivership case, in which his only cause of action is alleged to be based upon that judgment.

Where judgments are rendered against a corporation while its property is in the hands of a receiver and the collection of the judgment is

stayed or suspended on this ground, it has been held that the judgment creditor, in some instances at least, may proceed against the property of the corporation after the discharge of the receiver.

Thus, in *Blair v. Walker* (1886) 26 Fed. 73, it appeared that, where the creditor of a railroad company, the property of which was in the custody of a receiver undertook to intervene in the receivership proceedings, his petition for intervention was dismissed without prejudice and he was allowed to pursue his remedy in the state courts. He subsequently obtained judgment against the company, and, after its property had been sold in the receivership proceedings and turned over to the purchaser, he caused a levy to be made to enforce the judgment, and took steps to sell the property. The purchaser applied for an injunction restraining any proceeding under this levy. In denying the injunction, the court said: "The defendants in this case were not, under the proceedings had, parties to said suit, and consequently not bound thereby. They sought by intervention to become parties, to which objections were made, and the court dismissed their intervention without prejudice, thereby remitting their rights to the state court, wherein their judgment had been entered. The validity of said judgment is not assailed in this bill filed. On what ground, then, is an injunction sought against said judgment and the process issued thereon? Certainly it is a mistake to suppose that the decree of this court concluded the rights of those not parties thereto. The language of the decree cannot be construed to cover more than what the law permits. Besides, the records of this court show that, instead of passing upon the force and effect of the judgment in question, this court, under objections made, determined expressly that whatever was done in this tribunal should be subject to that outstanding controversy."

In *Trust Co. of America v. Norfolk & S. R. Co.* (1911) 183 Fed. 803, affirmed (1911) 111 C. C. A. 465, 190 Fed. 737, a creditor of a railroad company,

whose judgment by statute took priority over the mortgages of the railroad company, was held entitled to prosecute to judgment his action against the company, although a receiver had been appointed for the property of the company in an action to foreclose a mortgage thereon, and the judgment rendered in favor of the creditor was held to be enforceable as against the purchaser of the property. The terms of the receiver's sale provided that the purchaser took subject to all claims and demands theretofore filed under the order of reference, or which had been or might thereafter be established thereunder as prior in lien to such mortgages. The court said: "It is well settled that when a court of equity undertakes to sell a perfect title to property and discharge all liens upon it, or pay off all existing claims entitled to share in the proceeds, it has the power, by appropriate process, to bring all such claimants before the court and adjudicate their validity and order of priority; but it is equally well settled that before claimants are thus barred and foreclosed they must be made parties or brought into the record, and a reasonable time given within which to present their claims and be heard. The claim of Talbott was for damages, triable by a jury in the state court, and under any aspect of the case he should have been given notice and a reasonable time after the rendition of his judgment to intervene. The judgment was rendered about one month before the decree for the sale of the property was made." And see intimation to the same effect in the reported case (*MARSHALL v. WABASH R. Co.* ante, 435).

In *Mather v. Cincinnati R. Tunnel Co.* (1888) 2 Ohio C. D. 161, it is held that the appointment of a receiver for the property of a railroad company does not suspend the right to prosecute an action pending against the company at the time of the appointment, and a judgment rendered in such action will become a lien on the land of the company within the county in which the judgment was rendered, and it may be enforced after the dis-

charge of the receiver and the vesting of the property.

In *Kansas City, M. & O. R. Co. v. State* (1914) 106 Tex. 249, 163 S. W. 582, it is held that the appointment of a receiver in a Federal court for the property of a railroad company does not preclude the granting in a state court of a mandatory injunction requiring the railroad company to construct its line to and through a certain town, but the appointment of the receiver renders it legally impossible for the corporation to comply with the injunction; hence its enforcement will be suspended until conditions so change as to put it within the power of the corporation to obey.

The Federal court, in a receivership proceeding against a railroad company in behalf of bondholders, creditors, and stockholders, will not withdraw the property of the corporation indefinitely from the right of general creditors of the corporation to proceed against it to secure their indebtedness, and the judgment creditors of the corporation will be permitted to levy an execution upon the property unless paid by the receiver within a fixed time. *Scott v. Farmers' Loan & T. Co.* (1895) 16 C. C. A. 358, 32 U. S. App. 468, 69 Fed. 17.

Where, however, in a decree for the foreclosure and sale of the property of a corporation, in a proceeding in a Federal court, the court reserves the right to determine what liens or claims shall be charged upon the title conveyed by the court, and retains jurisdiction of the case to settle all claims against the property and to determine what burden shall be borne by the purchaser as a condition to holding the title conveyed, the decree amounts to a determination that exclusive jurisdiction of all claims against res, which had origin in the possession of the res in the judicial proceedings for the foreclosure of the mortgage, may be continued after sale and conveyance of the property, for the purpose of deciding what claims are legally chargeable against it; hence a state court is without power, in a case which was pending against the corporation at the time of the appointment of the receiver.

er, to decree a sale of the property upon satisfaction of the judgment. After the property has been turned over to the purchaser thereof in the foreclosure proceeding in such case, the judgment creditor must pursue his remedy in the Federal court, "which doubtless will consider the decisions of the state court, or questions of state law, with the respect which the decisions of this court require." *Wabash R. Co. v. Adelbert College* (1907) 208 U. S. 38, 52 L. ed. 379, 23 Sup. Ct. Rep. 182.

Of course, if the mortgage covers all of the property of the railroad company, including that subsequently to be acquired, and the property as a whole is sold in foreclosure proceedings and turned over by the receiver of the company to the purchaser, the rights of judgment creditors, whose claims were contracted subsequently to the execution and recording of the mortgages, are cut off by the foreclosure and sale, and they cannot interfere with the possession of the property by the purchaser. *Bell v. Chicago, St. L. & N. O. R. Co.* (1882) 84 La. Ann. 785; *Re Immanuel Presby. Church* (1904) 112 La. 348, 36 So. 408. This point really involves the question of priority of heirs, and cases of that character are not included herein.

**II. When the appointment in effect destroys the corporate existence.**

**a. In general.**

Where the effect of an appointment of a receiver for a corporation is to extinguish the existence of the corporation as a body corporate except as the receiver may have the right to use the corporate name in actions at law or in equity necessary in winding up the affairs of the corporation, the effect of the appointment of the receiver is to abate actions against the corporation pending at the time of the appointment, and likewise to preclude the commencement of actions against the corporation. As hereinafter pointed out, however, this does not mean that creditors who have obtained a lien on the property of the corporation by actions at law will be subjected to the

abatement of their actions, to the loss of such lien.

**United States.**—*First Nat. Bank v. Colby* (1874) 21 Wall. 609, 22 L. ed 687.

**Maine.** — *Read v. Frankfort Bank* (1843) 23 Me. 318; *Hunt v. Columbian Ins. Co.* (1867) 55 Me. 290, 92 Am. Dec. 592; *Carter, C. & M. Co. v. Stewart Drug Co.* (1916) 115 Me. 289, 98 Atl. 809.

**New Jersey.**—*Morton v. Stone Harbor Improv. Co.* (1899) — N. J. L. —, 44 Atl. 875.

**New York.** — *Merchants' Loan & T. Co. v. Clair* (1837) 107 N. Y. 663, 14 N. E. 414; *People v. Troy Steel & I. Co.* (1894) 82 Hun, 303, 31 N. Y. Supp. 337.

**Porto Rico.** — *Berwind-White Coal Min. Co. v. Borinquin Sugar Co.* (1913) 6 Porto Rico Fed. Rep. 259.

**Pennsylvania.**—*Cowan v. Pennsylvania Plate Glass Co.* (1898) 184 Pa. 1, 38 Atl. 1075.

**Texas.**—*Ellis v. Vernon Ice, Light & Water Co.* (1893) 86 Tex. 109, 23 S. W. 858; *Guaranty State Bank & T. Co. v. Thompson* (1917) — Tex. Civ. App. —, 195 S. W. 960, disaffirming *Central Coal & Coke Co. v. Southern Nat. Bank* (1896) 12 Tex. Civ. App. 334, 34 S. W. 383.

In *Cowan v. Pennsylvania Plate Glass Co.* (1898) 184 Pa. 1, 38 Atl. 1075, conceding that there might be many cases in which the appointment of a receiver would not change the status of the corporation property, or suspend the ordinary remedy of creditors, it was held that there are many instances where, from the very nature of the case, the ordinary remedy of creditors is suspended when the receivership is established, as, for example, where the proceeding is for the appointment of a receiver for the distribution of the assets of an insolvent corporation.

In *Read v. Frankfort Bank* (1843) 23 Me. 318, it is held that where a bank ceases to exist upon the appointment of a receiver for it, except so far as the receiver may prosecute any actions pending in its name, and use its name in any suit necessary to enable him to collect its debts, the plaintiff in an action against the bank, pending

at the time of the appointment of a receiver, cannot prosecute to judgment, nor take out execution against it, unless in a court of equity.

In *Hunt v. Columbian Ins. Co.* (1868) 55 Me. 290, 92 Am. Dec. 592, it is held that in order that the appointment of a receiver for an insolvent corporation in one state shall have the effect of precluding the prosecution to judgment of an action pending against the corporation in another state in which the corporation has an agency, it must appear that the effect of the appointment of the receiver is not merely to prohibit the corporation from the customary existence of its corporate functions, but that the corporation thereby actually becomes extinct. The court said that it is not merely the perpetual paralysis, but an unqualified dissolution of the corporation, that would defeat the plaintiff's right to take judgment.

In *Berwind-White Coal Min. Co. v. Borinquen Sugar Co.* (1913) 6 Porto Rico Fed. Rep. 259, it is held that the appointment of a receiver for a corporation in insolvency proceedings is in the nature of a sequestration, and claims cannot be enforced against it in any other court than that where the property is being administered. The court said that by such appointment there was a suspension of ordinary process proceedings.

In *Morton v. Stone Harbor Improv. Co.* (1899) — N. J. Eq. —, 44 Atl. 875, in holding that a receiver appointed for a corporation in another state, in whom was vested all the corporation assets, was entitled to restrain the prosecution of an action pending against the corporation at the time of his appointment, the court said that the prosecutor of a suit against a corporation before a common-law court, after a receiver has been appointed in chancery, can acquire no preference by such a suit, and the pendency of the suit before judgment does not advance his claim in any way beyond that of the other creditors of the corporation; hence, he can secure all of his rights by proof of his claim before the receiver, and that this is the proper and only mode of

procedure. In this regard it is pointed out that "to permit a creditor to pursue a suit against a corporation while the corporation is (by the very terms of the order appointing a receiver and granting an injunction) restrained from doing any business, or raising or expending any money, whereby it might make a defense,—in short, while it is denuded of all its property,—is practically to leave the corporation standing before the common-law court absolutely stripped of all means of defense." Ordinarily, cases are not included herein which involve the right of the receiver to enjoin the prosecution of actions against the corporation.

*b. After judgment of dissolution.*

A judgment of dissolution operates to bar the right to sue the corporation or to prosecute to judgment an action pending against it, unless an order of the court appointing the receiver, permitting such procedure, is obtained. *People v. Troy Steel & I. Co.* (1894) 82 Hun, 803, 31 N. Y. Supp. 337. In the foregoing case, it appeared that judgment was entered for the dissolution of a corporation and for the appointment of a receiver, in an action by the state under a statute authorizing such procedure. The court said that such a judgment ordinarily had the effect of preventing the maintenance of an action against the corporation, and that, if actions are pending at the time of the rendition of such judgment, they cannot be continued unless by order of the court at the time that the judgment of dissolution is rendered. In *Merchants' Loan & T. Co. v. Clair* (1887) 107 N. Y. 663, 14 N. E. 414, it is held that where a receiver is appointed for a corporation in the state of its domicile, after or upon its dissolution, no action can be maintained against the corporation in the courts of another state. In *First Nat. Bank v. Colby* (1874) 21 Wall. (U. S.) 609, 22 L. ed. 687, it is held that where a receiver is appointed for a bank in proceedings in which a decree is entered forfeiting the rights, privileges, and franchises of the bank, and adjudging its dissolution, the existence of the bank as a legal entity thereby ceases,

and it becomes a defunct institution; hence, a judgment cannot be rendered against it in a suit pending at the time of the dissolution, and the receiver is entitled to an order dissolving the attachment upon the property of the corporation levied in such action.

But the fact that a foreign corporation has been dissolved and a receiver appointed for it in a court in the state of its creation does not bar the prosecution of a pending action against the corporation in another state. *Hunt v. Columbia Ins. Co.* (1867) 55 Me. 290, 92 Am. Dec. 592; *Taylor v. Columbian Ins. Co.* (1867) 14 Allen (Mass.) 358.

*III. When effect of suit would be to interfere with the receiver's possession of the property.*

Where the property of a corporation is placed in the possession of a receiver appointed for it, the property is in custodia legis, and hence no action or proceeding can be maintained against the corporation the effect of which would be to interfere with the receiver's possession of the property. *Calhoun v. Lanaux* (1887) 127 U. S. 634, 32 L. ed. 297, 8 Sup. Ct. Rep. 1345; *Dickinson v. Willis* (1916) 239 Fed. 171; *National Bank v. Richmond Factory* (1892) 91 Ga. 284, 18 S. E. 160; *Spencer v. Welch* (1899) 51 La. Ann. 753, 25 So. 405; *Rickman v. Rickman* (1914) 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237; *Morton v. Stone Harbor Improv. Co.* (1899) — N. J. Eq. —, 44 Atl. 875; *City Water Co. v. State* (1895) 88 Tex. 600, 32 S. W. 1033; *French v. McCreedy* (1900) — Tex. Civ. App. —, 57 S. W. 894.

A receiver appointed for a corporation may enjoin the further prosecution of an action at law pending against it at the time of his appointment, if such action may result in a preferential action against the corporation, which it is the duty of the receiver to prevent. *Morton v. Stone Harbor Improv. Co.* (1899) — N. J. Eq. —, 44 Atl. 875.

In *Rickman v. Rickman* (1914) 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237, the court said that, "after the appointment of a receiver for an insolvent corporation, the right of a creditor to sequester its property by

attachment, and thus gain a priority, is suspended."

In *Dickinson v. Willis* (1916) 239 Fed. 171, the appointment of a receiver for all of the property in possession of a railroad company, and enjoining all parties from in any manner whatsoever interfering with the receiver thus appointed in his operation, control, and management of the business or property of the railroad company, was held to operate as a bar to an action subsequently commenced for the specific enforcement of an executory contract with the railroad company and to restrain its violation, where the effect would be to interfere with the control and management of the railroad property by the receiver.

In *French v. McCreedy* (1900) — Tex. Civ. App. —, 57 S. W. 894, it is held that, after the appointment of a receiver to take charge of all of the property of the corporation, a judgment against the corporation upon a note executed by it is invalid, at least, in so far as it attempts to set aside a conveyance of property to the corporation which was included in the property turned over to the receiver.

In *Brown v. Crawford* (1918) 254 Fed. 146, it is held that the fact that a receiver had been appointed in a state court for the property of an insolvent corporation does not bar an action in a Federal court to foreclose a mortgage upon the property of the corporation. It is recognized that ordinarily the possession of a receiver, appointed by a court of concurrent jurisdiction, cannot be interfered with. In this case, however, after the appointment of the receiver by the Federal court, the corporation was adjudicated a bankrupt under the Federal Bankruptcy Act, and a trustee appointed who took possession of the property of the corporation. The right of the trustee to the possession of the property is sustained, but it is held that he should not have taken possession by summary process.

In *National Bank v. Richmond Factory* (1892) 91 Ga. 284, 18 S. E. 160, it appeared that a receiver had been appointed to take charge of the property of an insolvent corporation at the



instance of a creditor stockholder. Under these circumstances, it was held that an action could not be maintained by another creditor for the appointment of another receiver for the whole or a portion of the property of such corporation.

But where a receiver is appointed in a state or Federal court, merely as a custodian of the property of the corporation and to carry out the special orders of the court with reference thereto, such appointment does not preclude the appointment of a receiver in a state court, under a state statute providing for the winding up of the affairs of the corporation under certain conditions. In such case the receiver in that proceeding will supersede the receiver appointed in another state court under a general statute or common-law proceeding, and such receiver will be authorized to intervene in the Federal court and deny the charge of the receiver appointed under the general equity powers. *Morse v. Metropolitan S. S. Co.* (1917) 87 N. J. Eq. 217, 100 Atl. 219, modified in (1917) 88 N. J. Eq. 325, 102 Atl. 524, as to vesting of the title to the corporate property in the receiver; *Michel v. William Necker* (1919) — N. J. Eq. —, 106 Atl. 449; *People v. New York City R. Co.* (1907) 57 Misc. 114, 107 N. Y. Supp. 247; *People v. Hasbrouck* (1907) 57 Misc. 130, 107 N. Y. Supp. 257.

In *Hitchcock v. American Pipe & Constr. Co.* (1918) 89 N. J. Eq. 440, 105 Atl. 655, upon this point the court said: "That the district court had no jurisdiction of the subject-matter I think is clear. The bill prayed for no specific relief other than the appointment of a receiver. It is conceded, of course, that a court of equity may take under its control assets of a corporation, foreign or domestic, with the view to ultimate distribution of such assets among creditors, and may appoint receivers of a solvent corporation in some instances where, for one reason or another, the board of directors ought not to be left in control. . . . But I have never, unless the instant case is an exception, heard of a case in which it was contended that

a court of equity might by judicial fiat prescribe a moratorium in favor of a corporation. When a court takes under its control and puts in custodia legis assets of a corporation with a view to ultimate distribution, creditors and stockholders are provided with a remedy for the enforcement of their demands. But, where a court appoints a receiver merely to take the place of the management of the corporation to act for an indefinite time, creditors and stockholders are deprived of their ordinary legal remedies and no adequate substitute provided. There is a distinction between the power which is exercised by a court, where a bill is filed for the winding up of the affairs of a corporation, or charging that the directors of a corporation ought not to be left in control although the corporation may be solvent, in appointing receivers, and in refraining from directing immediate disposition of the assets pending rehabilitation or the election of a proper board, as the case may be, and the power which the Federal court sought to exercise in the instant case in appointing a receiver under a bill where no ultimate relief of any kind is asked." Reversed in (1919) — N. J. L. —, 107 Atl. 267, as to the allowance of attorneys' fees to attorneys for creditors of the corporation.

In *Jones v. Lincoln Sav. & T. Co.* (1908) 222 Pa. 325, 71 Atl. 209, it appeared that a receiver had been appointed for a banking corporation under a general statute of the state. This proceeding was held not superseded by the appointment of a receiver for the corporation by another court, at the instance of the attorney general of the state, acting under special banking laws of the state. The court pointed out that the two cases might both proceed harmoniously. It was said: "We have not been asked by the plaintiff to do anything which the statute referred to above authorizes. We are not asked to dissolve the corporation. We are not asked to give time for making good an impaired capital, or to make a decree based upon proofs of unsafe or improper conduct of business. On the contrary, we are asked

only to give a relief which is customary and often afforded, and which has no reference whatever to the remedies of a public character that the statute affords. So far as we can see, there is nothing in any proper action which we have taken, or may hereafter take, in the case, that will interfere with the commonwealth's effecting all that ought to be done, in any interest which needs to be guarded, without impinging upon the previously acquired jurisdiction of this court. We have said that we do not find in the statute any grant of exclusive jurisdiction over the case to the court of Dauphin county. This might be owing to some want of perception on our part, but we may go further, and say that no such express grant has been pointed out to us by the attorney general. In the absence of that which would deprive us of the jurisdiction already taken of the case as it stands before us, we know of no rule of law or requirement of public policy, which demands that we should vacate the decree made by us. There is, besides, a certain amount of respect for our own tribunal that we are bound to recognize."

#### IV. *Effect of collusion between the parties to the receivership proceedings.*

A debtor corporation by fraudulent collusion with some of its creditors cannot, by receivership proceedings, so tie up its property as to preclude other creditors from taking steps to secure the liquidation of their claims. The *Coliseum v. Inter-State Lumber Co.* (1898) 123 Ala. 512, 26 So. 122.

So, where a receiver was appointed in the Federal court, for the property of a corporation and to conduct and carry on its business, at the instance of a stockholder, for the general benefit of the stockholders and creditors, but nothing was done toward winding up the affairs of the corporation, a lien creditor will be permitted to prosecute his lien by the sale of the property covered thereby, in the state court in which such lien was established. *Cohen v. Gold Creek, Nevada Min. Co.* (1899) 95 Fed. 580.

#### V. *What constitutes the destruction of the corporate existence.*

##### a. *In general.*

It is not entirely clear as to just what proceedings will amount to the extinguishment of the existence of a corporation as a corporate body. This must necessarily depend upon the statutes of different states and the construction placed thereon by the local courts. Upon this matter it can only be said that, if the effect of the appointment of a receiver under statutes of this character is to extinguish the legal existence of the corporation, the rule applies that actions cannot be commenced or prosecuted against it. But unless the appointment of a receiver has this effect, such appointment does not preclude the commencement or prosecution of actions against the corporation.

In *New York v. Illinois Surety Co.* (1917) 180 App. Div. 513, 167 N. Y. Supp. 752, it is held that a mere appointment of a chancery receiver for a corporation does not affect the corporate existence of the corporation, and hence does not prevent placing a claim against it.

In *Paddack v. Staley* (1899) 13 Colo. App. 363, 58 Pac. 363, it appeared that the general manager and an officer of a corporation secured the appointment of a receiver for the corporation, not for the purpose of winding up and dissolving the corporation, but simply to obtain an accounting between him and the company, and to place the possession of the property in the meantime in the officer of the corporation, for management and control pending a decree. It is pointed out that the action was not for the destruction of the corporate capacity or powers of the corporation, and hence that it did not affect the rights of those creditors to bring actions against the corporation for the enforcement of their claims.

##### b. *Appointment of a receiver in a mortgage foreclosure proceeding.*

It is clear that, where the property of a corporation is placed in the hands of a receiver in proceedings to foreclose a lien upon such property, the

existence of the corporation is not thereby affected, and creditors may commence or continue the prosecution of actions against the corporation to the extent of placing their demand in judgment.

**United States.**—*Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* (1899) 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Scott v. Farmers' Loan & T. Co.* (1895) 16 C. C. A. 358, 32 U. S. App. 468, 69 Fed. 17; *Moore v. Southern States Land & Timber Co.* (1896) 83 Fed. 399; *Buckhannon & N. R. Co. v. Davis* (1905) 68 C. C. A. 345, 135 Fed. 707.

**Illinois.**—*Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613.

**Iowa.** — *Allen v. Central R. Co.* (1876) 42 Iowa, 683; *O'Mara v. Newton & N. W. R. Co.* (1912) 156 Iowa, 701, 137 N. W. 942.

**Michigan.**—*Merchants' & Mfrs. Nat. Bank v. Kent Circuit Judge* (1880) 43 Mich. 292, 5 N. W. 627; *MARSHALL v. WABASH R. Co.* (reported herewith) ante, 435.

**Missouri.**—*Heath v. Missouri, K. & T. R. Co.* (1884) 83 Mo. 617.

**New York.** — *Decker v. Gardner* (1891) 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814.

In *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* (1899) 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238, it is held that pendency of a foreclosure suit in a Federal court, in which the decree entered therein saved rights secured by a prior mortgage, does not interfere with the negotiation of bonds secured by such mortgage, or in any degree impair the lien created thereby.

In *Scott v. Farmers' Loan & T. Co.* (1895) 16 C. C. A. 358, 32 U. S. App. 468, 69 Fed. 17, it is held that jurisdiction by a court of chancery to foreclose a mortgage upon the property of a corporation and appoint a receiver for the property pending the foreclosure gave to the court no jurisdiction or power to seize or take into its custody or control, through the receiver or otherwise, property of the corporation which was not covered by the mortgage, nor could the court in such a

suit lawfully make any order that would prevent, hinder, or delay other creditors of the mortgagor from subjecting the property of the corporation not included in the mortgage to the payment of their debts.

In *Moore v. Southern States Land & Timber Co.* (1896) 83 Fed. 399, it is held that, notwithstanding a suit to foreclose a mortgage and to appoint a receiver to take charge of the assets of the corporation, creditors of the corporation may maintain actions against the corporation and obtain priority of lien on the lands of the corporation, except such as are covered by the mortgage, unless actions of this character are especially enjoined by the court appointing the receiver. See *Buckhannon & N. R. Co. v. Davis* (1905) 68 C. C. A. 345, 135 Fed. 707, holding that the Federal court appointing a receiver for a railroad company in a proceeding to foreclose a mortgage against the company, in granting permission to maintain a proceeding to condemn a right of way over the property of the company, may require that such proceeding shall be prosecuted in that court rather than in the state court.

In *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613, it is held that the fact that a railroad corporation has been placed under the control of a receiver in a proceeding to foreclose a mortgage upon its property does not have the effect to abate or continue a pending action against the railroad company to recover damages for the tort. The court said that the mere fact that the property of a railroad corporation has been placed in the hands of a receiver will not bar or suspend a suit theretofore commenced against the corporation to recover a demand against it. When, however, the successful party undertakes its collection, it may be that the receiver can interpose.

In *Allen v. Central R. Co.* (1876) 42 Iowa, 683, it is held that an action may be maintained against a railroad company to recover damages for injury due to the negligence of the company, without first obtaining the consent of the court appointing a receiver in the

mortgage foreclosure proceeding against the company.

In *O'Mara v. Newton & N. W. R. Co.* (1912) 156 Iowa, 701, 137 N. W. 942, it is held that the mere fact that a receiver has been appointed of a railroad company, in an action to foreclose a mortgage against it, since an action was commenced against the company, furnishes no ground for the dismissal of the action.

In *Merchants' & Mfrs. Nat. Bank v. Kent Circuit Judge* (1880) 43 Mich. 292, 5 N. W. 627, it is held that a receiver appointed in a proceeding to foreclose a chattel mortgage executed upon its property by a corporation is not entitled to restrain the prosecution of the pending action against the corporation. In so holding, the court said: "The order appealed from by the bank was improper in that it forbade a person not a party to the suit from testing in the customary common-law method the title which is asserted to specific property, and in so doing stretched unnecessarily, improperly, and oppressively, the power of the court of equity in abridgment of the jurisdiction of the court of law. There may be cases in which it would be proper for a court of equity, by means of a receivership, to draw to itself the jurisdiction to try disputed titles to property; but the jurisdiction to do so is exceptional, and must be supported by circumstances which render the common-law remedies inadequate, or for some reason unfit and unsuitable in the particular case. No such circumstances appear or are suggested here. It was proper and just that the bank be allowed to go on with the suit in replevin, if that seemed most for its interest, and improper and unjust that it should be restricted to a suit in trover, which would be in effect for net proceeds only, after the costs of a receivership, which the bank did not desire or assent to, had been deducted. If the property belonged to the bank, the injustice of requiring the owner to submit to such management, manufacture, and sale of it as another person might think expedient, and to recover the net proceeds only after the costs of a re-

ceivership in a suit between other parties had been wholly or in part deducted, would be too manifest to require more than mere mention." And see the reported case (*MARSHALL v. WABASH R. Co.* ante, 435), holding that the fact that the property of a railway company was in the hands of a receiver appointed in another state in a mortgage foreclosure proceeding does not bar the right to prosecute an action for personal injuries against the company, the possession of the property of the corporation by the receiver not being thereby interfered with.

In *Heath v. Missouri, K. & T. R. Co.* (1884) 83 Mo. 617, it is held that the fact that a receiver has been appointed for the property of a railroad company in a proceeding to foreclose a mortgage upon such property does not bar the right to prosecute an action to recover for an injury due to the negligence of the company. The court said: "The fact that the property and most of the franchises of defendant were held in custody by a court of equity, for the purpose of enforcing satisfaction of specific claims against them, does not work a dissolution of the defendant as a corporation, or a cessation of its franchises. The corporate existence of defendant continues, although its dominion over its road and property may be in a state of suspension until they shall be returned to it by the court taking them in charge. Consequently, the defendant may be sued upon all causes of action for which it may be or become liable, in personam; and no license from that court having charge of its property is necessary as a condition precedent to the bringing of such actions. No judgment thus obtained could be satisfied from its property in the hands of a receiver, except through the administering assistance of the court appointing him. After its property is returned to its custody by the court taking charge of it, such judgment could be enforced against it, in the usual way, on final process. There is nothing, therefore, impossible or illegal in the suit against the defendant, notwithstanding the receivership."

In *Decker v. Gardner* (1891) 124

N. Y. 334, 11 L.R.A. 480, 26 N. E. 814, it is held that, where a receiver is appointed in a proceeding to foreclose a mortgage upon the property of a railroad company, he is confined in his functions to the care and preservation of the mortgaged property. In the temporary management of the railroad under the direction of the court, his appointment does not affect a right of action against the corporation, which does not interfere with his possession and control of the corporate property.

Where a receiver was appointed by the Federal court of one state in a proceeding to foreclose bonds issued by the corporation and in ancillary receivership proceedings, and such receiver was also appointed for the property of the corporation by the Federal court in another state, the latter court will entertain a petition by a creditor of the corporation resident in the state where the ancillary receivership proceedings was had, to determine the amount of his claim, and he will not be required to resort to the court where the primary receivership proceedings were pending. *New York Secur. & T. Co. v. Equitable Mortg. Co.* (1896) 71 Fed. 556.

*c. Insolvency, winding up, or dissolution proceeding.*

The mere fact that a receiver is appointed for a corporation under state insolvency laws for the purpose of administering the assets of the corporation, or for the purpose of winding up its affairs, does not have the effect of precluding actions against the corporation unless, as a result of such proceeding, the legal existence of the corporation is virtually extinguished except as it may be represented by the receiver.

**United States.**—*Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* (1881) 104 U. S. 54, 26 L. ed. 693.

**Iowa.**—*Weigen v. Council Bluffs Ins. Co.* (1898) 104 Iowa, 410, 73 N. W. 862.

**Massachusetts.**—*Coyle v. Taunton Safe Deposit & T. Co.* (1911) 207 Mass. 441, 93 N. E. 791.

**New York.**—*People v. Commercial Alliance L. Ins. Co.* (1896) 5 App. Div. 273, 39 N. Y. Supp. 117, affirmed in

(1896) 151 N. Y. 640, 45 N. E. 1133; *Auburn Button Co. v. Sylvester* (1893) 68 Hun, 401, 22 N. Y. Supp. 891; *Knauer v. Globe Mut. L. Ins. Co.* (1880) 14 Jones & S. 370; *Mickles v. Rochester City Bank* (1844) 11 Paige, 118, 42 Am. Dec. 103.

**Washington.**—*Allen v. Olympia Light & P. Co.* (1895) 13 Wash. 307, 43 Pac. 55.

In *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* (1881) 104 U. S. 54, 26 L. ed. 693, it appeared that an action was commenced against a national bank to enforce a trust in a deposit in the bank by the agent of the complainant. A few days after the commencement of this action a receiver was appointed for the bank in a voluntary dissolution proceeding. It was held that the appointment of a receiver did not affect the right to prosecute the action to final judgment. The court said: "The very purpose of the liquidation provided for is to pay the debts of the corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist as a person in law capable of suing and being sued until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble not the technical dissolution of the corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership, which nevertheless continues to subsist for the purpose of liquidation and winding up its business."

In *Weigen v. Council Bluffs Ins. Co.*

(1898) 104 Iowa, 410, 73 N. W. 862, in holding that the appointment of a receiver for an insurance company did not preclude the commencement and prosecution against it of actions upon insurance policies, the court said: "It will be observed that there is no allegation that the corporation had been dissolved, or that the court, in appointing the receiver, enjoined it from exercising any of its corporate powers. No statute of this state limits the powers of a corporation upon the appointment of a receiver, and those of the defendant were restrained only by depriving it of its property. The right to sue and be sued, conferred by the statute, was retained. No relief was asked against the receiver, and he was not a necessary party, though he might, in the discretion of the court, be permitted, by intervening, to interpose any proper defense to the action."

In *Coyle v. Taunton Safe Deposit & T. Co.* (1911) 207 Mass. 441, 93 N. E. 791, it is held that although a receiver has been appointed for a corporation in a proceeding to wind up its affairs, and its assets have been in part collected, a creditor may nevertheless bring an action at law against the corporation for the purpose of securing a judgment as a basis for enforcing the personal liability of stockholders of the corporation.

In *People v. Commercial Alliance L. Ins. Co.* (1896) 5 App. Div. 273, 39 N. Y. Supp. 117, affirmed in (1896) 151 N. Y. 640, 45 N. E. 1133, it is held that the appointment of a receiver for a life insurance company, in an action to dissolve the company, will not affect an action against the company pending in another court. The court said: "Such corporation could only be dissolved by the final judgment of the court, and the order appointing the temporary receiver had no effect upon the life of the corporation or its ability to sue or liability to be sued. Until such corporation was actually dissolved by a judgment, it continued in existence with the same powers and subject to the same liability as before the appointment of the temporary receiver, except so far as a court could, in the exercise of its equitable jurisdiction,

restrain the corporation in the exercise of such power. There was nothing to prevent a creditor who had an action pending against the corporation from proceeding in that action, unless he was restrained by an order of the court from doing so; and such a restraining order would not affect him until it was served upon him. Upon the entry of final judgment dissolving the corporation, however, it is clear that all actions or proceedings against the corporation abated, and all subsequent proceedings in such actions were void, but as this judgment was regularly entered prior to the dissolution of the corporation, it was a valid and subsisting judgment, and was conclusive as against the corporation."

In *Auburn Button Co. v. Sylvester* (1893) 68 Hun, 401, 22 N. Y. Supp. 891, it is held that, by a judgment of sequestration against a corporation under which a receiver was appointed, the legal existence of the corporation is not extinguished, although by the judgment of sequestration the property and effects of the corporation were vested in the receiver, with power to sell and dispose of the same and pay the debts.

In *Knauer v. Globe Mut. L. Ins. Co.* (1880) 14 Jones & S. (N. Y.) 370, it is held that the appointment of a receiver pendente lite for an insurance company, at the instance of an attorney general, on the ground of the insolvency of the company, does not operate to suspend pending actions against the company, and such actions may be prosecuted to judgment without making the receiver a party thereto. The court said that a receiver pendente lite does not absolutely and in all respects supersede a corporation in extremis; that it is not dead until it is dissolved, hence that a suit against it can be prosecuted to judgment.

In *Mickels v. Rochester City Bank* (1844) 11 Paige (N. Y.) 113, 42 Am. Dec. 103, it is held that the appointment of a receiver for a bank does not affect the right of creditors to sue the bank, unless such actions are enjoined. The court said that until a judgment quo warranto, or a decree

of the court declaring the surrender of the corporate franchises and the dissolution of the corporation, any creditor is at liberty to proceed with a suit against the corporation and obtain satisfaction of his debt in the same manner as if that surrender by insolvency or a nonuser had not occurred, and that if any creditors wish to prevent other creditors from obtaining a preference they must file a bill for the purpose of obtaining a judicial declaration of the court that the corporation has surrendered its corporate rights and franchises, according to the statute, together with a decree declaring the corporation dissolved, and directing the application of its property and effects to the payment of its creditors.

The appointment of a receiver for a corporation does not ipso facto dissolve the corporation and put an end to its individual capacity of suing and being sued by creditors. *Kincaid v. Dwinelle* (1875) 59 N. Y. 548; *Del Valle v. Navarro* (1887) 21 Abb. N. C. (N. Y.) 136; *Allen v. Olympia Light & P. Co.* (1895) 13 Wash. 307, 43 Pac. 55.

And the appointment of a receiver for a national bank does not terminate the legal existence of the corporation, and hence such appointment does not preclude the rendition against it of a judgment for rental, accruing under a lease subsequently to the time the bank was placed in the hands of a receiver. *Chemical Nat. Bank v. Hartford Deposit Co.* (1895) 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439, affirming (1895) 156 Ill. 522, 41 N. E. 225.

And in *Allen v. Olympia Light & P. Co.* (1895) 13 Wash. 307, 43 Pac. 55, it is held that the appointment of a receiver does not work the dissolution of the corporation, and hence does not preclude an action against it upon its note.

In some jurisdictions the general plan of statutes providing for the appointment of a receiver for insolvent persons, or in proceedings to wind up the affairs of a corporation, contemplate the allowance and payment of claims against the corporation in the

court in which the receivership proceedings are pending. In such case there is no advantage to a creditor in further prosecuting an individual action against the corporation, and there may be a disadvantage in not being in a position to secure dividends paid by the receiver. Where the court appointing a receiver thus draws to itself the administering of the property of the corporation and closing its affairs, it may be plausibly argued that in effect the legal existence of the corporation has been extinguished in so far as concerns maintaining against it actions at law in the usual case,—at least, where the claim is not contested,—and hence the court does not require that the issue be tried in an action at law. *Berwind-White Coal Min. Co. v. Borinquen Sugar Co.* (1913) 6 Porto Rico Fed. Rep. 59; *Read v. Frankfort Bank* (1843) 23 Me. 318; *Hunt v. Columbian Ins. Co.* (1867) 55 Me. 290, 92 Am. Dec. 592; *Morton v. Stone Harbor Improv. Co.* (1899) — N. J. Eq. —, 44 Atl. 875; *Cowan v. Pennsylvania Plate Glass Co.* (1898) 184 Pa. 1, 38 Atl. 1075.

In *Carter, C. & M. Co. v. Stewart Drug Co.* (1916) 115 Me. 289, 98 Atl. 809, it is held that where a receiver is appointed in a proceeding to dissolve a corporation and wind up its affairs, or the corporation is dissolved by a surrender of its charter, and a receiver is appointed to wind up its affairs, it ceases to exist as a body corporate, and the plaintiff in proceedings then pending against it has no standing in court to make any motion regarding the prosecution or disposal of the case.

In this regard it has been held that after the appointment of a receiver for a corporation in a proceeding which contemplates the administration of its property for the benefit of its creditors, no creditor will be permitted to acquire a lien on any property of the corporation by attachment, judgment, or otherwise. *Guaranty State Bank & T. Co. v. Thompson* (1917) — Tex. Civ. App. —, 195 S. W. 960, disapproving, in this regard, *Central Coal & Coke Co. v. Southern Nat. Bank* (1896) 12 Tex. Civ. App. 334, 34 S. W. 383, and following *Ellis v. Vernon Ice, Light &*

Water Co. (1893) 86 Tex. 109, 23 S. W. 858.

In *Steinhauer v. Colmar* (1898) 11 Colo. App. 494, 55 Pac. 291, it is held that the appointment of a receiver and even the dissolution of the corporation does not affect the validity of the order of affirmance in the appellate court of a judgment rendered against the corporation in the trial court. In this state, however, it is expressly provided by law that the dissolution of a corporation, for any cause whatever, shall not take away or impair any remedy given against such corporation for liabilities incurred prior to its dissolution.

*VI. Effect of appointment upon enforcement of existing liens.*

*a. Judgment, attachment, garnishment, or execution liens.*

After the appointment of a receiver for a corporation, judgments rendered against the corporation are not liens upon its real estate. *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* (1896) 81 Fed. 439; *Clyde v. Richmond & D. R. Co.* (1893) 56 Fed. 539. And this is true although such a judgment was entered between the time of entering an order appointing the receiver and the approval of the receivership bonds. *Temple v. Glasgow* (1897) 25 C. C. A. 540, 42 U. S. App. 417, 80 Fed. 441.

It has been held that the appointment of a receiver for a beneficiary association does not dissolve valid attachments of the property of the corporation levied before the filing of the bill of complaint under which the receiver was appointed, and where the funds attached have been paid over to the receiver upon order of the court, without prejudice to the rights of the attaching parties, the receiver takes the property subject to all valid attachments, and the claims of the attaching plaintiffs, when proved, are to be treated as preferred. *Kittredge v. Osgood* (1894) 161 Mass. 384, 37 N. E. 369.

That the dissolution of a foreign corporation in insolvency proceedings against it does not affect the validity of an attachment lien upon its prop-

erty is the holding of *Life Asso. of America v. Fassett* (1882) 102 Ill. 315. Upon this point the court said: "When the attachment in this case was sued out, there was no legal impediment in the way of enforcing the plaintiff's claim. It was rightfully levied upon the company's lands, and became an existing lien upon them and a security for the attaching creditor's claim. If the company were a domestic corporation, it is clear this lien could not be defeated by a decree of dissolution under insolvency proceedings here. The company would be regarded, notwithstanding such decree, as still existing, for the purpose of enforcing the attachment lien by proceeding to judgment and execution in the usual way, and we see no sufficient reason why foreign corporations owning property and doing business here should not be regarded in the same way, and placed upon an equal footing in this respect, with domestic corporations. Whatever may be the effect of a decree of dissolution in the state creating the corporation, it may nevertheless be regarded as at least a de facto corporation here, for the purpose of enabling creditors to reach its effects in this state."

In *Buswell v. Supreme Sitting, O. I. H.* (1894) 161 Mass. 224, 23 L.R.A. 846, 36 N. E. 1065, it is held that the appointment of a receiver for an insolvent corporation does not affect attachment liens existing against the property of the corporation before the appointment.

It is pointed out in *Cramer v. Iler* (1901) 68 Kan. 579, 66 Pac. 617, that the statute gives to the custody of a receiver of the property of a bank no such effect as to make it equivalent to the levy of an execution upon the property and deprive a creditor of his priority and preference to the same extent as if a judgment had been rendered against the bank, and it is said that the general rule of law is to the contrary: "That is, that liens are not lost or affected by the appointment of a receiver; that he merely holds the property intact until the relative rights of parties can be determined; and that when the property rightfully



passes into the custody of the law it is not subject to execution or interference without permission of the court, and any attempt to seize or sell it by a third party, without permission, would be a contempt of the court having it in custody."

In *J. W. Dann Mfg. Co. v. Parkhurst* (1890) 125 Ind. 317, 25 N. E. 847, it was held that an appointment of a receiver in an action to foreclose an employee's lien did not have the effect of divesting an execution lien acquired upon the property of the corporation by other creditors, prior to the appointment of the receiver, since a court did not acquire jurisdiction over the parties holding such liens, even though, during the time that such property was in the hands of the receiver, the right to enforce the liens was suspended, the property being in the hands and subject to the control of the court.

In *Rickman v. Rickman* (1914) 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237, it is held that an action in one state against a corporation, to secure a judgment and lien upon its property, is not suspended by the appointment of a receiver for the corporation in another state, and the receiver is not entitled to have the prosecution of such suit enjoined where the creditor, by garnishment process, has secured a lien upon the funds of the corporation kept within the state.

In *Second Nat. Bank v. New York Silk Mfg. Co.* (1882) 11 Fed. 532, it is held that the appointment in a state court of a receiver for an insolvent corporation does not preclude the corporation from removing to the Federal court an attachment action, where attachment has been levied upon the property of the corporation prior to the appointment of the receiver.

*b. Contract or mortgage liens.*

In *Willink v. Morris Canal & Bkg. Co.* (1840) 4 N. J. Eq. 377, it is held that where, in a foreclosure proceeding, a decree was entered against a corporation before the appointment of a receiver for it, the proceeding may be prosecuted without delaying the

same in order to make the receiver a party thereto.

In *Metropolitan Trust Co. v. Lake Cities Electric R. Co.* (1900) 100 Fed. 897, it is held that where a receiver of a railroad company is appointed in a state court at the instance of a creditor of the corporation, on the ground that it is insolvent, the appointment of the receiver will not preclude an action in the Federal court to foreclose a mortgage on the railroad property. The receiver's possession of such property, however, will not be interfered with in such suit.

In *Re French* (1918) 181 App. Div. 719, 168 N. Y. Supp. 988, affirmed without opinion in (1918) 224 N. Y. 555, 120 N. E. 863, it was apparently assumed that the holder of a mortgage upon property of an insolvent corporation in the hands of a receiver, appointed in proceedings to dissolve the corporation and wind up its affairs, would ordinarily be entitled to continue the prosecution of an action to foreclose the mortgage. It was, however, held that it was within the power of the court appointing the receiver to stay such foreclosure proceeding in order to enable the receiver to sell the equity of the corporation in the property covered by the mortgage.

In *Re Binghamton General Electric Co.* (1894) 143 N. Y. 261, 38 N. E. 297, it is held that under statutory proceedings for the dissolution of a corporation, to wind up its affairs, and appoint a receiver, it is within the power of the court appointing the receiver to restrain a creditor of the corporation from foreclosing his lien upon the collateral deposited by the corporation with him, prior to the insolvency proceeding, to secure a loan.

And it has been held that where a judgment has been obtained against the corporation, and an attachment execution issued thereon and levied upon the property of the corporation, before the dissolution of the corporation and the appointment of a receiver for it, the lien will not be set aside. *Hays v. Lycoming Fire Ins. Co.* (1882) 99 Pa. 621; *Pickersgill v. Myers* (1882) 99 Pa. 602. A. G. S.

EDWIN A. LANDELL, JR., Appt.,  
v.

WILLIAM M. LYBRAND et al., Copartners Trading as Lybrand, Ross  
Brothers, & Montgomery.

*Pennsylvania Supreme Court — April 21, 1919.*

(264 Pa. 406, 107 Atl. 783.)

**Public accountant — liability to one relying on audit in purchasing stock.**

A public accountant is not, merely because of negligence in making an audit of the books of the corporation, under contract with it, liable for losses sustained by one who purchases corporate stock in reliance upon the audit.

[See note on this question beginning on page 462.]

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Philadelphia County in favor of defendants in an action brought to hold them liable for losses alleged to have been sustained by plaintiff in purchasing stock of a corporation in reliance upon an audit made by them of its books. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William T. Cooper and John W. Jennings for appellant.

Messrs. Yale L. Schekter, Ira Jewell Williams, and Francis Shunk Brown, for appellees:

In the absence of contract or privity between the parties, no action can be sustained upon contract or upon the case for negligence.

Houseman v. Girard Mut. Bldg. & L. Asso. 81 Pa. 256; Moore v. Lancaster, 212 Pa. 642, 2 L.R.A. (N.S.) 819, 62 Atl. 100; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Le Lievre v. Gould [1893] 1 Q. B. 491, 62 L. J. Q. B. N. S. 353, 4 Reports, 274, 68 L. T. N. S. 626, 41 Week. Rep. 468, 57 J. P. 484.

The alleged misrepresentation was not made to plaintiff, or with the intent that plaintiff should act upon it.

Langridge v. Levy, 2 Mees. & W. 513, 150 Eng. Reprint, 863, 6 L. J. Exch. N. S. 137; Bigelow, Frauds, p. 83; Hindman v. First Nat. Bank, 86 Fed. 1013; Cox v. Highley, 100 Pa. 249; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874, 17 Atl. 252; Clerk & L. Torts, p. 560; Peek v. Gurney, L. R. 6 H. L. Cas. 377, 43 L. J. Ch. N. S. 19, 22 Week. Rep. 29, 7 Eng. Rul. Cas. 527; Nash v. Minnesota Title & T. Co. 159 Mass. 437, 34 N. E. 625; Hunnewell v. Duxbury, 154 Mass. 286, 13 L.R.A. 733, 28 N. E. 267.

The representation was not of a

fact, but was merely a statement of opinion.

Peck, P. & W. Co. v. Stevenson, 6 Pa. Super. Ct. 536; Brown v. Eccles, 2 Pa. Super. Ct. 192; Watts v. Cummins, 59 Pa. 84.

Defendants must have made the statement, knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood, to render them liable.

Derry v. Peek, L. R. 14 App. Cas. 337, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 38 Week. Rep. 33, 1 Megone, 292, 54 J. P. 148, 12 Eng. Rul. Cas. 250; Wilson v. Talhemier, 20 Pa. Co. Ct. 203; Deppen v. Light, 228 Pa. 79, 77 Atl. 247.

**Per Curiam:**

Appellees, defendants below, are certified public accountants, and, as such, audited the books and accounts of the Employers' Indemnity Company for the year 1911. The appellant, plaintiff below, averred in his statement of claim that he had been induced to buy eleven shares of the capital stock of that company, at the price of \$200 per share, on the strength of the report made by the appellees as to its assets and liabilities at the close of the year 1911; the report having

been shown to him by someone who suggested that he purchase the stock. A further averment was that the report was false and untrue, that the stock purchased by him on the strength of it is valueless, and for the loss he sustained he averred the defendants were liable. To enforce this liability an action in trespass was brought against them. In their affidavit of defense they averred that the statement of claim disclosed no cause of action, and asked that this be disposed of by the court below as a matter of law, under the provisions of § 20 of the Practice Act of May 14, 1915 (P. L. 483). It was so disposed of by the court below in entering judgment for the defendants.

There were no contractual rela-

tions between the plaintiff and defendants, and, if there is any liability from them to him, it must arise out of some breach of duty, for there is no averment that they made the report with intent to deceive him. The averment in the statement of claim is that the defendants were careless and negligent in making their report; but the plaintiff was a stranger to them and to it, and, as no duty rested upon them to him, they cannot be guilty of any negligence of which he can complain. *Schiffer v. Sauer Co.* 238 Pa. 550, 86 Atl. 479. This was the correct view of the court below, and the judgment is accordingly affirmed.

Public accountant—liability to one relying on audit in purchasing stock.

## ANNOTATION.

### Liability of public accountant.

The only cases other than the reported case (*LANDELL v. LYBRAND*, ante, 461) which have been found involving the question of the liability of public accountants are those where contractual relations existed between them and the plaintiffs.

Thus, the duties and liabilities of expert accountants are considered in *East Grand Forks v. Steele* (1913) 121 Minn. 296, 45 L.R.A.(N.S.) 205, 141 N. W. 181, Ann. Cas. 1914C, 720, and *Smith v. London Assur. Corp.* (1905) 109 App. Div. 882, 96 N. Y. Supp. 820, which involved contractual relations between the accountants and the parties seeking to hold them liable. In the former case, it is stated in the syllabus by the court that one who holds himself out as an expert accountant and accepts employment as such impliedly represents that he possesses the ability and skill of the average person engaged in that branch of skilled labor; and that an action to recover damages arising from negligence of an expert employed to audit accounts is founded on breach of contract, and not on tort.

In *Smith v. London Assur. Corp.* (N. Y.) supra, the court, after stating

that public accountants now constitute a skilled professional class; and are subject generally to the same rules of liability for negligence in the practice of their profession as are members of other skilled professions, quoted Coolsey's statement of the rule governing the measure of such liability, as follows: "Every man who offers his services to another and is employed assumes the duty to exercise in the employment such skill as he possesses with reasonable care and diligence. In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and, if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error. He undertakes for good faith and integrity, but not infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses conse-

quent upon mere errors of judgment." Cooley, Torts, 2d ed. p. 277.

And it was held in *Smith v. London Assur. Corp.* (N. Y.) *supra*, that public accountants who were employed on an express agreement frequently to check a company's cash account in one branch of its business, and verify items thereon, were liable for sums embezzled by an agent of the company, because of their wilful and negligent failure to perform their undertaking. The action was by the accountants to recover for their services, and the company filed a counterclaim for the sums embezzled.

*Fox v. Morrish* (1918) 35 Times L. R. (Eng.) 126, involves the question of the duty and liability of an accountant to a manufacturer who employed him to examine the books of the concern, it being held that the accountant was negligent in failing to verify the bank balance as shown on the books.

In *Mead v. Ball* (1911) 106 L. T. N. S. (Eng.) 197, 28 Times L. R. 81, it was held that an accountant employed by the plaintiff to investigate the financial condition of a certain business was not liable for losses sustained by the plaintiff through an additional investment in the business, since it was not shown that the defendant's negligence had caused the damage.

Several cases of a nature somewhat analogous to the reported case (*LANDELL v. LYBRAND*, ante, 461) support the doctrine of that case.

Thus, in *Le Lievre v. Gould* [1893] 1 Q. B. (Eng.) 491, 62 L. J. Q. B. N. S. 353, 4 Reports, 274, 68 L. T. N. S. 626, 41 Week. Rep. 468, 57 J. P. 484, it was held that a mortgagee of a builder's interest in land and in buildings to be erected thereon, the mortgage money to be paid in instalments as the building progressed, could not recover from a surveyor and architect who had been procured by the owner of the property, and who had no contractual relations with the mortgagee, for negligence in giving certificates as to the progress of the building, on the faith of which the mortgagee advanced money; since the surveyor owed no duty to the mortgagee. It was held

that, in the absence of fraud, there could be no recovery even for gross negligence. It appears that the surveyor, who was employed by the owner of the land prior to the giving of the mortgage, was not aware of the contents of the mortgage contract. But it was contended that he owed a duty to the mortgagee to exercise care in giving the certificates because he knew that the mortgagee would or might act upon them in advancing money. Instances were cited in which a duty exists, irrespective of contractual relations, as where, by reason of proximity to another, one may owe a duty not to cause a personal injury, or where an owner of premises which are in a dangerous condition owes a duty to invitees, or where an owner of a chattel of a dangerous nature owes a duty to use care that it may not injure others. But it was said that the law did not go to the extent of holding one responsible for what he stated in a certificate to any person to whom he might have reason to suppose that the certificate would be shown; that the law did not consider that what one wrote on paper was like a gun or other dangerous instrument, and, unless he intended to deceive, did not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

According to *Le Lievre v. Gould* (Eng.) *supra*, fraud in making untrue statements in a certificate under the circumstances stated above could not arise from gross negligence alone, although that might be an element tending to prove fraud; but, for the misstatement to be fraudulently made, it must be made either with knowledge by the one making it that it was untrue, or, if he did not know that the statement was untrue, it must be made by him deliberately, intending that it should be acted upon, and not knowing and not caring whether it was true or false.

*Le Lievre v. Gould* (Eng.) *supra*, and other cases therein cited, were held to have overruled the case of *Cann v. Willson* (1888) L. R. 39 Ch. Div. (Eng.) 39, 57 L. J. Ch. N. S. 1034, 59 L. T. N. S. 723, 37 Week. Rep. 28.

which held that a valuer of property, employed by the owner, who was desirous of obtaining a mortgage on it, was liable to the mortgagee for damages for negligence in making a false valuation, although there were no contractual relations between him and the mortgagee, where the valuation was made directly to the agent of the mortgagee, with knowledge of the purpose for which it was to be used.

And in *Love v. Mack* (1905) 93 L. T. N. S. (Eng.) 352, affirming (1905) 92 L. T. N. S. 345, it was held that a valuer of property who had made the valuation for an insurance society which had been requested to guarantee a proposed loan on the property was not liable to the mortgagee for negligence in making the valuation, since it was not made for his use, but for that of the guaranty company, although, with the consent of the latter, the valuer had given the agent of the mortgagee a copy of the valuation, and knew that the mortgagee would not make an independent valuation.

A case which appears to be of value on the subject under annotation is *Scholes v. Brook* (1891) 63 L. T. N. S. (Eng.) 837, in which, although it was held that a valuer of property was liable to a mortgagee for negligence in making the valuation, because of contractual relations between them, the valuation having been made for the mortgagee, the court was of the opinion that had the evidence not showed such contractual relations, there could have been no recovery. It was said: "Fraud in this case has not been pleaded, and is not established; but it is said on behalf of the plaintiff that, even if fraud has not been established, and although there might not be what has been called by counsel a contractual relationship between the plaintiff and the valuers, there was nevertheless an obligation or duty on the part of the valuers towards the plaintiff, which would make them liable on the ground that they had invited the plaintiff to act on their valuation, in case it was not accurate or was not made with reasonable care apart from fraud. In my judgment that point would not avail the plain-

tiff. Cases have been cited which, it is said, establish such a liability. But, apart from *Cann v. Willson* (Eng.) *supra*, it appears to me that the authorities may be divided into two classes. One of those classes is when one person invites another to come upon his premises, in which case the person giving the invitation must use reasonable care to insure that the condition of the premises does not subject the person invited to danger. Another class is where a person becomes liable for using or leaving about, in such a way as to cause danger, an instrument which is dangerous in itself. Beyond those two classes, I am not aware, for the moment, of any circumstances under which a person can be held liable in a case such as that which has been argued before me. But the present case falls within neither of these two classes. An invitation to advance money or take shares on a valuation or on a prospectus does not, I think, come within the first class, nor can a valuation or a prospectus be considered a dangerous instrument within the meaning of that term as used above by me; and that being so, I think that, if the plaintiff had not established a contract, this action must have failed unless I followed *Cann v. Willson*." And this decision the court regarded, as in the cases previously cited, as overruled.

The principle relied on in the reported case (*LANDELL v. LYBRAND*, ante, 461) is supported by such cases as *National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621, and the decisions therein cited. That was an action against an attorney by a lender of money on real-estate security for negligence in examination of the title. The attorney had been employed by the borrower, had made the examination prior to any negotiations for the loan, without knowledge of the use to which his search was to be put, and without any contractual relations or communications of any kind with the plaintiff. It was held that, in the absence of fraud or collusion, the attorney was not liable, as his duty was only to his client.

The principles involved in the pres-

ent subject appear to be somewhat analogous to those on the question of the liability of a title abstractor to one not in contractual relations with him. Without attempting to exhaust the cases on this latter subject, attention is called to several cases involving title abstractors because of their bearing on the present question.

In *Anderson v. Spriestersbach* (1912) 69 Wash. 393, 42 L.R.A. (N.S.) 176, 125 Pac. 166, it was held that one preparing an abstract of title to real estate at the instance of the owner of property, which, at his instance, is delivered to a stranger whom the abstractor knows will rely upon it in dealing with the property, is liable to him for losses resulting from a material error or omission in the abstract. The court refers to the rule laid down in 1 Cyc. 215, that "by the weight of authority, an abstractor is liable only to the person ordering and paying for the abstract; and, where this view obtains, the fact that an abstractor has knowledge that his abstract is to be used in a sale or loan to advise a purchaser, or person about to lend money, does not affect the rule as to his liability." But the court stated that while this rule was sustained by the weight, considered in numbers, of authority, it was not willing to apply it, unless it was plain that there was no duty on the part of the abstractor to the party injured; and that in the case before it the abstractor not only knew the purpose of the abstract, but became the agent of the other party to the transaction out of which the loss resulted, to deliver it to the defendant.

The general rule, it is stated in *Thomas v. Guarantee Title & T. Co.* (1910) 81 Ohio St. 432, 26 L.R.A. (N.S.) 1210, 91 N. E. 183, 2 N. C. C. A. 80, is that an abstractor can be held liable for negligence in making or certifying an abstract of title only to the person who employed him.

It appears that the liability of an abstractor for negligence, in the absence of statute, depends generally on

privity of contract; so that an abstractor furnishing an abstract of title to one person is not liable to another party using the same for omissions or negligence; at least, where the abstractor had no notice or knowledge that the abstract was furnished for his use. See, among other cases to this effect: *Talpey v. Wright* (1895) 61 Ark. 275, 54 Am. St. Rep. 206, 32 S. W. 1072; *Schade v. Gehner* (1896) 133 Mo. 282, 34 S. W. 576; *Zweigardt v. Birdseye* (1894) 57 Mo. App. 462; *Glawatz v. People's Guaranty Search Co.* (1900) 49 App. Div. 465, 63 N. Y. Supp. 691; *Lockwood v. Title Ins. Co.* (1911) 73 Misc. 296, 130 N. Y. Supp. 824; *Equitable Bldg. & Life Asso. v. Bank of Commerce & T. Co.* (1907) 118 Tenn. 678, 12 L.R.A. (N.S.) 449, 102 S. W. 901, 12 Ann. Cas. 407.

But a different rule has sometimes been applied where the abstractor has notice that the abstract is procured for a particular person or use, it being held that he is liable to such person for damages caused by his negligence or omission in the examination of the records. See, for example, *Denton v. Nashville Title Co.* (1903) 112 Tenn. 320, 79 S. W. 799; and *Brown v. Simms* (1899) 22 Ind. App. 317, 72 Am. St. Rep. 308, 53 N. E. 779. Some of the cases in which the abstractor was held liable to a third party proceed, it appears, on the ground that there was privity of contract, the party dealing with the abstractor being regarded as the agent of the one for whose use the abstract was intended. Thus, an abstractor who furnished an abstract to the owner of property was held liable in *Dickle v. Nashville Abstract Co.* (1890) 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896, to the purchaser who relied upon it, on the theory that there was privity of contract between them. And that an abstractor may be liable for negligence to an undisclosed principal, see, for example, *Young v. Lohr* (1902) 118 Iowa, 624, 92 N. W. 684.

R. E. H.

## PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS

v.

WILLIAM RECKTENWALD et al., Appts.

*Illinois Supreme Court — December 17, 1919.*

(290 Ill. 314, 125 N. E. 271.)

**Eminent domain — sufficiency of effort to agree.**

1. Sufficient effort to agree with the property owner as to compensation to be awarded for property sought by a public service corporation, to warrant the institution of condemnation proceedings, is effected by making in writing a cash offer for an acreage rate, to which no reply is made.

[See note on this question beginning on page 471.]

— failure to agree with one joint owner — effect.

2. Upon failure to agree with one joint owner of property sought by a public service corporation as to the compensation to be made for it, no attempt to negotiate with the other joint owner is necessary.

— General Corporation Law.

3. The General Corporation Act of Illinois does not confer the right to acquire property by eminent domain.

— delegation of power.

4. The legislature may lawfully delegate to the Public Utilities Commission the right and power to compel an exercise of the power of eminent domain to secure the public safety.

Constitutional law — subject of statute — construction.

5. The constitutional provision that no act shall embrace more than one subject, which shall be expressed in the title, prohibits the passage of an act containing provisions not fairly embraced in the title, and it also prohibits the passage of an act relating to different subjects embraced in the title.

[See 25 R. C. L. 841 et seq.]

Statute — sufficiency of title.

6. An act having a single general subject, indicated by its title, may contain any number of provisions, no matter how diverse they may be, so long as

they are not inconsistent with or foreign to the general subject.

[See 25 R. C. L. 842.]

**Eminent domain — conferring power upon light and power company.**

7. The power of eminent domain may be conferred upon a corporation organized to serve the public by supplying the people with gas, electricity, heat, and water.

[See 9 R. C. L. 1194; 10 R. C. L. 195; 12 R. C. L. 885.]

**Statute — title — sufficiency.**

8. A provision conferring upon a commission power to require additions, extensions, repairs, or improvements to or changes in the existing plant, equipment, apparatus, facilities, or other physical property of a public utility is covered by a title, "An Act to Provide for the Regulation of Public Utilities."

[See 25 R. C. L. 853, 860.]

— conferring power of eminent domain.

9. A provision conferring upon public service corporations the power to secure property necessary to carry out an order of the Public Utilities Commission, by an exercise of the right of eminent domain, is covered by a title, "An Act to Provide for the Regulation of Public Utilities."

[See 25 R. C. L. 860.]

**APPEAL** by defendants from a judgment of the Lake County Court (Persons, J.) denying motions to dismiss and in arrest of judgment, in a proceeding brought to condemn certain real estate belonging to defendants for the purpose of constructing an extension of petitioner's electric transmission line. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. V. Orris and R. J. Dady for appellants.

Messrs. Isham, Lincoln, & Beale, William A. Morrow and Cyrus H. Adams, Jr., for appellee:

The inability to agree of the parties to a condemnation proceeding will be sufficiently established by proving an offer to purchase made by letter, duly mailed to a property owner, to which offer the company received no reply.

Pittsburg, C. C. & St. L. R. Co. v. Gage, 286 Ill. 213, 121 N. E. 582; Re Metropolitan Elev. R. Co. 18 N. Y. S. R. 134, 2 N. Y. Supp. 278.

If one of two owners in common of land will not agree to sell to the corporation seeking to condemn, it is unnecessary to negotiate with the other.

Rogers v. Cosgrave, 98 Neb. 608, 153 N. W. 569.

Where it appears that the property owners filed a cross petition for damages to their land not taken, consented to the impaneling of a jury, and vigorously contested the case, the allegation of the petition of inability to agree need not be supported by any other evidence, and the point has been waived.

Ward v. Minnesota & N. W. R. Co. 119 Ill. 287, 10 N. E. 365; Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co. 149 Ill. 272, 37 N. E. 91; West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 90 N. E. 377, 17 Ann. Cas. 776; Alton & S. R. Co. v. Vandalia R. Co. 271 Ill. 558, 111 N. E. 531.

The requirement of article 4, § 13, of the Constitution of the state of Illinois is complied with when the statute has but one general subject, fairly indicated by its title. The constitutional provision must be liberally construed, and every presumption exercised in favor of the validity of a statute.

People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217; Manaster v. Kioebge, 257 Ill. 431, 100 N. E. 989; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784; People v. Sayer, 246 Ill. 382, 92 N. E. 900.

The comprehensiveness of the title of an act is no objection, provided it is not deceptive or misleading.

People v. McBride, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; Milne v. People, 224 Ill. 125, 79 N. E. 631.

An act embracing one general subject is not unconstitutional as containing more than one subject, because it

is comprehensive and contains numerous provisions, if these provisions are pertinent to the general subject of the act.

Sutter v. People's Gaslight & Coke Co. 284 Ill. 634, 120 N. E. 562; People v. Braun, 246 Ill. 428, 92 N. E. 917, 20 Ann. Cas. 448; People ex rel. Davis v. Nellis, 249 Ill. 12, 94 N. E. 165.

The title, "An Act to Provide for the Regulation of Public Utilities," will embrace a provision granting the power of eminent domain to these utilities, and the grant of the power of eminent domain is germane to the provisions of the act with respect to regulation, and does not constitute a separate or different subject.

Chicago Dock & Canal Co. v. Garity, 115 Ill. 155, 3 N. E. 448; Corvallis & E. R. Co. v. Benson, 61 Or. 359, 121 Pac. 418; McWethy v. Aurora Electric Light & P. Co. 202 Ill. 218, 67 N. E. 9; Newark v. Mt. Pleasant Cemetery Co. 58 N. J. L. 168, 33 Atl. 396; State ex rel. Great Northern R. Co. v. Superior Ct. 63 Wash. 572, 40 L.R.A. (N.S.) 793, 123 Pac. 996; Tennessee Coal, Iron & R. Co. v. Paint Rock Flume & Transp. Co. 128 Tenn. 277, 160 S. W. 522; Oneonta Light & P. Co. v. Schwarzenbach, 164 App. Div. 548, 150 N. Y. Supp. 76; People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217.

The right of the legislature to delegate to the Public Utilities Commission control over the exercise by corporations of the power of eminent domain, and the constitutionality of the Public Utilities Act and of this provision, have been upheld by the supreme court of Illinois.

State Public Utilities Commission v. Monarch Refrigerating Co. 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528; Chicago, B. & Q. R. Co. v. Cavanagh, 278 Ill. 609, 116 N. E. 128.

Cartwright, J., delivered the opinion of the court:

The appellee, the Public Service Company of Northern Illinois, filed in the county court of Lake county its petition, setting forth that it was a corporation organized under the Act of 1872 (Laws 1871-72, p. 296), entitled, "An Act Concerning Corporations," to manufacture, produce, distribute, and sell gas and electricity, to distribute water, and to distribute heat, and was a public utility



within the meaning of the act entitled, "An Act to Provide for the Regulation of Public Utilities" (Laws 1913, p. 459); that the Public Utilities Commission, after hearing upon complaint, entered an order finding that the construction, operation, and maintenance of an extension of petitioner's electric transmission line ought to be made, and was necessary to promote the convenience of the public and to secure adequate service or facilities, and directing the petitioner to construct, operate, and maintain such extension from its substation No. 82 in the city of Evanston, northwesterly, and in general along the eastern side of and adjoining the existing right of way of the Chicago & Northwestern Railway Company to a point specified in the petition; that said transmission line would consist first of a single row, and later, when conditions might warrant, a double row, of steel towers supporting high-tension wires; and that it was unable to agree with the various owners and persons interested in the tracts of land therein described as to the amount of compensation to be paid them for the taking and use thereof; and the petition prayed the court to cause such compensation to be ascertained according to law. Among the tracts of land described in the petition was "a strip of land eighty-five (85) feet wide east of and immediately adjoining the right of way of the Chicago & Northwestern Railway Company, in and through the south half of the northeast quarter of the northeast quarter of section thirty-four (34), township forty-three (43) north, range twelve (12) east of the third principal meridian, in Lake county, Illinois," and the appellants, William Recktenwald and Charlotte Recktenwald, were named as owners. The appellants entered their special appearance, and, alleging that they were the owners in fee simple of the tract of land, moved the court to dismiss the petition. After a hearing the motion was denied, and appellants then entered

their general appearance and filed a cross petition, alleging damage to land not taken, and engaged in a trial, which resulted in a verdict fixing the compensation. The appellants made a motion in arrest of judgment, which was denied, and judgment was entered, from which this appeal was prosecuted.

Nine grounds of the motion to dismiss were stated therein, but those which are now relied upon by the appellants are that the petitioner had not made an effort to agree with the appellants upon the compensation to be paid to them before filing the petition, and that the petitioner had no right to exercise the power of eminent domain.

The tract of land was owned jointly by the appellants, and the petitioner, by a letter addressed to the appellant William Recktenwald, inclosing a copy of the order of the Public Utilities Commission and a description of the property, offered him in cash at the rate of \$350 per acre. No reply was made to the letter, and there was a sufficient effort on the part of the petitioner to agree with William Recktenwald. *Pittsburg, C. C. & St. L. R. Co. v. Gage*, 286 Ill. 213, 121 N. E. 582. The appellants were joint owners of the land, and the offer was for the whole title, perhaps in the belief that the interest of Charlotte Recktenwald was an inchcate right of dower. The offer was, in substance, to the owners of the tract; but in any view of the matter, if the petitioner could not agree with William Recktenwald for his undivided interest, no further attempt to negotiate was necessary.

The principal argument in support of the errors assigned is that the petitioner had no right to exercise the power of eminent domain, and this is based upon the following propositions: "(1) That the act under which the petitioner was organized did not confer the right; (2) that §§ 50 and 59 of the Act

Eminent domain  
—sufficiency of  
effort to agree.

—failure to  
agree with one  
joint owner—  
effect.

Providing for the Regulation of Public Utilities are obnoxious to and in contravention of § 13 of article 4 of the Constitution, which provides that 'no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title;' (3) that the provision of § 59 for the exercise of the power of eminent domain is not expressed in or covered by the title of the act or, if so expressed, the title embraces more than one subject; (4) if the provisions of §§ 50 and 59 are expressed in the title, they violate the Constitution by delegating to the Public Utilities Commission the power to delegate to a public utility the right to exercise the power of eminent domain; (5) if those sections are constitutional, they do not confer upon corporations created prior to the passage of the act the right to exercise the power of eminent domain, but simply regulate the exercise of such power by a corporation already having it."

The General Corporation Act, under which the appellee is organized, does not confer the right to acquire private property by the exercise of the power of eminent domain. *Harvey v. Aurora & G. R. Co.* 174 Ill. 295, 51 N. E. 163. The existence of the right depends upon the provisions and validity of the act for the regulation of public utilities.

Aside from the question of the constitutionality of §§ 50 and 59, which was not raised or considered in the case of *Chicago, B. & Q. R. Co. v. Cavanagh*, 278 Ill. 609, 116 N. E. 128, the questions whether the Public Utilities Commission has power to require a public utility to do some act which will require the exercise of the power of eminent domain, and whether the Public Utilities Act simply regulates the exercise of the power by a corporation already having it, were settled in that case. The *Chicago, Burlington, & Quincy Railroad Company* had been invested with power to take private property by eminent

domain for the original construction of its railroad, but the power had been exhausted by the original location and no longer existed. If the company had power to relocate its railroad, and to take private property for the relocation, it was derived from the Public Utilities Act under the order of the Public Utilities Commission. It was said that the general assembly might lawfully delegate to the Public Utilities Com-

—delegation of power.

mission the right and duty to exercise or compel the exercise of the power of eminent domain to secure the public safety, and the right and duty were necessarily implied, because, if the petitioner had no right to take property for the proposed change, it would be powerless to comply with the order, and, the Commission having been empowered to make the order, everything essential to require and assure compliance with it was necessarily included.

The constitutional provision that no act shall embrace more than one subject, which shall be expressed in the title, prohibits the passage of an act containing provisions not fairly embraced in the title, and any such provisions are void, and it also prohibits the passage of an act relating to different subjects expressed in the title, in which case the whole act is void. *Milne v. People*, 224 Ill. 125, 79 N. E. 631; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109; *Sutter v. People's Gaslight & Coke Co.* 284 Ill. 634, 120 N. E. 562. The general purpose of the constitutional provision, however, is accomplished when a law has but one general subject, which is fairly indicated by its title. The title is not required to be an index to the body of the act, or as comprehensive in matters of detail, but if it fairly indicates the general subject, and reasonably covers all the provisions of the act, and is not calculated to mislead the general assembly or the people, it is a sufficient compliance

—General Corporation Law.

Constitutional law—subject of statute—construction.

with the constitutional requirement. Unless the act contains matters having no proper connection or relation to the title, or the title itself contains subjects having no proper relation to each other, the constitutional provision is not violated. An act having a single general subject, indicated in the title, may contain

any number of provisions, no matter how diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance of such subject by providing for the method and means of carrying out the general object. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; *Manaster v. Kioebge*, 257 Ill. 431, 100 N. E. 989; *Perkins v. Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; *Sutter v. People's Gaslight & Coke Co.* 284 Ill. 634, 120 N. E. 562.

It cannot be doubted that power may be conferred upon a corporation, organized under authority of the general assembly to serve the public by supplying the people with gas, electricity, heat, and water, which can best be produced and distributed by such a corporation acting under state control, to take private property for the public uses of such corporation by the power of eminent domain. The question here is whether that has been accomplished by the act entitled, "An Act to Provide for the Regulation of Public Utilities." The regulation of such corporations performing a public service includes their control, direction, and government, and subjects them to rules and restrictions for their management or government, in order that the public may be efficiently served on equal terms, and for reasonable compensation, with services and commodities furnished by the corpo-

**Eminent domain**  
—conferring  
power upon  
light and power  
company.

rations. To that end it is within the general purview of the title to provide that if the Commission, after hearing, shall find that the service is inadequate and that additions, extensions, repairs, or improvements to or changes in the existing plant, equipment, apparatus, facilities, or other physical property of any public utility ought reasonably to be made, or that a new structure or structures should be erected to promote the security or convenience of the public, or in any other way to secure adequate service or facility, the Commission may require the same to be made. That has been done by § 50 of the act, and it is free from constitutional objection.

For the purpose of rendering the provision of § 50 effective, and providing the method and means of requiring the improvement, changes, or new structures, § 59 provides that, when necessary for the construction of any alterations, additions, extensions, or improvements ordered or authorized under § 50, any public utility may enter upon, take, or damage private property in the manner provided for by the law of eminent domain. This is only a provision for making effective an order lawfully made, and comes within the established rule that any provision in furtherance of the title, or to render the provisions of an act effective, is not in violation of the constitutional restriction. Without the power of eminent domain, a lawful order for securing the public safety and convenience would be an idle ceremony, because private property could not be taken and appropriated to the required use.

No reason is suggested why the act for the regulation of public utilities should be held to apply only to corporations organized after the passage of the act, and none is apparent.

The act does not embrace more

**Statute—title—**  
**sufficiency.**

—conferring  
power of  
eminent domain.

than one subject, and that subject is expressed in the title. The court did not err in denying the motions

to dismiss and in arrest of judgment.

The judgment is affirmed.

### ANNOTATION.

**Eminent domain: what is sufficient attempt to agree on compensation.**

#### I. Introductory:

- a. General principles, 471.
- b. Claimants and title, 472.
- c. Contest as waiver, 472.

#### II. Illustrations of sufficient attempts, 473.

#### III. Illustrations of insufficient attempts, 475.

#### IV. Miscellaneous, 477.

##### 1. Introductory.

##### a. General principles.

Of course, no attempt to agree on compensation is necessary unless required by Constitution or statutes, and this note presupposes such requirement.

The effort to agree must be a bona fide one, showing an attempt to purchase by treaty between the parties. *Mahoney v. San Francisco* (1879) 53 Cal. 383; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* (1886) 62 Mich. 564, 4 Am. St. Rep. 875, 29 N. W. 500; *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 371; *Schenectady R. Co. v. Lyon* (1908) 41 Misc. 506, 85 N. Y. Supp. 40; *Big Cuyahoga Light, Heat & P. Co. v. Turner, V. & T. Co.* (1913) 17 Ohio C. C. N. S. 34.

A reasonable bona fide attempt to agree is sufficient. *Todd v. Austin* (1867) 34 Conn. 78; *Bridwell v. Gate City Terminal Co.* (1907) 127 Ga. 520, 10 L.R.A. (N.S.) 909, 56 S. E. 624; *Volberg v. Gate City Terminal Co.* (1907) 127 Ga. 537, 56 S. E. 991; *Trotier v. St. Louis, B. & S. R. Co.* (1899) 180 Ill. 471, 54 N. E. 487; *Chicago & W. I. R. Co. v. Heidenreich* (1912) 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266; *Pittsburg, C. C. & St. L. R. Co. v. Gage* (1919) 286 Ill. 213, 121 N. E. 582; *PUBLIC SERVICE CO. v. RECKTENWALD*, (reported herewith) ante, 466; *Fort Street Union Depot Co. v. Jones* (1890) 83 Mich. 415, 47 S. W. 349; *Philadelphia Trust, S. D. & Ins. Co. v. Merchantville* (1907) 75 N. J. L. 451, 68

Atl. 170, affirmed in (1908) 76 N. J. L. 822, 74 Atl. 1135; *Re New York C. & H. R. R. Co.* (1884) 33 Hun (N. Y.) 274; *Waverly v. Waverly Water Co.* (1908) 127 App. Div. 440, 111 N. Y. Supp. 541, affirmed in (1909) 194 N. Y. 545, 87 N. E. 1129; *Re New York, W. & B. R. Co.* (1912) 151 App. Div. 50, 185 N. Y. Supp. 234; *Erie & J. R. Co. v. Brown* (1907) 57 Misc. 164, 107 N. Y. Supp. 983.

The "law does not mean that it must be impossible to buy . . . at any price, however large; it means that the owner must be either unwilling to sell at all, or willing to sell only at a price so large as, in the good judgment of the agents of the corporation, is excessive." *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 371.

To refuse to admit proof of value was error where the petition alleged that "your petitioner has not been able to acquire title thereto by agreement with the owner for the purchase thereof, for the reason that such owner asks for the same what your petitioner considers an unreasonable price, and refuses to accept the reasonable sum which your petitioner has offered therefor," and the allegation was controverted. The court said: "It was only by showing the value that the question whether an effort to acquire the title by agreement, or whether the owner asked or demanded an unjust, unreasonable, and exorbitant price for his land, could be determined." *Grand Rapids, L. & D. R. Co. v. Weiden* (1888) 69 Mich. 572, 37 N. W. 872.

But it is not sufficient, but a mere conclusion, to state "upon information and belief, that your petitioner has not been able to acquire title to the real estate so taken as aforesaid, and is unable to agree for the purchase thereof with the persons who own, or have, or claim to own or have, estates or interests in the said real estate, and

the reason of such inability is that they will not sell the same to your petitioner for a reasonable compensation." *Re Metropolitan Elev. R. Co. v. Dominick* (1889) 55 Hun, 198, 8 N. Y. Supp. 151.

*b. Claimants and title.*

No attempt need be shown to agree upon a sale with one who cannot convey his title. *Davis v. Northwestern Elev. R. Co.* (1897) 170 Ill. 595, 48 N. E. 1058; *Indiana C. R. Co. v. Oakes* (1862) 20 Ind. 9; *Balch v. Essex County* (1869) 103 Mass. 106; *Stillwater & M. Street R. Co. v. Slade* (1899) 36 App. Div. 587, 55 N. Y. Supp. 966.

So, an offer need not be made to an infant. *Davis v. Northwestern Elev. R. Co.* (Ill.) *supra*; *Indiana C. R. Co. v. Oakes* (1862) 20 Ind. 9; *Stillwater & M. Street R. Co. v. Slade* (N. Y.) *supra*.

In *Davis v. Northwestern Elev. R. Co.* (1897) 170 Ill. 595, the court said: "The pleadings show that defendants were nonresidents, and that certain of them were minors. In such case it is not necessary to show by proof that the compensation and damage could not be agreed upon. The minors could not make an agreement."

It has been held that it is sufficient to show a failure of negotiations as to an undivided part of the land. *Rogers v. Cosgrave* (1915) 98 Neb. 608, 153 N. W. 569.

So, failure with a lessor makes it unnecessary to show failure with a lessee. *Re Rochester, H. & L. R. Co.* (1888) 110 N. Y. 119, 17 N. E. 678. And if the property is in the hands of a lessee on a long lease, and he will not agree, it is not required to show an attempt to agree with the lessor. *State, Pennsylvania R. Co. Prosecutor, v. National Docks & N. J. Junction Connecting R. Co.* (1894) 57 N. J. L. 86, 30 Atl. 183.

One owner may not object to a lack of evidence of the failure of the condemnor to agree with another owner. *Eddleman v. Union County Traction & P. Co.* (1905) 217 Ill. 409, 75 N. E. 510; *Mercer County v. Wolff* (1908) 237 Ill. 74, 86 N. E. 708.

It is not necessary to show an at-

tempt to agree with the holder of a vendor's lien. *Thomas v. St. Louis, B. & S. R. Co.* (1897) 164 Ill. 634, 46 N. E. 8.

Where an adult claimed all, infants claimed some, and there were liens, the plaintiff might properly say that it was unable to agree with the owners. *Stillwater & M. Street R. Co. v. Slade* (1899) 36 App. Div. 587, 55 N. Y. Supp. 966.

*c. Contest as waiver.*

Where the owner contests on the merits he waives the objection of failure to attempt to agree on compensation. *Ward v. Minnesota & N. W. R. Co.* (1887) 119 Ill. 287, 10 N. E. 365; *West Skokie Drainage Dist. v. Dawson* (1909) 243 Ill. 175, 90 N. E. 377, 17 Ann. Cas. 776; *Alton & S. R. Co. v. Vandalia R. Co.* (1916) 271 Ill. 558, 111 N. E. 531; *Mississippi & M. R. Co. v. Rosseau* (1859) 8 Iowa, 373; *Schuylkill & S. Navigation v. Diffebach* (1794) 1 Yeates (Pa.) 367; *State ex rel. Skamania Boom Co. v. Superior Ct.* (1907) 47 Wash. 166, 91 Pac. 637; *State ex rel. Wilson v. Superior Ct.* (1907) 47 Wash. 397, 92 Pac. 269.

In *Ward v. Minnesota & N. W. R. Co.* (1887) 119 Ill. 287, 10 N. E. 365, *supra*, where there was a cross petition asking damages for lands not taken, the court said: "It is true no direct testimony was offered, but the fact there is a vigorous contest between the landowner and the corporation, both on the original as well as upon the cross petition, makes it evident the parties were unable to agree as to the compensation to be paid for the land to be condemned. It would have been idle to offer direct testimony on a point in the case that both parties conceded."

Courts will not set aside inquisitions on writs on the ground that the owners of the lands have not been offered terms of agreement, when it appears that they combined in a body against the work itself, attended the striking of the jury, showed their lines to the jury, and made preparations for their coming. *Schuylkill & S. Navigation v. Diffebach* (1794) 1 Yeates (Pa.) 367, *supra*.

One who has enjoined a public serv-

ice corporation from interfering with his property cannot, in the condemnation proceeding, raise the objection that, prior to the proceeding, no endeavor was made to obtain the rights by purchase. *State ex rel. Burrows v. Superior Ct.* (1908) 48 Wash. 277, 17 L.R.A. (N.S.) 1005, 125 Am. St. Rep. 927, 93 Pac. 423.

Where the plaintiffs insisted that a school board sought to appropriate the land without trying to purchase it at a reasonable price, or to procure it by donation or otherwise, the court said: "The evidence shows that the plaintiffs stated positively that they would not sell the land unless compelled so to do. Invoking the principle often announced in the law of tender that where it is useless to make a tender none is required, it was not necessary for the defendants to attempt to purchase this land, or to secure it by donation or otherwise, before instituting condemnation proceedings." *Nelson v. School Dist.* (1917) 100 Kan. 612, 164 Pac. 1075.

It may be noted that it has been held that where the owner appears and makes no objection as to failure to show lack of agreement, the matter is waived. *Doughty v. Somerville & E. R. Co.* (1848) 21 N. J. L. 442. So, where the owner offers no evidence against the report of a village board of its unavailing efforts to agree with parties interested, he may not object to the finding to this effect. *Depue v. Danschbach* (1916) 273 Ill. 574, 113 N. E. 156.

#### *II. Illustrations of sufficient attempts.*

"A bona fide offer of an amount which the petitioner considered a fair price, and the refusal to accept it, are sufficient negotiations, within the statute. It is of no consequence that petitioner's agent had no expectation that the offer would be accepted." *Fort-street Union Depot Co. v. Jones* (1890) 83 Mich. 415, 47 S. W. 349.

Where the statute provides for condemnation proceedings if the company "shall not agree" with owners, a failure to reply to the overtures of a telegraph company by the owning railroad company in a reasonable time is sufficient. *Louisville, N. O. & T. R.*

*Co. v. Postal Teleg.-Cable Co.* (1891) 68 Miss. 806, 10 So. 74.

In *Mercer County v. Wolff* (1908) 287 Ill. 74, 86 N. E. 708, where an owner had declined to accept the offer of the county, the court said: "While it is true that he stated that he could not give an answer within a week, the county board was not compelled to wait that length of time. If he would not accept the offer, that was a failure to agree."

A ten days' offer is sufficient, though the directors of the owning corporation had no meeting within that time. *Re New York* (1892) 18 N. Y. Supp. 536, affirmed in (1892) 185 N. Y. 253, 31 Am. St. Rep. 825, 81 N. E. 1043.

Where fair written offers were made, to be answered within forty-eight hours, the court said: "The shortness of time given to answer might present a serious question, were it not for the fact that the running of the railroad for ten years in front of the property must have presented the question of the extent of damages to the parties frequently, and it is not unreasonable that, with fixed ideas on the subject, they were in a position within forty-eight hours to determine whether they would or would not accept." *Re Metropolitan Elev. R. Co.* (1889) 12 N. Y. Supp. 502.

Making no answer to a request for terms, or naming so large a sum that the proposition is rejected, sufficiently shows that the parties are unable to agree in relation to damages. *Todd v. Austin* (1867) 34 Conn. 78.

If a real estate agent, representing a railroad company, informed a lot owner that the company desired her lot for the purpose of the right of way and freight yard, and made her an offer which he testified was a fair price for the property desired, and which she refused to accept, this would be a sufficient negotiation for purchase, within the meaning of the statute, before the commencement by the company of condemnation proceedings. *Bridwell v. Gate City Terminal Co.* (1907) 127 Ga. 520, 10 L.R.A. (N. S.) 909, 56 S. E. 624; *Volberg v. Gate City Terminal Co.* (1907) 127 Ga. 537, 56 S. E. 991.

In *Chicago & W. I. R. Co. v. Heidenreich* (1912) 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266, the court said: "It was proved that the agent of the appellee offered the appellant \$1,000 a front foot for his property, which was the valuation put upon the property, with great unanimity, by the witnesses for appellee on the trial. The evidence justifies the belief that the offer was bona fide, and that there was a sufficient attempt to agree on the compensation."

A request that the owner name a price, and his naming a price nearly twice what is later allowed by appraisers, show that the property could not be obtained by purchase or otherwise at a reasonable or satisfactory price. *Jockheck v. Shawnee County* (1894) 53 Kan. 780, 37 Pac. 621.

It was held to be sufficient when, as to one owner, the petition of village trustees alleged that when called on to fix a price he named \$8,000, a sum which the trustees claimed to be more than ten times the value of his right, and, as to another, that when applied to to name a sum he declined, and that his property was so encumbered by mortgages and judgments as to make it difficult, if not impossible, to fix a price. *Re Middletown* (1880) 82 N. Y. 196.

The "law does not mean that it must be impossible to buy the right of way at any price, however large; it means that the owner must be either unwilling to sell at all, or willing to sell only at a price so large as, in the good judgment of the agents of the corporation, is excessive. That appears here. Though the price offered to the owners was nominal, they refused to name any price, or that asked by them was so much beyond the view of value held by the president, that there seemed no likelihood of agreement." *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 371.

In *Waverly v. Waverly Water Co.* (1908) 127 App. Div. 440, 111 N. Y. Supp. 541, affirmed in (1909) 194 N. Y. 545, 87 N. E. 1129, it was held that an unanswered substantial offer by a village to buy the plant and property of a water company, two unanswered requests for a price of sale,

and neglect and refusal by the company to enter into negotiations, are, when alleged, sufficient to assert endeavor and inability to agree.

The refusal of many offers, including an offer to pay the highest price that had been paid by the company to the owners of adjoining land, is sufficient. *Re New York, W. & B. R. Co.* (1912) 151 App. Div. 50, 135 N. Y. Supp. 234.

An offer of \$4,000 and a counter offer of \$25,000, followed by another offer for slightly differing land of \$5,000, followed by a counter offer, with certain reservations, of \$15,000, shows inability to purchase. *Erie & J. R. Co. v. Brown* (1907) 57 Misc. 164, 107 N. Y. Supp. 983.

In *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* (1892) 5 W. Va. 382, 5 Mor. Min. Rep. 389, it was held that sufficient effort to agree was shown, where the company sent its agents to the agents of the owner at its principal office in the state, its president and directors then residing out of the state, and that two propositions were made and not accepted.

In *Evansville, S. & N. R. Co. v. Evansville Terminal R. Co.* (1910) 175 Ind. 21, 93 N. E. 282, an agent of the condemning railway company called upon the agent of the owning railway company to see if they could agree upon a crossing by the plaintiff company of the defendant company, and the owner's agent was to call the next morning early at the condemnor's office and examine blue prints of the proposed crossing. He omitted to do so and could not be reached by telephone, but during the forenoon sent a letter, requiring a copy of such blue prints before going further. The court said, in affirming a judgment holding that a bona fide attempt to agree had been made: "It is true that events followed each other rapidly after the matter of agreement was taken up, but the conduct of Mulhausen in failing to keep his promise to call and examine the blue prints, or send any explanation of his conduct, and the spirit of the letter he subsequently sent to Funkhouser, considered together, may reasonably be construed as indicating a

feeling of hostility to any further discussion of the crossing question, and we think the court was warranted in arriving at that conclusion."

In *New York, C. & H. R. R. Co. v. Yonkers* (1907) 103 N. Y. Supp. 252, the court said, in holding the effort to agree as to a boat club's land sufficient: "The evidence indicates that the agent of the plaintiff, in negotiating with the representatives of the club, misunderstood the exact location of the description of the parcel which the plaintiff was seeking to purchase from the club, in that he did not understand that such description included a portion of the land under the boathouse. It cannot be doubted, of course, that an offer to purchase one distinct parcel will not warrant proceedings to condemn an entirely different parcel; but I do not think that a mistake of this character, in an attempt to locate the exact description given, should be held to vitiate the effect of the negotiation. It, moreover, is quite apparent in this case that the negotiations would not have been successful had not this error been made, because the plaintiff's offer for the land at a certain rate per square foot was in effect rejected by the club, even with the explanation that it did not take any part of the premises under the boathouse. Much more would it have been rejected if it had been well understood that the parcel described did go for a space under the boathouse, so that the removal of that structure would likely be necessary."

It seems that, in Pennsylvania, the filing of the company's bond is in itself evidence of the inability of the parties to agree. *Bland v. Tipton Water Co.* (1908) 222 Pa. 285, 71 Atl. 101; *Burkhard v. Pennsylvania Water Co.* (1914) 243 Pa. 369, 90 Atl. 157.

In *Trinity College v. Hartford* (1865) 32 Conn. 452, it seems to have been held sufficient to show an attempt to agree, that city authorities applied to officers of the owner, who claimed they were not authorized.

In *Fulton v. Methow Trading Co.* (1906) 45 Wash. 136, 88 Pac. 117, it was held that sufficient was shown by the allegation that the plaintiffs had

been and still were unable to agree as to compensation to be paid the said owners, "for the reason that said owners will not make to plaintiffs a stated demand for any given sum of money in compensation to them and it for said right of way, and that such of said owners of said parcels of land over which it is desired to extend said ditch, hereinafter described, have refused, and still refuse, to grant to these plaintiffs the use thereof for purposes aforesaid, and plaintiffs have been wholly unable to obtain from such owners any right in or upon or to the use of said premises for the purposes aforesaid."

If the landowner claims to stand by an alleged previous agreement, it is useless to make him an offer. *Re Rochester* (1913) 82 Misc. 598, 144 N. Y. Supp. 1086.

### *III. Illustrations of insufficient attempts.*

It was held insufficient where the propositions made by plaintiff to several defendants were all alike, offering \$1,000 to each, though their properties were of different values, and were mailed about 4 o'clock one evening, and the petition filed shortly after 7 o'clock the next morning, before the defendants had any opportunity to consider them, or make counter propositions. *Big Cuyahoga Light, Heat & P. Co. v. Turner, V. & T. Co.* (1913) 17 Ohio C. C. N. S. 84.

Where a board agreed to pay \$73,000 for land, subject to approval of two boards not in control of it, one of which omitted to approve the agreement, and some time later the first board made an offer of \$56,000, dated December 29, served on December 30, and dated and verified a petition on December 31, stating failure to agree, which was served on January 3 following, it was held that no bona fide effort to agree was shown. *Re Bronx Parkway Commission* (1917) 176 App. Div. 717, 163 N. Y. Supp. 882.

It was held that there had not been a sufficient attempt shown where negotiations ceased without notice when both parties regarded them as still pending, and nothing afterwards occurred to indicate their termination.



Chambers v. Carteret & S. R. Co. (1891) 54 N. J. L. 85, 22 Atl. 995.

Where the statute required a board to "enter into negotiation" with owners for the purchase before taking any step towards condemnation, it was held that a petition for a mandamus in condemnation proceedings was insufficient which did not show that petitioners ever offered to sell at any price, or that they refused to name a price, and showed affirmatively that the commissioners never determined on a price to offer for the lands and waters of petitioners. *Mahoney v. San Francisco* (1879) 53 Cal. 383.

An offer by the owner, and its laying on the table by a city, are not a sufficient treaty with the owner. *Laue v. Saginaw* (1884) 53 Mich. 442, 19 N. W. 137.

A fruitless casual inquiry of a neighbor as to the residence of a nonresident landowner is not sufficient to excuse the lack of effort to negotiate with him. *McCotter v. New Shoreham* (1898) 21 R. I. 43, 41 Atl. 572.

It has been held that a railroad company shows no attempt to agree if its only evidence is that it tried by agreement to obtain the property for steamboat purposes (*New York, N. H. & H. R. Co. v. Long* (1897) 69 Conn. 424, 37 Atl. 1070); that an effort to agree with the mayor is not sufficient where the water commissioners were the proper authority (*Jersey City v. Bayonne* (1910) 80 N. J. L. 131, 76 Atl. 1010); that a refusal to give a school trustee a price cannot be held to be a refusal to give the district a price, and does not show that the owner could not have agreed with the district, the trustee having no authority to represent the district (*Howland v. School Dist.* (1888) 16 R. I. 257, 15 Atl. 74); and that the owner must be informed of the identity of the offerer and of the purpose for which the property is wanted (*Pittsburgh, C. C. & St. L. R. Co. v. Gage* (1917) 280 Ill. 639, 117 N. E. 726).

Where the owner was ill and the agent of the plaintiff negotiated with the owner's son, there being nothing to show that the son was informed that

the other party was agent for the plaintiff, or that the son had authority to act for the owner, it was held that the evidence of failure to agree was insufficient. *Connecticut College v. Alexander* (1912) 85 Conn. 602, 84 Atl. 365.

Where the authority of a railroad company's agent in acquiring property for a station was limited to agree upon a price and to secure a right for a trust company to buy, this was held not to be sufficient to prove any attempt to purchase. *Michigan C. R. Co. v. Ferguson* (1910) 162 Mich. 220, 127 N. W. 320.

Sufficient effort to purchase was not shown where a city addressed a letter to an executor and legatee of the late owner, as follows: "It is the intention of the city to agree with you, if possible, as to the price to be paid, before instituting condemnation proceedings in court. I understand that you own a one-twenty-seventh interest in this property, subject to an estate for the life of your mother, and that you are one of the executors of the estate of Alfred Austell, deceased. The city asks that you make an offer as to what you will take for your interest. Kindly write me what price you would be willing to accept for the interest you hold,"—as the letter was to be construed as a proposition to the addressee personally. *Atlanta v. Austell* (1916) 146 Ga. 456, 91 S. E. 478.

A recital, as to a desired mining right of way for water, that there was never any agreement, is not sufficient. *Glass v. Basin Min. & Concentrating Co.* (1899) 22 Mont. 151, 55 Pac. 1047, where the court said: "The allegation of the plaintiffs is that there never was any agreement, and, fearing 'lost defendant might be deprived of certain water, they made an 'offer' by which, if defendant would grant plaintiffs a right of way across its mining claims, plaintiffs, in consideration thereof, would give defendant any water it might need for certain of its purposes. This is not an averment of a past attempt to agree upon compensation for a right of way. It is merely a recital of what plaintiffs were willing to do to allay the apprehensions

which they understood defendant had, in case it should allow plaintiffs to build a flume across its property."

Where a company which was not trying to acquire anything but the right of operating not as a railroad corporation, but as a street railway, offered a nominal amount not for land to be taken, but for a waiver of objection to their so operating in place of another company, it was held that this was not the attempt to agree on a price of property to be taken that is contemplated by the law. *Specht v. Atlantic City & S. R. Co.* (1911) 81 N. J. L. 108, 78 Atl. 1049.

Correspondence by a city board before deciding on a street improvement is not an effort to agree upon terms of purchase. *Core v. Norfolk* (1901) 99 Va. 190, 37 S. E. 845.

#### IV. Miscellaneous.

Proof of inability to agree may be shown by the owner's own evidence. *De Buol v. Freeport & M. River R. Co.* (1884) 111 Ill. 499.

The inability of the parties to agree as to the amount of damages "may be shown by any testimony evincive of the fact." *Williams v. Hartford & N. H. R. Co.* (1840) 13 Conn. 397.

Evidence of negotiations with the treasurer of the owning corporation is admissible. *Stafford Springs Street R. Co. v. Middle River Mfg. Co.* (1907) 80 Conn. 37, 66 Atl. 775.

To mail a letter is not sufficient evidence of an attempt to purchase, without evidence that the letter reached its destination. *Re Rochester* (1918) 82 Misc. 598, 144 N. Y. Supp. 1086.

"The averments in the petition to condemn land for a public use need not be in the language of the statute, but any allegations showing affirmatively that the petitioner has been unable to agree with the owner in respect to the compensation to be paid will suffice." *St. Louis & C. R. Co. v. Postal Tele. Co.* (1898) 173 Ill. 508, 51 N. E. 382.

A statement in an affidavit by an agent that he was unable to agree upon compensation or upon assessors, with the persons named in the petition, implies an effort to agree before the

petition was presented. *Tucker v. Erie & N. E. R. Co.* (1856) 27 Pa. 281.

Where the statute provides for the condemnation of property, "the title to which he cannot otherwise acquire," all that is meant is a failure to agree. *Westfield Cemetery Asso. v. Danielson* (1892) 62 Conn. 319, 26 Atl. 345.

Sometimes the statute requires that it should appear as a jurisdictional fact that the petitioner "has not been able to acquire title thereto, and the reason of such inability." *Re Marsh* (1877) 71 N. Y. 315.

Where the intention of the statute is that, before any agreement made by the commissioner shall be binding, the price to be paid shall be approved by the board of estimate and apportionment, it is not necessary that an offer should be made. It is sufficient if the price asked by the property owners is unsatisfactory to the city. *Re Rochester* (1917) 100 Misc. 421, 165 N. Y. Supp. 1026, reversed on other grounds in (1918) 184 App. Div. 925, 170 N. Y. Supp. 1072, 184 App. Div. 369, 171 N. Y. Supp. 12, which are respectively affirmed in (1918) 224 N. Y. 386, 659, 121 N. E. 102, 859.

Under a statute providing that if the owner of property taken, or person sustaining damages, "shall not agree on the damages to be paid therefor," he may file a petition for the assessment of his damages, it is not a condition precedent to the right to file such petition that it should appear that the parties did not agree upon the damages to be paid; the filing of the petition shows the petitioner's election not to agree, and no previous attempt is necessary. *Ætna Mills v. Waltham* (1879) 126 Mass. 422.

In *United States v. Oregon R. & Nav. Co.* (1883) 9 Sawy. 61, 16 Fed. 524, where the statute in substance provided that the proceeding to compel a sale should not be resorted to until the owner had refused to sell for a reasonable price, and this fact was alleged in the complaint, it was objected that the allegation was a general one, neither stating when the offer to purchase was made and refused, nor what was the price offered. The court said: "However, this at

most is only a defective statement of a material fact, for which the only remedy provided by the Code of Civil Procedure (§ 84) is a motion to make more definite and certain. As the allegation stands, proof may be made under it of all the particulars implied in it. It is sufficient to support a verdict. . . . Nor is it necessary that the complaint should contain a distinct allegation as to the value of the premises. Whether they are of much or little or no value is not material to the plaintiff's right to the relief sought. But it may be that the defendant can tender the plaintiff an issue upon this point in its answer, which the latter

must meet in his replication, or the fact as pleaded will, for the purposes of the action, be admitted." In *Colorado Fuel & I. Co. v. Four Mile R. Co.* (1901) 29 Colo. 90, 66 Pac. 902, the court overruled an attack made for the first time on appeal, upon an allegation in the petition as insufficient, which alleged "that the petitioner has endeavored to agree with the respondents upon the compensation to be paid in respect to the property herein sought to be taken, but has been unable to acquire the right of way herein described by purchase or voluntary grant from the said respondents."

B. B. B.

W. J. STAGG, Appt.,

v.

KANSAS FREE FAIR ASSOCIATION.

*Kansas Supreme Court — December 6, 1910.*

(105 Kan. 600, 185 Pac. 893.)

**Corporation — report to directors — effect.**

1. Although a board of directors of a corporation hears the reading of a financial report of the corporation's liabilities and approves the report, the corporation is not thereby precluded from afterward denying its liability on specific items set out in the report.

[See note on this question beginning on page 484.]

**Master and servant — contract of employment.**

2. The facts in dispute touching the duration and terms of a contract of employment examined, and no error discerned in the trial court's determination thereof.

**Corporation — president's promise to pay debt.**

3. Where a president of a corporation is not shown to have authority to obligate the corporation, and a letter

written by him, endeavoring to pacify an insistent creditor and promising to make a desperate effort to raise money to take up the corporate debts, included the promise, "Your account is among the others of which I am fully aware, and if we can raise this money it will be one of the first taken care of," it is held, that such promise is subject to explanation and is not necessarily binding on the corporation.

[See 7 R. C. L. 450 et seq.]

Headnotes by DAWSON, J.

**APPEAL** by plaintiff from a judgment of the District Court for Shawnee County (Whitcomb, J.) in favor of defendant in an action brought to recover a balance alleged to be due for services performed by plaintiff under a contract of employment. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. James A. Troutman for appellant.

Mr. W. E. Atchison, for appellee:

Even if the letter written by the president was an admission that the association was indebted to plaintiff, it would be only an admission by an officer of the corporation who was not advised of the facts, and would be subject to be disproved or explained.

Robins Min. Co. v. Murdock, 69 Kan. 596, 77 Pac. 596; 1 Enc. Ev. 396; Arkansas City v. Payne, 80 Kan. 355, 102 Pac. 781, 18 Ann. Cas. 82.

A new trial should not be granted because of newly discovered evidence which is merely cumulative.

Daly v. Gregg, 91 Kan. 506, 138 Pac. 614.

Dawson, J., delivered the opinion of the court:

This is an action for a balance alleged to be due as wages for services performed in 1915. The plaintiff is an accountant. The defendant is an incorporated association which conducts an annual fair in Topeka. Plaintiff alleged that in December, 1914, he was hired by the defendant for a term of ten months at \$100 per month; but, owing to the financial difficulties of the defendant, he was induced to agree to a change in his compensation, whereby the defendant was to pay him \$50 per month from January 1, 1915, until June 1st, and \$150 per month thereafter, and that he had received \$250 on this contract, and that there was due to him a balance of \$750 and interest.

The defendant denied plaintiff's allegations and alleged that plaintiff's services for the first few months of 1915 were gratuitous—like those of many other public-spirited citizens of Topeka who were endeavoring to conduct and maintain a successful fair—that a public election was held in May to authorize the granting of county aid to the fair, and after that election the defendant employed the plaintiff at \$50 per month, as from May 1, 1915, with a further understanding that if the fair in the autumn of 1915 was a financial success plaintiff should be paid on the basis of \$100 per month; that owing to

rainy weather the fair was financially a failure and had a large deficit; and, accordingly, that defendant owed plaintiff nothing.

A jury was waived, and the defendant prevailed. Plaintiff appeals.

Plaintiff's evidence tended to support the allegations of his petition. Defendant's evidence tended to support the facts set up in its answer. Master and servant—contract of employment.

The trial court's judgment on that disputed issue is final. Bruington v. Wagoner, 100 Kan. 439, 164 Pac. 1060.

It is argued that the defendant admitted its obligation to plaintiff in a report of the financial affairs which was made to the board of directors of the defendant. One item of the statement of current liabilities read: "W. J. Stagg, balance of ten months, \$750."

This report was approved and filed. At another time, in answer to a demand for payment, the president of the association wrote to plaintiff:

Dear Stagg:—Replying to yours of March 11th, will say, I am fully aware of the conditions of the state fair association as you quote them. . . . We have got to create a sentiment in favor of boosting things, if we ever get anywhere. And you can't do it by giving it a black eye.

I have had several meetings, and have impressed on their minds that we must raise the money to pay off the indebtedness. Your account is among the others of which I am fully aware also. And if we can raise this money it will be one of the first taken care of. . . .

I have no fault to find with your services. . . . They will receive full commendation from me. . . .

If we have got to start in and have another fight among ourselves, as well as to try to raise this shortage, as for me, I will soon be done with it forever. So I say again let everybody boost. If you feel called upon to have an interview, let it be a boosting interview, and not a knocking one.

A report of an officer to his association is not an "account stated." It is a mere tabulation of facts and figures for the information of the corporation. The approval of such

a report does not estop the corporation to deny its accuracy. The president of the association was not shown to have authority to bind the corporation (Robins Min. Co. v. Murdock, 69 Kan. 596, 77 Pac. 596); and the president testified (1 Enc. Ev. 396) that about the time he wrote plaintiff he was struggling with the financial troubles of the fair and trying to pacify its most insistent creditors and avoid lawsuits.

You didn't have a stereotyped letter ready to send?

A. No, but I just wrote to Mr. Stagg without any intention of acknowledging his claim or anything of the kind, any more than at that time I would make a desperate effort to raise the money to take care of these back accounts, and Mr. Eastman and I had laid awake nights. . . .

Q. As a matter of fact, did you know about his claim at that time?

A. No, I didn't know about his claim at that time. . . .

Q. Then you didn't say you were going to pay him any \$750?

A. No, sir.

On the motion for a new trial, affidavits were offered to show that the financial report of the corporate liabilities was read to the board of directors—a matter which had been in dispute at the trial. We can assume that plaintiff's contention on that subject was true, but it does not change the net result.

Even if the president were shown to have authority to bind the corporation by his promise, that would be unavailing here, since there was no consideration given for such promise.

The judgment discloses no error, and the judgment is affirmed.

Petition for rehearing denied.

#### NOTE.

No case other than the reported case (STAGG v. KANSAS FREE FAIR ASSO. ante, 478) has been found which passes upon the effect of a report made by an officer to his company as an account stated which precludes the corporation from denying its accuracy. As appears from the reported case, the view is there taken that such a report is not an account stated, but is a mere tabulation of facts and figures for the information of the corporation, and that the approval of such a report does not estop the corporation to deny its accuracy.

STEPHEN MCNAMARA, Admr., etc., of Philip McNamara, Deceased,  
Respt.,

v.

ABRAHAM LEIPZIG, Impleaded, etc., Appt.

*New York Court of Appeals—November 25, 1919.*

(227 N. Y. 291, 125 N. E. 244.)

**Master and servant — liability of one hiring automobile for negligence of chauffeur.**

One who hires the use of an automobile furnished with a chauffeur from a garage keeper for a number of months is not liable for injuries caused by the negligent driving of the chauffeur, where he merely directs

the chauffeur as to when and where to go, while the garage keeper hires and pays him and contracts to furnish the fuel and upkeep of the car and procure insurance against accident.

[See note on this question beginning on page 484.]

APPEAL by defendant Leipzig from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Trial Term, Part IV., for New York County (Dugro, J.) in favor of plaintiff in an action brought to recover damages for the death of his intestate alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Joseph Force Crater with Mr. Alfred W. Meldon, for appellant:

The trial court erred in denying the defendant's motion to dismiss the complaint, made at the close of the evidence upon the ground that the plaintiff had failed to establish that the driver of the automobile was the servant of the defendant at the time of the accident, and in submitting that question to the jury over defendant's objection and exception.

Schmedes v. Deffaa, 214 N. Y. 675, 108 N. E. 1107, reversing 153 App. Div. 819, 138 N. Y. Supp. 931; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500; Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 53 L. ed. 480, 483, 29 Sup. Ct. Rep. 252; Maxmillian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Shearm. & Redf. Neg. § 162; Cannon v. Fargo, 222 N. Y. 328, 118 N. E. 796; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444; Lee v. Cranford Co. 182 App. Div. 191, 169 N. Y. Supp. 370; Weaver v. Jackson, 153 App. Div. 661, 188 N. Y. Supp. 609; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Loughrain v. Auto-phone Co. 77 App. Div. 542, 78 N. Y. Supp. 919, 13 Am. Neg. Rep. 182; Catlin v. T. B. Peddie & Co. 46 App. Div. 596, 62 N. Y. Supp. 76; Lewis v. Long Island R. Co. 162 N. Y. 52, 56 N. E. 548, 7 Am. Neg. Rep. 299; Murray v. Dwight, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Quarman v. Burnett, 6 Mees. & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969; Hanatsek v. Wilson, 161 App. Div. 634, 146 N. Y. Supp. 1016; Vasligato v. Yellow Pine Co. 158 App. Div. 551, 148 N. Y. Supp. 817; Nauyoks v. Otis Elevator Co. 176 App. Div. 623, 163 N. Y. Supp. 430; Stewart v. California Improv. Co. 131

Cal. 125, 52 L.R.A. 205, 63 Pac. 177, 724; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A.(N.S.) 1126, 92 Pac. 224, 14 Ann. Cas. 730.

It was error for the trial court to admit in evidence the policy of insurance against accidents issued to Abraham Leipzig.

Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854; Hordern v. Salvation Army, 124 App. Div. 674, 109 N. Y. Supp. 131; Haigh v. Edelmeyer & M. Hod Elevator Co. 123 App. Div. 376, 107 N. Y. Supp. 936.

Messrs. Almy, Van Gordon, Evans, & Kelly, for respondent:

Duffy was, at the time of the accident, under the direction and control of defendant, and was therefore his servant as a matter of law, for whose negligence defendant is responsible.

Hartell v. T. H. Simonson & Son Co. 218 N. Y. 345, 118 N. E. 255; Schmedes v. Deffaa, 153 App. Div. 819, 138 N. Y. Supp. 931, reversed in 214 N. Y. 675, 108 N. E. 1107; Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172; Wirth v. General R. Signal Co. 136 App. Div. 536, 121 N. Y. Supp. 66; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500; McInerney v. Delaware & H. Canal Co. 151 N. Y. 411, 45 N. E. 848, 1 Am. Neg. Rep. 135; Muldoon v. City Fireproofing Co. 134 App. Div. 453, 119 N. Y. Supp. 320; Callahan v. Munson S. S. Line, 141 App. Div. 791, 126 N. Y. Supp. 538; McCarthy v. McCabe, 131 App. Div. 396, 115 N. Y. Supp. 829; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Gorney v. New York, 102 App. Div. 259, 92 N. Y. Supp. 451; Baldwin v. Abraham, 57 App. Div. 67, 67 N. Y. Supp. 1079; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381.

The admission of the policy of insurance constituted no error.

*Simpson v. Foundation Co.* 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321, 2 N. C. C. A. 183; *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500; *Havholm v. Whale Creek Iron Works*, 162 App. Div. 354, 147 N. Y. Supp. 856; *Dunn v. Ruppert*, 166 App. Div. 390, 151 N. Y. Supp. 662, affirmed in 219 N. Y. 653, 114 N. E. 1065; *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Johnson v. Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283, affirmed in 159 N. Y. 555, 54 N. E. 1092; *Desbecker v. McFarlane*, 42 App. Div. 455, 59 N. Y. Supp. 439, affirmed in 166 N. Y. 625, 60 N. E. 1110; *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed in 173 N. Y. 598, 66 N. E. 1105; *Pescia v. Societa Co-Operativa*, 91 App. Div. 506, 86 N. Y. Supp. 952.

*Collin, J.*, delivered the opinion of the court:

The action is to recover damages for the alleged negligence of the defendant by which the death of plaintiff's intestate was caused. Code Civ. Proc. §§ 1902-1905. The judgment of the trial term consequent upon the verdict in favor of the plaintiff was affirmed by the nonunanimous decision of the appellate division.

Under the exceptions and the briefs of counsel the appeal presents the single question whether or not the evidence tended to prove the liability of the defendant for the negligence of the chauffeur in so driving the automobile in which the defendant was, against the plaintiff's intestate, as to cause his death. The evidence concerning the question is harmonious and without contradiction. The defendant was in the automobile under the conditions: An agreement in writing existed between the Concord Garage Company, the owner, or the representative of the owner, of the automobile, and the defendant, whereby the company rented the automobile and the service of the chauffeur to the defendant for the term of three months, to be used by him during the term at any hour of the day or night he desired; the company agreed "to engage and furnish a

chauffeur to operate and run said automobile during said period at its own cost and expense," and "to pay all expenses for gasoline used in propelling said automobile, together with any and all expenses for repairs or supplies used in said automobile," also to procure insurance covering the defendant from all liability by reason of accidents, injuries of any kind, or from any cause whatsoever; the defendant agreed "to pay for the use of the aforesaid automobile and services of a chauffeur during the period," a designated sum. The performance of the agreement had been entered upon and was being carried out at the time of the accident. In the performance the defendant exercised no control in the selection of the chauffeur, or over him, his wages, or the car, other than to direct him when and where to come with the car for the defendant, and where to transport him. The car, when not in the use of the defendant, was kept in the garage of the company, was there cared for and supplied with the necessities by the company, and there the chauffeur received calls of the defendant for the use of the car and the chauffeur. In the matters of coming to and leaving the defendant, and of taking him to the places directed by him, the chauffeur was under his directions. The defendant paid for the chauffeur's luncheon when using him at luncheon time, and paid the cost of having the car watched when in the defendant's use, and it was necessary for the chauffeur as well as defendant to leave it unattended. The accident happened upon a street specifically designated by defendant to be taken by the chauffeur.

In virtue of those facts this case falls into a class concerning which established legal principles are applicable and decisive. The defendant was not liable for the death of the intestate unless the facts tended to prove that the negligent chauffeur in driving was in a legal sense a servant of the defendant. There is not evidence that the defendant ac-

tively interfered with and caused the manner of driving, or had knowledge or notice that the chauffeur was incompetent or careless. It was essential, therefore, in order to establish a liability against the defendant, that the relation of principal and agent, or that of master and servant, should exist. *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Stevens v. Armstrong*, 6 N. Y. 435. The relation of

Master and servant—liability of one hiring automobile for negligence of chauffeur.

principal and agent obviously did not exist. The liability of the defendant depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction, and control of the master throughout all the details of the work, are essential. *Schmedes v. Deffaa*, 214 N. Y. 675, 108 N. E. 1107, decided upon the dissenting opinion of Miller, J., in the court below, 153 App. Div. 819, 138 N. Y. Supp. 931; *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500; *Scribner's Case*, 231 Mass. 132, 3 A.L.R. 1178, 120 N. E. 350; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017. A servant may, with his consent, through the agreement of his master, become for the occasion and time, and to the extent agreed upon, the servant of another. A master may loan or let to another a servant in his general employment, with the consent of the servant, as he may his implements, in such manner that the servant does the work of the other under the other's exclusive control, and therefore is, for the occasion and time, the servant of the other. On the other hand, the master may agree with another that the master shall himself perform the work of the other through his own

servant, the master retaining the service, direction, and control of the servant. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed. *Schmedes v. Deffaa*, 214 N. Y. 675, 108 N. E. 1107; *Hartell v. T. H. Simonson & Son Co.* 218 N. Y. 345, 113 N. E. 255; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; *Donovan v. Laing* [1893] 1 Q. B. 629, 63 L. J. Q. B. N. S. 25, 4 Reports, 317, 68 L. T. N. S. 512, 41 Week. Rep. 455, 57 J. P. 583. In the *Hartell Case* Judge Cuddeback said: "A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence." 218 N. Y. 349.

A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done or in what way it is to be done. If the servant remains subject to the general orders of the person who hires and pays him, he is still his servant, although specific directions may be given him by the other from time to time as to the work to be done. The other person has the right to exercise the degree of control of the servant essential to secure the fulfilment of the agreement between the master and himself. *Johnson v. Netherlands American Steam Nav. Co.* 132 N. Y. 576, 30 N. E. 505; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252; *W. S. Quinby Co. v. Estey*, 221 Mass. 56, 108 N. E. 908.

Those principles have been frequently applied to the letting or hiring of a carriage or wagon with



horses and a driver to be used for the conveyance of the hirer or his property from place to place. The judicial decisions hold clearly and almost uniformly that in the care and management of the horses and vehicle the driver does not become the servant of the hirer, but remains subject to the control of the general employer, and that therefore the hirer is not liable for his negligence in driving. *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 38 L.R.A. (N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444; *Little v. Hackett*, 116 U. S. 366, 379, 29 L. ed. 652, 656, 6 Sup. Ct. Rep. 391; *Quarman v. Burnett*, 6 Mees. & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969; *Hussey v. Franey*, 205 Mass. 413, 137 Am. St. Rep. 460, 91 N. E. 391; *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143; *Peach v. Bruno*, 224 Mass. 447, 113 N. E. 279; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Fenner v. Crips Bros.* 109 Iowa, 455, 80 N. W. 526, 6 Am. Neg. Rep. 504; *Sacker v. Waddell*, 98 Md. 43, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324; *Frerker v. Nicholson*, 41 Colo. 12, 13 L.R.A. (N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730. The vehicles, with the horses and driver, are let with the implied understanding that the driver remained the servant of the owner, and as such had the management of the property and exercised care and control over it. The driver and the property are engaged in the owner's business and subject to his management, direction, and control. It is inherent in and a part of that business that the person being transported should have the power

of direction as to where and when he should be taken.

The same rule is applied to the letting of an automobile and a chauffeur. *Shepard v. Jacobs*, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; *Wallace v. Keystone Auto Co.* 239 Pa. 110, 86 Atl. 699; *Gerretson v. Rambler Garage Co.* 149 Wis. 528, 40 L.R.A. (N.S.) 457, 136 N. W. 186.

In the present case the written agreement defines the relation and liabilities of the parties. It gave for a consideration to the defendant the use, at demand, of the automobile and a chauffeur to operate and run it for a certain period. The company possessed, managed, cared for, and supplied the automobile and selected, employed, and controlled the chauffeur who operated the car for it. The extent of the defendant's control was to direct the chauffeur when and where to come with the automobile, where to go, and where to stop. In obeying those directions the chauffeur was carrying out the company's work under the agreement. The defendant had no authority, management, or care over the automobile, or as to the manner in which it should be treated or driven. The chauffeur did the company's business in his own way, and the orders given him by the defendant merely stated to him the work which the company had arranged to do.

The judgment should be reversed, and the complaint dismissed, with costs in all the courts.

**Hogan, Cardozo, and Crane, JJ., concur.**

**Hiscock, Ch. J., and Chase and Andrews, JJ., dissent.**

## ANNOTATION.

### **Liability for negligence of chauffeur furnished with a car hired for an extended period.**

The cases on this subject seem hardly susceptible of classification, except as to their results. It will be observed

that the underlying question is whether the owner or the hirer of the machine is, for the purposes of the case,

the master of the chauffeur. Cases where a car is hired for particular occasions are excluded.

It will be seen that it is held in the reported case (*MCNAMARA v. LEIPZIG*, ante, 480) that the hirer of an automobile with the service of a chauffeur, for three months, to be used at any hour of the day or night he desires, the owner to pay all expenses for gasoline, repairs, and supplies, and to procure insurance covering the hirer from liability in case of accident, is not liable for the negligence of the chauffeur in running down plaintiff's intestate while driving the defendant.

A motion to set aside a judgment for the defendant was denied in a case where the defendant hired the auto truck which did the damage for which a recovery was sought, at a certain amount per week, from a motor-renting company which supplied the chauffeur and paid his wages, and paid for all repairs, oil, gasoline, etc., used, and the defendant had no power of selection of chauffeurs, and exercised no authority or control over the one furnished except to indicate to him where he was to go, and the chauffeur had no duties except the operation of the truck, the loading and unloading of goods being performed by two employees of the defendant furnished for that purpose alone. The court remarked, however, that the decisions under such conditions were extremely close. *Waldman v. Picker Bros.* (1912) 140 N. Y. Supp. 1019.

Where an express company hires an electric van with a chauffeur, by the month or day (it not clearly appearing which), and the chauffeur has nothing to do with the putting of the parcels into the vehicle or delivering them, a servant of the express company performing these duties, it was held not liable for an injury resulting from the operation of the van, it appearing that at the time all of the packages had been delivered and the machine had returned to the express company's office, where the employee of that company had been left, and the chauffeur was, at the time of the accident, on his way either to lunch or to have the vehicle repaired, as the chauffeur was

not ad hoc the hirer's servant. *Bohan v. Metropolitan Exp. Co.* (1907) 122 App. Div. 590, 107 N. Y. Supp. 530. The court said: "In the present case, if the accident had actually occurred while the express packages were being delivered, it might be that the defendant would be liable under the rule laid down in the last two cases [cases involving liability for injuries occurring while goods were being delivered by hired van]; but even then it might be doubtful, inasmuch as the chauffeur had nothing whatever to do with the handling of the goods of the defendant or making collections. All he did was to obey the directions as to where he should take the vehicle. *Lewis v. Long Island R. Co.* (1900) 162 N. Y. 52, 56 N. E. 548, 7 Am. Neg. Rep. 299; *Johnson v. Netherlands American Steam Nav. Co.* (1892) 132 N. Y. 576, 30 N. E. 505. But, as we have already seen, at the time of the accident he had delivered all the packages for the defendant, and was not then engaged in doing any work for it; he was then either taking the vehicle to the transportation company's office to have it repaired, or else was engaged in his personal business, and in neither case can it be said that he was acting as the servant of the defendant or engaged in its business. The defendant did not own the vehicle, had no right to inspect it, or give directions as to repairs. Under such circumstances I know of no rule of law under which defendant can be held liable. When the chauffeur left the defendant's office for the purpose of going back to the transportation company's office to have the vehicle repaired, or to get his lunch, he ceased to be the servant of the express company, because he was not then engaged in doing its business, and for his negligence in operating the vehicle while thus engaged the express company is not liable."

In *Macale v. Lynch* (1920) — Wash. —, 188 Pac. 517, it was held that the owner of a truck was liable for the negligence of the chauffeur as he was not in the exclusive control of the hirer, where the hirer engaged a truck and driver for so much per hour to be used in delivering potatoes from car

to warehouse to various retail dealers, the hirer meeting the truck and driver, giving the latter instructions as to where to go and going with him. Judgment for the plaintiff, however, was reversed on another ground.

It may be noted that a general contractor who receives a day ahead, from a customer, notice of the deliveries it is ready to make and who assigns the trucks and the drivers and the route, is liable for the negligence of the chauffeur, and the customer is not liable. *Grastataro v. Brodie* (1919) 189 App. Div. 779, 179 N. Y. Supp. 324.

On the other hand, judgment in favor of one injured by the negligence of the driver of a truck, against the hirer of the truck, was affirmed, where the owner of the truck had agreed with such hirer, who was a seller of paint, that he would furnish a truck and driver for the purpose of delivering goods for such seller at so much per week, the owner to keep the truck in repair and supply the oil and gasoline. The only direction the owner gave to the driver was to report to such seller. The arrangement had been in force about three years at the time of the accident, during all of which time the same driver drove the truck except when, for short intervals, the owner would send another driver. The court said: "The true test in determining who the master is, in a case of this character, is not who actually did control the actions and movements of the servant in doing the work, but who had the right to control. . . . We hold that under the evidence the question as to whether the driver of the truck was, at the time of the injury to appellee, the servant of appellant, was properly submitted to the jury, and that the verdict is sustained by the evidence." *Sargent Paint Co. v. Petrovitzky* (1919) — Ind. App. —, 124 N. E. 881.

In *Burns v. Southern P. Co.* (1919) — Cal. App. —, 185 Pac. 875, the court reversed a judgment of nonsuit in favor of the hirer of a motor truck where the death of one riding on the truck had occurred through the negligence of the chauffeur, and affirmed a judgment of nonsuit in favor of the owner of the truck. The hirer conducted a

ranch and fruit farm, and all that is reported as to the length of the hiring is the statement that "the defendant Prinderville was a chauffeur engaged in the driving of a truck belonging to the defendant Diggs, and was in the general employ of said defendant, but at the time in question both chauffeur and truck had been hired by defendant Diggs to defendant Jackson, and were under the exclusive control and direction of the latter."

Where a truck owner let trucks and furnished chauffeurs to a company, with which such company made its own deliveries, the chauffeurs reporting night and morning to the truckman's garage, it was held that the hirer was liable for damages for personal injuries resulting from the negligence of the chauffeur furnished to it by the truck owner, although the contract provided that the relation of master and servant should not exist between the hirer and the employees of the truck owner to the end that no claim should be made against such hirer for the negligence of such employees, that the truck owner should indemnify the hirer in that behalf, and take out indemnity insurance in its favor. *Finegan v. H. C. & A. I. Piercy Contracting Co.* (1919) 189 App. Div. 699, 178 N. Y. Supp. 785.

In *Braxton v. Mendelson* (1920) 190 App. Div. 278, 179 N. Y. Supp. 845, it was held that the owner of trucks who employed and paid the chauffeurs was not liable for the negligence of the chauffeur of one of them, where, under a yearly contract, such owner furnished the trucks to work for the day for a dairy company, the trucks being continuously in possession of the dairy company and under its sole control, except when being repaired at the owner's expense. The chauffeurs were hired and paid by the truck owner, but took their orders from the dairy company, and the truck in question was engaged in the dairy company's business when the accident occurred. The court said: "Under these conditions the rules laid down in *McNamara v. Leipzig*, 227 N. Y. 291, 125 N. E. 244 (November 25, 1919), become applicable. Here the work being performed

was that of the dairy company, to which the services of defendant's chauffeur had been let, with the sole use of the truck, and the chauffeur was doing the work of the dairy company, under its exclusive control, and therefore for the occasion and time was the servant of the dairy company. It follows that the implied finding of the jury that the chauffeur was the servant of defendant is without evidence to support it."

In *Baum v. Link* (1920) 110 Misc. 297, 180 N. Y. Supp. 468, it was held to be error to dismiss a complaint against the hirer of an automobile based on the negligence of the chauffeur, where the contract between the owner and the hirer provided that the hiring should be of the car with the driver for one year "to do such labor and perform such services at such time and in such place" as the hirer should from time to time reasonably direct, the hirer to have the privilege of paying the chauffeur and to charge the amount to the sum to be paid by him under the contract; although the owner testified that the chauffeur was under his direction and that he never took any orders from the hirer. The court distinguished the reported case (*McNAMARA v. LEIPZIG*, ante, 480) as follows: "In the *McNAMARA CASE* it was, however, shown that the owner of the automobile agreed to pay the expenses for gasoline used in propelling said automobile, together with all expenses for repairs and supplies used for said automobiles; whereas, in the present case, the owner of the automobile did not agree to pay for any expenses or supplies used in said automobile, except that he agreed that the automobile 'at all times shall be in good serviceable condition, and that he will procure the necessary insurance, compensation, and otherwise.' Moreover in the *McNamara Case* the chauffeur was under the defendant's direction only in the matter of coming to and leaving the defendant, and of taking him to the place directed by him, while in the present case the contract provides that the 'automobile wagon and driver will be fit for the purposes of the said A. Langstadter's

business, . . . and that they will obey the reasonable directions of the said A. Langstadter and perform such labor as he shall from time to time direct.'"

Where the board of county commissioners made a contract for the use of an automobile on occasions of visits to the county asylum by its members, the county agreeing to pay for the upkeep of the machine and pay the wages of the chauffeur, in consideration of which its board of commissioners were to have the exclusive use of the automobile when called for by them, and on a trip for the commissioners an accident occurred from the negligence of the chauffeur, who served the owner as dining room boy and driver of the car, it was held that at the time of the accident the car was, in legal contemplation, in the possession of the chauffeur as the servant of the board of commissioners, and not of the owner. *Core v. Resha* (1917) 140 Tenn. 408, 204 S. W. 1149.

A logging contractor was held liable for an accident caused by the negligence of the driver of a truck, where its owners were to furnish it and the driver, and the contractor was to furnish oil and gas and any repairs, and the truck's time was to be with the driver's time; if the driver worked more than eight hours, the truck was to be more than eight hours; that price was to be an eight-hour price, and over that the truck was to draw the same ratio. The court said: "To our minds, the question of control of operation is the determining factor in this case. The respondents in the course of business had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, ipso facto, have effected a transfer of responsibility. If such be the fact, we feel that respondent's contention that the hirer stood, in relation to the law of this case, as if he had purchased the truck and hired the driver, must logically follow. There being no disputed facts to go to the jury, the trial court did not err in so deciding as a

matter of law." *Olson v. Veness* (1919) 105 Wash. 599, 178 Pac. 822.

Judgment for the plaintiff was reversed where he sued for personal injuries caused by an automobile truck, and the evidence showed, without contradiction, that the truck was owned by the defendant, which paid the wages of the chauffeur; that the truck, however, was rented out to another concern, the Turner Company, which was engaged in snow removal; that the chauffeur took his instructions from that company; and that, in point of fact, although his wages were, under the agreement, to be paid by the defendant, he, personally, had been hired for this job by the Turner Company. The court said: "Under the circumstances, if there is any liability, it is that of the Turner Company and not of the defendant." *Diamond v. Sternberg Motor Truck Co.* (1914) 87 Misc. 805, 149 N. Y. Supp. 1000.

Though the nonresponsibility of a motor company for the negligence of a chauffeur was held in *De Perri v. Motor Haulage Co.* (1918) 185 App. Div. 384, 173 N. Y. Supp. 189, not to be a necessary legal inference from the terms of an agreement, purporting in its introductory part to be for the hauling of material from the plant of a road contractor to a job on which it was engaged, by which the motor company was to furnish several trucks with drivers, gasoline, and oil at a specified sum per day, "to carry on your (road contractor's) work,"—the court observing that the contract was susceptible of either construction, and that the course of dealing under it was a helpful guide in reaching a correct conclusion—a judgment against the motor company in favor of an employee of the road contractor, injured while riding home in a truck after his

day's work, was reversed, it appearing that no control over the driver was exercised by anyone except the road contractor; and that the motor company, upon learning that the road contractor's men were riding on the trucks, instructed the drivers not to haul any more of them without specific orders from the road contractor, and that a representative of the latter told, or at least requested, the drivers to carry the men during a street railway strike. The court said that the uncontradicted testimony that the trucks were used for everything that the road contractor directed was inconsistent with the plaintiff's claim that the motor company had merely undertaken, as independent contractor, to haul the material from the plant to the job; and that a provision of the contract for the payment of the motor company, whether the trucks were in use or not, furnished strong evidence against the plaintiff's view. The instructions which the motor company gave with reference to carrying the men were regarded as rather emphasizing its understanding that the drivers were subject to the orders of the road contractor. Finally, the court said that, assuming that the contract was for the transportation of material from the plant to the job, the hauling of the workmen was in the interest of the road contractor, not of the motor company.

In *Neuschaefer v. Colonial Sand & Stone Co.* (1920) 180 N. Y. Supp. 413, it does not appear that the hiring was for more than a day.

For validity, construction, and effect of statutes which make owner responsible, or create a lien for injury or damage inflicted by another operating an automobile, see the annotation to *Wolf v. Sulik*, 4 A.L.R. 356.

B. B. B.

CLARA BERG, Appt.,

v.

W. A. JOHNSON.

Arkansas Supreme Court — June 23, 1919.

(— Ark. —, 213 S. W. 393.)

**Deed — to partnership — effect.**

1. Conveyance of real estate to a partnership, in the name of which only the surname of one partner is mentioned, vests the legal title in him.

[See note on this question beginning on page 500.]

**Courts — transfer to equity — reformation of deed — absence of pleading.**

2. An action to recover possession of real estate should not be transferred to equity on the ground that reformation of a deed so as to show the true date of the execution sale under which it was executed was necessary, if the pleadings do not show any defect in the deed and there is no prayer for equitable relief.

**Reformation of instrument — necessity.**

3. An action to recover real property need not be transferred to equity to reform a deed in plaintiff's chain of title, which runs to a partnership in which the surname of only one partner appears, if there is no prayer for reformation and a partition suit has settled the rights of all parties claiming equitable interests in the property.

**Tax — sale — defect in certificate of acknowledgment — effect.**

4. The use of a portion of the name of the grantee as part of the name of the clerk in the certificate of acknowledgment by the clerk of court to a tax deed does not defeat the deed or require reformation, if it is clear from the deed and acknowledgment that the deed was executed and acknowledged by the clerk.

**Laches — as defense to action to recover real estate.**

5. The plea of laches is not available in an action to recover possession of real estate where no equitable relief is sought in the complaint.

[See 9 R. C. L. 882.]

**Adverse possession — sufficiency of showing of title.**

6. Possession of real estate under tax deed for a period sufficient to give title by adverse possession is not shown by an affidavit filed in support of a petition to recover possession of the land, which merely alleges that defendant claims the land under a tax sale, without showing the date of sale or how long defendant had been in possession.

**Pleading — effect of allegation.**

7. An allegation in a complaint to recover possession of real estate as to the time of defendant's possession is not binding upon plaintiff so far as it relates to defendant's plea of the Statute of Limitations.

**Jury — right to — action to recover real estate.**

8. A plea of the Statute of Limitations in an action to recover possession of real estate raises an issue upon which plaintiff is entitled to trial by jury.

[See 9 R. C. L. 916, 917; 16 R. C. L. 215.]

**APPEAL** by plaintiff from a decree of the Chancery Court for Clay County (Wheatley, Ch.) in favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Mr. F. G. Taylor, for appellant:

Neither the Statute of Limitation of two years nor the Statute of Limitation of seven years affects the claim of the plaintiff in this cause.

Deane v. Moore, 105 Ark. 309, 151 S. W. 286.

Title by adverse possession cannot be built up against a married woman. Harvey v. Douglass, 73 Ark. 221, 83

S. W. 946; *Rowland v. McGuire*, 64 Ark. 412, 42 S. W. 1068; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *Hershy v. Latham*, 42 Ark. 305; *Kirby*, Dig. § 5056.

Plaintiff is not barred by the doctrine of laches.

*McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84, 69 S. W. 56; *Taylor v. Leonard*, 94 Ark. 122, 126 S. W. 387; *Rowland v. McGuire*, 67 Ark. 320, 55 S. W. 16; *Anders v. Roark*, 108 Ark. 248, 156 S. W. 1018; *Waits v. Moore*, 89 Ark. 19, 115 S. W. 981; *Galloway v. Battaglia*, 133 Ark. 441, 202 S. W. 836.

The taxes should have been uniform throughout the county, otherwise the tax sale is void.

*Hutchinson v. Ozark Land Co.* 57 Ark. 554, 38 Am. St. Rep. 258, 22 S. W. 173.

If the firm style contains one or more, but not all the parties, a conveyance to the partnership in such style vests the legal title in the partner or partners whose names appear, but in trust for the firm, and such named partners can convey title to the property.

30 Cyc. 432; *Gossett v. Kent*, 19 Ark. 603; *Cole v. Mette*, 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407; *Spaulding Mfg. Co. v. Godbold*, 92 Ark. 63, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; *Morse v. Carpenter*, 19 Vt. 613.

Proof of possession without showing how or by what act it was maintained is not evidence of adverse possession.

*Brookfield v. Stephens*, 40 Ark. 366.

The burden of proof is on the person who claims title by adverse possession.

*McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Nicklance v. Dickerson*, 65 Ark. 422, 46 S. W. 945; *Calhoun v. Moore*, 79 Ark. 109, 94 S. W. 931; *Gaither v. Gage*, 82 Ark. 51, 100 S. W. 80; *Maney v. Dennison*, 110 Ark. 571, 163 S. W. 783; *Newman v. Peay*, 117 Ark. 579, 176 S. W. 143; *Love v. Cowger*, 130 Ark. 445, 197 S. W. 853; *Jones v. Temple*, 126 Ark. 86, 189 S. W. 847.

*Mr. G. B. Oliver*, for appellee:

The grantee in the sheriff's deed was *Hecht & Brother*. This conveys an equitable title only, and will not sustain an action in ejectment.

*Percifull v. Platt*, 86 Ark. 456; *Cooper v. Newton*, 68 Ark. 150, 56 S. W. 867; *Hendren v. Wing*, 60 Ark. 561, 46 Am. St. Rep. 218, 31 S. W. 149; *Spaulding Mfg. Co. v. Godbold*, 92 Ark.

63, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; 30 Cyc. 431.

The two years' Statute of Limitations runs against married women.

*Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623; *Sparks v. Farris*, 71 Ark. 117, 71 S. W. 255, 945.

In fact, in both law and equity, a demurrer to the complaint on the ground that it showed on its face that the cause of action was barred by limitations would have been sustained.

*McGehee v. Blackwell*, 28 Ark. 27; *Evans v. Pettus*, 112 Ark. 572, 166 S. W. 955; *Collins v. Mack*, 31 Ark. 684; *Hutchinson v. Hutchinson*, 34 Ark. 164; *St. Louis, I. M. & S. R. Co. v. Brown*, 49 Ark. 253, 4 S. W. 781; *Anthony v. St. Louis, I. M. & S. R. Co.* 108 Ark. 219, 157 S. W. 394; *Rogers v. Ogburn*, 116 Ark. 233, 172 S. W. 867; *Mueller v. Light*, 92 Ark. 522, 31 L.R.A.(N.S.) 1013, 123 S. W. 646.

*McCulloch*, Ch. J., delivered the opinion of the court:

Appellant instituted this action against appellee in the circuit court of Clay county to recover possession of a tract of land containing 80 acres in that county, alleged to be in the unlawful possession of appellee. The cause was transferred to the chancery court over the objection of appellant, and proceeded to a final decree in favor of appellee.

Appellant's chain of title runs as follows: The land was purchased from the state of Arkansas in July, 1872, by a copartnership composed of P. H. Young, James Surridge, and Joseph T. Fisher, and was, in the year 1877, sold under execution against said purchaser, and at the execution sale was purchased by *Hecht & Brother*, a copartnership composed of *Levi Hecht* and *Samuel Hecht*. Upon the expiration of the statutory time for redemption, the sheriff of Clay county executed a deed pursuant to the sale, which purported to convey the land to the copartnership by that name without specifying the individual names of either of the partners. *Samuel Hecht* died intestate, leaving appellant and other children as his heirs at law, and in a partition suit between said heirs and *Levi Hecht* the

tract in controversy was allotted to the heirs of Samuel Hecht. The other heirs of Samuel Hecht conveyed their interest to appellant.

Appellee claims title under a tax sale in the year 1889, at which sale J. M. Stephens became the purchaser. Stephens conveyed the land in the year 1893 to H. H. Williams, and Williams conveyed to appellee by deed dated November 28, 1913. This action was begun on December 15, 1915.

The first question presented is whether or not the circuit court erred in transferring the cause to the chancery court. The ruling of the court in transferring the cause is defended by learned counsel for appellee, first, on the ground that there is a defect in the sheriff's deed under the execution sale, in that it recites the sale to have been made by the officer after the return day of the writ, and that a reformation of the deed so as to show the true date of the sale is essential to appellant's cause of action for the recovery of the land. The answer to this contention is that the pleadings do not show any defect in the sale with respect to the sale being made after the return day of the writ, and there is no prayer for equitable relief. There was an amendment to the complaint, substituting a new copy of the sheriff's deed and alleging that the copy originally exhibited contained the wrong date; but it is not alleged that there was any error in the recitals of the deed concerning the date of sale, nor is there any prayer for reformation.

Courts—transfer to equity—reformation of deed—absence of pleading.

Next, it is urged that the sheriff's deed of conveyance to the copartnership under that name (Hecht & Brother), without specifying the individual names of either of the partners, conveyed only the equitable title, and that it was essential to appellant's cause of action for the case to be transferred to equity so that the deed could be reformed. Again, it may be said in answer to this contention that there was no prayer

for a reformation, nor was that essential to appellant's right of action, for the reason that the deed conveyed the legal title to the

Deed—to partnership—effect.

copartner whose surname was stated, and the subsequent partition suit settled the rights of all other parties who had an equitable interest. In Percifull v. Platt, 36 Ark. 456, it was decided that a deed to a partnership under the firm name, which expressed the surname and initials of one of the copartners, operated as a conveyance of the legal title to the copartner so named, and in Cole v. Mette, 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407, it was held that a conveyance to a copartnership under the firm name, which expressed the surnames, but not the Christian names, nor initials, of the copartners, was sufficient to convey the legal title to both of the copartners. In disposing of that question in the case of Cole v. Mette, the court approved the case of Fletcher v. Mansur, 5 Ind. 267, where it was held that "a deed to one person, describing him by his surname only, is not for that reason void."

Reformation of instrument—necessity.

In the present case only the surname of one of the partners was stated in the conveyance, and, under the doctrine of the cases just referred to, that was sufficient to convey the legal title to him. It became just a question of identification, and the only difference between this case and the case of Cole v. Mette is a matter of degree of proof of identification; it being said in the opinion in that case that the fact that the surnames of both of the partners being mentioned afforded better means of identification than where the name of only one of them was mentioned. It is clear, therefore, that appellant showed in her pleadings a legal title to the land and the right to immediate possession, and was entitled to sue at law.

It is further contended that appellee set up sufficient grounds in his answer to justify the transfer



of the cause to equity, in that the original tax deed under which he claimed was imperfect, because the name of the clerk of the court was not specified in the certificate of acknowledgment. W. E. Spence was the county clerk who executed the deed, and J. M. Stephens was, as before stated, the purchaser. The deed was in the form specified by statute and mentioned the name of the grantee and the name of the officer who made the conveyance. The certificate of acknowledgment followed the form specified in the statute, but erroneously mentioned the name of the clerk as "W. E. Stephens." It was certified, however, that the party who appeared and executed the conveyance was the clerk of the county court, who was personally known to the officer, and acknowledged that he executed the conveyance "as clerk of the county court of said county." The only error in the certificate of acknowledgment was in stating the name of the clerk, and this was an obvious clerical error, which did not defeat the conveyance; for it is

**Tax—sale—defect in certificate of acknowledgment—effect.**

clear from the deed and acknowledgment that the deed was executed by W. E. Spence as clerk of the county, and was duly acknowledged by him before the officer.

There were no grounds for transferring the cause to the chancery court, as appellant had based her right of action on a legal title to the land, and sought only a legal remedy, and appellee offered no equitable defense, except the plea of laches, but that plea was not available

**Laches—no defense to action to recover real estate.**

where no equitable relief was sought in the complaint. *Rowland v. McGuire*, 67 Ark. 320, 55 S. W. 16.

It is insisted that the complaint and one of the exhibits show affirmatively that appellant's right of action was barred by limitation, and that for that reason the error in transferring the cause to chancery was harmless. An examination of

the record, however, does not sustain that contention. The complaint sets out appellant's chain of title, and contains an allegation that appellee "is in the unlawful possession of said lands, and has been for two years past." The complaint contains no allegation with respect to the character of appellee's possession, except that it is unlawful. It is not alleged that the possession was adverse, or that it was held under any claim of ownership under a tax deed, or otherwise. It is true there was an affidavit filed with the complaint which was made by appellant's attorney, stating that "she is informed and believes" that appellee claims the land in controversy "by reason of a sale of said land for the taxes on the same," and that appellant had tendered to appellee "a sum of money equal to the amount of taxes and costs first paid for said land, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of improvements made on such land." The affidavit does not recite the date of the tax sale or deed, nor does it contain any allegation that appellee was in possession under a tax deed. The affidavit does not constitute a part of the pleadings in the case; but, even if it were so treated, it is not sufficient to show on its face, either by itself or in connection with the allegations of the complaint, that appellee occupied the premises adversely for two years under a tax deed. **Adverse possession—sufficiency of showing of title.** For that reason it is not correct to say that the complaint shows affirmatively that appellant's right of action is barred. It is undisputed that appellee claims the land under a tax deed, but the testimony does not show beyond controversy that there was an adverse holding under that deed for two years before the commencement of this action.

The allegation in the complaint with respect to the unlawful possession of appellee for two years before

the commencement of the action was not necessary, so far as the length of time of said possession was concerned, to a statement of appellant's cause of action for the recovery of the land, and was included merely for the purpose of setting forth the facts upon which a recovery of the rents and profits could be based. On the trial of the action it would operate as an admission on the part of appellant as to the length of time appellee had been

**Pleading—effect of allegation.**

in possession, but she was not conclusively bound by the allegation so far as it related to appellee's plea of the Statute of Limitations. Appellant was entitled to a trial by jury in a court of law on the issue raised by appellee's plea of the Statute of Limitations, and this privilege was denied by the transfer to equity.

The decree is, therefore, reversed, and the cause is remanded, with directions to remand the cause to the

Circuit Court for further proceedings not inconsistent with this opinion.

**NOTE.**

The question considered in the reported case (BERG v. JOHNSON, ante, 489), whether a deed in which a partnership is named as grantee, without specifying the individual names of the partners, is effectual to pass the legal title, is discussed in a note in 1 A.L.R. 564, on "Effect of designating grantee in deed or mortgage by firm name," in which it appears that while the authorities agree that a partnership, as such, cannot take or hold the legal title to real estate, there is a difference of opinion as to whether or not the legal title passes to the members of the firm, or, if it does pass, whether it vests in all the partners, or only in those whose surnames appear in the partnership title.

Since the compilation of such note, no other decisions have been reported.

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ELIZA CHILES et al., Appts.,  
v.  
FT. SMITH COMMISSION COMPANY et al.

*Arkansas Supreme Court—July 14, 1910.*

(— Ark. —, 216 S. W. 11.)

**Explosion — "res ipsa loquitur" — wrecking of building to injury of employee.**

1. The maxim "res ipsa loquitur" is applicable to the wrecking of a building to the injury of an employee of a tenant by an explosion from unknown cause, where all of the fixtures and appliances containing the gas and ammonia in the building, which alone might have caused the explosion, are exclusively under the control of the owner of the property, against whom the action is brought.

[See note on this question beginning on page 500.]

**Pleading — negligence — conclusions of law.**

2. Allegations of negligence resulting in personal injuries, which are in effect mere conclusions of law, are not sufficient to state a cause of action.

[See 21 R. C. L. 440, 499.]

**Negligence — effect of maxim "res ipsa loquitur."**

8. The doctrine of "res ipsa loquitur" does not dispense with the requirement that the one alleging negligence must prove it, but relates only to the mode of proving it.

[See 20 R. C. L. 187 et seq., 194.]

**APPEAL** by plaintiffs from a judgment of the Circuit Court for Sebastian County (Little, J.) sustaining a demurrer to and dismissing the complaint in an action brought to recover damages for the death of plaintiffs' intestate, alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. T. J. Wear for appellants.  
Messrs. Hill, Fitzhugh, & Brizzolara  
and Daily & Woods, for appellees:

No negligence was charged in the complaint.

Fain v. Goodwin, 35 Ark. 109; Lawrence v. Meyer, 35 Ark. 104; Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Keith v. Freeman, 43 Ark. 296; Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 S. W. 348; Keller v. Vowell, 17 Ark. 445; Lott v. Porter, 97 Ark. 97, 138 S. W. 180; Donnelly v. Wheeler, 34 Ark. 111; Chicago, R. I. & P. R. Co. v. Smith, 94 Ark. 524, 127 S. W. 715; Wood v. Drainage Dist. 110 Ark. 416, 161 S. W. 1057; Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 S. W. 709.

One of the essential elements of the rule "*res ipsa*" is that the accident could or would not have occurred under ordinary circumstances except through the negligence of the defendant.

Minneapolis General Electric Co. v. Cronon, 20 L.R.A. (N.S.) 816, 92 C. C. A. 345, 166 Fed. 651; Zahniser v. Pennsylvania Torpedo Co. 190 Pa. 350, 42 Atl. 707; Keenan v. McAdams & C. Elevator Co. 129 App. Div. 117, 113 N. Y. Supp. 343.

The term "*res ipsa*" does not apply to explosions of gas or fires growing out of same.

Thornton, Oil & Gas, 2d ed. §§ 610, 611; Bishop v. Brown, 14 Colo. App. 535, 61 Pac. 50; Branham v. Buckley, 158 Ky. 848, 166 S. W. 618, Ann. Cas. 1915D, 861; Huff v. Austin, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864; Dickinson v. Stuart Colliery Co. 71 W. Va. 325, 43 L.R.A. (N.S.) 335, 76 S. E. 654; 29 Cyc. 594; 5 Thomp. Neg. § 7686; Fuchs v. St. Louis, 167 Mo. 620, 57 L.R.A. 136, 67 S. W. 610; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; Reiss v. New York Steam Co. 128 N. Y. 103, 28 N. E. 24; Lucid v. E. I. Du Pont De Nemours Powder Co. L.R.A. 1917E, 189, note; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233; Smith v. Boston Gaslight Co. 129 Mass. 318; Washington Gaslight Co. v. Eckloff, 4 App. D. C. 174; McGahan v. Indian-

apolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Strawbridge v. Philadelphia, 13 Phila. 173; Moore v. West Virginia Heat & Light Co. 65 W. Va. 552, 64 S. E. 721; Topolski v. Chicago Heights Gas Co. 150 Ill. App. 126; Western Coal & Min. Co. v. Garner, 87 Ark. 190, 22 L.R.A. (N.S.) 1183, 112 S. W. 392; Allegheny Improv. Co. v. Weir, 96 Ark. 500, 132 S. W. 462; St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 529; Waters-Pierce Oil Co. v. Burrows, 77 Ark. 74, 96 S. W. 336; Waters-Pierce Oil Co. v. Knisel, 79 Ark. 617, 96 S. W. 342.

Plaintiffs were bound to show that the explosion resulted from the negligence of the defendant or its servants, and this they failed to show at the trial.

Schaum v. Equitable Gaslight Co. 15 App. Div. 74, 44 N. Y. Supp. 284, 2 Am. Neg. Rep. 204; People's Gaslight & Coke Co. v. Porter, 102 Ill. App. 461; Hammerschmidt v. Municipal Gas Co. 114 App. Div. 290, 99 N. Y. Supp. 890; Brunner v. Blaisdell Bros. 170 Pa. 25, 32 Atl. 607; Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224; Earle v. Arbogast, 180 Pa. 409, 36 Atl. 923, 1 Am. Neg. Rep. 677; Barrickman v. Marion Oil Co. 45 W. Va. 634, 44 L.R.A. 92, 32 S. E. 327; Thornton, Gas & Oil, 3d ed. § 743; Woodburn v. Union Light, Heat & P. Co. 164 Ky. 29, 174 S. W. 730; Marshall Window Glass Co. v. Cameron Oil & Gas Co. 63 W. Va. 202, 59 S. E. 959; Moore v. West Virginia Heat & Light Co. 65 W. Va. 552, 64 S. E. 721.

Smith, J., delivered the opinion of the court:

Appellants are the widow and children of J. C. Chiles, and brought this suit as such to compensate the loss sustained by them in the death of their intestate. For their cause of action the following facts are alleged: That the defendants were conducting a mercantile business at No. 119 Rogers avenue, in the city of Fort Smith, in a four-story brick building, of which they had joint

control and management. Other allegations of the complaint are as follows:

"That said defendants were in joint control of all of the pipes, pumps, tanks, machinery, and all other appliances that were used by defendants in their businesses in furnishing the gas and ammonia that were used for the various purposes of the defendants in said building.

"That there were large amounts of ammonia used by said defendants in said building, and by reason thereof they had large amounts or quantities of ammonia stored in pipes, tanks, and vats in the basement of said building, and they also had large amounts and quantities of natural gas circulating through and into said building by means of large pipes.

"That on or about 1:50 P. M., on the 22d day of October, 1918, through the negligence of the defendants, their agents, servants, and employees, in some manner unknown and unexplained to plaintiffs, the gas and ammonia that were being used by said defendants in said building were exploded, and were set on fire, and said building was wrecked and burned up and demolished, and the said J. C. Chiles, deceased, who was in said building at the time of said explosion, and when said gas and ammonia were set on fire, was killed by reason of said explosion and fire by the gas, ammonia, and by fire which suddenly filled said building, before he was able to make his escape from the fourth floor of said building, where he was at work as an employee of the W. J. Echols Company, wholesale grocers.

"That at the time of the said explosion and fire the said J. C. Chiles, deceased, was in the employ of the W. J. Echols Company, wholesale grocers, and when the explosion and fire occurred he was in a room or on the fourth floor of the said building of the defendants aforesaid, which room or floor the said W. J. Echols Company, wholesale grocers, had

rented or reserved from the defendants, and into which the said W. J. Echols Company, wholesale grocers, had the right, under its contract with the defendants, to enter with its employees to transact its business on said fourth floor of said building, and it also had the right of ingress and egress to said building, and the said defendants, by reason of their said contract with the said W. J. Echols Company, wholesale grocers, owed it and its employees a contractual duty and ordinary care not to injure or kill them by reason of an explosion of the said gas and ammonia, or the burning of the gas and ammonia in said building, which were used in their building, by their negligence or by the negligence of either of them.

"That at the time that said J. C. Chiles, deceased, was killed by said explosion and by the burning of said gas and ammonia in said building, he was at work for the said W. J. Echols Company, wholesale grocers, and was in the due scope or course of his employment, and was using due and proper care and caution for his own safety and protection at the time he was killed, and that it was through no fault of his that said explosion occurred, or that said gas and ammonia were set on fire, or that he was killed.

"That the defendants owed the said J. C. Chiles, deceased, a contractual duty, as aforesaid, not to injure or kill him by their negligence in the manner as aforesaid.

"That plaintiffs do not know the exact act or acts of negligence of the defendants that caused said explosion and caused said gas and ammonia to be set on fire, and they are unobtainable by these plaintiffs, as said building, pipes, pumps, tanks, vats, machinery, and appliances in and being used in said building were in the sole and exclusive control and management of the defendants, their agents, servants, and employees, as were also the gas and ammonia that were in said building, and that were being used

by said defendants in their business in said building at the time.

"That it was through the negligence of the defendants that said explosion occurred, and said gas and ammonia were set on fire, and that said building was wrecked and burned up and demolished, and that said J. C. Chiles, deceased, was killed.

"That said explosion would not have occurred, and said gas and ammonia been set on fire, and said building would not have been wrecked and burned up and demolished, and the said J. C. Chiles, deceased, been killed, if the defendants had used due and proper care in the management and control of the pipes, pumps, tanks, vats, machinery, and appliances that were used by said defendants in their business in furnishing the gas and ammonia that were used for the various purposes of the defendants in said building, and if they had used due and proper care in the storing and handling of the said gas and ammonia that were used by said defendants in said building.

"That the act or acts of negligence upon the part of the defendants that caused said explosion, and caused said gas and ammonia to be set on fire, and said building to be wrecked, burned up, and demolished, and caused the said J. C. Chiles, deceased, to be killed, were and are known to the defendants."

A demurrer was filed on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants or either of them. The demurrer was sustained and the complaint dismissed, and this appeal has been prosecuted to review that action.

Appellants first insist that negligence on the part of the defendants is sufficiently charged to constitute a cause of action; and the second contention is made that, if this be not true, sufficient facts are alleged to make applicable the maxim "*res ipsa loquitur*."

We do not agree with the first

contention. The allegations in regard to negligence are in effect conclusions of law, and if the maxim "*res ipsa loquitur*" is not applicable the complaint is demurrable. <sup>Pleading—negligence—conclusions of law.</sup>

Ballard v. Kansas City & M. Farms Co. 131 Ark. 83, 198 S. W. 527; Hollis v. Hogan, 126 Ark. 207, 190 S. W. 117; Phillips v. Southwestern Teleg. & Teleph. Co. 72 Ark. 478, 81 S. W. 605; Northern Constr. Co. v. Johnson, 132 Ark. 528, 201 S. W. 510; Keller v. Vowell, 17 Ark. 445; Chicago, R. I. & P. R. Co. v. Smith, 94 Ark. 524, 127 S. W. 715; Wood v. Drainage Dist. 110 Ark. 416, 161 S. W. 1057; Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 S. W. 709.

So far from alleging the cause of the explosion or the particular act or acts of negligence which occasioned it, the complaint contains the affirmative recital that the plaintiffs do not know the cause of the injury, consequently there could be no specific allegations concerning it. When analyzed, the complaint is found to contain substantially the following allegations: That a four-story business house was blown up and plaintiff's intestate killed; that the building, and all gas and ammonia fixtures and appliances therein, were in the exclusive control of the defendants; that the intestate was rightfully in the building at the time of the explosion, but had no duty to perform in connection with the instrumentalities which occasioned the injury; and that the cause of the explosion was unknown to plaintiffs. The concurrence of these conditions <sup>Explosion—"res ipsa loquitur"—wrecking of building to injury of employee.</sup> makes

applicable the doctrine of "*res ipsa loquitur*."

This doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. Stewart v. Van De- <sup>Negligence—effect of maxim "res ipsa loquitur."</sup>

venter Carpet Co. 138 N. C. 60, 50 S. E. 562.

As applied to railroads, the rule is stated in 4 Elliott on Railroads, § 1644, as follows: "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, . . . a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden . . . is then cast upon the company to show that its negligence did not cause the injury."

We quoted and approved this statement of the law in the case of *Biddle v. Riley*, 118 Ark. 218, L.R.A. 1915F, 992, 176 S. W. 134; *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 9, 91 S. W. 768; *Price v. St. Louis, I. M. & S. R. Co.* 75 Ark. 491, 112 Am. St. Rep. 79, 88 S. W. 575; and *St. Louis, I. M. & S. R. Co. v. Armbrust*, 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D, 537.

In the *Riley* and *Price* Cases the persons injured were passengers upon trains; and in the *Doughty* Case a fireman on a freight train; while in the *Armbrust* Case the party injured was a traveler at a railroad crossing, who was hit by a piece of coal falling from the train. But there is nothing in the opinion in any one of the cases which makes the doctrine applicable only to railroads. There are cases which apparently treat the doctrine as applicable only against carriers, and it is no doubt true that the doctrine has been more frequently applied in cases against carriers of passengers than in any other class of cases. But there appears to be no valid reason for thus limiting the doctrine. A leading case on the subject, and one well considered, is that of *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L.R.A. 718, 48 Am. 8 A.L.R.—32.

St. Rep. 146, 40 Pac. 1020. That was a case where property was destroyed by an explosion of nitroglycerin in process of manufacture into dynamite, and Mr. Justice Garoute, speaking for the supreme court of California, said: "All courts agree that where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence and makes a *prima facie* case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident, by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passenger. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only *prima facie*, and always disputable. As was well said by the court in *Rose v. Stephens & C. Transp. Co.* [C. C.] 20 Blatchf. 411, 11 Fed. 438: 'Undoubtedly, the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation, in authority or reason, for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a

certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in *Shearman & Redfield on Negligence* (§ 60): 'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking to this question, it is said in *Cooley on Torts* (p. 799): 'The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule which may be applied wherever the cir-

cumstances impose upon one party alone the obligation of special care.' The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: 'True, the act of God, or some excusable accident, may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection.'

In support of the statement of the law thus quoted a large number of cases are there cited and reviewed. There is also an extended case note.

In the article on Negligence in 20 R. C. L. § 156, it is said: "More precisely, the doctrine '*res ipsa loquitur*' asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. . . . The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case, which entitles him to a favorable finding, unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine '*res ipsa loquitur*' has no application."

And in § 157 of the same article it is said: "It has been held in some cases that the maxim applies only where the relation of carrier and passenger exists, or where there is a contractual relation between the parties to the transaction producing the injury; but the prevailing view is that a presumption of negligence

may be indulged in many other cases, and independently of the existence of any contractual relation between the person injured and him who is charged with responsibility for the injury."

At § 158 of the same article it is said that this doctrine has found frequent application in cases of injuries from falling objects and substances, and that the rule has been applied in many instances to injuries produced by the fall of awnings, signs, walls, buildings, parts of buildings, building materials, tools, electric wires, and many other objects. Annotated cases are cited in the notes to the text, which collect a very large number of cases. Among the annotated cases there cited are our own cases of *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, annotated in 12 L.R.A. 189, and the case of *Hall v. Gage*, 116 Ark. 50, 172 S. W. 833, annotated in L.R.A. 1915C, 704.

The litigation in the case of *Hall v. Gage*, supra, arose from the falling of a wall which had been left standing after a fire, and in holding that the trial court had erred in refusing to charge the jury that the falling wall was *prima facie* evidence of negligence, which imposed upon the owner the burden of showing that the accident happened without his negligence, we said: "In the case of *Earl v. Reid*, 21 Ont. L. Rep. 545, 18 Ann. Cas. 1, Teetzel, J., said: 'I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully on adjoining lands. In other words, every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbor's land and injure persons lawfully there. While the owner cannot be charged for injuries caused by inevitable accident, the result of *vis major*, or of the wilful act or negligence of someone for whom he is not responsible, he is liable for injuries

caused by the failure on his part to exercise reasonable care.' The fact that the wall fell is *prima facie* evidence of negligence, in conformity with the maxim '*res ipsa loquitur*.' 1 *Thomp. Neg.* ¶ 1213. See also ¶ 1060 of the same volume. To the same effect, see *Earl v. Reid*, supra."

In the case of *Gurdon & Ft. S. R. Co. v. Calhoun*, 86 Ark. 76, 109 S. W. 1017, an employee working on the railroad track was injured by the falling of a tie jack weighing 300 pounds, from a work car, and it was there contended by the railway company that the injury complained of was not caused by the running of a train, in the sense of the Constitution and statute, making railroads liable for damage done by the running of trains; but the court expressly pretermitted the decision of that question for the reason, there stated, that the uncontradicted facts raised the presumption of negligence, and in so holding the court said: "Appellee was in a place, where he had a right to be. It was a safe place until made dangerous by the presence and operation of the train over which appellant railway company had the exclusive management and control. The falling of a 'tie jack,' weighing 300 pounds, from the car, could not well have happened in the usual course, unless there had been some negligence in loading it on the car in the first place, or in the manner in which the train was operated and the car was moved, in the second place. Such an implement, if handled with ordinary care, could not fall from the car in the usual and ordinary method of its use, as shown by the proof. The fact, then, that it did fall, raises the presumption of negligence."

In the case of *Southwestern Teleg. & Teleph. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564, the telephone company strung a wire across a vacant lot, which broke and left the end on the foundation of a house where the plaintiff was working. Plaintiff picked up the wire to throw it aside, and was shocked and burned.



The court applied the doctrine of "*res ipsa loquitur*" in fact, but not *eo nomine*, and in doing so said: "And where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part."

Another case which applied the doctrine in fact, but not *eo nomine*, is that of *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781. The complaint there alleged that as plaintiff was driving along the road the top of her carriage was caught by defendant's telephone wire and torn off, causing the horse to become frightened and run away and injure the plaintiff. The court charged the jury "that the plaintiff, in order to entitle her to recover damages under this action, is required to prove that the accident occurred through the negligence of W. D. Reeves." Discussing that instruction, the court said it was abstractly correct; that no liability rested upon the defendant except through negligence; but that the instruction was misleading, under the facts of that case, in not being qualified or coupled

with another one, explaining that the evidence of the accident and injury following therefrom, when the occurrence was not out of the usual course, was *prima facie* evidence of negligence, and shifted the burden onto the defendant to prove that it was not caused by any want of care on his part.

See also *Arkansas Teleph. Co. v. Ratteree*, 57 Ark. 429, 21 S. W. 1059; *St. Louis, I. M. & S. R. Co. v. Steele*, 129 Ark. 532, 197 S. W. 288, 15 N. C. C. A. 49; *Thomp. Neg.* § 1213.

In the case of *Barnowsky v. Helson*, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989, the facts were that the roof of a house slipped and tipped to one side, and fell, while being raised by jackscrews. There was no showing that the house had been sufficiently braced, nor other explanatory proof offered, and the supreme court of Michigan held there was a presumption of negligence which entitled the plaintiff to go to the jury. Appended to this case is an extended note, in which a large number of cases are collected.

We conclude, therefore, that a cause of action was stated in the complaint, and, if testimony is offered which supports these allegations, a case will be made entitling plaintiffs to go to the jury to have decided whether such testimony, considered together with any other testimony which may be offered, discharges the burden of proof resting upon the plaintiff.

The judgment of the court below sustaining the demurrer is therefore reversed, and the cause will be remanded, with directions to overrule the same.

## ANNOTATION.

### Applicability of "*res ipsa loquitur*" to explosion of gases or chemicals.

This note is not concerned with explosions of illuminating gas, nor with explosions of gunpowder, dynamite, and the like. Cases of injuries to employees are also excluded, as they in-

volve considerations peculiar to the relation of master and servant. In *G. A. Duerler Mfg. Co. v. Dullnig* (1904) — *Tex. Civ. App.* —, 83 S. W. 889, affirmed in (1905) — *Tex*

—, 87 S. W. 332, for example, denying the application of the doctrine, where an employee of a bottling works was injured by the explosion of a bottle of carbonated water, the court observed that the rule is rarely applied in any cases between master and servant, except where the injury to the servant is caused by falling objects. That, perhaps, is open to question; but suggests the objection to including master and servant cases, which present considerations not peculiar to the physical cause of the injury.

The reported case (*CHILES v. FT. SMITH COMMISSION Co.*, ante, 498) has substantial support in its holding that, where a building in exclusive control of one is blown up by an explosion, the cause of which is unknown to the parties injured, there is presented a case for the application of the doctrine of "res ipsa loquitur."

Thus, in *Kearner v. Charles S. Tanner Co.* (1910) 31 R. I. 203, 29 L.R.A. (N.S.) 537, 76 Atl. 833, the doctrine of "res ipsa loquitur" was held to obtain where an explosion in a starch factory threw the wall of the building outward on a person passing upon the adjoining highway. The court said that, "as well-regulated starch manufactories do not ordinarily explode while the business therein is conducted with a reasonable degree of care, it would seem as though, after such an explosion has taken place and has caused the death of a person lawfully using the highway while ignorant of the danger to which he was exposed, it is not asking too much to require the proprietor to explain, for the benefit of the representatives of the deceased, the cause of such explosion. As the business is entirely within the control of the defendant, and its methods of manufacturing starch may be good, bad, or indifferent, it is called upon to explain when a fatal explosion occurs within its premises. In our opinion, the case is included within the doctrine aforesaid."

And see also *Warn v. Davis Oil Co.* (1894) 61 Fed. 681, where, in an action for damages due to an explosion in a building used for the refining of

grease, the court affirmed that it was a case for the application of the doctrine of "res ipsa loquitur."

But since the principle only applies to cases where, on proof of the occurrence and injury, the existence of negligent default is the more reasonable probability, it should not be allowed to prevail where on proof of the occurrence, without more, the matter still rests only in conjecture. *Dail v. Taylor* (1909) 151 N. C. 284, 28 L.R.A. (N.S.) 949, 66 S. E. 135. When we come to the consideration of cases of explosion of bottles containing carbonated drink, we find the general rule to be that the doctrine of "res ipsa loquitur" is not applicable.

So, the mere explosion of a bottle of coca-cola to the injury of a purchaser was held in *Dail v. Taylor* (N. C.) *supra*, not sufficient to carry to the jury the question of the negligence of the one who bottled it, under the doctrine of "res ipsa loquitur."

The court stated that, while coca-cola seems to be a recognized article of merchandise not usually or necessarily dangerous under ordinary conditions, the evidence showed that it was put up in glass bottles charged with gas to a pressure of not less than 60 pounds to the square inch, and in this instance shipped in cases or crates for quite a distance, and handled in various ways and by different parties, and that such facts presented a case where it would be entirely unsafe to permit the application of the principle contended for, or to hold that the explosion of one single bottle of such an article, under such circumstances, should of itself rise to the dignity of legal evidence, sufficient, without more, to carry a case to the jury.

And the mere fact that a bottle containing a carbonated drink, which had been placed on ice, burst when the lid of the ice chest was lifted, was held in *Wheeler v. Laurel Bottling Works* (1916) 111 Miss. 442, L.R.A. 1916E, 1074, 17 So. 743, not to be a case for the application of the doctrine of "res ipsa loquitur" in an action against the bottlers, as the bottle, at the time of the injury, was not under

the control or management of the manufacturer.

So too, in *Stone v. Van Noy R. News Co.* (1913) 153 Ky. 240, 154 S. W. 1092, an action for personal injuries to a news agent, due to the explosion of a bottle filled with soft drink as he lifted the lid of an ice box in order to get some bottles for the purpose of vending same, it was held that a verdict for defendant was properly directed, where the only evidence against the bottling company was the mere fact of the explosion of the bottle.

So also, in *Glaser v. Seitz* (1901) 35 Misc. 341, 71 N. Y. Supp. 942, an action by a vendee against the vendor of seltzer water for injuries due to the explosion of a siphon of seltzer, it was held that it did not present a case for the application of the doctrine of "*res ipsa loquitur*," the court stating that it was necessary to go further, and prove affirmatively some misconduct on the part of the vendor.

However, in *Payne v. Rome Coca-Cola Bottling Co.* (1912) 10 Ga. App. 762, 73 S. E. 1087, an action against bottlers, for personal injuries due to the explosion of a bottle of coca-cola, it was held that, as there was direct or circumstantial evidence of freedom from fault on the part of all persons through whose hands the bottle passed after it left the bottler, it was a case for the application of the doctrine of "*res ipsa loquitur*." The court said that "since for every effect there is a cause, where negligence exists someone must have been the responsible author. If he can be found, it is right that he should pay the penalty. The bottle exploded. Inferentially, someone was negligent. It was not Cook, the last vendor of the bottle, nor the plaintiff's brother, nor the plaintiff, nor yet Barnett, because they all stand exonerated by direct or circumstantial evidence of their freedom from fault. But the inference of negligence remains, and someone is *prima facie* to blame. By a process of elimination we get back to the manufacturer who set the dangerous agency in motion, and upon whom the blame ought inferentially to be fastened. It is certainly no hardship to require at

the manufacturer's hands an explanation of the occurrence, that the jury may say whether it, like the other persons who handled the bottle, has been exonerated. . . . It charged the bottle with carbonic acid gas, it put together the constituent elements of the beverage, it manufactured or procured the bottle to hold these elements, and it put the bottle in circulation with an invitation to the public to use the contents as a harmless and refreshing beverage." This case cannot be said to be in conflict with the other cases cited in this note, which have held that the mere explosion of a bottle does not present a case for the application of the doctrine of "*res ipsa loquitur*," as in the latter cases there has not been the added evidence of freedom of fault on the part of all through whose hands the bottle passed after it left the bottler. In fact, the court in the *Payne* Case stated specifically that, as to whether an inference of negligence would arise against the manufacturer upon mere proof of the explosion, without more, it expressed no opinion.

Negligence in the manufacture of lubricating oil will not be presumed from the mere fact of explosion, where the evidence shows that the explosion might as well have happened from other and existing causes. *Standard Oil Co. v. Murray* (1902) 57 C. C. A. 1, 119 Fed. 572.

So too, in *Kusick v. Thorndike & Hix* (1916) 224 Mass. 413, 112 N. E. 1025, an action to recover for personal injuries due to the explosion of a can of lime, brought against one who packed and sold the lime, but did not manufacture it, it was held that the doctrine of "*res ipsa loquitur*" did not apply. The court stated that, although the explosion might be evidence of a defect of some kind, its cause was wholly conjectural, and there was nothing to show that it resulted from the fault of the defendant.

And in *Conley v. United Drug Co.* (1914) 218 Mass. 288, L.R.A.1915D, 830, 105 N. E. 975, action to recover for injuries due to the explosion of a tank filled with carbonic acid gas, it was held that as there was no evi-

dence to warrant a finding that the owner of the premises had any control over the tank, or was in any way re-

sponsible for its presence, the rule of "res ipsa loquitur" was inapplicable.  
J. H. B.

EDWARD R. PURCHASE

v.

RALPH H. SEELYE.

*Massachusetts Supreme Judicial Court — December 30, 1918.*

(231 Mass. 434, 121 N. E. 413.)

**Master and servant — liability for mistake of surgeon.**

1. A railroad company whose negligence causes hernia in an employee is not liable to him for injuries caused by a surgeon in operating on the wrong side to relieve the hernia because of mistake as to the identity of the patient.

[See note on this question beginning on page 506.]

**Release — personal injury — scope.**

2. A release by an employee of his employer whose negligence caused his injury, from all claims and demands arising or which may arise out of said injury, does not release the surgeon

from liability for operating, by mistake as to the identity of the patient, on the wrong side of the injured person to relieve the injury.

[See 23 R. C. L. 406.]

EXCEPTIONS by plaintiff to rulings of the Superior Court for Hampden County made during the trial of an action brought to recover damages growing out of an unauthorized surgical operation performed by defendant on the body of plaintiff, which resulted in a verdict for defendant. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Harvey & Muleare, for plaintiff:

The consideration received by the plaintiff from the railroad company in payment for the injuries sustained by the plaintiff while in its employ cannot now be set up by the defendant to be a satisfaction, as a matter of law, for the claim now made by the plaintiff against him.

Brewer v. Casey, 196 Mass. 384, 82 N. E. 45; Aldrich v. Parnell, 147 Mass. 409, 18 N. E. 170; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Boston Supply Co. v. Rubin, 214 Mass. 217, 101 N. E. 133; Feneff v. Boston & M. R. Co. 196 Mass. 575, 82 N. E. 705; Gray v. Boston Elev. R. Co. 215 Mass. 143, 102 N. E. 71, 8 N. C. C. A. 602; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490.

If there had been no release, and an action had been brought against the railroad company, the act of the de-

fendant in performing an unauthorized operation upon the plaintiff's body would not have been deemed a natural and probable consequence and an element of damage to be shouldered by the railroad company. The unauthorized operation was not due to the injury in the railroad shops, but to a new and independent cause.

Snow v. New York, N. H. & H. R. Co. 185 Mass. 321, 70 N. E. 205; Martin v. Cunningham, 93 Wash. 517, L.R.A. 1918A, 225, 161 Pac. 355.

Messrs. Green & Bennett, for defendant:

A release to one discharges all the world for the matters embraced in the claim against the one.

Stimpson v. Poole, 141 Mass. 502, 6 N. E. 705; Brewer v. Casey, 196 Mass. 384, 82 N. E. 45.

If a person is hurt, and if, in honest effort to lessen the injurious effects of the accident, he has (using due care) applied for treatment to a reputable

physician, the person responsible for the original injury is responsible in damages for the injury that resulted from the mistake and negligence of the physician.

Gray v. Boston Elev. R. Co. 215 Mass. 143, 102 N. E. 71, 8 N. C. C. A. 602; Eastman v. Sanborn, 3 Allen, 594, 81 Am. Dec. 677, 1 Am. Neg. Cas. 653; Hunt v. Boston Terminal Co. 212 Mass. 99, 48 L.R.A.(N.S.) 116, 98 N. E. 786; Dallas v. Meyers, — Tex. Civ. App. —, 55 S. W. 742; Martin v. Cunningham, 93 Wash. 517, L.R.A.1918A, 225, 161 Pac. 355; Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; Chicago City R. Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029; Chicago City R. Co. v. Saxby, 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755; Variety Mfg. Co. v. Landaker, 227 Ill. 22, 81 N. E. 47; Sandwich v. Dolan, 34 Ill. App. 199; Joliet v. Le Pla, 109 Ill. App. 336; Bethany v. Lee, 124 Ill. App. 397; Horney v. St. Louis & N. E. R. Co. 165 Ill. App. 547; Collins v. Council Bluffs, 32 Iowa, 824, 7 Am. Rep. 200; Rice v. Des Moines, 40 Iowa, 638; Stover v. Bluehill, 51 Me. 439; Hooper v. Bacon, 101 Me. 583, 64 Atl. 950; McGarrahan v. New York, N. H. & E. R. Co. 171 Mass. 211, 50 N. E. 610, 4 Am. Neg. Rep. 284; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616; Reed v. Detroit, 108 Mich. 224, 65 N. W. 967; Youmans v. Padden, 1 Mich. N. P. 127; Viou v. Brooks-Scanlon Lumber Co. 99 Minn. 97, 108 N. W. 891, 9 Ann. Cas. 318; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Fields v. Mankato Electric Traction Co. 116 Minn. 218, 133 N. W. 577; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Elliott v. Kansas City, 174 Mo. 554, 74 S. W. 617; Scholl v. Grayson, 147 Mo. App. 652, 127 S. W. 415; Tuttle v. Farmington, 58 N. H. 13; Seeton v. Dunbarton, 73 N. H. 134, 59 Atl. 944; Lyons v. Erie R. Co. 57 N. Y. 489; Radman v. Haberstro, 49 Hun. 605, 17 N. Y. S. R. 497, 1 N. Y. Supp. 561; Caven v. Troy, 15 App. Div. 163, 44 N. Y. Supp. 244; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Loeser v. Humphrey, 41 Ohio St. 378, 52 Am. Rep. 86; Heintz v. Caldwell, 16 Ohio C. C. 630, 9 Ohio C. D. 412; O'Donnell v. Rhode Island Co. 28 R. I. 245, 66 Atl. 578; Houston & T. C. R. Co. v. Hollis, 2 Tex. App. Civ. Cas. (Willson) 169; Texas & P. R. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237; Selleck v. Janesville, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep.

906, 75 N. W. 975; Selleck v. Janesville, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944; Rolater v. Strain, 39 Okla. 572, 50 L.R.A.(N.S.) 880, 137 Pac. 96; Robinson v. Crotwell, 175 Ala. 194, 57 So. 23, 2 N. C. C. A. 386; Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40; Baldwin v. Lincoln County, 29 Wash. 509, 69 Pac. 1081; La Croix v. Boston Elev. R. Co. 223 Mass. 242, 111 N. E. 785.

There is no evidence that the defendant intentionally, wilfully, voluntarily did other than to treat the injury intrusted to him according to his skill and ability.

Sullivan v. McGraw, 118 Mich. 39, 76 N. W. 149; Thompson v. Louisville & N. R. Co. 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; Sauter v. New York C. & H. R. R. Co. 66 N. Y. 50, 23 Am. Rep. 18, 5 Am. Neg. Cas. 208; Brown v. Kendall, 6 Cush. 292; Schayer v. Commonwealth Loan Co. 163 Mass. 322, 39 N. E. 1110; Wood v. Cummings, 197 Mass. 80, 83 N. E. 318; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328; 2 Greenl. Ev. §§ 84, 85; Jaggard, Torts, §§ 437, 438; Bigelow, Lead. Cas. in Torts, pp. 230, 231.

The release cannot be revoked.

McNamara v. Boston Elev. R. Co. 197 Mass. 388, 83 N. E. 878; Brown v. Cambridge, 3 Allen, 474; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Trambly v. Ricard, 130 Mass. 259; C. A. Smith Lumber & Mfg. Co. v. Parker, 140 C. C. A. 33, 224 Fed. 347; Squires v. Amherst, 145 Mass. 192, 13 N. E. 609; Barnard v. Crosby, 6 Allen, 327; Walsh v. Fore River Shipbuilding Co. 230 Mass. 89, 119 N. E. 680; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 501; Rosenberg v. Doe, 148 Mass. 560, 20 N. E. 176; John Soley & Sons v. Jones, 208 Mass. 561, 95 N. E. 94; Taylor v. Buttrick, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507; Alton v. First Nat. Bank, 157 Mass. 341, 18 L.R.A. 144, 34 Am. St. Rep. 285, 32 N. E. 228.

Crosby, J., delivered the opinion of the court:

This is an action to recover for an unauthorized surgical operation performed by the defendant, a surgeon, upon the body of the plaintiff.

On March 21, 1916, the plaintiff suffered a rupture in his right groin while in the employ of the Boston & Albany Railroad, of whose road the New York Central Railroad Com-

pany, was lessee; on the same day he consulted the defendant, and the next day was operated on by the latter. The following day the plaintiff discovered that the operation had been performed on his left side, and so stated to the defendant. The plaintiff testified that the defendant said: "I took you for another patient of mine that had a hernia on the left side. Well, the only thing we can do is to operate on the right side in about two or three days."

Afterwards an operation was performed by the defendant upon the plaintiff's right side.

On July 19, 1916, the plaintiff made a settlement of his claim against the railroad company and executed and delivered to it a release of all claims and demands "arising or which may arise out of said injury." This action having been brought since the settlement, an important question is whether it is barred by the release.

If the plaintiff's employer, in an action brought against it to recover for the original injury, would have been liable for the negligence of the defendant in improperly treating the plaintiff, then the release included such damages, and is a bar to the present action, for the reason that in such a case the plaintiff had a

claim against both the railroad company and the defendant for the same cause of action, and a release of one of the alleged wrongdoers would operate as a release of both. *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45; *Stimpson v. Poole*, 141 Mass. 502, 6 N. E. 705; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Brown v. Cambridge*, 3 Allen, 474.

It is the contention of the plaintiff that the alleged negligence of the defendant had no causal relation to the original injury, but created a new, separate, and independent cause of action, the liability for which was not barred by the release.

It is well settled in this commonwealth and in many other jurisdictions, that in an action for personal

injuries arising out of the alleged negligence of the defendant, the plaintiff is entitled to recover for the injuries resulting from the defendant's negligence, although such injuries are aggravated by the negligence of an attending physician, if, in his selection and employment, the plaintiff was in the exercise of reasonable care. *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 218, 50 N. E. 610, 4 Am. Neg. Rep. 284; *Gray v. Boston Elev. R. Co.* 215 Mass. 143, 102 N. E. 71, and cases cited.

The question is whether the act of the defendant in operating by mistake upon the plaintiff's left side was a natural and probable result of the negligence of the railroad company. We are of opinion that the general rule, as above stated, is not applicable to the case at bar. There was sufficient evidence to show that the defendant made a mistake in the identity of the plaintiff at the time the operation was performed; and that he then believed he was operating upon another patient who had a hernia on his left side. The reason why a wrongdoer is held liable for the negligence of a physician whose unskilful treatment aggravates an injury is that such unskilful treatment is a result which reasonably ought to have been anticipated by him.

The railroad company could not be held liable because of the defendant's mistaken belief that he was operating upon some person other than the plaintiff; such a mistake was not an act of negligence which could

Master and  
servant—  
liability for mis-  
take of surgeon.

be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made. The fact that the mistake made by the defendant might possibly occur is not enough to charge the railroad company with liability; the unskilful or improper treatment must have been legally and constructively anticipated by the original wrongdoer as a rational

and probable result of the first injury. This is the true test of responsibility, and it cannot be extended to cover the facts in the present case as shown by the record.

If a surgeon employed to operate upon a patient for hernia caused by the negligence of another, instead of performing that operation, removes one of the patient's kidneys (which is in sound condition) under the mistaken belief that he is treating another patient, can it reasonably be held that such a mistake is something that might sometimes follow, and as a matter of common knowledge and experience might be expected sometimes to follow, from an injury resulting in hernia? We think not. We are of opinion that the act of the defendant in operating on the wrong side, was a wholly wrongful, independent, and intervening cause for which the original wrongdoer was in no way responsible.

All the cases cited and relied on by the defendant are distinguishable from the case at bar because of the fact that the defendant did not intentionally operate upon the plaintiff for the injury received, as he did in those cases, but mistakenly understood and believed that he was operating upon another patient for a different injury.

It is unnecessary to decide whether the railroad company would have been liable for the aggravation of the plaintiff's injury, caused by the mistake of the defendant in operating upon the wrong side, had there been no mistake with reference to the identity of the patient.

In some jurisdictions it is held

that, in an action against the original wrongdoer, if a surgeon by mistake operates at a place other than the seat of the injury, and without the consent of the patient, such an act is a natural and probable consequence of the original injury for which the defendant is responsible. *Martin v. Cunningham*, 93 Wash. 517, L.R.A.1918A, 225, 161 Pac. 355; *Thompson v. Louisville & N. R. Co.* 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; *Sauter v. New York C. & H. R. R. Co.* 66 N. Y. 50, 23 Am. St. Rep. 18, 5 Am. Neg. Cas. 208; *Variety Mfg. Co. v. Landaker*, 227 Ill. 22, 81 N. E. 47; *Reed v. Detroit*, 108 Mich. 224, 65 N. W. 967; *Seeton v. Dunbarton*, 73 N. H. 134, 59 Atl. 944; *Lyons v. Erie R. Co.* 57 N. Y. 489; *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690. See also *Mohr v. Williams*, 95 Minn. 261, 1 L.R.A. (N.S.) 439, 111 Am. St. Rep. 462, 104 N. W. 12, 5 Ann. Cas. 303; *Sullivan v. McGraw*, 118 Mich. 39, 76 N. W. 149; *Pratt v. Davis*, 224 Ill. 300, 7 L.R.A. (N.S.) 609, 79 N. E. 562, 8 Ann. Cas. 197. The facts in the case at bar distinguish it from the cases above referred to.

If we assume that the release is valid and a bar to any claim which the plaintiff had against the railroad company, still a majority of the court are of opinion, for the reasons stated, that it is not a defense to the present action, and was not admissible in evidence.

The exceptions to the admission in evidence of the release and the ruling that it was a bar to the action must be sustained.

Ordered accordingly.

## ANNOTATION.

### Liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon.

#### I. Scope of note, 507.

#### II. Civil liability:

- a. Physician or surgeon selected by injured person, 507.
- b. Physician or surgeon selected by person causing injury, 515.

#### III. Criminal liability:

- a. General rule, 516.
- b. Qualification of rule, 520.
- c. Rule in Texas, 521.

*I. Scope of note.*

The purpose of this note is to review the cases wherein the courts have passed on the responsibility of one causing a personal injury, for the consequence of the negligence, mistake, or lack of skill of an attending physician or surgeon. The expression, "one causing a personal injury," is used in its legal significance as meaning one responsible in law for the injury. The note excludes cases involving the right to damages for malpractice without regard to the original injury, and also cases wherein the right to recover for the negligence of the physician or surgeon is based on a contractual obligation of the person causing the injury to furnish medical or surgical aid through a relief department, a hospital, or otherwise.

*II. Civil Liability.**a. Physician or surgeon selected by injured person.*

Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskilful treatment thereof, and holds him liable therefor.

**United States.**—*Texas & P. R. Co. v. Hill* (1915) 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575; *Atlas Portland Cement Co. v. Hagen* (1916) 147 C. C. A. 94, 233 Fed. 24, writ of certiorari denied in (1916) 242 U. S. 631, 61 L. ed. 537, 37 Sup. Ct. Rep. 15. See also *Meila v. Northern S. S. Co.* (1908) 162 Fed. 499. Compare *Chicago, M. & St. P. R. Co. v. Heil* (1907) 83 C. C. A. 400, 154 Fed. 626.

**California.**—Compare *Thorne v. California Stage Co.* (1856) 6 Cal. 232.

**Connecticut.**—*Flint v. Connecticut Hassam Paving Co.* (1918) 92 Conn. 576, 103 Atl. 840.

**Illinois.**—*Pullman Palace Car Co. v. Bluhm* (1884) 109 Ill. 20, 50 Am. Rep. 601; *Chicago City R. Co. v. Saxby* (1904) 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755; *Variety Mfg. Co. v. Landaker* (1907) 227 Ill. 22, 81 N. E. 47; *Sandwich v. Dolan* (1889) 84 Ill. App. 199, reversed on other grounds in (1890) 133 Ill. 177, 23 Am. St. Rep. 598, 24 N. E. 526; *Chicago City R. Co. v. Cooney* (1901) 95 Ill. App. 471, affirmed in (1902) 196 Ill. 466, 63 N. E. 1029; *Chicago & E. I. R. Co. v. Burrige* (1903) 107 Ill. App. 23, reversed on other grounds in (1904) 211 Ill. 9, 71 N. E. 838; *Joliet v. Le Pla* (1903) 109 Ill. App. 386; *Bethany v. Lee* (1906) 124 Ill. App. 397; *Horney v. St. Louis & N. E. R. Co.* (1911) 165 Ill. App. 547; *Rohmer v. Anderson* (1914) 189 Ill. App. 274. Compare *Moss v. Pardridge* (1881) 9 Ill. App. 490, 1 Am. Neg. Cas. 93.

**Indiana.**—*Suelzer v. Carpenter* (1915) 183 Ind. 23, 107 N. E. 467, 8 N. C. C. A. 485.

**Iowa.**—*Collins v. Council Bluffs* (1871) 32 Iowa, 324, 7 Am. Rep. 200; *Rice v. Des Moines* (1875) 40 Iowa, 638.

**Maine.**—*Stover v. Bluehill* (1863) 51 Me. 439; *Hooper v. Bacon* (1906) 101 Me. 533, 64 Atl. 950.

**Massachusetts.**—*McGarrahan v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 211, 50 N. E. 610, 4 Am. Neg. Rep. 284; *Hunt v. Boston Terminal Co.* (1912) 212 Mass. 99, 48 L.R.A. (N.S.) 116, 98 N. E. 786; *Gray v. Boston Elev. R. Co.* (1913) 215 Mass. 143, 102 N. E. 71, 8 N. C. C. A. 602. And see the reported case (*PURCHASE v. SEELYE*, ante, 503).

**Michigan.**—*Youmans v. Padden* (1870) 1 Mich. N. P. 127; *Reed v. Detroit* (1896) 108 Mich. 224, 65 N. W. 967. See also *Strudgeon v. Sand Beach* (1895) 107 Mich. 496, 65 N. W. 616.

**Minnesota.**—*Goss v. Goss* (1907) 102 Minn. 346, 113 N. W. 690; *Fields v. Mankato Electric Traction Co.* (1911) 116 Minn. 218, 133 N. W. 577. Compare *Viou v. Brooks-Scanlon Lumber Co.* (1906) 99 Minn. 97, 108 N. W. 891, 9 Ann. Cas. 318.



**Missouri.**—*Elliott v. Kansas City* (1903) 174 Mo. 554, 74 S. W. 617; *Scholl v. Grayson* (1910) 147 Mo. App. 652, 127 S. W. 415. See also *Nagel v. Missouri P. R. Co.* (1882) 75 Mo. 653, 42 Am. Rep. 418.

**Nebraska.**—See *Crete v. Childs* (1881) 11 Neb. 252, 9 N. W. 55.

**New Hampshire.**—*Tuttle v. Farmington* (1876) 58 N. H. 13; *Boynton v. Somersworth* (1878) 58 N. H. 321; *Seeton v. Dunbarton* (1905) 73 N. H. 134, 59 Atl. 944.

**New York.**—*Lyons v. Erie R. Co.* (1874) 57 N. Y. 489; *Sauter v. New York C. & H. R. R. Co.* (1876) 66 N. Y. 50, 23 Am. Rep. 18, 5 Am. Neg. Cas. 208; *Radman v. Habestro* (1888) 49 Hun, 605, 17 N. Y. S. R. 497, 1 N. Y. Supp. 561; *Caven v. Troy* (1897) 15 App. Div. 163, 44 N. Y. Supp. 244. Compare *Wade v. Mt. Vernon* (1908) 123 App. Div. 796, 108 N. Y. Supp. 241.

**North Dakota.**—*Pyke v. Jamestown* (1906) 15 N. D. 157, 107 N. W. 359.

**Oklahoma.**—*Smith v. Missouri, K. & T. R. Co.* (1918) — Okla. —, 185 Pac. 70.

**Ohio.**—*Loeser v. Humphrey* (1884) 41 Ohio St. 378, 52 Am. Rep. 86, 12 Am. Neg. Cas. 487; *Heintz v. Caldwell* (1898) 9 Ohio C. D. 412.

**Rhode Island.**—See *O'Donnell v. Rhode Island Co.* (1907) 28 R. I. 245, 66 Atl. 578.

**Texas.**—*Houston & T. C. R. Co. v. Hollis* (1884) 2 Tex. App. Civ. Cas. (Willson) 169; *Dallas v. Meyers* (1900) — Tex. Civ. App. —, 55 S. W. 742; *Texas & P. R. Co. v. McKenzie* (1902) 30 Tex. Civ. App. 293, 70 S. W. 237; *Houston & T. C. R. Co. v. Hanks* (1909) 58 Tex. Civ. App. 298, 124 S. W. 136; *Galveston, H. & S. A. R. Co. v. Miller* (1916) — Tex. Civ. App. —, 191 S. W. 374.

**Washington.**—*Baldwin v. Lincoln County* (1902) 29 Wash. 509, 69 Pac. 1081.

**Wisconsin.**—*Selleck v. Janesville* (1898) 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352; *Selleck v. Janesville* (1899) 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

**Canada.**—*Small v. Westville* (1898) 40 N. S. 226.

In *Texas & P. R. Co. v. Hill* (1915) 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575, an action for damages for personal injuries, the court upheld an instruction to the effect that the defendant was absolved from liability for damages resulting from the intervening malpractice of the attending surgeons, only in the event that the plaintiff had failed to exercise reasonable care in their selection, or thereafter, in following their advice. In *Atlas Portland Cement Co. v. Hagen* (1916) 147 C. C. A. 94, 233 Fed. 24, writ of certiorari denied in (1916) 242 U. S. 631, 61 L. ed. 537, 37 Sup. Ct. Rep. 15, it appeared that an injured employee, whose leg had been improperly set by a surgeon furnished by the master, had thereafter refused to allow the same physician to rebreak the leg, but had secured the services of another surgeon whose operation was not successful. The court held that, since there was no negligence on the plaintiff's part in refusing to allow the master's surgeon to reset the leg and in engaging another surgeon to perform the operation, the plaintiff could recover for the entire resultant damage arising from the defendant's negligence. In *Mella v. Northern S. S. Co.* (1908) 162 Fed. 499, an action for the death of the plaintiff's intestate, Mella, by the wrongful act of the defendant, it appeared that Mella had sustained a dislocated shoulder by stepping into a hole in the deck of the defendant's steamship. In a subsequent operation to reduce the dislocation Mella died from paralysis of the heart, due to the unnecessary administration of chloroform. The evidence showed that Mella had previously been affected with a diseased heart, and it was held that, since death resulted directly from the unnecessary and dangerous administration of chloroform, the previous dislocation of Mella's shoulder was not the proximate cause of his death, and the defendant could not be charged therewith. The court said: "I am of the opinion that when one person is injured by the negligence of another, and such injury is in no event fatal, the negligent party cannot be

held liable for the consequences of the unnecessary and dangerous acts of the surgeon employed by the injured party, even when done in the course of or in connection with a necessary surgical operation." But the court added: "The negligent party is responsible for all errors of judgment, mere mistakes, and errors, assuming there is no negligence in employing an incompetent surgeon." However, in *Chicago, M. & St. P. R. Co. v. Heil* (1907) 83 C. C. A. 400, 154 Fed. 626, an action by a railroad employee to recover damages for the negligence of the defendant, whereby he had lost one of his hands, it appeared that the amputation was made in such a manner that the stump was still suppurating when it should have been healed, and that another amputation farther up would probably be necessary to support an artificial appliance. The degree of care exercised in securing the services of the surgeon did not appear, nor did the court apparently consider it as in any way determinative of the rights of the parties, saying: "Evidence to show to what extent this condition was caused by the wrong of the defendant, and to what extent it was the result of some independent cause, such as the malpractice of the surgeon who treated it, was undoubtedly relevant, because the defendant was liable for the former and exempt from liability for the latter."

In *Sandwich v. Dolan* (1889) 34 Ill. App. 199, reversed on other grounds in (1890) 133 Ill. 177, 23 Am. St. Rep. 598, 24 N. E. 526, the plaintiff sought to recover damages for personal injuries caused by the alleged negligence of the defendant, which had been aggravated by the unskilful care of her physician, who treated her for pleurisy. It was held that since the plaintiff had exercised ordinary care in securing surgical attendance, the injuries resulting from the unskilfulness of her doctor were a direct result of the injury, the court saying: "It was her duty to employ such aid, surgical and otherwise, as ordinary prudence in the situation required, and to use ordinary judgment and

care in so doing. But the law does not make the appellee an insurer in such case that such surgeons, doctors, or nurses will be guilty of no negligence, want of care or skill, or of error in judgment. The liability to mistakes in judgment of the efforts or means used in the endeavor to effect a cure or causing a union of broken ribs, or even in the determination of the dislocation thereof, are incidents of such injury, and when such mistakes occur (the injured party using ordinary care) the injury resulting from such mistakes, if any, is, in law, regarded as one of the immediate and direct damages resulting from the injury." Likewise, in *Chicago City R. Co. v. Saxby* (1904) 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755, the defendant in an action for damages for personal injuries claimed that the diseased condition of the plaintiff's knee, for which she sought to recover, was not the natural and ordinary consequence of the injury received, but was the result of improper treatment by the plaintiff's physicians. The court, holding that the defendant was responsible for the entire injury, said with reference to the plaintiff's duty to secure competent medical aid: "All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril, and if she exercised reasonable care in selecting her physicians and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her, or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained." So, in *Variety Mfg. Co. v. Landaker* (1907) 227 Ill. 22, 81 N. E. 47, the court held that the trial judge was fully sustained by the authorities in charging as follows, as to the right to recover additional damages for an aggravation of injuries caused by the unskilful treatment of attending physicians: "A

should produce the death, either in whole or in part. If there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of an injured person is not homicide by the party who inflicted the original injury." By way of illustration, a hypothetical case of manifestly improper treatment, where death was the result of the wound and not of the treatment, was stated, in which B., who had sustained a knife wound from A., severing a small artery, is treated by a surgeon who, instead of attempting to stop the flow of blood, administers chloroform and leaves B. to bleed to death. This, the court pointed out, would be homicide under the common law, but not under the Texas statute. The phrase, "gross neglect and improper treatment," as used in the statute, was interpreted as meaning not only acts which destroy life, but such "as allow, suffer, or permit such destruction of life." Thus, where it appeared that, in the treatment of a knife wound inflicted by the accused on the temple of the deceased, the attending surgeons were guilty of gross negligence in making incisions in the back of the skull, which were of themselves perhaps mortal, when with proper treatment the deceased would have had a chance to recover, the court held that the accused was not guilty of homicide.

In *Brown v. State* (1873) 38 Tex. 482, wherein the accused, on trial for murder, produced evidence of malpractice by the physician in attendance on the victim, the court held that the jury should be instructed that the accused could not be found guilty unless they were satisfied that the death was the result of the wound, and not of the malpractice of the physician. And, commenting on the statute, the court said: "Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held

guilty, upon the theory that without the first injury no other would have followed, as resulting from the first."

And in *Johnson v. State* (1901) 43 Tex. Crim. Rep. 288, 65 S. W. 92, where the accused in a prosecution for murder alleged that the death of the deceased was the result of improper treatment and neglect by the attending physician, and that the wound of itself was not sufficient to cause death, the court held that the failure of the trial judge to charge affirmatively that if the wound was not necessarily mortal, but the deceased had died as a result of improper or neglectful treatment, the accused would not be responsible for his death, was reversible error.

In *Sartin v. State* (1907) 51 Tex. Crim. Rep. 571, 103 S. W. 875, the court held that it was correct to instruct the jury in a prosecution for murder as follows: "If you believe from the evidence that the defendant . . . did shoot the [deceased] as charged, but you further find from the evidence that there has been gross neglect or manifestly improper treatment of said [deceased] by any one or more of the physicians or persons attending him, between the inflicting of the wound and his death, which improper treatment or neglect, if any, caused the death of the said [deceased], then you cannot find the defendant guilty of taking the life of the said [deceased]."

And, where the evidence in a prosecution for murder suggested that the death may have resulted from the improper treatment of the attending physicians, the court held that the failure of the trial court to charge that, "if the death of the deceased was brought about by improper treatment or gross neglect of the physicians, he would not be guilty of the homicide," was reversible error. *McMillan v. State* (1910) 58 Tex. Crim. Rep. 525, 126 S. W. 875.

R. E. B.

MARGARET SHERIDAN et al.  
v.

L. J. McCORMICK et al., Appts.

*North Dakota Supreme Court—May 15, 1916.*

(39 N. D. 641, 168 N. W. 59.)

**Fraudulent conveyance — consideration — payment of debts.**

1. Where, at the time of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction and with knowledge of the fraud, agrees with the grantors to pay certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently and in pursuance of such an agreement pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid.

[See note on this question beginning on page 527.]

— consideration.

2. The law will treat as null and void as to creditors all fraudulent contrivances to screen the property of a debtor from his creditors. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void.

[See 12 R. C. L. 531 et seq.]

— participation by grantee.

3. Where a conveyance of real estate is made by a grantor with intent to hinder, delay, or defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in fraud by the

grantee as will invalidate the transfer as to such creditors, even where full consideration is paid.

[See 12 R. C. L. 533-535.]

**Judgment — collateral attack — execution.**

4. No defense can be interposed, in an action to remove a fraudulent conveyance from the path of an execution, on the ground that the claim on which the judgment was entered and on which the execution was issued, was invalid, or inequitable. The matter is precluded by the prior judgment; and, when no appeal was taken, it must be assumed that all of the defenses, both legal and equitable, which the defendants had or deemed themselves entitled to, were interposed on the former trial.

[See 12 R. C. L. 632.]

Headnotes by BRUCE, Ch. J.

(Robinson, J., and Fisk, District Judge, dissent.)

**APPEAL** by defendants from a judgment of the District Court for Renville County in favor of plaintiffs in an action brought to set aside an alleged fraudulent conveyance. *Modified.*

The facts are stated in the opinion of the court.

Messrs. Ryerson & Rodsater for appellants.

Messrs. J. E. Bryans and E. R. Sinkler for respondents.

Bruce, Ch. J., delivered the opinion of the court:

This action comes before us for a trial de novo, and is brought to set

aside a fraudulent conveyance. On the 3d day of May the plaintiffs recovered a judgment against the McCormicks for the sum of \$1,-140.25.

The indebtedness on which the judgment was founded grew out of the sale of an abstract business by

the plaintiffs to the defendants on September 8, 1911, for \$4,100, payable in monthly instalments of \$50, and the action was brought on the instalments then due and unpaid. The transfer, which is sought to be set aside, was made by the McCormicks to the defendant W. A. Overing, the father of Mrs. McCormick, on the 10th day of April, 1914, and on the day of the commencement of the action on which the judgment was obtained. The trial court found the issues for the plaintiffs, and "that the said deeds were executed and the land transferred wholly and voluntarily without consideration, and with the sole intent to hinder, delay, and defraud the plaintiffs in the collection of their claim, and to hinder, delay, and defraud all of their creditors, and that the said W. A. Overing, defendant, accepted and received such debts, and the transfer of such land, with full knowledge of all of such fraudulent intent, and with the full and sole intent on his part to assist the said L. J. McCormick and Luina M. McCormick in their fraudulent purpose." After a full argument and a thorough examination of the record, we are constrained to affirm this finding, and nothing would be gained by relating the testimony at length. The matter, indeed, is one largely of probability and of the credibility of the witnesses, and on the latter point the trial judge had the opportunity of personal observation which is not presented to us.

There can be no question that there was in the minds of the defendants the desire to prevent the plaintiffs from collecting their claim, and, as far as the consideration for the deeds is concerned, all that is presented is a claim for money alleged to have been advanced by the defendant Overing to the daughter some fourteen years before, and before her marriage, but, which not only was long since outlawed, if, in fact, it ever existed, but on and for which, according to her own statements, no interest had

ever been paid, no note given, and no payment even demanded, and the only evidence of which was a memorandum contained in a notebook owned by the defendant, Luina McCormick. It is true that the defendant Overing paid the past-due taxes and the interest on a prior mortgage just prior to the transfer, but the evidence clearly shows that he did this because he was led to believe that the deeds could not be recorded without these payments.

The case, indeed, in our minds, is not one where a debtor has honestly preferred a creditor, but one which clearly comes within the general condemnation of the authorities, which seem to hold that the law will treat "as null and void all fraudulent contrivances to screen the property of a debtor from his creditors; it is fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to defeat them by benefactions conferred upon others. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void." Note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 732; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792.

The case also clearly comes within the provisions of § 7220 of the Compiled Laws of 1913, which provides that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Fraudulent conveyance—consideration.

There is, too, no doubt of the knowledge of the grantee, Overing, of the fraudulent intent, nor of the applicability of the rule of law announced by us in the case of *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996, and where-in we said: "Where a conveyance of real estate is made by a grantor with intent to hinder, delay, and defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in the fraud by the grantee as will invalidate the transfer, even where full consideration is paid."

participation  
by grantee.

There is, of course, no merit in the contention that the abstract business was not worth what the defendants agreed to pay for it, and that therefore the plaintiffs do not come into a court of equity with clean hands. The matter is precluded by the judgment on which the collateral attack—execution.

We must assume that in that case the defendants interposed all of the defenses, both legal and equitable, which they had, or deemed themselves entitled to, and no appeal was taken from that judgment.

Nor do we believe that the defendant Overing is entitled to a lien for the taxes and interest paid by him.

Our conclusion from the record is that he knew of and was a party to the fraud which was sought to be consummated, and it is well established that "where, at the time of the execution of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction, agrees with the grantors to pay off certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently, and in pursuance of such agreement, the grantee pays such encumbrances,

Fraudulent  
conveyance—  
consideration—  
payment of  
debts.

he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid." *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271.

The judgment of the District Court, however, goes too far, as it holds that the conveyance is void as between the McCormicks and Overing. As far as this action is concerned, it is void only as to the lien of the plaintiff's judgment and attachment. It is modified to this extent, and, as so modified, it is affirmed.

Grace, J., being disqualified, the Honorable Frank Fisk, Judge of the Eleventh Judicial District, sat in his place.

Robinson, J., dissenting:

The purpose of this suit is to subject the half section of land in Renville county to the lien of the plaintiffs' judgment, which is \$1,140.25. In an action by the plaintiffs against the McCormick defendants on May 18, 1914, the plaintiffs caused a writ of attachment to be issued and levied on the lands in question. On May 13, 1915, a judgment in said action was obtained and docketed, and an execution was issued against the defendants, and the next day it was returned unsatisfied. Pending said action the McCormicks conveyed to W. A. Overing, father of Mrs. Luina M. McCormick, the S. E.  $\frac{1}{4}$  of 27-161-84, and the E.  $\frac{1}{4}$  of W.  $\frac{1}{4}$  of the same section. The deeds were made and recorded April 10, 1914. The first tract was owned by L. J. McCormick and the second by his wife. Both tracts were worth about \$10,000, and were subject to mortgages amounting to over \$7,000. At and prior to the transfer the past-due interest on the mortgages and the taxes amounted to \$840; and the McCormicks were unable to pay the same. The mortgages were pressing the mand insisting on immediate payment and threatening a foreclosure. Under such pressure the daughter natural-

Galveston, H. & S. A. R. Co. v. Miller (1917) — Tex. Civ. App. —, 191 S. W. 374.

In *Baldwin v. Lincoln County* (1902) 29 Wash. 509, 69 Pac. 1081, the plaintiff in an action for personal injuries admitted that he did not know whether the person whom he had employed to treat his injuries was a physician. The defendant maintained that it was not responsible for the aggravation of the plaintiff's injuries arising from improper treatment by his medical attendant. The court stated that if the plaintiff had used ordinary care in seeking medical aid, he would not be held to assume the liability of improper treatment, but added that the converse of this proposition was true, and "if the injured party was negligent in the employment of a competent physician, or employed some person whom he knew to be incompetent, when competent physicians were accessible, and improper treatment was resorted to and the injuries thereby greatly increased, these facts may be shown in mitigation of damages." A verdict for the defendant was affirmed.

In *Selleck v. Janesville* (1898) 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352, an action for personal injuries, the defendant sought to escape liability for the entire resultant injury by alleging that the plaintiff's diseased nervous system was a result of the negligence or unskilfulness of her physician in failing to reduce a dislocation of her ankle. The court, affirming a judgment for the plaintiff, said: "The wrongdoer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill." This statement of the rule by the court was affirmed in *Selleck v. Janesville* (1899) 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

In *Small v. Westville* (1898) 40 N. S. 226, it appeared that the plaintiff was severely cut about the wrist by

reason of the negligence of the defendant. The plaintiff had used reasonable care in selecting a surgeon possessed of ordinary skill, but, by reason of the surgeon's failure to suture a severed nerve, the plaintiff lost the use of her hand. The defendant maintained that it could not be held liable for the unskilful treatment by the surgeon, but the court held that even though the injury was aggravated by the improper treatment, the defendant, in view of the plaintiff's care in engaging surgical attention, was liable therefor.

Mere good faith in selecting a physician, or a belief that a physician is competent, does not amount to the ordinary care which must be exercised by an injured person in securing competent medical or surgical aid. *Flint v. Connecticut Paving Co.* (1918) 92 Conn. 576, 103 Atl. 840. So, in *Crete v. Childs* (1881) 11 Neb. 252, 9 N. W. 55, an action to recover damages for personal injuries, the jury were instructed that if the plaintiff had employed such medical aid "as she thought competent, and in good faith," she was not responsible for the result. The appellate court said that the theory of this instruction seemed to be that the "thought" or belief of the plaintiff as to the competency of the persons she employed to attend her injuries was sufficient to relieve her of responsibility for the result of the treatment, but added that this was error, since the plaintiff's duty was "to exercise reasonable care and diligence in the employment of medical aid."

The rule as to the degree of care required of an injured person in his selection of medical attendants is not altered by the fact that the plaintiff himself is a physician and surgeon. Thus, in *Boynton v. Somersworth* (1878) 58 N. H. 321, wherein the plaintiff in an action to recover damages for personal injuries maintained that no deduction should be made from the amount of damages recoverable because of any alleged improper medical treatment, the court held that since the plaintiff had exercised reasonable care in retaining a medical

attendant, he was not answerable for the success of the treatment, although he himself was a physician and surgeon.

In *Thorne v. California Stage Co.* (1856) 6 Cal. 232, wherein the defendant in an action to recover damages for personal injuries sought to show in mitigation of damages that the plaintiff's surgeon had a poor reputation for ability, the court, while excluding evidence of general reputation, said: "It would certainly have been competent for defendants to show in mitigation of damages that the plaintiff's injuries were wholly or partially the result of improper treatment on the part of his physician."

*b. Physician or surgeon selected by person causing injury.*

It seems that where one procures a physician or surgeon to attend a person whom he has injured, and uses due and reasonable care in the selection of such physician or surgeon, he is not liable for the negligence or unskilfulness of the latter, which results in an aggravation of the original injury. This rule, while apparently inequitable when compared with the rule fixing liability on the wrongdoer for the negligence of a physician or surgeon employed by the injured person, nevertheless seems to be fairly deducible from the following cases: *Secord v. St. Paul, M. & M. R. Co.* (1883) 5 McCrary, 515, 18 Fed. 221; *Atlantic Coast Line R. Co. v. Whitney* (1911) 62 Fla. 124, 56 So. 937; *Eighmy v. Union P. R. Co.* (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; *Louisville & N. R. Co. v. Foard* (1898) 104 Ky. 456, 47 S. W. 342; *Quinn v. Kansas City, M. & B. R. Co.* (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *Galveston, H. & S. A. R. Co. v. Scott* (1898) 18 Tex. Civ. App. 321, 44 S. W. 589.

In *Secord v. St. Paul, M. & M. R. Co.* (Fed.) supra, the plaintiff sued to recover for damages sustained by reason of personal injuries suffered while he was a passenger on one of the defendant's trains. It appeared that he had been attended by a surgeon furnished by the defendant, and he

sought to recover additional damages for the alleged malpractice of the surgeon in treating his injuries. The court held that, since it appeared that the defendant had exercised reasonable care to secure the services of a surgeon possessing ordinary skill, no liability could be predicated on the latter's malpractice, and the plaintiff's only recourse for such damage would be an action against the surgeon himself.

In *Louisville & N. R. Co. v. Foard* (1898) 104 Ky. 456, 47 S. W. 342, an action to recover for personal injuries sustained by the plaintiff while employed on the defendant's railroad, the court held that it was improper to admit evidence of damages caused by the unskilfulness of a surgeon employed by the defendant, saying: "In the employment by a railroad company of its surgeons to attend the persons injured by its trains, the relation of master and servant and principal and agent does not exist; and if the railroad company is careful, and selects suitable surgeons, it is not responsible for their neglect or malpractice." To the same effect see *Quinn v. Kansas City, M. & B. R. Co.* (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036.

In *Eighmy v. Union P. R. Co.* (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056, wherein it appeared that the defendant company had exercised reasonable care in the selection of a surgeon whose services it voluntarily offered to an injured employee, the court held that the employee could not recover additional damages for the negligence of the surgeon.

In *Atlantic Coast Line R. Co. v. Whitney* (1911) 62 Fla. 124, 56 So. 937, it was held that a railroad company was not liable to an injured employee for an aggravation of the injury, caused by the negligence of its surgeon, the court saying: "As we have heretofore decided, the railroad company is not responsible for the negligent work of its surgeon, if not negligent in selecting or retaining him, and knowledge of his failings must be brought home to it. His general reputation may be so bad that the



law will impute knowledge, but nothing short of this will make it liable."

In *Galveston, H. & S. A. R. Co. v. Scott* (1898) 18 Tex. Civ. App. 321, 44 S. W. 589, the court held that a railroad company was not liable to an injured passenger for an aggravation of damages arising from the negligence of a physician which it had furnished in the exercise of a reasonable care. The court said: "Where a common carrier . . . assumes to furnish a surgeon or physician to attend upon injured passengers, the duty devolved upon it is to furnish a competent one, and if this is done the carrier is not liable for any malpractice or neglect upon the part of the physician." But compare *St. Louis & S. F. R. Co. v. Doyle* (1894) — Tex. Civ. App. —, 25 S. W. 461, wherein the court allowed a recovery for the entire injury resulting from the defendant's negligence, remarking that it was immaterial whether the surgeon furnished by the defendant had made a mistake in treating the plaintiff.

### III. Criminal liability.

#### a. General rule.

When a person inflicts a wound on another which is dangerous, or calculated to destroy life, the fact that the negligence, mistake, or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide.

**Alabama.**—*Parsons v. State* (1852) 21 Ala. 300; *McDaniel v. State* (1884) 76 Ala. 1; *Daughdrill v. State* (1896) 113 Ala. 7, 21 So. 378; *Thomas v. State* (1903) 139 Ala. 80, 36 So. 734.

**Arkansas.**—*Sharp v. State* (1888) 51 Ark. 147, 14 Am. St. Rep. 27, 10 S. W. 228.

**Connecticut.**—*State v. Bantley* (1877) 44 Conn. 537, 26 Am. Rep. 486.

**Florida.**—*Johnson v. State* (1912) 64 Fla. 321, 59 So. 894.

**Georgia.**—*Downing v. State* (1901) 114 Ga. 30, 39 S. E. 927; *Allen v. State* (1909) 133 Ga. 260, 65 S. E. 431; *Perdue v. State* (1910) 135 Ga. 277, 69 S. E. 184.

**Iowa.**—*State v. Edgerton* (1896) 100 Iowa, 63, 69 N. W. 280; *State v. Wood* (1900) 112 Iowa, 411, 84 N. W.

520; *State v. Gabriella* (1913) 163 Iowa, 297, 144 N. W. 9.

**Louisiana.**—*State v. Briscoe* (1878) 30 La. Ann. 433; *State v. Barnes* (1882) 34 La. Ann. 395.

**Massachusetts.**—*Com. v. Hackett* (1861) 2 Allen, 136.

**Missouri.**—*State v. Landgraf* (1888) 95 Mo. 97, 6 Am. St. Rep. 26, 8 S. W. 237; *State v. Strong* (1899) 153 Mo. 549, 55 S. W. 78, 13 Am. Crim. Rep. 278; *State v. Daly* (1908) 210 Mo. 664, 109 S. W. 53.

**Nebraska.**—*Hamblin v. State* (1908) 81 Neb. 148, 115 N. W. 850, 16 Ann. Cas. 569.

**New York.**—*People v. Kane* (1915) 213 N. Y. 260, L.R.A.1915F, 607, 107 N. E. 655, Ann. Cas. 1916C, 635.

**New Mexico.**—*Territory v. Yee Dan* (1894) 7 N. M. 439, 37 Pac. 1101.

**Pennsylvania.**—*Com. v. Eisenhower* (1897) 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521.

**Virginia.**—*Clark v. Com.* (1893) 90 Va. 360, 18 S. E. 440.

**Washington.**—*State v. Baruth* (1907) 47 Wash. 283, 91 Pac. 977.

The rule, and the reason therefor, have been well stated by the supreme court of Arkansas as follows: "The well-established rule of the common law would seem to be that if the wound was a dangerous wound,—that is, calculated to endanger or destroy life,—and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death. . . . A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant upon the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which per-

sons guilty of the highest crimes might escape conviction and punishment." *Sharp v. State* (Ark.) supra.

And in *State v. Baruth* (Wash.) supra, the court stated the prevailing common-law rule as follows: "Where one unlawfully inflicts upon the person of another a wound calculated to endanger or destroy life, it is no defense to a charge of murder, where death ensues, to show that the wounded person might have recovered if the wound had been more skilfully treated. Even unskilful or negligent treatment of the wound on the part of the wounded person or his physicians, which may have aggravated the wound and contributed to the death, does not relieve the assailant from liability. He must show that the negligent and unskilful treatment was the sole cause of death, before he can escape the consequences of his unlawful act on this ground."

In *Parsons v. State* (1852) 21 Ala. 300, wherein the defendant sought to shelter himself from a charge of murder by alleging the unskilful treatment of the wounds as the cause of death, the court said: "We agree . . . that if the wound was mortal or dangerous the person who inflicted it cannot shelter himself under the plea of erroneous treatment."

That case was cited in *McDaniel v. State* (1884) 76 Ala. 1, in support of the following statement: "The doctrine is established that if the blow caused the death it is sufficient, though the individual might have recovered . . . had the surgeon treated the wound properly. This we understand to be the rule where the wound is in its nature mortal, or likely to produce death. So, we think, it results as a corollary, if the death result in part from a blow wrongfully given, which may produce death, and partly from neglect or unskilful treatment, then the assailant is guilty of the homicide in the degree the attendant circumstances assign to the act." And, continuing, the court said: "The true test is whether the deceased's death followed as an ordinary and natural result from the conduct of the defendant. If so, it is no defense

that the deceased, under another form of treatment, might have recovered. . . . But if the result is caused by the malpractice of the physician, the wound not being of itself mortal and the physician not acting in concert with the defendant, then the defendant is not responsible; for the wound, though a condition of the killing, is not its juridical cause."

In *Daughdrill v. State* (1896) 113 Ala. 7, 21 So. 378, it was said: "The true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded man suffering from it, will afford the defendant no protection against a charge of unlawful homicide." And the rule, as stated in *Daughdrill v. State* (Ala.) supra, was quoted and applied in *Thomas v. State* (1903) 139 Ala. 80, 36 So. 734.

In *Sharp v. State* (1888) 51 Ark. 147, 14 Am. St. Rep. 27, 10 S. W. 228, the defendant, on trial for the murder of one Martin, introduced expert testimony to prove that the wound which he had inflicted was not mortal, and that the death of Martin was caused by the maltreatment of the attending physician. It appeared that the wound inflicted was necessarily a dangerous one, and the court said: "If a person inflicts a wound with a deadly weapon in such a manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound, or its unskilful or improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible."

And where the defendant, who was charged with the death of another from the effects of a gunshot wound in the arm, claimed that death was the result of improper treatment of the wound by the attending physician, the court stated the rule applicable as

follows: "If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offense, either of manslaughter or murder as the case may be; and he is none the less responsible for the result, although it may appear that . . . unskilful or improper treatment aggravated the wound and contributed to his death." *State v. Bantley* (1877) 44 Conn. 537, 26 Am. Rep. 486.

In *Johnson v. State* (1912) 64 Fla. 321, 59 So. 894, a prosecution for murder, the accused claimed that the death was not the result of the wound inflicted by him, but was caused by improper surgery. The wound in itself was dangerous to life, and the court held that mere erroneous treatment of such a wound would afford no protection to a charge of homicide.

In *Downing v. State* (1901) 114 Ga. 30, 37 S. E. 927, the accused in a prosecution for unlawful homicide maintained that the death was produced by the failure of the surgeons to extract promptly certain foreign matter from the wound, which he claimed was not necessarily mortal. The trial court charged the jury that the negligence of the attending surgeons in treating a mortal wound, or their improper treatment of a wound not necessarily fatal, but which was productive of secondary causes resulting in death, would not relieve the accused from responsibility for the death of the deceased, and on appeal this charge was affirmed.

And where the accused in a prosecution for murder maintained that the death was the result of improper medical treatment of the wound, rather than of the wound itself, the court affirmed an instruction to the jury that, "if you believe from the evidence that the defendant unlawfully inflicted upon the deceased a mortal wound from which he thereafter died, he is responsible, though such wound was aggravated by improper and unskilful medical treatment and the death would not have resulted in the absence of such unskil-

fulness." *Allen v. State* (1909) 133 Ga. 260, 65 S. E. 431.

In *Perdue v. State* (1910) 135 Ga. 277, 69 S. E. 184, wherein the accused, in a prosecution for murder, requested a charge which involved the doctrine that one may intentionally inflict a wound on another, from which he dies, and that the quality of the act will be affected by the degree of skill and care which is exercised in the treatment of the wound, the court refused to give recognition to any such doctrine.

And where the jury was instructed that, if the wounds inflicted by the accused caused or contributed to the death of the deceased, the fact that the wounds were not treated more skilfully would not affect his guilt, the court held that the instruction was a proper one. *State v. Edgerton* (1896) 100 Iowa, 63, 69 N. W. 280.

Similarly, where there was evidence that the death of the deceased would not have resulted except for the alleged mismanagement of his physician, the court held that if the injuries inflicted by the accused had directly contributed to produce death, the fact that the victim would not have died had proper treatment been given him was not controlling. The court quoted *Greenleaf* to the effect that "if death ensues from a wound given in malice, but not in its nature mortal, but, which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it." *State v. Wood* (1900) 112 Iowa, 411, 84 N. W. 520.

In *State v. Gabriella* (1913) 163 Iowa, 297, 144 N. W. 9, the accused, on trial for murder, offered testimony to the effect that the cause of the death was not the gunshot wound inflicted by him, but the negligent performance of a surgical operation on the wound. The trial court rejected all this testimony, and this court in affirmation said: "There is no claim that Turso [the deceased] had recovered from his wound at the time of the operation, nor that there was any evil intent in the performance of the operation, nor that it was performed for any other purpose than in a good-faith attempt to save the life of the

patient. Lack of skill, or bad judgment, or mere negligence in any form on the part of the surgeon will not avail the slayer to protect him against the final consequences of his wrongful act."

When a wound has been maliciously inflicted from which death might ensue, and which has been followed by death, the burden of proof is on the accused to show that death resulted from some other cause, such as malpractice, or want of skill in the treatment of the wound; otherwise he will be chargeable therewith. *State v. Briscoe* (1878) 30 La. Ann. 433.

The doctrine that the unskilful treatment of a wound by a physician or surgeon would not be a ground for the acquittal, in a prosecution for murder, of one who had inflicted the wound with murderous intent, was reaffirmed in *State v. Barnes* (1882) 34 La. Ann. 395.

And it was held in *Com. v. Hackett* (1861) 2 Allen (Mass.) 136, a case which has been widely quoted as the basic authority for the rule here expressed that an accused who had designedly inflicted a dangerous wound on another would be guilty of unlawful homicide, even though the improper treatment of the wound by the attending surgeon may have contributed to his death.

In *State v. Landgraf* (1888) 95 Mo. 97, 6 Am. St. Rep. 26, 8 S. W. 237, the accused, on trial for murder, maintained that the death was not the result of the wound inflicted by him, but of the unskilful medical treatment of the attending surgeon. The trial judge charged that if the jury believed that the accused had wilfully shot the deceased, producing a dangerous wound, and that such wound was the cause of death, the accused would be guilty of murder in the first degree, "notwithstanding you may also believe and find that unskilled medical treatment aggravated such wound, and that deceased might have recovered if greater care and skill had been employed in treating her." The court in affirmance stated that there was abundant support in the authorities for this instruction."

In *State v. Strong* (1899) 153 Mo. 549, 55 S. W. 78, 13 Am. Crim. Rep. 278, it was held proper to charge that if the jury believed that the accused had wilfully struck another with a knife without a design to effect death, and that the victim had died from the effect of the wound, he would be guilty of manslaughter, notwithstanding that the jury might also find that unskilled medical treatment had aggravated the wound, and more skilful treatment might have resulted in a recovery.

And where, after the administration of morphine to one Harvey by the accused, his condition was diagnosed as intoxication, and the fact that he was poisoned was not discovered until after his death, the court held that the improper medical treatment would not relieve the accused from responsibility for the homicide, provided the jury found that Harvey had died as a result of the poison. *State v. Daly* (1908) 210 Mo. 664, 109 S. W. 53.

In *Hamblin v. State* (1908) 81 Neb. 148, 115 N. W. 850, 16 Ann. Cas. 569, a prosecution for murder, the accused maintained that the victim had died, not from the effects of the wound inflicted by him, but by reason of the malpractice of the surgeons in allowing a broken glass catheter to remain in the bladder of the wounded man for eight or ten days before removing it by operation, which negligence, the accused alleged, caused gangrene and resulted in death. There was sufficient evidence to show that the original wound was a mortal one, and the allegation of death as the result of the delay in removing the catheter was characterized by the court as speculative, the latter holding that, where a mortal wound is unlawfully inflicted, the fact that mistakes or other causes may have hastened death will not absolve the accused from responsibility for the crime.

In *People v. Kane* (1915) 213 N. Y. 260, L.R.A.1915F, 607, 107 N. E. 655, Ann. Cas. 1916C, 685, the accused, on trial for murder, maintained that the shots fired by him were not the cause of the death, but that intervening negligent medical and surgical treat-

ment had brought on the fatal result. It did not appear that the maltreatment was the sole cause of death, and the court held that where the wounds inflicted by the accused operate as causes of death, the fact that the malpractice of attending physicians or surgeons may have had some causative influence will not relieve the accused from responsibility for the act.

And where the accused claimed that the death was not the result of the injuries inflicted, but that the negligent performance of a surgical operation was the proximate cause thereof, the court held that "when a surgical operation, apparently necessary, is resorted to for the purpose of saving one from the probably fatal effect of a wound, it must clearly appear that maltreatment of the wound, and not the wound itself, was the sole cause of the death." And, the evidence not establishing this condition, a judgment of murder was affirmed. *Territory v. Yee Dan* (1894) 7 N. M. 439, 37 Pac. 1101.

Similarly, where it appeared, on a trial for murder, that a drainage tube, inserted by the attending surgeons during an operation on the wound inflicted by the accused, had found its way into the spinal canal, and the accused maintained that this mistake was the cause of the death, the court held that "the prisoner cannot escape by showing that death was the result of an accident occurring in an operation which his felonious act made necessary." *Com. v. Eisenhower* (1897) 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521.

In *Clark v. Com.* (1893) 90 Va. 360, 18 S. E. 440, the court found no error in an instruction, in a prosecution for murder, that "if the jury believe from the evidence that the prisoner wilfully inflicted upon the deceased a dangerous wound, one that was calculated to endanger and destroy life, and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskilful or improper treatment."

And it was held in *State v. Baruth* (1907) 47 Wash. 283, 91 Pac. 977, that one who unlawfully inflicts a dangerous wound on another cannot avail himself of the defense that negligent and unskilful treatment of the wound was the proximate cause of death, except where it be shown that such treatment was the sole cause of death.

#### *b. Qualification of rule.*

Where a person inflicts on another a wound not in itself calculated to produce death, and the injured person dies solely as a result of the improper treatment of the wound by an attending physician or surgeon, the fact that the death was caused by medical mistreatment is a good defense to a charge of homicide. *Parsons v. State* (1852) 21 Ala. 300; *McDaniel v. State* (1884) 76 Ala. 1; *Bush v. Com.* (1880) 78 Ky. 268; *Tibbs v. Com.* (1910) 138 Ky. 558, 28 L.R.A. (N.S.) 665, 128 S. W. 871; *State v. Scott* (1857) 12 La. Ann. 274; *People v. Kane* (1915) 213 N. Y. 260, L.R.A. 1915F, 607, 107 N. E. 655, Ann. Cas. 1916C, 685.

In *Parsons v. State* (Ala.) supra, wherein the accused, on trial for murder, sought to shelter himself from the charge by setting out the unskilful treatment of the wounds as the cause of death, the court said: "We all agree that ordinarily, if a wound is inflicted not dangerous in itself, and the death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable."

In *McDaniel v. State* (1884) 76 Ala. 1, the court stated the proposition as follows: "The true test is whether the deceased's death followed as an ordinary and natural result from the conduct of the defendant. If so, it is no defense that the deceased, under another form of treatment, might have recovered. . . . But if the result is caused by the malpractice of the physician, the wound not being in itself mortal and the physician not acting in concert with the defendant, then the defendant is not responsible; for the wound, though a condition of the killing, is not its juridical cause."

And in *Bush v. Com.* (1880) 78 Ky. 268, it was said that while the common-law rule seemed to be that when death ensued from a dangerous wound, unskilled and improper treatment thereof would not affect the criminality of the act, still "if the wound is not dangerous in itself, and death results from improper treatment or from disease subsequently contracted, not superinduced by or resulting from the wound, the accused is not guilty."

In *Tibbs v. Com.* (1910) 138 Ky. 558, 28 L.R.A.(N.S.) 665, 128 S. W. 871, the court held that it was error to exclude evidence, in a prosecution for murder, that the wound inflicted by the accused was not of itself dangerous, and that the victim had died from the effect of improper medical and surgical treatment, since by establishing proof of these facts the accused would be absolved of the charge of unlawful homicide.

It has been said that the fact that the deceased may have had an unskilful surgeon in attendance on his wound cannot mitigate the crime of the accused, unless it plainly appears that the treatment was the sole cause of death. The rule has been stated in the words of Mr. Greenleaf, as follows: "If death ensues from a wound given in malice, but not in its nature mortal, but, which being neglected or mismanaged, the party died; this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, . . . and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died." *State v. Scott* (1857) 12 La. Ann. 274.

In *People v. Kane* (1915) 213 N. Y. 260, L.R.A.1915F, 607, 107 N. E. 655, Ann. Cas. 1916C, 685, the court quoted Mr. Wharton to the effect that "where the wound or injury has contributed mediately or immediately to the death of the injured person, and the injury was neglected or mismanaged, to warrant the escape of the person inflicting the injury from the responsibility for

the killing, the subsequent neglect or mismanagement must have been the sole cause of death."

Compare *Coffman v. Com.* (1874) 10 Bush (Ky.) 495, wherein the court held that it was for the jury to determine, in a prosecution for murder, whether the operation performed on the deceased was such as ordinarily prudent and skilful surgeons would have deemed necessary, or if it would have been deemed necessary and was not performed with ordinary skill and added that if death resulted from such an operation, and not from the injuries inflicted by the accused, he should be acquitted, even though such injuries would eventually have proved fatal.

#### *c. Rule in Texas.*

In Texas, it is provided by statute (Texas Penal Code, arts. 652 and 653) that "the destruction of life must be complete by such act, agency, procurement or omission [of the accused]; but, although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide. . . . What is said of gross neglect or improper treatment has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant." See *Morgan v. State* (1884) 16 Tex. App. 593; *Brown v. State* (1873) 38 Tex. 482; *Johnson v. State* (1901) 43 Tex. Crim. Rep. 283, 65 S. W. 92; *Sartin v. State* (1907) 51 Tex. Crim. Rep. 571, 103 S. W. 875; *McMillan v. State* (1910) 58 Tex. Crim. Rep. 525, 126 S. W. 875.

In *Morgan v. State* (Tex.) supra, the court, commenting on the change which the statute made in the common-law rule, pointed out that at common law the improper treatment, and not the wound, must produce the death, in order to relieve the person who inflicted the original injury from the charge of homicide. And, continuing, it was said: "Our statute, as I interpret it, does not require that the neglect or improper treatment

should produce the death, either in whole or in part. If there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of an injured person is not homicide by the party who inflicted the original injury." By way of illustration, a hypothetical case of manifestly improper treatment, where death was the result of the wound and not of the treatment, was stated, in which B., who had sustained a knife wound from A., severing a small artery, is treated by a surgeon who, instead of attempting to stop the flow of blood, administers chloroform and leaves B. to bleed to death. This, the court pointed out, would be homicide under the common law, but not under the Texas statute. The phrase, "gross neglect and improper treatment," as used in the statute, was interpreted as meaning not only acts which destroy life, but such "as allow, suffer, or permit such destruction of life." Thus, where it appeared that, in the treatment of a knife wound inflicted by the accused on the temple of the deceased, the attending surgeons were guilty of gross negligence in making incisions in the back of the skull, which were of themselves perhaps mortal, when with proper treatment the deceased would have had a chance to recover, the court held that the accused was not guilty of homicide.

In *Brown v. State* (1873) 38 Tex. 482, wherein the accused, on trial for murder, produced evidence of malpractice by the physician in attendance on the victim, the court held that the jury should be instructed that the accused could not be found guilty unless they were satisfied that the death was the result of the wound, and not of the malpractice of the physician. And, commenting on the statute, the court said: "Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held

guilty, upon the theory that without the first injury no other would have followed, as resulting from the first."

And in *Johnson v. State* (1901) 43 Tex. Crim. Rep. 288, 65 S. W. 92, where the accused in a prosecution for murder alleged that the death of the deceased was the result of improper treatment and neglect by the attending physician, and that the wound of itself was not sufficient to cause death, the court held that the failure of the trial judge to charge affirmatively that if the wound was not necessarily mortal, but the deceased had died as a result of improper or neglectful treatment, the accused would not be responsible for his death, was reversible error.

In *Sartin v. State* (1907) 51 Tex. Crim. Rep. 571, 103 S. W. 875, the court held that it was correct to instruct the jury in a prosecution for murder as follows: "If you believe from the evidence that the defendant . . . did shoot the [deceased] as charged, but you further find from the evidence that there has been gross neglect or manifestly improper treatment of said [deceased] by any one or more of the physicians or persons attending him, between the inflicting of the wound and his death, which improper treatment or neglect, if any, caused the death of the said [deceased], then you cannot find the defendant guilty of taking the life of the said [deceased]."

And, where the evidence in a prosecution for murder suggested that the death may have resulted from the improper treatment of the attending physicians, the court held that the failure of the trial court to charge that, "if the death of the deceased was brought about by improper treatment or gross neglect of the physicians, he would not be guilty of the homicide," was reversible error. *McMillan v. State* (1910) 58 Tex. Crim. Rep. 525, 126 S. W. 875.

R. E. B.

MARGARET SHERIDAN et al.  
v.

L. J. McCORMICK et al., Appts.

*North Dakota Supreme Court—May 16, 1918.*

(39 N. D. 641, 168 N. W. 59.)

**Fraudulent conveyance — consideration — payment of debts.**

1. Where, at the time of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction and with knowledge of the fraud, agrees with the grantors to pay certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently and in pursuance of such an agreement pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid.

[See note on this question beginning on page 527.]

**— consideration.**

2. The law will treat as null and void as to creditors all fraudulent contrivances to screen the property of a debtor from his creditors. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void.

[See 12 R. C. L. 531 et seq.]

**— participation by grantee.**

3. Where a conveyance of real estate is made by a grantor with intent to hinder, delay, or defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in fraud by the

grantee as will invalidate the transfer as to such creditors, even where full consideration is paid.

[See 12 R. C. L. 533-535.]

**Judgment — collateral attack — execution.**

4. No defense can be interposed, in an action to remove a fraudulent conveyance from the path of an execution, on the ground that the claim on which the judgment was entered and on which the execution was issued, was invalid, or inequitable. The matter is precluded by the prior judgment; and, when no appeal was taken, it must be assumed that all of the defenses, both legal and equitable, which the defendants had or deemed themselves entitled to, were interposed on the former trial.

[See 12 R. C. L. 632.]

Headnotes by BRUCE, Ch. J.

(Robinson, J., and Fisk, District Judge, dissent.)

**APPEAL** by defendants from a judgment of the District Court for Renville County in favor of plaintiffs in an action brought to set aside an alleged fraudulent conveyance. *Modified.*

The facts are stated in the opinion of the court.

Messrs. Ryerson & Rodsater for appellants.

Messrs. J. E. Bryans and E. R. Sinkler for respondents.

Bruce, Ch. J., delivered the opinion of the court:

This action comes before us for a trial de novo, and is brought to set

aside a fraudulent conveyance. On the 3d day of May the plaintiffs recovered a judgment against the McCormicks for the sum of \$1,140.25.

The indebtedness on which the judgment was founded grew out of the sale of an abstract business by



the plaintiffs to the defendants on September 8, 1911, for \$4,100, payable in monthly instalments of \$50, and the action was brought on the instalments then due and unpaid. The transfer, which is sought to be set aside, was made by the McCormicks to the defendant W. A. Overing, the father of Mrs. McCormick, on the 10th day of April, 1914, and on the day of the commencement of the action on which the judgment was obtained. The trial court found the issues for the plaintiffs, and "that the said deeds were executed and the land transferred wholly and voluntarily without consideration, and with the sole intent to hinder, delay, and defraud the plaintiffs in the collection of their claim, and to hinder, delay, and defraud all of their creditors, and that the said W. A. Overing, defendant, accepted and received such debts, and the transfer of such land, with full knowledge of all of such fraudulent intent, and with the full and sole intent on his part to assist the said L. J. McCormick and Luina M. McCormick in their fraudulent purpose." After a full argument and a thorough examination of the record, we are constrained to affirm this finding, and nothing would be gained by relating the testimony at length. The matter, indeed, is one largely of probability and of the credibility of the witnesses, and on the latter point the trial judge had the opportunity of personal observation which is not presented to us.

There can be no question that there was in the minds of the defendants the desire to prevent the plaintiffs from collecting their claim, and, as far as the consideration for the deeds is concerned, all that is presented is a claim for money alleged to have been advanced by the defendant Overing to the daughter some fourteen years before, and before her marriage, but, which not only was long since outlawed, if, in fact, it ever existed, but on and for which, according to her own statements, no interest had

ever been paid, no note given, and no payment even demanded, and the only evidence of which was a memorandum contained in a notebook owned by the defendant, Luina McCormick. It is true that the defendant Overing paid the past-due taxes and the interest on a prior mortgage just prior to the transfer, but the evidence clearly shows that he did this because he was led to believe that the deeds could not be recorded without these payments.

The case, indeed, in our minds, is not one where a debtor has honestly preferred a creditor, but one which clearly comes within the general condemnation of the authorities, which seem to hold that the law will treat "as null and void all fraudulent contrivances to screen the property of a debtor from his creditors; it is

**Fraudulent conveyance—consideration.**

fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to defeat them by benefactions conferred upon others. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void." Note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 732; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792.

The case also clearly comes within the provisions of § 7220 of the Compiled Laws of 1913, which provides that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

There is, too, no doubt of the knowledge of the grantee, Overing, of the fraudulent intent, nor of the applicability of the rule of law announced by us in the case of Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996, and wherein we said: "Where a conveyance of real estate is made by a grantor with intent to hinder, delay, and defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in the fraud by the grantee as will invalidate the transfer, even where full consideration is paid."

There is, of course, no merit in the contention that the abstract business was not worth what the defendants agreed to pay for it, and that therefore the plaintiffs do not come into a court of equity with clean hands. The matter is precluded by the judgment on which the collateral attack—execution.

We must assume that in that case the defendants interposed all of the defenses, both legal and equitable, which they had, or deemed themselves entitled to, and no appeal was taken from that judgment.

Nor do we believe that the defendant Overing is entitled to a lien for the taxes and interest paid by him.

Our conclusion from the record is that he knew of and was a party to the fraud which was sought to be consummated, and it is well established that "where, at the time of the execution of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction, agrees with the grantors to pay off certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently, and in pursuance of such agreement, the grantee pays such encumbrances,

he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid." *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271.

The judgment of the District Court, however, goes too far, as it holds that the conveyance is void as between the McCormicks and Overing. As far as this action is concerned, it is void only as to the lien of the plaintiff's judgment and attachment. It is modified to this extent, and, as so modified, it is affirmed.

Grace, J., being disqualified, the Honorable Frank Fisk, Judge of the Eleventh Judicial District, sat in his place.

Robinson, J., dissenting:

The purpose of this suit is to subject the half section of land in Renville county to the lien of the plaintiffs' judgment, which is \$1,140.25. In an action by the plaintiffs against the McCormick defendants on May 18, 1914, the plaintiffs caused a writ of attachment to be issued and levied on the lands in question. On May 13, 1915, a judgment in said action was obtained and docketed, and an execution was issued against the defendants, and the next day it was returned unsatisfied. Pending said action the McCormicks conveyed to W. A. Overing, father of Mrs. Luina M. McCormick, the S. E.  $\frac{1}{4}$  of 27-161-84, and the E.  $\frac{1}{2}$  of W.  $\frac{1}{2}$  of the same section. The deeds were made and recorded April 10, 1914. The first tract was owned by L. J. McCormick and the second by his wife. Both tracts were worth about \$10,000, and were subject to mortgages amounting to over \$7,000. At and prior to the transfer the past-due interest on the mortgages and the taxes amounted to \$840; and the McCormicks were unable to pay the same. The mortgages were pressing the mand insisting on immediate payment and threatening a foreclosure. Under such pressure the daughter natural-

Fraudulent conveyance—consideration—payment of debts.

ly requested her father, whose note was good at the bank, to loan them money to pay the interest and taxes. Having previously advanced the daughter several sums which, with interest, amounted to about \$2,000, and which was then outlawed, the father refused to loan the money, and the land was conveyed to him for the amount due on the same and the money which he had loaned his daughter. Thus the McCormicks counted on paying their debts and shifting the burden onto the old man. However, it is quite clear the deeds were made, not only because of immediate pressure and to prevent a ruinous foreclosure, but also to hinder and delay the plaintiffs whose attorney was pressing them for a mortgage on the land. Defendant Overing knew, or should have known, of such intent.

However, under the statute the transfer should be held void only in so far as it might prevent the plaintiffs from collecting the judgment by the sale of the land; and, though the general rule is that a fraudulent grantee of land cannot hold the same as security for the payment of prior liens and taxes, yet there are reasons why that rule should not govern this case. Defendant Overing may well be considered a ward of the court. He was an old man in poor health, and his mind was sadly impaired, and his payment of the interest and taxes was no damage to any party. The chances are that in buying the land his motive was to prevent a foreclosure and to get something for the money advanced to his daughter. However it may be, it is quite certain the equity of Overing compares well with those of the plaintiffs. Their judgment was obtained on a deal which was rather sharp and unconscionable. It was given on notes for an abstract outfit sold to the McCormicks for \$4,100, and taken back on a chattel mortgage and sold to the plaintiff for \$500. The courts might well refuse to aid in the collection of such a judgment, or any judgment not based on a fair and

honest consideration. Thus, in suits for specific performance, a court refuses to aid an unconscionable deed when the deeds were made as part of the consideration for the same. Overing paid the taxes and the past-due interest on the mortgages, amounting to \$840, and since then he has paid a considerable amount of taxes and interest as the same became due, and for all such payments Overing has an equity superior to the plaintiffs, and he should have and retain full title to the land unless reimbursed for such payments.

It is clear the judgment in this case must be reversed for the reason it goes too far. It declares the deed to Overing to be null and void, whereas, in any event, such deeds may be adjudged void only so far as they hinder the collection of plaintiffs' judgment. It is only to the extent of the judgment that the plaintiffs may question the right of the McCormicks to give away their land.

As the record does not clearly show the several amounts paid by Overing for taxes and interest, on return of the remittitur the district court should forthwith take such additional testimony as may be necessary to ascertain such payments, and the amount of the same, with interest, and then to give judgment to the effect that for such amount Overing's claim of title to the land is and shall be superior to the plaintiffs' judgment, and that within thirty days the plaintiffs may repay the amount of such taxes and interest, and for the same that they be subrogated to a lien on the land, and that on such payment by the plaintiffs that the deeds to Overing be adjudged void in so far as they hinder the collection of the plaintiffs' said judgment.

**Fisk, District Judge, dissenting:**

I agree with the conclusion reached by Judge Robinson, but not in all that he says in his opinion.

There is little doubt but that the transfer of the land was fraudulent and made for the purpose of hinder-

ing, delaying, and defeating, if possible, the collection of the plaintiffs' judgment. I do not, believe, however, that the defendant Overing was such an active participant in the scheme as to say that he should be punished by giving the plaintiffs' judgment priority over the amount Overing paid in taxes and interest which were prior liens. Overing was an old man and I believe he was used by his daughter and son-in-law to further their fraudulent scheme without any particular knowledge on his part of everything that was going on. Under such circumstances I do not believe the rules of law as announced by the majority opinion apply. I am in full accord

with all of the rules therein announced, but I believe the rule that "where the fraud is constructive only, the grantee comes into court with comparatively clean hands, and the courts treat him with leniency. In such cases the fraudulent conveyance has been allowed to stand as security for the purchase price, or for the amount of prior liens or debts of the grantor paid by the grantee, or for taxes paid" (Daisy Roller Mills v. Ward, 6 N. D. 324, 70 N. W. 271), comes nearer fitting the facts in this case than the rules announced in the majority opinion.

Petition for rehearing denied June 1, 1918.

### ANNOTATION.

**Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors.**

I. Scope and introduction, 527.

II. Statement of rules in general:

- a. Actual fraud, 529.
- b. Constructive fraud, 535.
- c. Claimants under or representatives of grantee, 537.
- d. Suspicious circumstances; inconclusive evidence; discretion of court, 538.

III. Accounting for rents and profits or proceeds of property, 539.

IV. As to affirmative relief of grantee, 542.

V. Conclusions, 543.

#### *I. Scope and introduction.*

The present annotation is intended to cover only those cases in which reimbursement was sought, on the setting aside of the conveyance or transfer, for taxes or encumbrances discharged by the fraudulent grantee, and not those cases involving reimbursement for expenditures for improvements, repairs, the purchase price, or to discharge unsecured indebtedness of the grantor; although attention is called to some cases not on the facts within the scope of the title of the annotation, which lay down the rule broadly enough to cover the class of cases herein considered.

There appears to be more reason for allowing claims of priority over rights of creditors of the fraudulent grantor in the case of sums paid by the grantee to discharge taxes or encumbrances on the property than in the case of payments to the grantor as a part of the purchase price. This is recognized in *Leq Ve v. Stoppel* (1896) 64 Minn. 74, 66 N. W. 208, where, in holding that the grantee should be entitled on the sale of the property to reimbursement for sums expended to discharge a prior mortgage, the evidence not being conclusive that there was actual fraud, although showing a state of facts so suspicious that the court did not feel warranted in allowing the conveyance to stand, the court stated: "This is not a case where reimbursement is sought for money paid to the grantor, which he may have used up, or placed beyond the reach of his creditors. That would present a very different case. Here the money went to the benefit of the property, and, if the mortgage had not been paid, the creditors, or those who purchased at a creditors' sale, would have to pay it, in order to save the property."

And distinction as to the right of a fraudulent grantee to reimbursement for money paid to the grantor as a part of the purchase price, and his right to reimbursement for sums expended to discharge valid prior mortgages on the property, on the setting aside of the conveyance at the instance of creditors of the grantor, is stated in *Hamilton Nat. Bank v. Halsted* (1892) 134 N. Y. 520, 30 Am. St. Rep. 693, 31 N. E. 900, as follows: "If A convey to B his farm, worth \$5,000, with intent to defraud his creditors, B paying him \$1,000 at the time of the delivery of the deed, the court, in the decree setting aside the conveyance, will refuse to grant him relief, not as a proper punishment for the offense, but because the creditors have an equity equal to the value of the property granted, which should be fully protected as against him who fraudulently sought to despoil it. But for the conveyance the entire property would have been applicable to the payment of the creditors. By the fraud it was put beyond the reach of an execution. Because of it a court of equity declares the deed void. And to the request of B, that he be allowed the \$1,000 paid to his fraudulent grantor, a court of equity refuses to listen because the equity of the creditors embraces the whole of the property, including necessarily the interest represented by the \$1,000 paid to A, and it cannot be cut down or interfered with by any payment constituting a part of the fraudulent transaction. But for the misconduct of B, the creditors presumably could have reached the entire interest; therefore, the result of it must be borne by him, and not by the innocent party. Should A convey his farm to B, subject to a valid pre-existing mortgage of \$5,000 held by a third party, and B subsequently dispose of it for a larger sum, out of the proceeds of which he pays the mortgage, he cannot be required to pay to the creditors the full value of the farm without deducting the amount due on the mortgage, for as to that sum the creditors have no equity. If the fraud had not been consummated, only the value of the property in excess of the

mortgage could have been made available in payment of the claims of the creditors. As to that interest secured by the mortgage no wrong was done them. Having no right to such interest, no principle of equity exists on which to found a claim for an appropriation of any benefit, on account of it, from a fraudulent grantee of the equity of redemption. Or, if before B sells the property, the conveyance is set aside on the ground of fraud, in an accounting for the rents and profits, he will be allowed for interest paid on the mortgage, and for the reason that, the mortgage being valid, the property was chargeable with the payment of the interest, as well as the principal, and the creditors were not, therefore, harmed by it."

So, although holding that, on the setting aside of the conveyance at the instance of creditors, the grantee, who was guilty of actual fraud, was entitled to a credit, in an accounting for rents and profits, for taxes paid on the property, the court in *How v. Camp* (1844) Walk. Ch. (Mich.) 427, held that he was not entitled to a credit for advances to the grantor, unless they were used by the latter before the creditors filed their bill, to pay debts owing from the grantor to the creditors at the time of the conveyance. It was said that, so far as payments were concerned which the grantor had so used, the conveyance had not operated as a fraud on the creditors, but that no other advances of money should be allowed, since to the extent of such allowances, the court would be giving effect to the fraud, and would remove the chief obstacle to third persons, assisting debtors in defrauding creditors by indemnifying them against pecuniary loss in case of detection.

A distinction should be noted between cases where, as in *Wells v. White* (1886) 142 Mass. 518, 8 N. E. 442, the grantee or transferee obtains an assignment to himself of a mortgage on the property, and does not simply discharge it by payment, and cases where there is no assignment, but the encumbrance is discharged. In the former class of cases, if, as is implied

in the case referred to, he is held accountable to the creditors only for the surplus or equity over the amount of the mortgage, this would result apparently from the fact that, independently of the fraudulent contract, he could rely on his mortgage; and it would not necessarily follow that, if he had discharged the mortgage without procuring such assignment, he would be entitled to reimbursement, as against creditors of the vendor, on the setting aside of the conveyance or transfer. For other cases where the mortgage or other liens were assigned to the grantee, see the following cases cited under II. a, *infra*; *Smith v. Grimes* (1876) 43 Iowa, 356; *Fordyce v. Hicks* (1888) 76 Iowa, 41, 40 N. W. 79; and *Boggs v. Douglass* (1896) 100 Iowa, 385, 69 N. W. 689; also *Adams v. Young* (1909) 200 Mass. 588, 86 N. E. 942, cited under II. b, *infra*. See, however, *Greigg v. Rice* (1903) 66 S. C. 171, 44 S. E. 729, cited under II. a, *infra*, holding that a fraudulent grantee was not entitled to subrogation to the rights of holders of prior mortgage and judgment liens, although apparently these had been assigned to him.

## II. Statement of rules in general.

### a. Actual fraud.

As to whether a grantee who is guilty of actual fraud is entitled to reimbursement for taxes and prior encumbrances on the property, discharged by him, the authorities are conflicting. The majority of the cases passing on the question hold that a grantee who is clearly shown to be guilty of actual fraud is not entitled, as against creditors of the grantor, on the setting aside of the conveyance, to reimbursement for sums paid by him to discharge taxes and prior encumbrances on the property, and cannot be subrogated to the rights of the holders of such prior liens.

**United States.**—*Milwaukee & M. R. Co. v. Soutter* (1871) 13 Wall. 517, 20 L. ed. 543 (fraudulent grantee not entitled to affirmative relief); *Burt v. C. Gotzian & Co.* (1900) 43 C. C. A. 59, 102 Fed. 937, writ of certiorari denied in (1900) 179 U. S. 684, 45 L. ed. 385, 8 A.L.R.—34.

21 Sup. Ct. Rep. 916 (taxes and encumbrances); *Lynch v. Burt* (1904) 67 C. C. A. 305, 132 Fed. 417.

**Alabama.**—*Tickner v. Wiswall* (1846) 9 Ala. 305 (assumption of encumbrance as part of purchase price); see also *Tissier v. Wailes* (1905) — Ala. —, 39 So. 924, and *Pritchett v. Jones* (1888) 87 Ala. 317, 6 So. 75.

**Illinois.**—*Lobstein v. Lehn* (1887) 120 Ill. 549, 12 N. E. 68 (approving rule).

**Indiana.**—*Musselman v. Kent* (1870) 33 Ind. 452.

**Maryland.**—*Milholland v. Tiffany* (1885) 64 Md. 455, 2 Atl. 831 (recognizing rule).

**Michigan.**—*Morely Bros. v. Stringer* (1903) 133 Mich. 690, 95 N. W. 978 (recognizing rule).

**Minnesota.**—*Thompson v. Bickford* (1872) 19 Minn. 17, Gil. 1 (taxes and encumbrances).

**Missouri.**—*Mansur & T. Implement Co. v. Jones* (1898) 143 Mo. 253, 45 S. W. 41.

**New York.**—*Weiser v. Kling* (1899) 38 App. Div. 266, 57 N. Y. Supp. 48; see also *Sands v. Codwise* (1808) 4 Johns. 536, 4 Am. Dec. 305, and other cases cited *infra* this subdivision.

**North Dakota.**—*SHERIDAN v. McCORMICK* (reported herewith) ante, 523; *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271 (taxes and encumbrances).

**South Carolina.**—*Smith v. Pettus* (1851) 25 S. C. Eq. (4 Rich.) 197; *Greigg v. Rice* (1903) 66 S. C. 171, 44 S. E. 729.

**Texas.**—*Cooper v. Friedman* (1900) 23 Tex. Civ. App. 585, 57 S. W. 581.

**Vermont.**—*Lynch v. Murray* (1912) 86 Vt. 1, 83 Atl. 746 (taxes and interest on mortgage).

**Virginia.**—*Hazlewood v. Forrer* (1897) 94 Va. 703, 27 S. E. 507 (rule recognized).

The above doctrine is supported also by statements in various cases, where, however, the reimbursement sought was for sums expended for other purposes than to discharge encumbrances and taxes.

Thus, in *Baldwin v. Short* (1891) 125 N. Y. 554, 26 N. E. 928, the court stated that the contention that the con-

veyance might be sustained to the extent of the consideration paid was fully answered by the authorities which held that where the deed is fraudulent against creditors, it is wholly void, and cannot stand to any extent as security or indemnity; and that a different rule would put a premium upon fraud.

And in *Sands v. Codwise* (1808) 4 Johns. (N. Y.) 536, 4 Am. Dec. 305, Kent, Ch. J., in holding that where a conveyance is set aside for actual fraud on the part of both the parties, at the instance of creditors of the grantor, the conveyance cannot stand as security for advances for the purchase price by the grantee, said that "on the ground of absolute fraud, the deeds were void to all intents and purposes. It is the same thing as if no such deeds had ever been executed. A fraudulent conveyance is no conveyance, as against the interest intended to be defrauded. This is the plain language and intelligent sense of the rule of the common law. . . . It is impossible that those deeds can be permitted to stand as a security, if they are to be adjudged void ab initio. If they have no lawful existence, it would be inconsistent and absurd to recognize them for any lawful purpose. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a particeps criminis, in a case of positive fraud. . . . It is fit and proper that this result should take place, as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced from an act founded in actual fraud."

Also in *Boyd v. Dunlap* (1815) 1 Johns. Ch. (N. Y.) 478, where the question involved was the right of the grantee to indemnity for sums paid the grantor, the court stated that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity.

And the doctrine that a deed fraud-

ulent in fact is absolutely void as against creditors, and is not permitted to stand as a security for any purpose of reimbursement or indemnity, is approved in *Lodstein v. Lehn* (1887) 120 Ill. 549, 12 N. E. 68, although in this case it was held that the conveyance was only constructively fraudulent, and it therefore should be allowed to stand as security for money paid by the grantee to discharge taxes and encumbrances on the property.

On facts not within the scope of the note, the court in *Henderson v. Hunton* (1875) 26 Gratt. (Va.) 926, said: "When there is actual fraud, both parties participating, the deed is utterly void ab initio, and is not permitted to stand as a security for any purpose. The fraud infects the whole transaction. . . . In no instance will the court afford any indemnity to a particeps criminis in case of actual fraud."

See also the following cases, not on the facts within the scope of the annotation, as approving the broad rule that where there is actual fraud on the part of the grantee, the conveyance is void ab initio and should not be permitted to stand as security to him for any purpose: *First Nat. Bank v. Kennedy* (1890) 91 Ala. 470, 8 So. 652; *Parr v. Saunders* (1880) 1 Va. Dec. 724, 11 S. E. 979; *Alley v. Connell* (1859) 3 Head (Tenn.) 577; *Bean v. Smith* (1821) 2 Mason, 252, Fed. Cas. No. 1,174.

Where there is actual fraud on the part of both the grantor and grantee, the conveyance is considered as void ab initio, is set aside entirely, and cannot stand as security to the fraudulent grantee; the situation is the same as though no deed had been executed. *Thompson v. Bickford* (1872) 19 Minn. 17, Gil. 1, supra. And the court further approved the doctrine that "it would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat," and that "no right can be deduced from an act founded in actual fraud."

The rule was laid down in *Burt v. C. Gotzian & Co.* (1900) 43 C. C. A. 59, 102 Fed. 937, supra, that "one who

knowingly takes a conveyance or assignment to aid and abet a scheme to defraud creditors cannot hold the fraudulent instrument, or any interest under it, as against the creditors, to secure the amount paid for it, or for the satisfaction of taxes or encumbrances he has paid upon the property it affects."

If the grantee has been a conscious participant in the fraud, he is not, as against creditors of the grantor, entitled to reimbursement for expenditures for taxes or the discharge of encumbrances on the property, since public policy forbids the reimbursement of a *particeps criminis*, and otherwise one would hazard nothing by active participation in the fraud. *Lynch v. Burt* (1904) 67 C. C. A. 305, 132 Fed. 417.

And it is said in *Cooper v. Friedman* (1900) 23 Tex. Civ. App. 585, 57 S. W. 581, that if the grantee fraudulently purchased the property, he could not recover from the creditors of the grantor, or make the taxes and interest on the mortgage paid by him a charge on the property; that such purchase would be as to the creditors, under the statute, void; and that the grantee, in relation to the creditors, would occupy the position of a stranger.

Where, for the purpose of getting a debtor's property out of the state and evading claims of creditors, the grantee advanced, on a sale of the property to him, a sum out of which the debtor discharged a mortgage on the property, it was held in *Smith v. Pettus* (1851) 25 S. C. Eq. (4 Rich.) 197, *supra*, that, on the setting aside of the sale at the instance of creditors, the vendee should not be allowed a lien on the property for the amount expended in the discharge of the mortgage.

The payment of taxes by the fraudulent grantee, the court held in *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271, must be regarded as a voluntary payment in aid of the original fraud, for which the grantee, who was a party to the fraud, was not entitled to reimbursement on the setting aside of the conveyance at the instance of creditors of the grantor.

Although the facts did not bring the case within the scope of the annotation, the grantee in the fraudulent conveyance, who was guilty of actual fraud, having paid as a part of the purchase price a judgment against the grantor and a note owed by the latter, attention is called to the case of *Seivers v. Dickover* (1884) 101 Ind. 495, which states the reasons for refusal to allow a fraudulent grantee amounts expended by him as follows: "The loss of the amount paid by a fraudulent grantee is the penalty that the law inflicts for the fraudulent transaction. To refund to such a grantee the amount he has paid would be to destroy the penalty. Such a holding would destroy the salutary restraints which the law has built up against such transactions, by removing all danger of loss. When once a party has been convicted of fraud, the law refuses its aid to him in any manner or form, and leaves him, as to that transaction, just where it finds him."

In *Greig v. Rice* (1903) 66 S. C. 171, 44 S. E. 729, it was held that a grantee in a conveyance fraudulent as to creditors, who participated in the fraud, was not entitled to subrogation to the rights of holders of prior mortgage and judgment liens which had apparently been assigned to him. The point is not discussed. The court merely stated that it could not permit subrogation, and that the grantee should take the usual portion of the person dealing in fraud.

In some cases, the fact that the payment by the grantee of an encumbrance on the property was made pursuant to the terms of the original fraudulent contract of conveyance, as where the grantee expressly assumes the mortgage or discharges it at the time of the conveyance, has seemingly inclined the courts more strongly against the allowance to the grantee of reimbursement, on the ground that, the contract of sale being fraudulent, and the payment made pursuant thereto constituting, in effect, a part of the purchase price, to permit reimbursement would be to give relief on the fraudulent contract to a party to the fraud.



See, in this connection, the statement of the rule in *SHERIDAN v. MC-CORMICK* (reported herewith) ante, 523, and *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271, from which the court quotes in the former case.

The position was taken in *Morley Bros. v. Stringer* (1903) 133 Mich. 690, 95 N. W. 978, that prior liens on the property, paid pursuant to the fraudulent agreement between the grantor and the grantee to defraud creditors, stand upon the same basis as actual payments on the purchase price, and fall within the rule by which courts refuse to permit the grantee to have reimbursement for the consideration paid, as distinguished from the right of the fraudulent grantee to reimbursement for taxes paid and improvements made on the property after the conveyance.

In *Hamilton Nat. Bank v. Halsted* (1890) 56 Hun, 580, 9 N. Y. Supp. 852, modified on another point in (1892) 134 N. Y. 520, 30 Am. St. Rep. 693, 31 N. E. 900, it is stated that, while courts will extend no aid to a fraudulent grantee, it does not follow from this principle that he is not entitled to be credited with what may have been paid by him to relieve the property from encumbrances previously, in good faith, made upon it, such encumbrances not being tainted in any respect with the fraudulent designs of the vendor and purchaser; but that so far as the transactions are included within the terms of the fraudulent disposition of the property, the courts have ordinarily denied relief by way of indemnity to the purchaser.

The case of *Davis v. Leopold* (1881) 87 N. Y. 620, in which the court stated that the fraudulent grantee was "a guilty participant in the fraud, and not to be cared for," and approved the rule that "a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity," was distinguished in *Hamilton Nat. Bank v. Halsted* (N. Y.) *supra*, on the ground that in the *Leopold Case* the assumption of the existing encumbrance on the property formed a part

of the fraudulent transaction, and the court would not attempt to shield the fraudulent grantee from a burden assumed in his own wrong; and also on the ground that it did not appear from the report of the case that the grantee had paid the mortgage, or that it was not still a lien on the property.

Where a purchaser at a sale of property under a trust deed paid only the amount due on the trust deed, and had actual knowledge that the sale was in fraud of creditors, it was held in *McLean v. Letchford* (1882) 60 Miss. 169, that he was not entitled, on the setting aside of the conveyance at the instance of creditors of the grantor, to reimbursement for the amount paid, although the court did not decide whether he might be entitled to reimbursement for mortgages subsequently discharged. It was said that manifestly the fraudulent grantee could recover nothing paid on the trust deed, that this was the "vehicle of his fraudulently obtained possession. It was that which made the fraud possible. The money paid on it was the price which the fraud cost him. To allow him the money back would be to repay him that which he expended in accomplishing the very thing which the law prohibits and condemns. If it was wrong in him to obtain the title and the possession for a fraudulent purpose, it must be wrong to repay him the price paid therefor. He can base no right upon the fact that his payment extinguished a paramount lien which was superior to the rights of the complainants, because the mortgage was distinguished in and by the fraudulent acquisition of the property, and to revive it for his benefit would be both to contravene his own act and to cause a repayment of money expended in the act and for the purpose of perpetrating the fraud."

And where the only consideration for the conveyance was the assumption by the grantee of a mortgage on the property, and the grantee took the conveyance with an actual fraudulent intent to defeat creditors of the grantor, it was held in *Lynch v. Murray* (1912) 86 Vt. 1, 83 Atl. 746, that, on the setting aside of the conveyance, the gran-

tee was not entitled to reimbursement for taxes paid on the property and for interest paid on the mortgage, the court stating as a reason for its decision that "it was necessary for him to make those disbursements to give color of good faith to a transfer which was in fact fraudulent, and equity will not aid him in securing reimbursement for his expenses incurred for the purpose of defeating justice and concealing a fraud."

In *Tissier v. Wailes* (1905) — Ala. —, 32 So. 924, it was held that the fraudulent grantee, who was guilty of actual fraud, was not entitled to reimbursement, on the setting aside of the conveyance at the instance of a creditor, on account of the assumption of payment of a balance due on a mortgage on the property. It does not appear that the grantee had discharged the mortgage. And the court bases its decision apparently on the ground that the grantee who is guilty of actual fraud is not entitled to reimbursement for the consideration given to the grantor for the conveyance.

And in *Liddle v. Allen* (1894) 90 Iowa, 738, 57 N. W. 608, the court said that a fraudulent grantee is not protected even to the amount which he paid for the property; and it was held, therefore, that he could not raise the question of the court's power to determine the validity of a mortgage on the property, which he had paid as a part of the purchase price, without making the mortgagee a party to the action.

On the other hand, the doctrine that the grantee, though he is guilty of actual fraud, is entitled to reimbursement, on the setting aside of the conveyance, for sums expended to discharge prior liens for taxes and encumbrances, is supported by a few decisions: *Hutchinson v. Park* (1904) 72 Ark. 509, 82 S. W. 843 (taxes); *Ackerman v. Merle* (1902) 137 Cal. 169, 69 Pac. 983 (mortgage); *Garner v. Philips* (1872) 35 Iowa, 597 (mortgage); *Smith v. Grimes* (1876) 43 Iowa, 356 (assignment of liens to grantee). See also *Fordyce v. Hicks* (1888) 76 Iowa, 41, 40 N. W. 79, and *Boggs v. Douglass* (1896) 100 Iowa, 385, 69 N. W. 689 (cases in which the

grantees became the assignees of judgments against the grantor); *Bogard v. Buckner* (1884) 5 Ky. L. Rep. 856 (abstract) (mortgage). See also *Smisser v. Stevens* (1898) 20 Ky. L. Rep. 501, 45 S. W. 957; *Lamb v. McIntire* (1903) 183 Mass. 367, 67 N. E. 320 (taxes); *Rhead v. Huonson* (1881) 46 Mich. 243, 9 N. W. 267. See *Kimble v. Wotring* (1900) 48 W. Va. 412, 37 S. E. 606 (where grantee discharged vendor's lien).

The decision in *Lamb v. McIntire* (1903) 183 Mass. 367, 67 N. E. 320, supra, is based partly, perhaps, on the inconclusive nature of the evidence to show fraud, the court saying that the master had found that the defendant, whose mortgage was attacked by creditors of the mortgagor, participated in the fraud. But there is also a finding that he was at least put on inquiry.

It is said in the abstract reported in *Bogard v. Buckner* (1884) 5 Ky. L. Rep. 856 (abstract) supra, that, the deed being set aside on the ground of actual fraud, the court properly refused to direct the repayment of the purchase money except that which had been paid in discharge of a valid mortgage lien.

Where a debtor conveyed mortgaged land to his son, who discharged the mortgage, the court in *Rhead v. Huonson* (1881) 46 Mich. 243, 9 N. W. 267, supra, although stating that both the grantor and grantee participated in the design to defeat a creditor of the grantor, held that on a bill by the creditor in aid of execution, such a part of the land should be set off as constituted the value of the mortgage, and the remaining land only subjected to sale. The court said that the expenditure by the grantee in paying the mortgage relieved the property from the burden and practically increased the interest in the land to the amount paid; and that it seemed right to regard this as raising an equity in favor of the grantee.

Although holding that the circumstances were so exceptional as to warrant the court, at the instance of the grantors, in ordering a reconveyance on the ground that the parties to the fraudulent conveyance were not in

pari delicto, the grantors being ignorant negroes who conveyed the property to a merchant, in whom they had confidence, at his solicitation and advice that it was necessary to protect them against a threatened suit, the court, in *Hutchinson v. Park* (1904) 72 Ark. 509, 82 S. W. 843, held that the grantee was entitled, as a condition to such reconveyance, to reimbursement for taxes paid by him on the property. It will be observed that the questions in issue in this case were between the parties to the fraud, the action being by the grantors, and not by their creditors, to set aside the conveyance.

In *Ackerman v. Merle* (1902) 137 Cal. 169, 69 Pac. 983, although the grantee in the fraudulent conveyance was a party to the fraud, and received the conveyance without any consideration therefore, for the purpose of assisting the grantor to avoid her debts, it was held, in an action by the administrator of the latter, to set aside the conveyance, that the grantee, who had discharged a mortgage on the property, was entitled to be subrogated to the rights of the mortgagee. The court said that the creditors were entitled to subject to the payment of their claims only the property fraudulently conveyed; that this property consisted of the grantor's interest in the land, which was that of a mortgagor with a right to redeem from the mortgage; that by the fraudulent deed the grantee did not acquire the interest of the mortgagee in the land, but acquired that interest by paying off the mortgage debt,—an independent transaction, in no way tainted with fraud nor accompanied with an intention to avoid creditors; that in equity the creditors could not complain that the grantee was subrogated to the rights of the original mortgagee, their rights in the property not being enlarged nor extended by the fraudulent transfer; and that they could obtain nothing for the mere sake of punishing fraudulent grantee, but were entitled in equity to have only such interest in the property applied to the satisfaction of their claims as had been fraudulently conveyed.

And in *Garner v. Philips* (1872) 35 Iowa, 597, although, so far as appears, the grantee in a fraudulent conveyance was a party to the fraud, the court stating that the evidence established the fact that the conveyances were made by the parties thereto for the purpose of placing the property beyond the reach of creditors, it was held that, as the grantee, subsequent to the conveyance, had paid a mortgage which was a prior lien on the property, and there was no fraud in this transaction, he should be subrogated to the rights of the original mortgagee, as against creditors of the grantor whose judgments were subject to the lien of the mortgage.

In *Smith v. Grimes* (1876) 43 Iowa, 356, although it appears that the grantee in the fraudulent conveyance was a party to the fraud, with actual knowledge thereof, it was held that, as against judgment creditors of the grantor, he was entitled to be subrogated to the rights of the holders of prior mortgage and judgment liens on the property which he had paid and which had been assigned to him; in other words, that the mortgage and judgments paid by the grantee and assigned to him were in his hands liens on the land prior to the claims of the subsequent judgment creditors of the grantor. The court said that the fact that the deed to the grantee could not be supported against the grantor's creditors did not affect the grantee's right to the liens, the assignment of which must be regarded as valid; that it was true the deed was fraudulent as to creditors, but the court was not required to punish the fraud by setting aside the assignment and holding the liens to have been paid; that it was required to determine the rights of the parties, and not to administer punitive justice.

Where the mortgagee, who had accepted payment of the mortgage from the grantee, brought suit, as a judgment creditor of the grantor, to set aside the conveyance as fraudulent, it was held that while the acceptance of payment did not estop him from main-

taining the action, yet the grantee was entitled to subrogation to the plaintiff's right as mortgagee although he had actual knowledge of the grantor's fraudulent intent before payment of the consideration. *Arnold v. Hescholdt* (1897) 69 Minn. 101, 71 N. W. 829.

In *Smiser v. Stevens* (1898) 20 Ky. L. Rep. 501, 45 S. W. 357, where, in a conveyance from a husband to the wife, she assumed payment of a mortgage on the property, the court, although stating that it did not sufficiently appear that she was in fault, or that she accepted the conveyance with the intent of defrauding or hindering the creditors of the grantor, said that even if she had knowledge of such intent on the part of the latter, it would be inequitable to leave her bound for the payment of the mortgage, and that it was error to render judgment for a sale of the land without determination of the validity of the mortgage; that if in fact there was a mortgage on the land, it should have been enforced and adjudged prior to any claim of the creditors.

Without deciding whether, under any circumstances, a grantee who is guilty of actual fraud is entitled, on the setting aside of the conveyance at the instance of creditors of the grantor, to reimbursement for sums expended to purchase prior mortgages on the property, the court in *McLean v. Letchford* (1882) 60 Miss. 169, held that the grantee was not entitled to reimbursement where he had not sustained the burden of showing that the mortgages were purchased with his own means, and not from the proceeds of the property itself.

#### *b. Constructive fraud.*

In case of claimant under or representative of grantee, see *infra*, II. c.

Where the grantee in a fraudulent conveyance is not guilty of actual fraud, but is chargeable with knowledge of such facts that the law holds him guilty of constructive fraud, the authorities are apparently agreed that, on the setting aside of the conveyance, he is equitably entitled to reimbursement for sums expended by

him in good faith to discharge taxes or prior mortgages on the property.

**United States.** — *Lynch v. Burt* (1904) 67 C. C. A. 305, 132 Fed. 417.

**Alabama.** — *Potter v. Gracie* (1877) 58 Ala. 303, 29 Am. Rep. 748 (mortgage); rule approved in *Ruse v. Bromberg* (1889) 88 Ala. 619, 7 So. 384 (vendor's lien).

**California.** — *Tompkins v. Sprout* (1880) 55 Cal. 81 (mortgage).

**Colorado.** — *Tibbetts v. Terrill* (1914) 26 Colo. App. 64, 140 Pac. 936.

**Idaho.** — *Printz v. Brown* (1918) 31 Idaho, 448, 174 Pac. 1012 (mortgage and taxes).

**Illinois.** — *Lobstein v. Lehn* (1887) 120 Ill. 549, 12 N. E. 68 (taxes and encumbrances); *La Salle Opera House v. La Salle Amusement Co.* (1919) 289 Ill. 194, 124 N. E. 454 (violation of Bulk Sales Act).

**Indiana.** — *Marmon v. White* (1898) 151 Ind. 445, 51 N. E. 930 (street and sewer assessments).

**Kentucky.** — *Smiser v. Stevens* (1898) 20 Ky. L. Rep. 501, 45 S. W. 357 (where grantee assumed mortgage).

**Maryland.** — *Milholland v. Tiffany* (1885) 64 Md. 455, 2 Atl. 881 (approving rule).

**Massachusetts.** — *Adams v. Young* (1909) 200 Mass. 588, 86 N. E. 942 (violation of Bulk Sales Law; rule approved).

**Minnesota.** — *Leqve v. Stoppel* (1896) 64 Minn. 74, 66 N. W. 208 (recognizing rule).

**New York.** — *Lore v. Dierkes* (1884) 16 Abb. N. C. 47 (payment on mortgage).

**New Jersey.** — *Costello v. Prospect Brewing Co.* (1894) 52 N. J. Eq. 557, 30 Atl. 682 (mortgage).

**North Dakota.** — *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271 (recognizing rule).

**Oregon.** — *Hicks v. Beals* (1917) 88 Or. 82, L.R.A.1917D, 1067, 163 Pac. 83 (violation of Bulk Sales Law).

**South Carolina.** — *Anderson v. Fuller* (1840) 16 S. C. Eq. (1 M'Mull.) 27, 36 Am. Dec. 290; *Fulmore v. Burrows* (1844) 19 S. C. Eq. (2 Rich.) 95.

**Tennessee.** — *Carpenter v. Scales* (1897) — Tenn. —, 48 S. W. 249

(where an advance for taxes was made in good faith by grantee at the time of the conveyance).

**Virginia.** — *Dickenson v. Patton* (1909) 110 Va. 5, 65 S. E. 529 (payment of purchase-money lien); see also *Henderson v. Hunton* (1875) 26 Gratt. 926 (distinguishing between cases of actual and constructive fraud).

**West Virginia.** — *Herold v. Barlow* (1900) 47 W. Va. 750, 36 S. E. 8 (discharge of various liens as part of purchase price).

**Wisconsin.** — *Cook v. Berlin Woolen Mill Co.* (1883) 56 Wis. 643, 14 N. W. 808; *Kickbusch v. Corwith* (1901) 108 Wis. 684, 85 N. W. 148 (reimbursement for sums necessarily paid to preserve the property and relieve it from liens).

**Canada.** — *Smith v. Sugarman* (1909) 2 Alberta L. R. 442, reversed in (1910) 3 Alberta L. R. 108, but restored in (1910) 47 Can. S. C. 392 (mortgage).

It was held in *Hicks v. Beals* (1917) 83 Or. 82, L.R.A.1917D, 1067, 163 Pac. 83, *supra*, that one who, in good faith, without knowledge of the Bulk Sales Law or claim against the property, purchased stock of merchandise for full value, without complying with the provisions of such law, paying off, as part of the consideration, a chattel mortgage on the property, which was satisfied, was entitled to subrogation to the lien of the mortgage when the property was attached by creditors of the vendor because of the noncompliance with the statute.

And in *La Salle Opera House Co. v. La Salle Amusement Co.* (1919) 289 Ill. 194, 124 N. E. 454, *supra*, where a sale was fraudulent as against creditors under the Bulk Sales Act, and the vendor, out of the purchase money, paid liens to which the property sold was subject, the vendee was held entitled to the benefit of the equitable principle that when a conveyance of property has been avoided by creditors of a grantor, it may be upheld in favor of a grantee who is free from actual fraud to the extent of the actual consideration, and he may be subrogated to the rights of the holder of

liens whose encumbrances he has paid.

So, where a sale of a stock of goods was fraudulent as to creditors because not in compliance with the Bulk Sales Law, but the seller and purchaser acted in good faith, it was held in *Adams v. Young* (1909) 200 Mass. 568, 86 N. E. 942, *supra*, that the purchaser, who had taken an assignment of a mortgage on the property, was entitled to rely on the mortgage on the setting aside of the transfer. The court recognized also the rule that the vendee, guilty only of constructive fraud, is entitled, without an assignment, to subrogation to the rights of a mortgagee, where he has discharged a mortgage on the property.

Where the grantee paid a mortgage on the property assumed as part of the consideration for the conveyance, which was set aside at the instance of creditors of the grantor, not because actual fraud was shown, but because of the legal inference of fraud, it was held that the conveyance should stand as security for the sum so paid by the grantee. *Anderson v. Fuller* (1840) 16 S. C. Eq. (1 M'Mull.) 27, 36 Am. Dec. 290.

And where a conveyance was made by a husband to his wife for the purpose of defrauding creditors, but the wife accepted the deed without the intention to defraud creditors, and without full knowledge of the insolvency of the husband, and thereafter paid with her separate property valid prior mortgage and tax liens on the property, it was held that, as against creditors of the husband, she was entitled to a lien on the property for the amount so expended. *Printz v. Brown* (1918) 31 Idaho, 443, 174 Pac. 1012.

The law will not visit a punishment or penalty on a grantee in a fraudulent conveyance who is guilty only of constructive fraud by refusing to allow him a lien on the property for taxes and encumbrances thereon which were a valid lien, and which he has discharged. *Ibid.*

Where a conveyance by a husband to his wife of an equity of redemption was voluntary, and therefore voidable as to antecedent creditors, without respect to the intention of the parties in

making the conveyance, it was held in *Costello v. Prospect Brewing Co.* (1894) 52 N. J. Eq. 557, 30 Atl. 682, that the wife, who, after the conveyance, had paid a part of the mortgage debt, was entitled to subrogation to the rights of the mortgagee for the amount paid, on the setting aside of the conveyance in a suit by creditors of the husband.

On the principle that where a grantee, guilty only of constructive fraud, has discharged a valid prior encumbrance on the property, on the setting aside of a conveyance at the instance of creditors of the grantor, the conveyance will be allowed to stand as security for the sum so paid, the court in *Milholland v. Tiffany* (1885) 64 Md. 455, 2 Atl. 831, held that a third person with constructive notice of the fraud, who discharges an encumbrance on the property at the request of both the grantor and grantee, taking at the time as security a mortgage on the property which proves defective, should be subrogated, on the setting aside of the conveyance, to the rights of the mortgagee, where there were no intervening creditors.

*c. Claimants under or representatives of grantee.*

The distinction between actual and constructive fraud in allowing reimbursement for taxes and the discharge of encumbrances on the property conveyed (see *supra*, II. b) is not confined to the grantee himself, but is equally applicable to those who claim through him; so that, although the grantee may be precluded from such reimbursement by reason of actual fraud on his part, one claiming through such grantee, although constructively chargeable with knowledge of the fraud, may be entitled to reimbursement for sums expended in good faith to discharge prior liens on the property. *Lynch v. Burt* (1904) 67 C. C. A. 305, 132 Fed. 417.

A similar conclusion was reached in *Tompkins v. Sprout* (1880) 55 Cal. 31, and *Tibbetts v. Terrill* (1914) 26 Colo. App. 64, 140 Pac. 936. In the latter case, the court said: "The gen-

eral rule seems to be that a fraudulent grantee who has actually and knowingly participated in the fraud, has no standing in a court of equity for any purpose, and will not be subrogated or otherwise protected from moneys paid in discharging liens existing at the time of the fraudulent purchase. We think, however, that a purchaser from such fraudulent grantee, who has only constructive knowledge of the fraud, and has no knowledge or information of the fraudulent intention of those perpetrating the same, and in no way participates therein, ought not to be denied relief in a court of equity, where such relief works no injury to others."

It was held in *Bomberger v. Turner* (1862) 13 Ohio St. 263, 82 Am. Dec. 438, that, on the setting aside of a conveyance at the instance of creditors of the grantor, on the ground of fraud, compensation should be allowed for taxes innocently paid on the property by the fraudulent grantee's heir, to whom the property had been assigned in partition.

Executors of the grantee, who died pending the action to set aside the conveyance, were held entitled to subrogation to the rights of a mortgagee whose mortgage they had discharged, when it became due pending an appeal from a decision that the grantee was not shown to have had knowledge of the fraud, and that the conveyance should not have been set aside, since they were not volunteers, although the conveyance was subsequently set aside in the court of appeals, and the executors had constructive notice at the time of the payment of another action begun by creditors to set aside the conveyance. *Lilinthil v. Lesser* (1905) 102 App. Div. 500, 92 N. Y. Supp. 619, affirmed without opinion in (1906) 185 N. Y. 557, 77 N. E. 1190.

*d. Suspicious circumstances; inconclusive evidence; discretion of court.*

In many of the cases cited in II. a, *supra*, it seems that the evidence of actual fraud on the part of the grantee

was clear, and the court, having found such fraud so as to require a decree setting aside the conveyance as a fraud upon creditors, applied the rule of that subdivision and denied reimbursement without considering in that connection the conclusiveness or satisfactoriness of the evidence upon which the finding of actual fraud on the part of the grantee was predicated. In some cases, however, the courts, while regarding the evidence as to actual fraud on the part of the grantee as sufficiently convincing to warrant the setting aside of the conveyance, have thought that it was not sufficiently clear and conclusive to warrant the application of the rule which denies the grantee the right to reimbursement.

Where there are suspicious circumstances, but the evidence of fraud is not clear and conclusive, the conveyance may be permitted to stand for reimbursement to the fraudulent grantee of sums expended by him to discharge prior liens on the property. *Parr v. Saunders* (1880) 1 Va. Dec. 724, 11 S. E. 979 (vendor's lien discharged by grantee).

And where the proof of fraud on the part of the grantee in a fraudulent conveyance was not clear and conclusive, although the transaction, the court stated, might have involved actual fraud, in a legal sense, it was held in *Leqve v. Stoppel* (1896) 64 Minn. 74, 66 N. W. 208, that the conveyance should stand as security for reimbursement to the grantee of a sum paid by him to discharge a mortgage on the property, and on a sale of the property the grantee should be reimbursed out of the proceeds.

Referring to the doctrine that where a conveyance is tainted with actual fraud, it is absolutely void, although founded on a valuable consideration, and should not be allowed to stand for any purpose, either for reimbursement or indemnity of the grantee, the court in *Leqve v. Stoppel* (Minn.) supra, said: "An examination of the authorities satisfies us that this is too broad a statement of the law. We admit that where the grantor and grantee have

conspired together to commit a meditated, positive fraud, and the evidence of that fact is clear, no court ever has allowed or should allow the conveyance to stand for any purpose of reimbursement or indemnity to the grantee, who was particeps criminis. Any other rule would be to offer protection to positive fraud. But it is a matter of common knowledge with courts and lawyers that there are frequently cases where conveyances are set aside on the ground of what, in the legal sense, constitutes an actual fraud, which nevertheless involves no moral turpitude, and where the parties did not actually intend to commit, or suppose that they were committing, a fraud. There are also frequently cases where the circumstances are so suspicious that the court does not feel warranted in allowing the conveyance to stand, but the evidence of fraud is by no means clear or conclusive. To meet the requirements of justice in all these classes of cases, a more elastic rule should obtain than the mere presence or absence of actual fraud, in its broadest legal sense. And an examination of the adjudged cases shows that the courts have never been inclined to tie themselves down to any such hard-and-fast rule. The English courts seem to feel themselves at liberty, after looking at all the facts, and giving to each its due weight, to deal with each case according to their own ideas of right and justice. Numerous English cases can be found where the court, while setting aside the conveyance, has decreed that it stand as security for money actually paid by the grantee, even where he appeared to have been a partaker of the fraud, but the proof was not entirely clear. . . . The best American authorities have frequently announced a similar flexible rule, which left them at liberty to do equity in each particular case according as the facts appeared."

Of facts not within the scope of the annotation, it was said in *Bean v. Smith* (1821) 2 Mason, 252, Fed. Cas. No. 1,174, that while a conveyance which is fraudulent in fact is absolutely void and is not permitted to stand

as a security for any purpose of reimbursement or indemnity, it is otherwise with a deed obtained under suspicious or inequitable circumstances. To the same effect is *Alley v. Connell* (1859) 3 Head (Tenn.) 578.

The rule that a conveyance under suspicious circumstances may be permitted to stand as security for claims by the grantee against the grantor is approved also in *Boyd v. Dunlap* (1815) 1 Johns. Ch. (N. Y.) 478.

The court in *Anderson v. Fuller* (1840) 16 S. C. Eq. (1 M'Mull.) 27, 36 Am. Dec. 290, stated that in general, when a conveyance is set aside for fraud, it is within the discretion of the court to decree the conveyance to stand as a security for the money actually paid; and that this is commonly done where there is no imputation of moral fraud, or the proof of actual fraud is in any degree doubtful.

And the doctrine that in equity a fraudulent grantee or vendee may or may not be allowed reimbursement for sums expended by him, on the setting aside of the sale, is stated, on facts not within the scope of the annotation, in *Clements v. Nicholson* (1867) 6 Wall. (U. S.) 299, 18 L. ed. 786, as follows: "A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. Where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it al-

lows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."

See *Lamb v. McIntire* (1903) 183 Mass. 367, 67 N. E. 320, cited under II. a, *supra*, where the holding that a fraudulent mortgagee, on the setting aside of the mortgage, should be reimbursed for taxes paid on the property, is based partly, perhaps, on the inconclusive nature of the evidence to show that the mortgagee participated in the fraud.

### *III. Accounting for rents and profits or proceeds of property.*

The authorities are more agreed as to the rights of the fraudulent grantee to an allowance, on an accounting for rents and profits or the proceeds of the property, for expenditures for the discharge of taxes and encumbrances, than in an action merely to set aside the conveyance, where no accounting is sought. In the former case, where the fraud on the part of the grantee is constructive only, there is apparently no question but that an allowance should be made to the grantee, on an accounting for rents and profits or for the proceeds of the property, for expenditures made in good faith by him for taxes or to discharge encumbrances on the property which were prior to the rights of creditors of the grantor. *Potter v. Gracie* (1877) 58 Ala. 303, 29 Am. Rep. 748 (mortgage and taxes); *Gordon v. Tweedy* (1883) 74 Ala. 232, 49 Am. Rep. 813 (taxes); *Bartram v. Burns* (1897) 19 Ky. L.



Rep. 1295, 43 S. W. 248, 686 (taxes); *Brown v. Townsend* (1889) 8 N. Y. Supp. 61, reversed on other grounds in (1892) 135 N. Y. 174, 31 N. E. 1030 (taxes and interest on encumbrances).

A grantee in a conveyance which is constructively fraudulent as against creditors is entitled, on an accounting for use and occupation of the premises, to an allowance for taxes paid during his occupancy thereof, whether before or after the filing of the bill by creditors to set aside the conveyance. *Gordon v. Tweedy* (1883) 74 Ala. 232, 49 Am. Rep. 813, *supra*.

And a similar result has generally been reached even where the grantee was guilty of actual fraud. *Young v. Walsh* (1885) 115 Ill. 264, 3 N. E. 512; *How v. Camp* (1844) Walk. Ch. (Mich.) 427; *King v. Wilcox* (1845) 11 Paige (N. Y.) 589; *Loos v. Wilkinson* (1889) 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 892; *Hamilton Nat. Bank v. Halsted* (1892) 134 N. Y. 520, 30 Am. St. Rep. 693, 31 N. E. 900.

Thus, in *Loos v. Wilkinson* (1889) 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392, *supra*, it was held that a grantee, on an accounting for rent after the conveyance had been set aside in a suit by the grantor's creditors because of fraud to which the grantee was a party, was entitled to be credited with the amount paid by him for taxes, and interest on mortgages which were valid liens on the property so far as the same was within the rate which could have been enforced by the mortgagee. The court said: "It is true that a fraudulent grant to a grantee who is a guilty participant in the fraud must, as to the creditors of the grantor, be treated as void *ab initio*. But the only way the creditors can reach the rent and profits received by the grantee is by an accounting in equity. And what does such an accounting mean. Does it mean that he shall pay for more rent than he has received, or could have received, for more profit than he has made, or could have made? Shall he account to the creditors for more rents than they could have received if they had had possession of the real estate?

. . . To answer these queries in the affirmative would, even in a court of equity, be a wide departure from the rule of compensation. It would be spoliation, not justice or equity. A court of equity does not sit for the punishment of criminals . . . when the creditors of the grantor come into a court of equity seeking to compel him to account for rents and profits, the accounting must be upon equitable principles; and when he has been compelled to surrender the property conveyed to him, and to account for all the profits he has made, or could have made, or ought to have made therefrom the ends of justice have been completely and exactly attained."

And where the grantee was guilty of actual fraud, the court in *How v. Camp* (1844) Walk. Ch. (Mich.) 427, *supra*, held that on an accounting for rents and profits, where the conveyance was set aside at the instance of creditors, the grantee should be allowed credit for taxes paid on the property.

In *Young v. Walsh* (Ill.) *supra*, it was held that, on an accounting for rents and profits, the grantees should be subrogated to the rights of mortgagees, if they had discharged the encumbrances, although the court stated that there was almost irresistible evidence that they must have known that the grantors were deliberately trying to defraud their creditors.

A distinction as to the rights of the grantee guilty of actual fraud, to reimbursement for sums paid to discharge taxes and prior encumbrances on the property, between cases where the suit is merely to set aside the fraudulent conveyance and cases where an accounting is sought by creditors of the grantor, is made in *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271, the court refusing to allow reimbursement where the suit was merely to set aside the conveyance, although intimating that where the grantee is asked to account for rents and profits, or for the value of the property, he may be allowed reimbursements for sums paid to discharge prior liens on the property.

Courts of equity, merely for the pur-

pose of punishing the fraudulent grantee or transferee, will not compel him to account, on the setting aside of the conveyance or transfer, for a larger sum than could have been realized thereon by creditors had the conveyance or transfer not occurred. *Hamilton Nat. Bank v. Halsted* (1892) 134 N. Y. 520, 30 Am. St. Rep. 693, 31 N. E. 900, *supra*. In this case it was held that an assignee of securities, which, to secure a loan, had been pledged before the assignment, and after the assignment had been sold for a larger sum than the amount of the loan, was accountable to creditors of the assignor only for the surplus received by him. It appears that the assignee was a party to the fraud. It was contended that the assignee should be held accountable to the creditors of the assignor for the entire value of the securities, and that a court of equity would hold him liable to this extent by way of punishment for his participation in the fraud. In reply to this contention, the court said: "While it is true that cases abound where the courts, in an action to set aside a deed or transfer of personal property on the ground of fraud, have refused to allow the fraudulent grantee or transferee to be reimbursed the money actually paid as a consideration for the conveyance or transfer, and in the course of discussion have treated the refusal of the court to allow any reimbursement whatever as a proper punishment for the fraud, it has never been assumed, so far as we have observed, that the refusal to allow reimbursement for moneys paid was based on the right of a court of equity to punish the party because of his wrongdoing. The effect of the decisions may have been to punish quite severely the fraudulent grantee or transferee, but the courts did not have the power to deprive him of one dollar because they deemed him deserving punishment. If a fraudulent transferee sell the property before the commencement of the action to set aside the transfer, a judgment for the value of the interests transferred to him may be recovered; but, however scandalous the fraud may be, the court is powerless to award judgment

against him for a sum exceeding such value. Other tribunals than courts of equity administer the law which has for its object the punishment of the guilty."

The right of the fraudulent grantee in an accounting for rent and profits, on the setting aside of the conveyance, to an allowance for interest paid on a mortgage on the property which is a prior lien to the claims of creditors of the grantor, is recognized also in *Hamilton Nat. Bank v. Halsted* (N. Y.) *supra*, although the point was not necessary to the decision.

However, the Maryland court in *Strike's Case* (1826) 1 Bland, Ch. (Md.) 57, affirmed in (1828) 2 Harr. & G. 191, rejected the claim of the fraudulent grantee, who was a party to the fraud, to an allowance, on an accounting for rents and profits, for sums paid for taxes, street assessments, and ground rent, to which the property was subject. It was said that the grantee, as against the creditors of the grantor, was an "uninvited officious mala fide meddler with property which he knew did not belong to him, and which he was apprised ought to be liable to the claims of [the grantor's] creditors. He made these advances to serve himself, not for the benefit of these complainants; and if he had an intention that these advances should inure to the personal benefit of anyone, it must have been to [the grantor]; because it was from him he took the estate; and if the conveyances were to be annulled, it was only against him he could seek reimbursement. . . . [The grantee], therefore, cannot have, against these complainants, any shadow of counter-vailing equity on which to rest his claim for these advances, out of the proceeds directed to be brought into court."

*Strike's Case* (Md.) *supra*, was considered in *Loos v. Wilkinson* (1889) 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392, *supra*, but the New York court in the latter case reached an opposite conclusion, stating that, so far as the Maryland court decided that "the fraudulent grantee should be made to account for rents

and profits without any allowance for taxes, assessments, and ground rents paid by him, it is, we believe, unsupported by any authority, and stands without a fellow in this country or in England."

*Thompson v. Bickford* (1872) 19 Minn. 17, Gil. 1, also, supports the proposition that if the grantee in a fraudulent conveyance is guilty of actual fraud, he is not entitled, on an accounting for rents and profits, to an allowance for sums paid by him for taxes and to extinguish liens or encumbrances on the property.

In determining the amount due from the wife to a creditor of the husband, where the latter had made a fraudulent transfer of personal property to the wife, who had disposed of the same, the court, in *Jewell v. Kelley* (1914) 180 Mich. 61, 146 N. W. 402, approved an allowance to the wife for payment by her of a chattel mortgage on the property at the time of the sale. Whether the transferee was regarded as guilty of actual or only constructive fraud does not clearly appear. In an earlier appeal, reported in (1909) 155 Mich. 301, 118 N. W. 987, the court said that it was far from being convinced that the bill of sale was not given and received with an intent to hinder, delay, and defraud creditors.

#### IV. *As to affirmative relief of grantee.*

Where the grantee in a conveyance in fraud of creditors participates in the fraud, his only rights, if any, according to the weight of authority, are by way of reducing the recovery against him on an accounting, and he cannot set up any claim in equity to affirmative relief on account of taxes or encumbrances discharged by him. This is the effect of the majority of the decisions already cited. And the point has been expressly made in a few cases.

Where a grantee, guilty of actual fraud, is merely on the defensive, as in an accounting for the rents and profits while he occupied the premises, the case is very different as to his right to a deduction for taxes and interest on mortgages, than if he were obliged to come into a court of equity asking for affirmative relief and for

the enforcement of these claims against the property; in the latter case, the court might leave him where his fraud had placed him, while on an accounting for rents and profits he should be compelled to account only for such rents and profits as he actually received or could have received. *Loos v. Wilkinson* (1889) 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 892.

The same distinction is brought out in *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271. The court admitted that so far as the creditors of the grantor were concerned, where the fraudulent conveyance was set aside, their equities would not entitle them to more, as against the grantee, than they could have realized had there been no conveyance, and that the grantee might be entitled to reimbursement for taxes or encumbrances which were prior liens to the claims of the creditors. But it was held that where an accounting was not sought against the grantee for rents and profits, but the conveyance was merely set aside for fraud, in which he had participated, his fraud prevented him from invoking the aid of a court of equity for relief by way of reimbursement for taxes and encumbrances discharged by him, the court apparently taking the view that even though the grantee was merely a defendant against whom the creditors were seeking to set aside the conveyance, he was in effect asserting a right to affirmative relief so far as he claimed the right to such reimbursement, where the suit was not for an accounting, but merely to set aside the conveyance.

Second-mortgage bondholders of a railroad who fraudulently obtained a conveyance of the property to them on failure of the company to pay the interest coupons, and who discharged the first-mortgage bonds were held in *Milwaukee & M. R. Co. v. Soutter* (1872) 13 Wall. (U. S.) 517, 20 L. ed. 543, not entitled to sue the first-mortgage bondholders and recover the amount so paid to them, as paid under a mistake of fact, when the conveyance was set aside at the instance of creditors. The court said: "Who are the

complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, affected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for encumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity."

A different conclusion has been reached, however, where the grantee was guilty only of constructive fraud.

Thus, one who, in violation of the Bulk Sales Law, in good faith and without knowledge of the law or of claims against the property, purchased a stock of merchandise for full value, paying off, as part of the consideration, a chattel mortgage on the property, which was satisfied, was held in *Hicks v. Beals* (1917) 83 Or. 82, L.R.A.1917D, 1067, 163 Pac. 83, entitled to maintain a suit against the vendor and his creditors for the revival of the mortgage and for subrogation to the rights of the mortgagee, where the property has been attached by creditors because of noncompliance with the statute. The court said that it was contended on the part of the creditors that a merger could not be defeated by a plaintiff asking for affirmative relief in the same manner in which it could be resisted as a defense; that a sufficient answer to this contention was that the defendant was seeking to subject the property to the payment of its claims, and in defense the plaintiff was compelled to institute the suit; and that the form of the action or situation of the parties, whether plaintiff or defendant, was not a controlling feature.

Without deciding whether, under any circumstances, a grantee in a fraudulent conveyance who is guilty of constructive fraud may have relief

on account of payment of a mortgage on the property, assumed as a part of the consideration for the conveyance, the court in *Wiley v. Knight* (1855) 27 Ala. 336, held that such relief would not be granted on a bill by the grantee to reform the conveyance, where to permit the setting up of the mortgage would take the defendant entirely by surprise and result in a decree predicated on a state of facts precisely the opposite of those charged in the bill.

#### V. Conclusions.

To indicate what appears to be the better rule, in view of the conflict of the cases on the present question, it may be said that the weight of authority and the better reasoning appear to support the view that the grantee who is guilty of actual fraud is not entitled to reimbursement, on the setting aside of the conveyance, for sums expended by him to discharge liens for taxes and encumbrances, not because a court of equity desires to punish him for his fraud, although this may be the result of the ruling, but because the conveyance is absolutely void as to creditors, and the grantee therefore pays as would a stranger to the property, and also because to permit the conveyance to stand as security for sums so expended would be to that extent to give affirmative relief to a party to a fraudulent contract. But, on the other hand, if the grantee is only guilty of constructive fraud he has an equity which entitles him to subrogation, on the setting aside of the conveyance, to the rights of holders of prior liens for taxes or encumbrances which he has discharged. If an accounting is sought for the rents and profits or the proceeds of a sale of the property, the grantee may reduce the recovery by the amount of taxes paid and prior encumbrances discharged by him, and this is true, according to the weight of authority, whether he is guilty of actual or only constructive fraud. So, also, subrogation may be allowed, in the discretion of the court, if the proof of fraud is not clear, but the circumstances are too suspicious for the court to permit the conveyance to stand. R. E. H.

CHARLES A. ANDERSON, Appt.,  
v.  
RUCKER BROTHERS, Respt.

*Washington Supreme Court (In Banc) — July 21, 1919.*

(— Wash. —, 188 Pac. 70.)

**Evidence — effect of bill of particulars.**

1. Proof is restricted to the matters set out in the bill of particulars.  
[See note on this question beginning on page 550.]

**— limitation by pleading.**

2. Proof of the covering of soil with gravel by the breaking of a dam is not admissible where the complaint to recover for the injury specifies with particularity the injury done, without making mention of the injury by gravel.

**Pleading — amendment to include additional items of injury.**

3. A complaint may be amended so as to cover items of injury not originally specified, unless defendant would be misled, taken by surprise, or injured thereby.

**Dam — liability for injury by bursting.**

4. One who impounds the water of a stream by means of a dam is required to exercise such reasonable care and caution in its construction, maintenance, and operation as a reasonably careful and prudent man, who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain fall, and other conditions likely to cause freshets, would exercise under like circumstances.

**— duty to provide against floods.**

5. One constructing and maintaining a dam across a stream must take into consideration such freshets as

from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence.

**Appeal — inaccurate instructions — reversal.**

6. A judgment will not be reversed for technical inaccuracies in instructions, where they could not have misled the jury and there was no request at the trial for their correction.

[See 2 R. C. L. 256.]

**— conflicting evidence — reversal.**

7. The appellate court will not disturb a verdict on conflicting evidence if it cannot say that it preponderated in favor of the losing party.

[See 2 R. C. L. 198.]

**On Rehearing.**

**— right to complain of instruction.**

8. One cannot complain on appeal of an instruction which is as favorable to him as any view of the law would justify.

**Dam — liability of owner for injury caused by bursting.**

9. One building and maintaining a dam does not do so at his absolute peril, and is not an insurer, but will be excused from liability for injuries caused by acts of God, or floods which he could not have anticipated.

**APPEAL** by defendant from a judgment of the Superior Court for Snohomish County (Pemberton, J.) in favor of defendant in an action brought to recover damages for the flooding of plaintiff's land, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hathaway, Beebe, & Hathaway and J. Y. Kennedy for appellant.  
Messrs. Coleman & Fogarty and W. P. Bell for respondent.

**Bridges, J.**, delivered the opinion of the court:

Suit for damages caused by overflow.

The respondent was engaged in the logging and lumbering business. To assist it in its operations, a number of years prior to March, 1916, it built a dam near its works for the purpose of creating a backwater pond. In order to do this it dug a ditch from Lake Hanson creek to

Worthy creek, in Snohomish county, and dug another ditch from Worthy creek to its dam. The purpose of these ditches was to divert a part or all of the water of these two creeks to its dam for the purpose of creating the pond. The pond thus created covered from 5 to 15 acres of land and was from 3 to 6 feet in depth. The appellant owned a farm about  $\frac{1}{2}$  of a mile below the respondent's pond. The complaint alleged that during the month of March, 1916, through the carelessness and negligence of the respondent in constructing the dam, and in failing to properly maintain and keep the same in repair, and because it had become old and insufficient, the dam and the gates thereof gave way and released large quantities of water stored thereby, which waters flooded over the appellant's land, causing damage thereto for which he sought recovery. The case was tried by a jury, which returned a verdict in favor of respondent. Judgment was entered on this verdict, and the appeal is from that judgment.

At the trial the appellant offered evidence tending to prove that the flood waters caused by the breaking of the dam had deposited on the appellant's land sand and gravel. The trial court sustained objections to this testimony on the ground that it was not within the pleadings. The complaint very particularly mentioned the features of damage. It alleged that "the top soil of plaintiff's premises was eroded and washed out, to the plaintiff's damage in the sum of \$960; a certain creek running through the plaintiff's premises was filled up with stumps and other debris for a distance of about 160 rods, to the plaintiff's damage in the sum of \$350; two bridges were washed out, to the plaintiff's damage in the sum of \$25; 10 rods of puncheon were washed out, to the plaintiff's damage in the sum of \$25, together with about 100 feet of fence, to the plaintiff's damage in the sum of \$20."

It will thus be seen that, although

the complaint very specifically alleges the various items of damage, it wholly fails to refer to any deposit of sand or gravel on the land. A bill of particulars could not have more definitely given the various items for which recovery was sought, and where there is a bill of particulars proof will be restricted to the matters therein

*Evidence—  
effect of bill of  
particulars.*

set out. *Powers v. Washington Portland Cement Co.* 79 Wash. 1, 139 Pac. 615. In the case of *Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 557, this court held that where the complaint sets out the specific items of damage the plaintiff will not be permitted, over objection, to prove other items. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

*—limitation by  
pleading.*

If the appellant had asked to have his complaint amended so as to include this item of damage, it would have been the duty of the court to have granted the permission, unless it appeared that the respondent would have been misled, taken by surprise, or injured thereby. But appellant did not ask the amendment. Clearly, the offered proof was not within the pleadings, and the court did not err in its ruling.

*Pleading—  
amendment to  
include ad-  
ditional items of  
injury.*

The appellant next complains of certain instructions given by the court to the jury on the duty of the respondent in the construction and maintenance of the dam. The instructions complained of, the wording of which we will presently notice, the appellant claims did not impose upon the respondent a proper or sufficiently high degree of care.

A few of the earlier cases seem to have held that one creating a pond of water by means of a dam does so at his own peril, and can defend against a claim for damages because of flooding only on the ground that the damage was caused by an act of God. *Fletcher v. Rylands*, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14

Week. Rep. 799, 1 Eng. Rul. Cas. 235; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L.R.A. 736, 44 N. E. 238. But the more recent and unquestionably the greater weight of authority holds to a less strict and we believe a much more just rule of liability, and one which, while properly protecting the rights of others, encourages business development. The rule is that one who, by means of a dam, impounds the water of a stream, is required to exercise such reasonable care and caution in the construction, main-

**Dam—liability  
for injury by  
bursting.**

tenance, and operation of the dam as a reasonably careful and prudent man, who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain falls, and other conditions likely to cause freshets, would exercise under like circumstances. This rule would cover the stream not only in its ordinary and usual condition as to water, but also when in such unusual and extraordinary flood and freshet as such careful and prudent man would reasonably expect; but the dam owner would not be negligent in failing to provide against unprecedented floods or freshets or act of God. *Maplewood Farm Co. v. Seattle*, 88 Wash. 634, 153 Pac. 1061; *Dahlgren v. Chicago, M. & P. S. R. Co.* 85 Wash. 395, 148 Pac. 567; *Kuhnis v. Lewis River Boom & Logging Co.* 51 Wash. 196, 98 Pac. 655; 40 Cyc. 683; 13 Am. & Eng. Enc. Law, 688; 3 Farnham, Waters, p. 2798; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58, 5 So. 864; *Todd v. Cochell*, 17 Cal. 97, 10 Mor. Min. Rep. 655.

Let us see if the court's instructions, taken as a whole, will measure up to these requirements.

In its instruction No. 5, the court instructed the jury that "if the defendant used ordinary care in constructing and maintaining said dam, . . . it is not liable, and your verdict must be for the defendant. I further instruct you

that ordinary care means such care as ordinarily prudent men would exercise under like conditions, when the risk is their own.

The trial court's instruction No. 6 was to the effect that the defendant would be required to use "ordinary care, that is, that degree of care which an ordinarily prudent person would use under the same or similar circumstances, and under this rule the dam must be sufficient to withstand not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily prudent person would reasonably expect to occur. If you find from the evidence that there was an unusually large fall of snow in January and February, 1916, and that snow melted away very rapidly in March and caused unusually high freshets, such that an ordinarily prudent person, in the construction and maintenance of the dam in question, would not reasonably have expected to occur, and caused the damage to plaintiff, if you find there was any damage, then in that event the plaintiff cannot recover, and your verdict must be for the defendant."

It has been held time and again that one maintaining a dam of this character is bound to use only reasonable care and prudence. The case of *Maplewood Farm Co. v. Seattle*, supra, was very similar to the case at bar. The court said: "In the instruction defining negligence, the degree of care which the city was held to in building the superstructure was that of reasonable and ordinary care. The appellant requested an instruction which imposed upon the city a higher degree of care than that of ordinary care in the construction of the superstructure. The instructions given correctly state the law."

At page 388, vol. 13, Am. & Eng. Enc. Law, 2d ed., it is said: "That rule in relation to the present subject [floods] requires that each proprietor in exercising his own rights in his own territory shall act with

(— Wash. —, 183 Pac. 70.)

reasonable skill and care to avoid injury to others, and as an approximate rule for measuring that degree it is laid down to be such skill, care, and diligence as men of common and ordinary prudence in relation to similar subjects would exercise in the conduct of their own affairs." *Wolf v. St. Louis Independent Water Co.* 10 Cal. 541, 10 Mor. Min. Rep. 541.

See also, to the same effect, the cases hereinabove cited.

We have no doubt that all of instruction No. 5 and all but the last paragraph of instruction No. 6 properly state the law. In the latter portion of instruction No. 6 the trial court was somewhat unfortunate in the selection of his words. He instructed the jury that if the melting snow "caused an unusually high freshet, such that an ordinarily prudent person, in the construction and maintenance of the dam in question, would not reasonably have expected to occur," then the plaintiff could not recover. As such reasonably prudent person must, of necessity, expect unusually high freshets, it is plain that the court meant and referred to unprecedentedly high or extraordinary freshets. In the earlier part of this instruction the court, in the same connection, spoke of "extraordinary" high freshets, and it is plain that in the latter portion of the instruction he used the expression "unusually high freshets" in the sense of "extraordinary high freshets." It may be said generally that there are three stages of freshets: The ordinary freshet, the extraordinary freshet, and the unprecedented freshet. *Avery v. Vermont Electric Co.* 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179, and especially the note at pages 876 et seq., of 59 L.R.A. Such of any of these freshets or floods as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimat-

ing hazards attending the obstructions of a watercourse. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374, 11 Am. Neg. Rep. 179; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087; *Van Duzer v. Elmira, C. & N. R. Co.* 75 Hun, 487, 27 N. Y. Supp. 474; *Chicago, B. & Q. R. Co. v. Schaffer*, 26 Ill. App. 280.

Taking these instructions as a whole, it is perfectly plain that the court instructed that respondent's dam must be sufficient to withstand all such freshets or floods as an ordinarily prudent person, having knowledge of the conditions, would have expected to occur.

We think the court's instructions may be open to some criticism because they did not express more fully the idea that the reasonably prudent person therein mentioned should be a person who knew the surrounding country, the nature and habits of the stream, the likelihood of snow and rain fall, etc. But the court in instruction 5 told the jury that ordinary care meant such care as an ordinarily prudent man would exercise "under like conditions," and in instruction No. 6 the court spoke of ordinary care as meaning such care as an ordinarily prudent person would use under "the same or similar circumstances." The court unquestionably meant, and the jury must have understood, by the expression "like conditions" and "same or similar circumstances," the same thing as though the court had expressly required of such prudent person knowledge of the nature and habits of the stream, the snow and rain fall, and other surrounding circumstances and conditions. If the appellant had requested the court to amplify these instructions in this regard, it would doubtless have so done. But, taken as they were given by the court, we cannot conceive that the jury was misled. It would be absurd and against all rules of common sense for this court to reverse on

—duty to provide against floods.

Appeal—  
inaccurate  
instructions  
—reversal.





broke, and the water so confined flowed over the plaintiff's lands; and this action was brought to recover alleged damages caused thereby. From a verdict and judgment in favor of the defendant, this appeal is taken. For more of the facts involved reference is made to the former opinion.

Generally speaking, there are two chief questions involved in a case of this character. The first is whether the dam owner must construct and maintain his dam entirely at his own peril, and as an insurer against damage, or whether he will be excused from damages caused by floods which he could not reasonably have anticipated, and, if the latter be the correct doctrine, then the care required of such dam owner to anticipate freshets and flood waters; and, secondly, whether, as to all floods and conditions which he is required to anticipate, he must maintain his dam at his peril and as an insurer, or will reasonable care be the measure of his duty? In our former opinion we meant to deal only with the first proposition mentioned. It was not necessary to a decision of the case that we should deal with the second proposition above mentioned, because the trial court had instructed the jury that defendant was bound to maintain his dam so that the same would withstand "not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily prudent person would reasonably expect to occur." In other words, the trial court instructed the jury on the theory that the dam owner would be liable, regardless of the question of care or negligence, for damage resulting from the breaking of his dam, as the result of such floods as a reasonably prudent man would be required to anticipate.

This instruction was certainly as favorable to the appellant as he could have asked because it eliminated from the case the question of the negligence or lack of negligence of the defendant, and imposed upon it the duties of an insurer. We wish to say, however, that in the departmental opinion we did not mean to, nor do we now, either approve or condemn the instruction given by the trial court; we only hold that it was as favorable to the appellant as any view of the law would justify, and therefore he is not in position to complain.

—right to  
complain of  
instruction.

On the first above-mentioned question we intended to hold, and we now hold, that the dam builder and owner does not build and maintain the dam at his absolute peril and is not an insurer, but that, on the contrary, he will be excused by acts of God, or floods which he could not have anticipated, and that he would be required to anticipate only such floods as a reasonably prudent man, acquainted with all of the surrounding circumstances, would anticipate. But it is said that this holding is in accordance with the doctrine of the cases of *Fletcher v. Rylands*, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, 1 Eng. Rul. Cas. 235, and *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L.R.A. 736, 44 N. E. 238, which cases this court in its first opinion seemed to criticize.

Dam—liability of  
owner for injury  
caused by  
bursting.

We deem it unnecessary at this time to determine what those cases actually hold. It is sufficient to say that, if our holding is in accordance with the view of those cases, then we follow them; otherwise we do not.

Holcomb, Ch. J., and Mount, Mitchell, Parker, Tolman, Fullerton, and Main, JJ., concur.

## ANNOTATION.

## Effect of bill of particulars on proof.

- I. General rule, 550.
- II. Application of rule:
  - a. Action on contract, 551.
  - b. Action for tort, 555.
  - c. Prosecution for crime, 556.
- III. Limitations of rule:
  - a. Evidence slightly variant, 557.

*I. General rule.*

The purpose of a bill of particulars is, as was said in *Saunders v. Osgood* (1865) 46 N. H. 21, "to apprise the opposite party of the claims made upon him so fully as to guide him in his preparations for trial." Accordingly, as was said in the same case: "To allow the party furnishing such specification, to go beyond it, would be a surprise upon the other party." The effect of a bill of particulars is, therefore, to restrict the proof to the matters set forth therein.

**United States.** — *Bank of United States v. Lyman* (1848) 1 Blatchf. 297, Fed. Cas. No. 924; *Hanson v. Smith* (1899) 33 C. C. A. 581, 94 Fed. 960.

**Alabama.** — *Morrisette v. Wood* (1900) 128 Ala. 505, 30 So. 630.

**District of Columbia.**—*Columbus v. Sheehy* (1915) 43 App. D. C. 462; *Decker v. Lightfoot* (1915) 44 App. D. C. 45. See also *Moses v. Taylor* (1888) 6 Mackey, 255.

**Florida.** — See *Middleton v. State* (1917) 74 Fla. 234, 76 So. 785.

**Illinois.** — *McDonald v. People* (1888) 126 Ill. 150, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137; *O'Leary v. People* (1900) 88 Ill. App. 60; *Colwell v. Brown* (1902) 103 Ill. App. 22. See also *Waidner v. Pauly* (1892) 141 Ill. 442, 30 N. E. 1025; *American Rolling Mill Corp. v. Ohio Iron & Metal Co.* (1905) 120 Ill. App. 614; *People v. Depew* (1909) 237 Ill. 574, 86 N. E. 1090.

**Indiana.**—*Harding v. Griffin* (1845) 7 Blackf. 462.

**Kansas.**—*Ransom v. Getty* (1887) 37 Kan. 75, 14 Pac. 487.

**Kentucky.** — See *Brown v. Calvert* (1836) 4 Dana, 219.

**Maryland.**—*De Sobry v. De Laistre*

## III.—continued.

- b. Evidence conforming to pleading but not to particulars, 560.
- c. Evidence to rebut set-off or defense, 561.
- d. Evidence admitted without objection, 562.
- e. Miscellaneous, 562.

(1804) 2 Harr. & J. 223, 3 Am. Dec. 535; *Hall v. Sewell* (1850) 9 Gill, 146. See also *Lyell v. Walbach* (1909) 111 Md. 610, 75 Atl. 339; *Walzl v. King* (1910) 113 Md. 550, 77 Atl. 1117.

**Massachusetts.** — *Com. v. Snelling* (1854) 15 Pick. 321; *Com. v. Giles* (1854) 1 Gray, 466; *Jones v. Ilsley* (1861) 1 Allen, 273.

**Michigan.**—*Waterman v. Waterman* (1876) 34 Mich. 490; *Ritter v. Daniels* (1882) 47 Mich. 617, 11 N. W. 409; *Stoner v. Riggs* (1901) 128 Mich. 129, 87 N. W. 109. See also *Cicotte v. Wayne County* (1880) 44 Mich. 173, 6 N. W. 236.

**Mississippi.** — *Goforth v. Stingley* (1901) 79 Miss. 398, 30 So. 690.

**New Hampshire.** — *McQuesten v. Young* (1848) 19 N. H. 307; *Saunders v. Osgood* (1865) 46 N. H. 21.

**New York.**—*Quin v. Astor* (1829) 2 Wend. 577; *Bowman v. Earle* (1854) 3 Duer, 691; *Matthews v. Hubbard* (1872) 47 N. Y. 428; *Lester v. Clarke*, (1903) 40 Misc. 688, 83 N. Y. Supp. 168; *Nechamkin v. Kennedy* (1916) 95 Misc. 532, 159 N. Y. Supp. 682; *Franco v. Caruso* (1916) 158 N. Y. Supp. 751; *Peninsular Trading Agency v. Frazar* (1919) 176 N. Y. Supp. 739. See also *Brittingham v. Stevens* (1828) 1 Hall, 379; *Starkweather v. Kittle* (1837) 17 Wend. 20; *Kreiss v. Seligman* (1850) 8 Barb. 439; *Enright v. Seymour* (1887) 8 N. Y. S. R. 356; *Wait v. Borne* (1890) 123 N. Y. 592, 25 N. E. 1053; *Cochrane Carpet Co. v. Howells* (1894) 81 Hun, 610, 68 N. Y. S. R. 222, 30 N. Y. Supp. 1029; *American Broom & Brush Co. v. Addickes* (1896) 19 Misc. 36, 42 N. Y. Supp. 871; *St. Albans Beef Co. v. Aldridge* (1906) 112 App. Div. 803, 99 N. Y. Supp. 398.

**Pennsylvania.** — *Steinman v. Slay-*

maker (1875) 1 W. N. C. 132. See also *Williams v. Com.* (1879) 91 Pa. 493.

**Rhode Island.** — *Tourgee v. Rose* (1896) 19 R. I. 432, 37 Atl. 9; *Frost v. International Rubber Co.* (1915) 37 R. I. 476, 93 Atl. 641, denying rehearing (1915) 37 R. I. 406, 92 Atl. 1022; *Rhode Island Malleable Iron Works v. O. K. Nut Lock Co.* (1918) — R. I. —, 103 Atl. 1036.

**Vermont.** — See *Lapham v. Briggs* (1854) 27 Vt. 26.

**Washington.** — *Powers v. Washington Portland Cement Co.* (1914) 79 Wash. 1, 139 Pac. 615; *Eckhart v. Peterson* (1917) 94 Wash. 379, 162 Pac. 557. And see the reported case (*ANDERSON v. RUCKER BROS.* ante, 544).

**West Virginia.**—See *Clarke v. Ohio River R. Co.* (1894) 39 W. Va. 732, 20 S. E. 696.

**Wisconsin.** — *Cudworth v. Gaynor* (1890) 76 Wis. 296, 44 N. W. 1103.

**England.** — *Holland v. Hopkins* (1800) 2 Bos. & P. 243, 126 Eng. Reprint, 1260, 2 Esp. 168; *Wade v. Beasley* (1801) 4 Esp. 7. See also *Fisher v. Wainwright* (1836) 1 Mees. & W. 480, 150 Eng. Reprint, 523, 1 Tyrw. & G. 606, 5 L. J. Exch. N. S. 217, 5 Dowl. P. C. 102; *Roberts v. Elsworth* (1842) 10 Mees. & W. 653, 152 Eng. Reprint, 633, 12 L. J. Exch. N. S. 15, 6 Jur. 1092, 2 Dowl. N. S. 456; *Law v. Thompson* (1846) 4 Dowl. & L. 54, 15 Mees. & W. 541, 153 Eng. Reprint, 964, 15 L. J. Exch. N. S. 334. See also *Fisher v. Wainwright* (1836) 1 Mees. & W. 480, 150 Eng. Reprint, 523, 1 Tyrw. & G. 606, 5 L. J. Exch. N. S. 217, 5 Dowl. P. C. 102; *Dempster v. Purnell* (1841) 3 Mann. & G. 375, 138 Eng. Reprint, 1189, 4 Scott, N. R. 30, 11 L. J. C. P. N. S. 33, 1 Dowl. N. S. 163.

**Canada.**—*Young v. Erie & H. R. Co.* (1895) 17 Ont. Pr. Rep. 4.

In *Bowman v. Earle* (1854) 3 Duer, (N. Y.) 691, the court said: "A bill of particulars has the effect to restrict the proofs and limit the recovery to the matters set forth in it."

In *Morrisette v. Wood* (1900) 128 Ala. 505, 30 So. 630, wherein the plaintiff had set forth the dates and number of his visits in his bill of particulars,

it was held that he must be limited thereto.

And where the plaintiff has furnished a bill of particulars, stating his claim to be founded on a note, he cannot give evidence of the original consideration. *Bank of United States v. Lyman* (1848) 1 Blatchf. 297, Fed. Cas. No. 924; *Wade v. Beasley* (1801) 4 Esp. (Eng.) 7.

In *Saunders v. Osgood* (1865) 46 N. H. 21, it was pointed out that as regards giving evidence of matters outside the bill of particulars, the same principle applied to items of credit as to items of debit.

## II. Application of rule.

### a. Action on contract.

In *Bank of U. S. v. Lyman* (1848) 1 Blatchf. 297, Fed. Cas. No. 924, an action to recover for money had and received and on an account stated, it appeared that the defendant had agreed to purchase the property of a bank, and to give four notes in payment therefor. A bill of particulars was filed by the plaintiffs, stating their claim to be on two promissory notes. It was held that they were confined in their evidence to the bill of particulars, and could not give evidence of the original consideration.

In *Hanson v. Smith* (1899) 33 C. C. A. 581, 94 Fed. 960, an action to recover damages for breach of an option to sell certain mining property, the plaintiff's bill of particulars alleged a contract for the sale of the property to one Pennington. It was held that proof of a contract of sale to one Schlesinger was properly excluded.

In *Morrisette v. Wood* (1900) 128 Ala. 505, 30 So. 630, an action by a physician to recover for services rendered to the defendant's testator, plaintiff on demand furnished a bill of particulars, which contained the dates and number of visits made by him, and the charge for them. Witnesses could not testify to the correctness of the items, but stated that plaintiff's visits to defendant's testator had been frequent during a certain period of time. It was held that when a bill of particulars is furnished its effect is "to limit the proof to the par-

ticulars specified therein," and that the court had erred in not limiting the plaintiff's proof to the particular items stated.

But in *Pollack v. Gunter & Gunter* (1909) 162 Ala. 317, 50 So. 155, an action brought for services rendered, a bill of particulars was filed by the plaintiffs, setting forth the items of service, but failing to give a date for all of them. Construing the statute, the court held that the plaintiffs were not precluded by their bill of particulars from offering proof that certain services had been rendered on a date different from that set forth, only a list of the items demanded being required.

In *Columbus v. Sheehy* (1915) 43 App. D. C. 462, wherein an attorney sought to recover a share of a contingent fee paid to his colleague by their client [in an action for money received for the use of the plaintiff] plaintiff set forth in his particulars of demand their contract with the client. It was held that the particulars of demand setting forth the contract with the client "restricted the proof to the subject-matter therein specified."

*Decker v. Lightfoot* (1915) 44 App. D. C. 45, was an action to recover commissions for the alleged sale of defendant's real estate; the particulars of demand specified 3 per cent commissions for the sale of the "Bassett Building." The plaintiff had given evidence of negotiations for an exchange of farm property for the real estate of the defendant. It was held that the plaintiff was limited in his proof to the sale of the "Bassett Building."

In *Roberts v. Harris* (1861) 32 Ga. 542, wherein the plaintiff sought to recover for one year's rent of an office, a bill of particulars was annexed to his petition, setting forth the amount of the rent due quarterly on certain days. Evidence was offered to show the special contract. It was held that this evidence was admissible, since it had been set out in the bill of particulars.

In *Colwell v. Brown* (1902) 103 Ill. App. 22, an action of assumpsit on a building contract, the plaintiff sought

damages for "failure to construct a building according to contract," filing a bill of particulars of the damages claimed. Proof was admitted of the failure to build a partition wall and to relath the house, neither of which items was included in the bill of particulars. It was held that proof of damages should have been restricted to the items set forth in the bill of particulars, and that it was error to admit other items, except those involved in the plea of set-off.

In *Harding v. Griffin* (1845) 7 Blackf. (Ind.) 462, an action of assumpsit, the defendant furnished with his notice of set-off a bill of particulars containing an item of "cash \$100," and the date thereof. The defendant offered as evidence a receipt of the same date, signed by the plaintiff, and given to defendant as executor for part of a legacy left the plaintiff. It was held that since the bill of particulars showed an account between the parties individually, the evidence offered showing payment by the defendant as executor had been properly rejected. The general charge in the bill of particulars did not notify the plaintiff of the defendant's design.

In *Vannoy v. Klein* (1889) 122 Ind. 416, 23 N. E. 526, an action to recover for goods sold and delivered, a bill of particulars was filed with the complaint, which in its caption was addressed to Mr. R. W. Matthews, whereas the action was brought against Matthews and Vannoy. It was held that nevertheless it might be shown that Vannoy was liable, since his indebtedness was alleged in the complaint; that while a bill of particulars identified the goods sold, and limited the proof to the items mentioned, its purpose was not to specify the parties charged.

In *De Sobry v. De Laistre* (1804) 2 Harr. & J. (Md.) 223, 3 Am. Dec. 535, an action of assumpsit wherein the plaintiff filed an account specifying his claims against the defendant as executor, it was held that the plaintiff might not bring in evidence to establish his claim in a manner different from that set forth in his account,

viz., "to consider the testator his debtor for his use."

In *Hall v. Sewell* (1850) 9 Gill (Md.) 146, an action of assumpsit, the plaintiff furnished a bill of particulars containing certain charges, and later requested the defendant to answer a series of interrogations. It was held that the plaintiff was bound to confine himself in his proof to the bill of particulars furnished, and that he could not propose questions not relating to the matters in issue.

In *Jones v. Ilsley* (1861) 1 Allen (Mass.) 273, the defendant, by way of set-off, filed a declaration containing an item as follows: "To goods sold, materials found, and work done, \$100." It was held that under this item "the defendant should have been limited to the proof of a single article."

In *Blake v. Everett* (1861) 1 Allen (Mass.) 248, an action on a covenant against encumbrance, a specification was filed by the plaintiff, stating that the encumbrance in question was a right of way held by several named persons, including "one Hastings." Evidence given by Justus P. Hastings, called by the plaintiff, was held to have been properly admitted over an objection of the defendant that the witness had been specified merely as "one Hastings."

In *Hayes v. Wilson* (1870) 105 Mass. 21, an action on an account annexed for work done for the plaintiff, one item was for "sixty-one days' work on house, etc., \$122." It was held that under this item the plaintiff might prove work done in grading about the house, in addition to that done on the house, since the defendant had not "moved for a more definite specification."

In *Waterman v. Waterman* (1876) 34 Mich. 490, an action of assumpsit by a son against his father for money loaned to him, etc., the plaintiff offered evidence that he had loaned to the defendant a United States bond. It was held that this evidence was not admissible under an item in a bill of particulars setting forth the loan of money.

In *Ritter v. Daniels* (1882) 47 Mich. 617, 11 N. W. 409, an action of assump-

sit to recover for work and labor performed, defendant gave notice of set-off, and filed a bill of particulars therewith. Evidence of damage and injury resulting from the act of plaintiff in leaving defendant's service, was held to have been properly rejected, since no reference had been made thereto in the bill of particulars.

In *Wright v. Dickinson* (1887) 67 Mich. 580, 11 Am. St. Rep. 602, 35 N. W. 164, an action of assumpsit to recover money paid on land contracts, the plaintiff in his bill of particulars specified that his money had been paid without consideration, since the defendants had no title to the land which they had agreed to convey. It was held that since the bill of particulars showed that the action was for the recovery of money paid without consideration, it might be shown that the contract was invalid under the Statute of Frauds.

In *Duplanty v. Stokes* (1895) 103 Mich. 680, 61 N. W. 1015, an action of assumpsit, it was set forth that a certain amount of timber was to be delivered astern of a vessel. It was held that the bill of particulars admitted of proof to show that a raft of timber was delivered at a shipyard instead of astern of the vessel.

In *Grady v. Sullivan* (1897) 112 Mich. 458, 70 N. W. 1040, an action to recover for the sale of gravel under a contract, the plaintiff alleged a contract for the sale of gravel from certain lots, with an agreement to grade the lots to the street level. The bill of particulars filed by the plaintiff set forth a claim for damage done to lots in lowering them below the street level, etc., but made no mention of the specific lots. It was held that the bill of particulars was sufficiently specific to permit of recovery of damage to the lots in question.

In *Stoner v. Riggs* (1901) 128 Mich. 129, 87 N. W. 109, wherein the plaintiff sought to recover from his father-in-law for services performed and moneys expended, the defendant filed a bill of particulars of set-off to show alleged payments of money to the plaintiff at different times. A number of checks were offered in evidence to

show business transactions undertaken by the plaintiff while in charge of the defendant's affairs. It was held that since such items had not been included in the bill of particulars, the defendant could not claim injury because of its exclusion.

In *Goforth v. Stingley* (1901) 79 Miss. 398, 80 So. 690, an action of ejectment, the plaintiffs having filed a bill of particulars showing their title to have been derived in a certain fashion, it was held that they were bound thereby, and could not "show title by facts outside their bill of particulars."

In *McQuesten v. Young* (1848) 19 N. H. 307, an action of assumpsit wherein the plaintiff filed an account, it was held that an objection was properly taken to the offer of evidence of items of goods sold and items of cash, which did not appear to be the same as those set forth in the account.

In *Saunders v. Osgood* (1865) 46 N. H. 21, an action of assumpsit wherein the plaintiff had filed a bill of particulars setting forth a number of debits and credits, it was held to be improper to allow him to show that an item of credit so stated was erroneous, since the defendant would be misled thereby.

*Quin v. Astor* (1829) 2 Wend. (N. Y.) 577, was an action of assumpsit wherein the plaintiff had filed a bill of particulars containing various charges under date of April, 1821. It was held that no evidence could be given of services rendered prior to 1821, since time was material in a bill of particulars.

In *Standish v. Chandler* (1840) 28 Wend. (N. Y.) 511, an action of assumpsit, the defendant gave notice of set-off and filed a bill of particulars, setting forth therein a note, with specifications of the date, amount, etc., thereof, stating that it was made by one Samuel Standish, Jr. The note was rejected as evidence on the ground that there was another maker thereof in addition to Standish. It was decided that since the note was, in legal effect, a several contract, it was sufficiently set forth in the bill of particulars to make it admissible.

*Bowman v. Earle* (1854) 3 Duer (N. Y.) 691, was an action to recover for services rendered as an attorney, wherein a bill of particulars was filed by the plaintiff. It was held that the referee's order allowing certain items not included in the bill of particulars was improper, since the referee could not take proof of such items.

In *Matthews v. Hubbard* (1872) 47 N. Y. 428, wherein the plaintiff's bill of particulars set forth the dates, amounts, and descriptions of various sums alleged by him to have been remitted at the request of the defendant, it was held that the plaintiff was restricted to proof of remittances at defendant's request, and that consequently the items were sufficiently specific.

In *Lester v. Clarke* (1908) 40 Misc. 688, 88 N. Y. Supp. 168, an action to recover on a contract, plaintiffs filed a bill of particulars setting forth certain letters as evidencing the contract. On the trial they sought to introduce another letter which had not been mentioned in the bill of particulars. It was held that the effect of a bill of particulars is to restrict the proofs to the matters set forth therein, and that consequently it was improper to admit the letter in question.

In *Franco v. Caruso* (1916) 158 N. Y. Supp. 751, an action brought for an alleged breach of a contract of employment, the plaintiff in his bill of particulars set forth an alleged oral contract of employment for a period of six months, beginning October 1st, 1915. It was held that the plaintiff was limited in his proof to such a contract.

In *Peninsular Trading Agency v. Frazer* (1919) 176 N. Y. Supp. 739, an action to recover for alleged failure to deliver under a contract, the plaintiff filed a bill of particulars setting forth three papers which, it was alleged, constituted the contract. It was held that the plaintiff was limited in its proof to the alleged contract as stated in the bill of particulars.

In *Steinman v. Slaymaker* (1875) 1 W. N. C. (Pa.) 182, an action of assumpsit, a "bill of particulars claimed for money advanced by plaintiff to

defendant,' giving the dates and amounts." It was held that on this bill the plaintiff might be "restricted to proving a technical loan of money."

In *Frost v. International Rubber Co.* (1915) 37 R. L. 476, 93 Atl. 641, wherein the plaintiff brought an action for the accrued instalments on a contract for his services, and filed a bill of particulars thereof, it was held that he could not be permitted at the trial to offer testimony in support of additional claims, moving expenses, which had been eliminated by the bill of particulars.

In *Rhode Island Malleable Iron Works v. O. K. Nut Lock Co.* (1918) — R. L. —, 103 Atl. 1036, an action of assumpsit wherein the declaration made no complaint of the refusal to deliver patterns, it was held that no testimony could be given of the patterns, though the bill of particulars filed by the plaintiff contained a specification of damages for their retention.

*Powers v. Washington Portland Cement Co.* (1914) 79 Wash. 1, 139 Pac. 616, was an action to recover damages incurred in replacing work done by the plaintiff, and condemned. A bill of particulars was furnished by the plaintiff which, however, covered only a portion of the work in question. It was held that evidence could not be given of that portion of the work which was not specified in the bill of particulars.

In *Cudworth v. Gaynor* (1890) 76 Wis. 296, 44 N. W. 1103, an action to recover for services rendered as broker, the plaintiff demanded judgment for \$575, while his bill of particulars set forth a claim of \$435. It was held that the plaintiff would be restricted to proof of the items in the bill.

*Young v. Erie & H. R. Co.* (1895) 17 Ont. Pr. Rep. 4, was an action to compel the defendant to construct certain fences, and for damages resulting from the neglect of the defendant to build the fences. It was held that, having delivered particulars, the plaintiff would be restricted thereto in giving his evidence, and that no order of the court was necessary to enforce such restriction.

In *Law v. Thompson* (1846) 15 Mees.

& W. 541, 153 Eng. Reprint, 964, 4 Dowl. & L. 54, 15 L. J. Exch. N. S. 334, an action of assumpsit for work and labor, the plaintiff filed two sets of particulars in which he stated his claim for services at a certain amount for a certain period. It was held that under such particulars the plaintiff could not prove that commissions were due him on a different contract.

In *Roberts v. Elsworth* (1842) 10 Mees. & W. 653, 152 Eng. Reprint, 633, 12 L. J. Exch. N. S. 15, 6 Jur. 1092, 2 Dowl. N. S. 456, an action to recover £100, the particulars of demand furnished by the plaintiff set forth a claim founded on two promissory notes of £50 each. It was held that evidence of a conversation in which the defendant admitted a debt of £100, owing by him to the plaintiff, could not prove the plaintiff's case, which was restricted by his bill of particulars to proving an account stated with reference to the notes.

In *Wade v. Beasley* (1801) 4 Esp. (Eng.) 7, an action of assumpsit, the plaintiff having given a bill of particulars declaring that the action was on a promissory note, it appeared that the note had been given on an improper stamp, and the plaintiff gave evidence of a loan of money of the same amount as the note which was the consideration for it. It was held that such evidence was not admissible, since the plaintiff was bound by his particular.

In *Holland v. Hopkins* (1800) 2 Bos. & P. 243, 126 Eng. Reprint, 1260, 2 Esp. 168, an action of indebitatus assumpsit, the plaintiff filed a bill of particulars setting forth one claim for the prices of horses sold and delivered. It was held that under such a bill of particulars the plaintiff could not give evidence of a sale by the defendant as an agent for the plaintiff.

#### *b. Action for tort.*

In *Hubbard v. New York R. Co.* (1918) 183 App. Div. 470, 170 N. Y. Supp. 889, an action to recover for personal injuries, the bill of particulars filed by the plaintiff specified as an injury a "fracture of clavicle." It was held that under such a specifica-



tion evidence might be admitted of the fracture of both clavicles.

*McDonough v. Boston Elev. R. Co.* (1911) 208 Mass. 436, 94 N. E. 809, was an action to recover for injuries suffered by the plaintiff while passenger on a car of the defendant. The plaintiff filed specifications, the last clause of which stated: "And the plaintiff further says that he is unable to further specify as to the negligence of the defendant." It was held that the plaintiff was not debarred from relying on the doctrine of *res ipsa loquitur* by the filing of specifications.

In *Eckhart v. Peterson* (1917) 94 Wash. 379, 162 Pac. 557, an action for injuries alleged to be the result of an assault and rape, wherein the complaint set forth certain injuries resulting therefrom as in a bill of particulars, it was held to be improper to receive evidence of injuries not specified.

In *Tourgee v. Rose* (1896) 19 R. I. 432, 87 Atl. 9, wherein the plaintiff sought to hold the defendant liable for the seduction of his daughter, a bill of particulars was filed by the plaintiff, on the order of the court, setting forth the particulars of the charge. It was held that no evidence could be given concerning acts not specified in the bill of particulars.

In *Nechamkin v. Kennedy* (1916) 95 Misc. 532, 159 N. Y. Supp. 682, an action to recover damages to an automobile, the plaintiff filed a bill of particulars stating only damages to the car. It was held that evidence offered of the cost to the plaintiff of hiring another automobile was erroneously admitted, since it was beyond the bill of particulars.

In *Ransom v. Getty* (1887) 37 Kan. 75, 14 Pac. 487, an action to recover for the death of the plaintiff's mare and colt, the plaintiff in his bill of particulars specified a contract on the part of the defendant to take good care of the mare and colt. Evidence was given, over objection, to show that the defendant was to give special and extra care to the mare and colt. It was held that this evidence "ought not to have been admitted under the pleadings."

*c. Prosecution for crime.*

In *Com. v. Davis* (1831) 11 Pick. (Mass.) 435, wherein the defendant was indicted as a common barrator, notice of particulars was given him before the trial, one specification stating that evidence would be given concerning complaints in behalf of the commonwealth, before M. Gill, etc. It was held that under such specification evidence might be given of complaints which had been made before another magistrate, where the warrant was returned to M. Gill for a hearing.

In *Com. v. Giles* (1854) 1 Gray (Mass.) 466, the defendant was indicted for the sale of liquor without a license. A bill of particulars was furnished, setting forth the names of the persons to whom the sales were made. At the trial evidence was admitted over objection, showing sales to persons not specified. It was held that the evidence was inadmissible.

In *Com. v. Snelling* (1854) 15 Pick. (Mass.) 321, wherein the defendant was indicted for libel, he furnished a bill of particulars of his justification, one of the specifications of which set forth "that in all the cases aforesaid, and divers others," one Whitman, an officer, had acted in an improper manner. The defendant was restricted in his evidence to the cases specified, and not allowed to go into the facts surrounding "the others" not specified. It was held that this was a proper restriction.

In *O'Leary v. People* (1899) 88 Ill. App. 60, wherein the defendant was indicted for keeping a gaming house, a bill of particulars specified that a gaming house had been kept in a building known as the Washington Park Club. Evidence was offered showing that betting had taken place on the grounds near the building. The court directed that if this were found to be the fact, a verdict of guilty should be given. It was held that, under the bill of particulars, the allegations must be proved as stated, and that consequently the instruction given by the court was improper.

In *McDonald v. People* (1888) 126 Ill. 150, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137, the defend-

ant was indicted for conspiracy to obtain money under false pretenses. He was furnished with a bill of particulars, setting forth a number of bills together with their dates, all of which bills related to services and materials furnished at a normal school. Evidence was admitted to show fraudulent bills rendered in connection with a courthouse, an insane asylum, an infirmary, and a hospital. It was held that the evidence should have been confined to the bills for services and material on the normal school, and it was erroneous to allow other evidence to be given to the jury.

### III. Limitations of rule.

#### a. Evidence slightly variant.

Where the proof offered substantially conforms to the charges set forth in the bill of particulars, evidence slightly variant, but not misleading to the other party, will not be excluded thereby. *Ames v. Quimby* (1882) 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116; *Moline Water Power & Mfg. Co. v. Nichols* (1861) 26 Ill. 90; *Bonney v. Seely* (1829) 2 Wend. (N. Y.) 482; *Dubois v. Delaware & H. Canal Co.* (1834) 12 Wend. (N. Y.) 334, affirmed in (1834) 15 Wend. 87; *Hoag v. Weston* (1886) 10 N. Y. Civ. Proc. Rep. 92, 24 N. Y. Week. Dig. 91; *John Reis Co. v. Post* (1918) 183 App. Div. 696, 170 N. Y. Supp. 610; *Harris v. Montgomery* (1851) 11 C. B. 398, 138 Eng. Reprint, 525, 2 Lowndes, M. & P. 425, 20 L. J. C. P. N. S. 221, 15 Jur. 757.

Evidence is not to be excluded because it is not confined most precisely and directly to the items as set forth in the bill of particulars. *American Secur. & T. Co. v. Kaveney* (1912) 39 App. D. C. 223; *Mason v. Fractional School Dist.* (1876) 84 Mich. 228; *Ware v. McQuillan* (1877) 54 Miss. 708; *Robinson v. Weil* (1871) 45 N. Y. 810; *Duncan v. Ray* (1838) 19 Wend. (N. Y.) 530; *Imhoff v. Fleurer* (1856) 2 Phila. (Pa.) 35; *Mercier v. Travelers Ins. Co.* (1901) 24 Wash. 147, 64 Pac. 158.

Nor will evidence be excluded because of a variance from the bill of particulars which is immaterial, where the other party is not misled thereby.

*Mason v. Fractional School Dist.* (Mich.) supra; *McNair v. Gilbert* (1829) 3 Wend. (N. Y.) 344; *Brown v. Williams* (1830) 4 Wend. (N. Y.) 368; *Smith v. Hicks* (1880) 5 Wend. (N. Y.) 48; *Seaman v. Low* (1859) 4 Bosw. (N. Y.) 337; *Jackson v. Reich* (1893) 3 Misc. 86, 22 N. Y. Supp. 366; *Spokane & I. Lumber Co. v. Loy* (1899) 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

So, where the proof pertains to the charge specified in the bill of particulars, it will not be excluded because it may seem remote. *Cohn-Goodman Co. v. People's Sav. Bank* (1918) 203 Mich. 307, 168 N. W. 1042; *Calhoun v. Akeley* (1901) 82 Minn. 354, 85 N. W. 170.

*Ames v. Quimby* (1882) 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116, was an action of assumpsit to recover the price of a number of shovel handles furnished the defendant by the plaintiff. The defendant contended that a charge should have been given that the plaintiff might recover for only the number of handles, at the price stated in the bill of particulars. The plaintiff claimed that a mistake as to the price had been made in the bill of particulars. The court charged that while plaintiff could not recover for more handles than were set forth in the bill of particulars, he could show the actual price thereof, regardless of the mistake. It was held that the charge was correct.

In *American Secur. & T. Co. v. Kaveney* (1912) 39 App. D. C. 223, a physician sought to recover from an executor for services rendered to the testator. A bill of particulars having been added to the declaration, it was held that, while the plaintiff was limited thereby to the subject-matters specified, "he is not limited to direct proof of each and every item on the particular date specified, but may prove as many of the specified matters as may be possible by the best evidence attainable."

In *Moline Water Power & Mfg. Co. v. Nichols* (1861) 26 Ill. 90, wherein the plaintiff sought to recover for one year's services, his bill of particulars specified a claim for one year's salary at \$2,000. Evidence was offered of a

year's service on the part of the plaintiff. It was held that there was substantially "no difference between a charge for a year's salary and a year's service, when found in the bill of particulars."

In *Mason v. Fractional School Dist.* (1876) 34 Mich. 228, it was sought to recover from the defendant a balance of money had and received by him as assessor. A bill of particulars filed by the plaintiff contained numerous items, resulting in the balance sued for. It was held that evidence might be given of items larger than any mentioned in the bill of particulars, if they did not alter the amount of the balance as shown therein, since the defendant could not claim to have been misled by such evidence.

*Cohn-Goodman Co. v. People's Sav. Bank* (Mich.) *supra*, was an action to recover money claimed to be due on a certificate of deposit issued by the defendant, the plaintiff, on request for a bill of particulars, specifying that the cause of action was the certificate of deposit and interest, etc. The plaintiff sought to show that the money belonged to him. It was held that since no effort had been made to change the terms of the certificate, the plaintiff was not to be considered as ignoring his bill of particulars because he proved things not mentioned therein.

*Calhoun v. Akeley* (1901) 82 Minn. 354, 85 N. W. 170, was an action to recover for legal services rendered. The plaintiffs having furnished a bill of particulars itemizing their account, giving the number of days involved, and the total sum of the statement, it was held that the bill of particulars did not preclude the admission of the testimony of practising attorneys as to the value of the services rendered; such testimony being simply one way of establishing the total value of the services, and being no departure from the bill of particulars.

In *Ware v. McQuillan* (1877) 54 Miss. 703, an action for goods sold and delivered, the plaintiff having filed a bill of particulars, it was held that, while he could not prove any other indebtedness than that specified in the

bill of particulars, there was no discrepancy in showing that the account was owing by W. B. McQuillan, where the heading of the bill of particulars specified William B. McQuillan.

In *Bonney v. Seely* (1829) 2 Wend. (N. Y.) 482, an action of assumpsit, wherein the plaintiff gave a bill of particulars claiming for money which he had been compelled to pay for the defendants on a note, an agreement "to save the plaintiff from the payment" was produced. The plaintiff offered evidence of payment in land instead of money, to which the defendants objected as varying from the bill of particulars. It was held that the conveyance of land was to be considered the same as if the plaintiff had paid money.

In *McNair v. Gilbert*. (1829) 3 Wend. (N. Y.) 344, an action of assumpsit, wherein the plaintiff offered "to prove the new promise of the defendant to pay the note subsequent to the granting of an insolvent discharge," the defendant objected thereto on the ground that the plaintiff's bill of particulars described the notes as bearing interest, which was not supported by the proof. The objections were overruled. It was held that unless the variance between the evidence and the bill of particulars was material and misleading to the defendant it would not be regarded.

*Brown v. Williams* (1830) 4 Wend. (N. Y.) 368, was an action of assumpsit, wherein the plaintiff filed a bill of particulars stating that the money had been received by the defendant from one Dubois, while the evidence offered tended to show that it had been paid otherwise. It was held that since the bill of particulars apprised the defendant that the money "which the plaintiff had paid was sought to be recovered back," there could have been no surprise, as the transaction amounted in law to a discharge of the sum, even though it were not paid by Dubois.

In *Smith v. Hicks* (1830) 5 Wend. (N. Y.) 48, an action of assumpsit for money had and received, etc., the plaintiff's bill of particulars specified the sum due at \$605.63, whereas the evidence offered tended to show the

amount as \$644.45. It was held that since the bill of particulars apprised the other side of the evidence which was to be offered, so that there could be no mistake as to the preparation to be made to resist the claim, the party furnishing the bill of particulars should not be prejudiced by the error therein.

In *Dubois v. Delaware & H. Canal Co.* (1834) 12 Wend. (N. Y.) 234, affirmed in (1835) 15 Wend. 87, an action on a contract for an excavation, the plaintiff filed a bill of particulars as follows: "To 12,000 yards of hardpan excavation, \$8,600." Evidence was offered and admitted to show that the work was in reality worth 75 cents per yard, which the defendants rebutted with other evidence of the value thereof. It was held that since the price of the excavation was the matter in question, and since no objection was made to the evidence at the time of its admission, it could not later be considered. The court intimated that an objection would have been of no avail, even if made at the time of the presentation of the evidence.

In *Duncan v. Ray* (1838) 19 Wend. (N. Y.) 530, was an action to recover the price of a mare sold by the plaintiff to the defendant. The plaintiff filed a bill of particulars in which the sale was set forth as having taken place October 13, 1824, and the defendant objected to evidence showing the sale to have been made in October, 1825. It was held that "the objection of variance between the bill of particulars and the evidence of sale was properly disregarded."

In *Seaman v. Low* (1859) 4 Bosw. (N. Y.) 337, an action wherein the plaintiff sought to recover money paid to the defendant for the purchase of stock in an association, a bill of particulars was filed by the plaintiff, setting forth the payments, etc., as money received by the defendant for stock never delivered to the plaintiff, etc. Evidence was offered that the defendant had made false representations as to the valuation of his land which was to be sold to the association. It was held that this evidence was improperly excluded, the court saying that the de-

fendant had been neither misled nor surprised.

In *Robinson v. Weil* (1871) 45 N. Y. 810, wherein the plaintiff sought to recover for services rendered as a physician, the first item of his bill of particulars was as follows: "To professional services from December 23d, 1867, to February 19th, 1868, per agreement, \$500." The court said: "We are of opinion that the plaintiff was not precluded, by the form of his bill of particulars, from proving and recovering the value of the services, though he should fail to prove an agreement for the payment of a specified sum therefor. The bill of particulars specifies the nature of the services and the dates between which they were rendered, and the amount claimed, and in those respects limited the plaintiff's proofs; but the addition of the words, 'by agreement,' did not restrict him to proof of a special agreement fixing the price."

In *Jackson v. Reich* (1893) 3 Misc. 86, 22 N. Y. Supp. 366, an action to recover for goods sold and delivered, the plaintiff set forth in a bill of particulars an itemized account of articles and labor, together with the dates and locations of work. Evidence was admitted to show work done at other times than those stated. It was held that the evidence was properly admitted, since the variance as to dates was immaterial and the defendant could not have been misled.

In *John Reis Co. v. Post* (1918) 183 App. Div. 696, 170 N. Y. Supp. 610, was an action brought by the plaintiff to recover commissions alleged to have been earned in a transaction undertaken for defendant's testator. The plaintiff filed a bill of particulars specifying that a certain conversation notifying the defendant's testator of the negotiations was held by one Ohnewald at a certain place. It was held that the testimony of two other witnesses to the conversation, not mentioned in the bill of particulars, had been properly admitted over the defendant's objection, since there had been "no order to preclude the plaintiff from such evidence."

In *Imhoff v. Fleurer* (1856) 2 Phila.

(Pa.) 35, wherein the plaintiff filed a bill of particulars, it was objected that the evidence given of certain items differed in date from those charged in the bill. It was held that a discrepancy of a few days in date, where it did not appear that the defendant had been surprised, would not prohibit the matter from being given to the jury. And the fact that the defendant's name as stated in the bill of particulars was Fleurer was held not to exclude from evidence the plaintiff's book entries against "Mrs. Flory."

In *Spokane & I. Lumber Co. v. Loy* (1899) 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, an action on a bond, it appeared that the plaintiff had furnished lumber to a contractor for whom the defendants were sureties. The plaintiff filed a bill of particulars, and objection was made by the defendants to the admission of "evidence of sales of lumber prior to any of the times mentioned in the bill of particulars." It was held that while a bill of particulars restricts proof to matters set forth therein, such testimony would not be excluded where the opposite party was neither surprised nor misled.

In *Mercier v. Travelers Ins. Co.* (1901) 24 Wash. 147, 64 Pac. 158, an action to recover on an accident insurance policy, it was alleged in a bill of particulars that the insured died as the result of a fall, which injured his left side and induced fatty degeneration of the heart. It was held that the plaintiff was not prejudiced by the admission of proof that the insured's death had been caused by the accident, but not by the disease specified in the bill of particulars.

In *Harris v. Montgomery* (1851) 15 Jur. 757, 11 C. B. 393, 138 Eng. Reprint, 525, 2 Lowndes, M. & P. 425, 20 L. J. C. P. N. S. 221, an action of assumpsit, the plaintiff's particulars of demand set forth a claim for salary due him for a certain year as damages for dismissal. It was held that the plaintiff might give evidence of work and labor done during the year, since the defendants could not be misled thereby.

*b. Evidence conforming to pleading but not to particulars.*

Proof which applies to a count or statement in the declaration which is not covered by a bill of particulars is not restricted thereby. *Vila v. Weston* (1865) 33 Conn. 42; *Gubbins v. Ashley* (1906) 146 Mich. 453, 109 N. W. 841; *Wait v. Borne* (1890) 123 N. Y. 592, 25 N. E. 1053, reversing (1889) 52 Hun, 612, 5 N. Y. Supp. 168; *Davis v. Hunt* (1831) 18 S. C. L. (2 Bail.) 412; *Day v. Davies* (1832) 5 Car. & P. (Eng.) 340; *Page v. Pavey* (1839) 8 Car. & P. (Eng.) 769.

In *Vila v. Weston* (Conn.) *supra*, an action of assumpsit against a surviving partner, the plaintiff filed a bill of particulars setting forth an item of goods sold to the partnership. At the trial the plaintiff offered the note on which a special count in the declaration had been based. It was held that since the note was set forth in a special count as a cause of action, the defendant must have had knowledge thereof, and that the necessity of filing a bill of particulars, including the note, was superseded thereby.

*Gubbins v. Ashley* (1906) 146 Mich. 453, 109 N. W. 841, was an action of assumpsit for money obtained by fraud and deceit, for the purchase of an option on a company in which the defendants were officers. The declaration contained special and common counts, the special count alleging the fraud. The plaintiff filed a bill of particulars showing \$1,000 paid to the defendants, with interest thereon, and later offered to show fraud and deceit. It was held that the bill of particulars did not limit the plaintiff to the common counts.

In *Wait v. Borne* (1890) 123 N. Y. 592, 25 N. E. 1053, reversing (1889) 52 Hun, 612, 5 N. Y. Supp. 168, an action for damages for alleged breach of warranty in the sale of oil to be used in the manufacture of carpets, the plaintiff filed a bill of particulars setting forth the sale of carpets at reduced prices, and subject to return, because of damage inflicted by the oil; there was also a statement that the carpets were "inferior, unsalable," etc. It was held that to prove this last charge the

plaintiffs were not limited to the bill of particulars, but might give "evidence looking to general damage upon carpets."

In *Davis v. Hunt* (1831) 18 S. C. L. (2 Bail.) 412, an action of indebitatus assumpsit for money had and received to the use of the plaintiff, a bill of particulars was filed for money "received by the defendant as sheriff in the case of the plaintiff v. Philip and John Weaver." It was held that while evidence of demands not contained in a bill of particulars may not be given over objection, it is no valid objection to evidence which sustains the count "that it does not agree with that which is no part of the count."

Day v. Davies (1832) 5 Car. & P. (Eng.) 340, was an action of assumpsit. The first count set forth special damage arising from the failure of the defendant to indemnify the plaintiff in the acceptance of a bill of exchange. There were several other counts. The plaintiff's particulars of demand stated a claim on the indebitatus counts to recover the amount of a bill of exchange, paid by the plaintiff. The court said: "It did not follow that, because a particular had been given applying only to the indebitatus counts, therefore the plaintiff was precluded from going into evidence upon a special count to which the particular did not profess to apply."

In *Page v. Pavey* (1839) 8 Car. & P. (Eng.) 769, an action of assumpsit, the first count stated a sale of wheat with a warranty that it would grow, a breach in that it did not grow, and loss to the plaintiff thereby. There were also several other counts for money had and received, etc. The particulars of demand set forth a claim of £6, 19s, 6d., on the indebitatus counts. Evidence was offered to show the plaintiff's loss by reason of the failure of the seed to grow. It was held that the evidence was under the first count, and was not affected by the particulars, which applied only to the common counts.

*c. Evidence to rebut set-off or defense.*

A plaintiff in rebutting a claim made under a plea of set-off, or of an affirmative defense, is not restricted to the proof of items specified in his bill of

particulars. *Robertson v. Emerich* (1899) 88 Ill. App. 522; *Young v. Boyd* (1908) 107 Md. 449, 69 Atl. 33; *Brown v. Denison* (1829) 2 Wend. (N. Y.) 593; *Wilson v. Deacon* (1880) 9 W. N. C. (Pa.) 47.

In *Robertson v. Emerich* (Ill.) supra, an action brought to recover on three promissory notes, a bill of particulars was filed by the plaintiff, limiting the claim to the notes. Concerning the application of certain payments made by the defendant, who contended that they had been made on the notes, the plaintiff was permitted to give evidence of another transaction on which he claimed the payment had been applied. It was held that since this evidence was not to show a cause of action, but for the purpose of rebutting proof of payment, it did not go beyond the restrictions of the bill of particulars.

So, in *Wilson v. Deacon* (Pa.) supra, wherein the plaintiff had filed a bill of particulars of his claim, the defendant proved a payment of \$50. The defendant objected to evidence offered by the plaintiff to show that this payment had been appropriated to a prior debt, on the ground that no item setting forth this debt appeared in the bill of particulars. The evidence was held to be admissible.

In *Young v. Boyd* (1908) 107 Md. 449, 69 Atl. 33, an action for money held by the defendant for the plaintiff, a bill of particulars was filed by the plaintiff, setting forth certain items as received by the defendant for the plaintiff. The defendant filed a plea of set-off together with a bill of particulars containing certain items which the plaintiff disputed, alleging that the defendant was not entitled to credit on such items since they had been used for the defendant's benefit, testimony to this effect having been admitted. It was held that the motion to exclude this evidence was properly overruled, since the plaintiff was not attempting to recover anything not included in her bill of particulars.

*Brown v. Denison* (1829) 2 Wend. (N. Y.) 593, was an action brought to recover for flour deposited with the defendants. "The referees had refused

to receive evidence showing that an item in the defendants' account, . . . for cash paid on the order of the plaintiff, had been refunded by the plaintiff, on the ground that it had not been contained in the bill of particulars filed by the plaintiff. It was held that since the evidence offered had been to rebut the defendants' evidence, it was improper to reject it.

*d. Evidence admitted without objection.*

Evidence of matters not within the bill of particulars, admitted without objection, is not subject to interference by the court thereafter. *Paisley v. Western New York & P. Traction Co.* (1918) 80 Misc. 258, 141 N. Y. Supp. 63; *Phelps v. Conant* (1858) 30 Vt. 277.

In *Paisley v. Western New York & P. Traction Co.* (N. Y.) *supra*, an action to recover for damages incurred by the sudden stopping of one of defendant's cars, the plaintiff's bill of particulars set forth a number of special injuries, and on the trial introduced without objection proof of an alleged injury not so specified. It was held that, since the proof of matters beyond the bill of particulars was received without objection from the defendant, the court would not interfere.

In *Phelps v. Conant* (Vt.) *supra*, an action of assumpsit wherein the plaintiff filed a specification setting forth two notes in favor of the plaintiffs, it was held that where the plaintiffs' testimony was at variance with the specification, the defendant, not objecting thereto at the time, could not later object where the claim was practically the same as described.

*e. Miscellaneous.*

In *Star Brewery v. Farnsworth* (1898) 172 Ill. 247, 50 N. E. 228, wherein the plaintiff sought to recover the price of a building erected by him, it was claimed that the evidence of the plaintiff should have been stricken out, since he had proven the value of the building and the value of the labor in a single sum, while a bill of particulars had been filed with specific articles and items. It was held that a bill of particulars restricted the proof to the items and prices set forth therein,

but that the question could not be raised because the bill of particulars had not been preserved in the bill of exceptions.

In *McKinnie v. Lane* (1907) 230 Ill. 544, 120 Am. St. Rep. 388, 82 N. E. 878, an action to recover the balance due on the purchase price of paintings, the bill of particulars stated that the balance of the amount due "was to be given in pictures at agreed price." Evidence was given that the defendant was to pay the balance in pictures or cash. It was held that the effect of a bill of particulars was to restrict the plaintiff to proof of the causes of action as set forth therein, but that the plaintiff could avail himself of the variance, because amendment of the bill of particulars had been improperly refused.

In *Hall v. Wood* (1857) 9 Gray (Mass.) 60, an action on contract for work and labor, it appeared from the plaintiff's bill of particulars that the Statute of Limitations would bar a recovery on the first two items therein. The court said: "In any aspect of the case the form of the declaration was a proper one, and, it being upon the common counts, the bill of particulars was properly filed, and its detailed statements did not estop the plaintiff from showing that all the items of services were performed under one contract."

In *Com. v. Farrell* (1870) 105 Mass. 189, wherein the plaintiff had been indicted for keeping a liquor nuisance, specifications were filed in the municipal court setting forth the date when the offense was committed. At the trial in the superior court the commonwealth was not restricted to the dates specified in their testimony to which the defendant took exception. It was held that specifications are ordered at the discretion of the court before which a cause is to be tried, and are not a part of the record, so that on appeal the court was not bound by the specifications filed in the lower court.

In *Graham v. Whitely* (1857) 26 N. J. L. 254, an action of ejectment wherein the plaintiffs had filed a bill of particulars which specified that

certain documentary evidence of title would be used by them, including a copy of a will, it was held that the plaintiffs were not restricted to a claim by devise, but might show title by descent in their grantors.

In *Hayden v. Astoria* (1917) 84 Or. 205, 164 Pac. 729, an action wherein the plaintiff sought to recover for work and materials on a quantum meruit, a bill of particulars was filed by the plaintiff in which he set forth in detail the various expenditures. It was held that while a bill of particulars furnished on the order of the court limits the party providing it to proof of the items set forth therein, where "an account is furnished on demand of the adverse party in a cause wherein the account is not demandable, the account so furnished cannot be used to shut out testimony otherwise competent, in the absence of a

showing that the adverse party had been misled."

In *Hurst v. Watkis* (1807) 1 Campb. (Eng.) 68, 10 Revised Rep. 634, an action of assumpsit for money had and received and on an account stated, wherein it appeared that the plaintiff and the defendant had been partners and had had other mutual transactions, the plaintiff's particular set forth the separate accounts. The defendant, in showing a balance in favor of himself on the separate account, disclosed on the opposite page a partnership balance in favor of the plaintiff. It was held that while a party is ordinarily restricted in his evidence to the contents of his particular, where a defendant, in an attempt to defeat the claim, offers evidence which incidentally aids the plaintiff, plaintiff is not precluded from taking advantage thereof. R. S.

## STATE OF NEBRASKA

v.

EDWARD K. MURRAY, Plff. in Err.

*Nebraska Supreme Court—December 15, 1910.*

(— Neb. —, 175 N. W. 666.)

**Constitutional law — Sunday labor — discrimination against barber.**

1. Chapter 234, Laws 1917, is not discriminative class legislation by reason of the fact that it imposes upon barbers a more severe penalty for working at their trade on Sunday than that imposed by the General Sunday Act, namely, § 8802, Rev. Stat. 1913.

[See note on this question beginning on page 566.]

**Sunday — labor — penalty.**

2. Under the police power the legislature may impose such reasonable penalty for a violation of the Sunday Law as it may deem reasonably necessary to make the act effective.

**— barber shop — work of necessity.**

3. It is within the province of the legislature to provide by law that keeping barber shops open on Sunday is not a work of necessity.

[See 25 R. C. L. 1424.]

Headnotes by DEAN, J.

(Rose, J., dissents.)

**ERROR** to the District Court for Douglas County (Sears, J.) to review a judgment convicting defendant of doing barber work on Sunday in violation of law. *Affirmed.*

The facts are stated in the opinion of the court.



and profits without any allowance for taxes, assessments, and ground rents paid by him, it is, we believe, unsupported by any authority, and stands without a fellow in this country or in England."

*Thompson v. Bickford* (1872) 19 Minn. 17, Gil. 1, also, supports the proposition that if the grantee in a fraudulent conveyance is guilty of actual fraud, he is not entitled, on an accounting for rents and profits, to an allowance for sums paid by him for taxes and to extinguish liens or encumbrances on the property.

In determining the amount due from the wife to a creditor of the husband, where the latter had made a fraudulent transfer of personal property to the wife, who had disposed of the same, the court, in *Jewell v. Kelley* (1914) 180 Mich. 61, 146 N. W. 402, approved an allowance to the wife for payment by her of a chattel mortgage on the property at the time of the sale. Whether the transferee was regarded as guilty of actual or only constructive fraud does not clearly appear. In an earlier appeal, reported in (1909) 155 Mich. 301, 118 N. W. 987, the court said that it was far from being convinced that the bill of sale was not given and received with an intent to hinder, delay, and defraud creditors.

#### *IV. As to affirmative relief of grantee.*

Where the grantee in a conveyance in fraud of creditors participates in the fraud, his only rights, if any, according to the weight of authority, are by way of reducing the recovery against him on an accounting, and he cannot set up any claim in equity to affirmative relief on account of taxes or encumbrances discharged by him. This is the effect of the majority of the decisions already cited. And the point has been expressly made in a few cases.

Where a grantee, guilty of actual fraud, is merely on the defensive, as in an accounting for the rents and profits while he occupied the premises, the case is very different as to his right to a deduction for taxes and interest on mortgages, than if he were obliged to come into a court of equity asking for affirmative relief and for

the enforcement of these claims against the property; in the latter case, the court might leave him where his fraud had placed him, while on an accounting for rents and profits he should be compelled to account only for such rents and profits as he actually received or could have received. *Loos v. Wilkinson* (1889) 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392.

The same distinction is brought out in *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271. The court admitted that so far as the creditors of the grantor were concerned, where the fraudulent conveyance was set aside, their equities would not entitle them to more, as against the grantee, than they could have realized had there been no conveyance, and that the grantee might be entitled to reimbursement for taxes or encumbrances which were prior liens to the claims of the creditors. But it was held that where an accounting was not sought against the grantee for rents and profits, but the conveyance was merely set aside for fraud, in which he had participated, his fraud prevented him from invoking the aid of a court of equity for relief by way of reimbursement for taxes and encumbrances discharged by him, the court apparently taking the view that even though the grantee was merely a defendant against whom the creditors were seeking to set aside the conveyance, he was in effect asserting a right to affirmative relief so far as he claimed the right to such reimbursement, where the suit was not for an accounting, but merely to set aside the conveyance.

Second-mortgage bondholders of a railroad who fraudulently obtained a conveyance of the property to them on failure of the company to pay the interest coupons, and who discharged the first-mortgage bonds were held in *Milwaukee & M. R. Co. v. Soutter* (1872) 13 Wall. (U. S.) 517, 20 L. ed. 543, not entitled to sue the first-mortgage bondholders and recover the amount so paid to them, as paid under a mistake of fact, when the conveyance was set aside at the instance of creditors. The court said: "Who are the

complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, affected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for encumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity."

A different conclusion has been reached, however, where the grantee was guilty only of constructive fraud.

Thus, one who, in violation of the Bulk Sales Law, in good faith and without knowledge of the law or of claims against the property, purchased a stock of merchandise for full value, paying off, as part of the consideration, a chattel mortgage on the property, which was satisfied, was held in *Hicks v. Beals* (1917) 83 Or. 82, L.R.A.1917D, 1067, 163 Pac. 83, entitled to maintain a suit against the vendor and his creditors for the revival of the mortgage and for subrogation to the rights of the mortgagee, where the property has been attached by creditors because of noncompliance with the statute. The court said that it was contended on the part of the creditors that a merger could not be defeated by a plaintiff asking for affirmative relief in the same manner in which it could be resisted as a defense; that a sufficient answer to this contention was that the defendant was seeking to subject the property to the payment of its claims, and in defense the plaintiff was compelled to institute the suit; and that the form of the action or situation of the parties, whether plaintiff or defendant, was not a controlling feature.

Without deciding whether, under any circumstances, a grantee in a fraudulent conveyance who is guilty of constructive fraud may have relief

on account of payment of a mortgage on the property, assumed as a part of the consideration for the conveyance, the court in *Wiley v. Knight* (1855) 27 Ala. 336, held that such relief would not be granted on a bill by the grantee to reform the conveyance, where to permit the setting up of the mortgage would take the defendant entirely by surprise and result in a decree predicated on a state of facts precisely the opposite of those charged in the bill.

#### V. Conclusions.

To indicate what appears to be the better rule, in view of the conflict of the cases on the present question, it may be said that the weight of authority and the better reasoning appear to support the view that the grantee who is guilty of actual fraud is not entitled to reimbursement, on the setting aside of the conveyance, for sums expended by him to discharge liens for taxes and encumbrances, not because a court of equity desires to punish him for his fraud, although this may be the result of the ruling, but because the conveyance is absolutely void as to creditors, and the grantee therefore pays as would a stranger to the property, and also because to permit the conveyance to stand as security for sums so expended would be to that extent to give affirmative relief to a party to a fraudulent contract. But, on the other hand, if the grantee is only guilty of constructive fraud he has an equity which entitles him to subrogation, on the setting aside of the conveyance, to the rights of holders of prior liens for taxes or encumbrances which he has discharged. If an accounting is sought for the rents and profits or the proceeds of a sale of the property, the grantee may reduce the recovery by the amount of taxes paid and prior encumbrances discharged by him, and this is true, according to the weight of authority, whether he is guilty of actual or only constructive fraud. So, also, subrogation may be allowed, in the discretion of the court, if the proof of fraud is not clear, but the circumstances are too suspicious for the court to permit the conveyance to stand. R. E. H.

exercise of its police power, has the right to enact Sunday laws, and that it also has the right to provide for the regulation and restriction of those engaged in an employment which in and of itself may prove harmful to the community, such as the liquor traffic. But it is contended that the business of conducting a barber shop is not of this class, and that it is in the nature of class legislation to prohibit this business under more severe penalties than those provided for the conduct of other legitimate business on Sunday. We do not deem the act in question open to such objection. By class legislation we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case offending."

Cooley Const. Lim. 7th ed. 554, is cited in support of the text.

Defendant argues too that, in view of the stipulation which provides that Lefler "was in necessary need of barbering in order to be comfortable and healthy," this made the barbering a work of necessity. We do not think so. Lefler was barbered in the barber shop. Under the agreed statement of facts he did not come within the class of persons who are excepted from the operation of the statute, and for whom the services of a barber may lawfully be performed "in connection with the medical treatment of persons confined to their rooms or in a

hospital and being under the care of a physician." If any of these conditions had obtained, the barbering, under the express terms of the act, would, of course, be construed to be a work of necessity. It will not be presumed that the legislature by this act intended to make it a crime, in a case of emergency, to cut the hair or to remove the beard of a person who has sustained injuries about the head or face, and for whose proper treatment such services are required. The facts stipulated do not present a case of that kind.

Defendant's contention that it is not within the province of the legislature to define what is a work of necessity or charity does not seem to be well founded. In *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, the Supreme Court of the United States commented on and approved this language found in the Minnesota opinion: "In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barbers' shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

We do not find reversible error.

The judgment is affirmed.

Rose, J., dissenting.

## ANNOTATION.

### Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday Law.

This annotation lies in narrow compass. It is generally held that statutes are not unconstitutional because they prohibit some labors or acts on Sunday, and not others. It would seem but a short step further to indicate by the amount of prescribed punishment that some of the acts prohibited on Sunday are more obnoxious than others.

It is a general rule that statutes discriminating as regards degree of penalty or punishment for violation of Sunday laws are not unconstitutional. *State v. Hogleiver* (1899) 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921; *People v. Bellet* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; *STATE v. MURRAY* (reported herewith) ante, 563; *Stanfeal v.*

State (1908) 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138; *Breyer v. State* (1898) 102 Tenn. 108, 50 S. W. 769; *Ex parte Wright* (1909) 56 Tex. Crim. Rep. 504, 120 S. W. 868. (Probably the same was held in *Re Donnellan* (1908) 49 Wash. 460, 95 Pac. 1085, but the court does not touch on the point.) But compare cases at the end of this annotation.

A statute imposing a larger penalty on persons who play baseball on Sunday than is imposed by general law on those who are engaged in hunting, fishing, rioting, quarreling, and in acts of common labor, does not violate the constitutional right of citizens to equal privileges and immunities. *State v. Hogreiver* (1899) 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921, *supra*.

In *Ex parte Wright* (1909) 56 Tex. Crim. Rep. 504, 120 S. W. 868, *supra*, the court sustained a statute imposing upon licensed sellers of intoxicating liquors, for Sunday sales, a greater punishment than that imposed on Sunday sellers of goods and wares generally.

In *Moore v. Owen* (1908) 58 Misc. 332, 109 N. Y. Supp. 585, the court apparently considered it a matter of course that the legislature could provide greater penalties for the giving of certain shows on Sunday than for the giving of other theatrical shows on that day.

The foregoing rule has been several times sustained in the case of barbers. *People v. Bellet* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; *STATE v. MURRAY* (reported herewith); *Stanfeal v. State* (1908) 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138; *Breyer v. State* (1898) 102 Tenn. 108, 50 S. W. 769.

In *People v. Bellet* (Mich.) *supra*, the court said: "In the present case it may have been the judgment of the legislature that those engaged in the particular calling were more likely to offend against the law of the state providing for Sunday closing than those engaged in other callings. If so, it became a question of policy as to whether a more severe penalty should not be provided for engaging in that particular business on Sunday than

that inflicted upon others who refuse to cease from their labors one day in seven."

In *Breyer v. State* (Tenn.) *supra*, the court said: "A day of rest was needed for this most industrious and overworked trade, and it was admitted that without the imposition of heavier penalties it could not be secured, for none were willing to close their shops on Sunday unless all were made to do so. The former law was found wholly ineffective. We cannot know or state judicially what reasons controlled the legislature in the passage of the act, but considerations like these would constitute sound and valid reasons for this classification, and such classification would neither be arbitrary nor unreasonable."

In *State v. Hogreiver* (1899) 152 Ind. 652, 45 L.R.A. 504, 53 N. E. 921, *supra*, the court said: "The constitutional authority of the legislature to enact any statute making it unlawful to do certain acts on the first day of the week, commonly called Sunday, being admitted, violations of such laws are not privileges and immunities which must be secured to all citizens alike, and upon the same terms. Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. It is but reasonable that in every case of the violation of law the penalty should be graduated by the character and circumstances of the offense, and in proportion to its injurious consequences to the public. This principle has been recognized and adopted in this state from the earliest period of its government."

It has also been held that ordinances imposing upon the doing of some acts on Sunday greater penalties than those provided by the General Sunday Statute are not unconstitutional. *St. Louis v. DeLassus* (1907) 205 Mo. 578, 104 S. W. 12 (obiter); *Sherman v. Paterson* (1912) 82 N. J. L. 345, 82 Atl. 889; *Schachter v. Hauenstein* (1918) 92 N. J. L. 104, 105 Atl. 13;

State v. Davis (1916) 171 N. C. 809, 89 S. E. 40, Ann. Cas. 1918E, 1168.

Thus, an ordinance imposing a greater penalty on Sunday sales of certain articles than that imposed by the General Sunday Statute is valid. *Sherman v. Paterson* (1912) 82 N. J. L. 345, 82 Atl. 889, and *Schachter v. Hauenstein* (1918) 92 N. J. L. 104, 105 Atl. 13, *supra*.

So, a town authorized "to make regulations to cause the due observance of Sunday" may provide greater penalties for Sunday sales by drug-store keepers than for Sunday sales by keepers of restaurants. *State v. Davis* (1916) 171 N. C. 809, 89 S. E. 40, Ann. Cas. 1918E, 1168, *supra*.

In *Sherman v. Paterson* (N. J.) *supra*, the court said: "The imposition of a fine of \$2, imposed by the Vice & Immorality Act, may not have operated in the judgment of the municipal board as a sufficient deterrent in the locality to prevent the violation of the law; and the passage of the ordinance may have been deemed necessary, with its larger pecuniary penalty combined with the physical deterrent of imprisonment, to effectuate a compliance with the law."

(It may be noted that it was held in *New York v. Alhambra Theatre Co.* (1910) 136 App. Div. 509, 121 N. Y. Supp. 3, affirmed in (1911) 202 N. Y. 528, 95 N. E. 1125, that a statute prohibiting certain theatrical performances, declaring the same to be a misdemeanor, and imposing a penalty to be recovered in the name of a certain society, did not prevent the city from passing an ordinance imposing a like penalty for the same act, and providing that the city might recover it in

an action, as the ordinance provided for a civil remedy.)

On the other hand, it has been held in some cases that a statute imposing a greater penalty on barbering on Sunday than that prescribed for violations of a general Sunday law was unconstitutional as special legislation.

Thus, a statute requiring the closing of barber shops on Sunday, and fixing a different penalty for its violation from that imposed for violations of the General Sunday Law, violates a constitutional provision forbidding special laws for the punishment of misdemeanors. *Armstrong v. State* (1908) 170 Ind. 188, 15 L.R.A.(N.S.) 646, 84 N. E. 3.

So, it has been held that the business of barbering is not such as warrants the legislature in putting its transaction on Sunday in a class by itself, and imposing upon it a penalty more severe than is imposed upon other Sunday labor, where the Constitution forbids special laws where general statutes may be made applicable, or upon the subject of punishment of misdemeanors. *Stratman v. Com.* (1910) 137 Ky. 500, 27 L.R.A.(N.S.) 949, 136 Am. St. Rep. 299, 125 S. W. 1094.

So, in *State v. Granneman* (1896) 132 Mo. 326, 33 S. W. 784, an act making it a misdemeanor for any person to carry on the business of barbering on Sunday was held to be a special law, in conflict with a constitutional provision prohibiting a special law when a general law can be made applicable, there being a prior general law prohibiting all kinds of labor on Sunday (which seems not to have provided the same punishment).

B. B. B.

ERNEST CARLSON  
v.  
CONNECTICUT COMPANY, Appt.

*Connecticut Supreme Court of Errors — December 22, 1919.*

(— Conn. —, 108 Atl. 531.)

**Street railway — incompetent operatives — injury to person on track — liability.**

1. The mere fact that an electric railway company fails to provide competent and experienced operatives for its car does not render it liable for injury to a person asleep on its track.

[See note on this question beginning on page 574.]

**Evidence — sufficiency — inexperience of motorman.**

2. Operatives of a street car cannot be found to have been incompetent or inexperienced merely because they had been in the company's employ only a month and had been on a particular run only four or five days at the time of the happening of an accident.

[See 25 R. C. L. 1216.]

**Trial — issue for jury — absence of facts.**

3. No issue foreign to the facts in evidence should be submitted to the jury.

[See 14 R. C. L. 786.]

**Negligence — last clear chance — necessity of knowledge.**

4. Knowledge, actual or imputed, on the part of one accused of negligence with respect to the peril of a person injured is necessary to bring into operation the doctrine of last clear chance.

[See 25 R. C. L. 1256.]

**Notice — presence of person on railway track.**

5. Knowledge of the presence of a person asleep beside an electric railway track in the night cannot be imputed to the company from the mere fact that he had been there a half or three quarters of an hour, if no car had passed and no employee of the company had been in the vicinity in the meantime.

**Negligence — last clear chance — necessity of opportunity to avoid injury.**

6. To render an electric railway company liable under the doctrine of last clear chance for injury to a person asleep on its track by running over him with a car, it must appear that the motorman might by the exercise of reasonable care have avoided the injury after he discovered or should have discovered the peril.

[See 25 R. C. L. 1256.]

**APPEAL** by defendant from a judgment of the Superior Court for Hartford County (Case, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *New trial ordered.*

Statement by Prentice, Ch. J.:

September 28, 1918, the plaintiff was injured by being run over by one of the defendant's trolley cars. He was at the time lying asleep by the side of the defendant's tracks, with one or both of his feet extending over one of the rails. As a result of his injuries both his feet had to be amputated just above the ankle.

The plaintiff lived with and was

employed by one Reardon, who resided in South Windsor, and upon the main highway between Springfield and Hartford, along which the trolley line between those two cities runs. The point of injury was near the company's station No. 28. The trolley line was here a single track, one laid along the east side of the traveled way, an improved road surfaced with Warrenite. Its westerly rail was some 5 or 6 feet east of

the easterly edge of the Warrenite. The intervening space was not improved for public travel. On the outer, or easterly, side of the east rail was a strip of land within highway limits, about 9 feet in width. This strip was wholly unimproved and unused by travelers. Immediately east of the tracks and for a distance of some 4 or 5 feet, the ground was slightly lower than the surface of the ties upon which the rails were laid, and from that point rose gradually to the highway boundary. At that point the land was some 2 feet higher than were the tracks. The space easterly of the tracks was covered with a growth of uncut grass of varying length. The defendant claimed that this grass was so high that all of the plaintiff's body, except his feet, was concealed from view as he lay at the time he was injured; the plaintiff, that it was not of sufficient height and character to hide the plaintiff as he lay in it. The time of the accident was about midnight, and the place in the open country where there were no street lights.

The plaintiff had left the home of his employer, which was near station No. 33, on the evening of the day in question to visit Hartford. He remained in the city until nearly 11 o'clock, and drank during that time, as he himself admitted, two glasses of beer and one of whisky. At 10:55 he boarded one of the defendant's cars to return to his home. At station No. 28, which is about 1 mile from his destination and a half mile south of the fare-limit station, which was No. 31, he, for some reason which he was unable to explain, left the car and started in the direction of his home on foot. From that time until he was run over by the car some one half or three quarters of an hour afterwards, he was not, as far as is known, seen by anyone, and in the meantime no car passed the point of accident in either direction.

The car which occasioned the plaintiff's injuries was proceeding in a southerly direction toward Hartford. It was equipped with a power-

ful headlight, and was running at a speed variously estimated from 15 miles an hour upward. In the front vestibule of the car, in addition to the motorman, was a constable of the town of South Windsor in uniform. He was employed by and acting under the orders of the selectmen of the town to keep a lookout for persons or other obstructions which might be upon the trolley tracks at a late hour on Saturday nights. At that time there was in the town a large number of tobacco growers and a very large acreage of tobacco. This industry called to the town during the growing and harvesting season a large number of employees, more or less of whom were likely to be found upon the highway at a later hour on Saturday nights than at other times. This the defendant motorman well knew, as he did also the reason for the constable's presence on his car.

As the car approached and passed the spot where the plaintiff lay, neither the motorman nor the constable saw him. The motorman, however, felt a jar, which caused him to think that he had run over something. He brought the car to a stop as soon as possible, and requested the conductor to see what had happened. The latter investigations having proved unsuccessful, the motorman reversed his power, and backed his car to and beyond the point where the plaintiff lay. When it had fully passed, the rays of the headlight revealed the presence of the injured plaintiff. The plaintiff claimed that the injury to his right leg was caused by the second passage of the car; the defendant, that both legs were injured when the car first passed.

The defendant claimed to have shown that the motorman was keeping a proper lookout ahead and giving proper attention to the performance of his duties, and that neither he nor the constable, who stood at his side, saw the plaintiff or any portion of his body before the car struck him, and that their failure to do so

was due entirely to the concealed position in which the plaintiff lay.

The assignments of error, five in number, all challenge the correctness of portions of the court's charge as follows:

"(1) Now, as to the first of these assignments of negligence—that is, as to the inexperience of the men—it is of course the duty of the defendant to employ men fitted to perform their duties consistently with the general safety of the public. But to make any such assignment of negligence effective, it must not only appear by a fair preponderance of the evidence that the servants of the defendant were actually inexperienced men, but, further, that Carlson's injuries are directly chargeable to that inexperience.

"(2) I, of course, suggest to you that the law expects a high degree of care from one in charge of a powerful engine of this character, to preserve not only its own passengers but other travelers who may be abroad and in the neighborhood of the railroad tracks from injury. One in such a situation—that is, one in the situation of the motorman—is bound to keep strict watch of his road ahead, and to keep his car under control by maintaining only a speed proper for the surrounding conditions. If, in the fair exercise of these precautions, the motorman actually did not see Carlson before striking him, then neither he nor his principal is responsible here for whatever injury was inflicted upon Carlson when the car first struck him.

"(3) Whether that negligence still remained a proximate or efficient cause of his injuries would depend upon the entire situation then and whether he had been so long on the track as to charge the company with knowledge of his presence there.

"(4) Of course his continued presence on the track in a drunken stupor, if he was in a drunken stupor, was an act of continuing negligence; but if his position was one which was or ought to have been obvious to the motorman of an ap-

proaching car, I think you must find that the negligence of the motorman, assuming that you find him to have been negligent under all these conditions, was the proximate cause of the injury without reference to any conduct of the plaintiff, and in that event the plaintiff must have a verdict.

"(5) Remembering all the principles of negligence, as I have suggested them to you, and the specific allegations of negligence which refer to this branch of the case by the plaintiff, if you find that the man was injured by losing his remaining foot on this second trip of the car, I think the question of contributory negligence is removed—absolutely removed—from this feature of the case."

Messrs. Robinson, Robinson, & Cole, for appellant:

It was error to submit to the jury the question of the company's liability on the ground of the inexperience of its employees.

Thomas v. Cincinnati, N. O. & T. P. R. Co. 97 Fed. 245; Monroe v. Hartford Street R. Co. 76 Conn. 201, 56 Atl. 498.

Defendant was under no duty to keep a lookout not to injure plaintiff.

Morse v. Consolidated R. Co. 81 Conn. 395, 71 Atl. 558; 36 Cyc. 1473; Hayden v. Fair Haven & W. R. Co. 76 Conn. 355, 56 Atl. 613; Ferguson v. Connecticut Co. 87 Conn. 652, 89 Atl. 267; Dickson v. Chattanooga R. & Light Co. L.R.A.1917C, 464, 237 Fed. 352, 150 C. C. A. 366; O'Neil v. New Haven, 80 Conn. 154, 67 Atl. 487; Wilson v. Granby, 47 Conn. 59, 36 Am. Rep. 51; Ward v. North Haven, 43 Conn. 148; Snow v. Coe Brass Mfg. Co. 80 Conn. 63, 66 Atl. 881.

The last clear chance doctrine was not applicable to this case.

Bourrett v. Chicago & N. W. R. Co. 152 Iowa, 579, 36 L.R.A.(N.S.) 959, 132 N. W. 978; Dickson v. Chattanooga R. & Light Co. L.R.A.1917C, 464, 150 C. C. A. 366, 237 Fed. 352; Dyerson v. Union P. R. Co. 7 L.R.A.(N.S.) 132, note; Wilson v. Illinois C. R. Co. 150 Iowa, 33, 34 L.R.A.(N.S.) 687, 129 N. W. 340; Nehring v. Connecticut Co. 86 Conn. 109, 45 L.R.A.(N.S.) 896, 84 Atl. 301, 524; Hygienic Ice Co. v. Connecticut Co. 90 Conn. 21, 96 Atl. 152; Vizacchero v. Rhode Island Co. 26 R. I. 392,



69 L.R.A. 188, 59 Atl. 105; *Trigg v. Water, Light & Transit Co.* 215 Mo. 521, 20 L.R.A.(N.S.) 987, 114 S. W. 972; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 495, 164 Fed. 41.

Messrs. *Morris Blumer, Jacob Schwolsky, and Joseph P. Tuttle*, for appellee:

Where a railroad has reason to anticipate the presence of trespassers, it is bound to exercise due care to detect the presence of such trespassers, and in case there is a failure to use such due care in maintaining a proper watch, and the situation is such that had a proper lookout been kept the peril of the trespasser would have been discovered in time to have avoided injury by the subsequent use of reasonable care, then the railroad is liable to a trespasser even if he was injured before his presence was discovered.

*Blackburn v. Louisiana R. & Nav. Co.* 144 La. 520, 80 So. 708; *Fearons v. Kansas City Elev. R. Co.* 180 Mo. 208, 79 S. W. 394; *Southern R. Co. v. Chatman*, 124 Ga. 1026, 6 L.R.A.(N.S.) 283, 53 S. E. 692, 4 Ann. Cas. 675; *McKeon v. Steinway R. Co.* 20 App. Div. 601, 47 N. Y. Supp. 376; *Texas & P. R. Co. v. Barrett*, 23 Tex. Civ. App. 545, 57 S. W. 602; *Louisville R. Co. v. Hoskins*, 28 Ky. L. Rep. 124, 88 S. W. 1087; *Chattanooga R. & Light Co. v. Wallace*, 23 Ga. App. 554, 99 S. E. 57; *Mathison v. Staten Island Midland R. Co.* 66 App. Div. 610, 72 N. Y. Supp. 954; *McCarthy v. New York, N. H. & H. R. Co.* 153 C. C. A. 406, 240 Fed. 602; *Eppstein v. Missouri P. R. Co.* 197 Mo. 720, 94 S. W. 967; *Trojanowski v. Chicago & N. W. R. Co.* 163 Wis. 76, 157 S. W. 536; *Rice v. Jefferson City Bridge & Transit Co.* — Mo. App. —, 186 S. W. 568; *Gray v. Wabash R. Co.* — Mo. App. —, 198 S. W. 1137; *Glenn v. Louisville & N. R. Co.* 28 Ky. L. Rep. 949, 90 S. W. 975; *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 3 L.R.A.(N.S.) 1190, 91 S. W. 691; *Williams v. Metropolitan Street R. Co.* 114 Mo. App. 1, 89 S. W. 59; 36 Cyc. 1487; *Brown v. Boston & M. R. Co.* 73 N. H. 568, 64 Atl. 194; *Elliott v. New York, N. H. & H. R. Co.* 83 Conn. 320, 76 Atl. 298; *Goudreau v. Connecticut Co.* 84 Conn. 406, 80 Atl. 281; *Nehring v. Connecticut Co.* 86 Conn. 109, 45 L.R.A.(N.S.) 896, 84 Atl. 301, 524; *Fine v. Connecticut Co.* 92 Conn. 626, 103 Atl. 901.

The judge in his charge merely lays

down the rule of reasonable care under the particular circumstances.

*McAdam v. Central R. & Electric Co.* 67 Conn. 445, 35 Atl. 341; *Nelson v. Branford Lighting & Water Co.* 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490.

The situation was such that reasonable care would, relatively speaking, require the exercise of a high degree of care.

*Cutler v. Putnam Light & P. Co.* 80 Conn. 470, 68 Atl. 1006.

The defendant cannot complain that the court has required too high a degree of care, for in such a situation reasonable care is, relatively speaking, a high degree of care.

*Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 538, 87 Atl. 379; *Hayden v. Fair Haven & W. R. Co.* 76 Conn. 355, 56 Atl. 613; 36 Cyc. 1477.

*Prentice, Ch. J.*, delivered the opinion of the court:

The portion of the charge first complained of was called out by the allegation in the complaint that the plaintiff's injuries were caused, among other things, by the defendant's negligence in failing to provide competent and experienced operatives for its car. This was not a good allegation of actionable negligence. Had its charge been well founded, the defendant would not for that cause alone

Street railway—  
incompetent  
operatives—  
injury to person  
on track—  
liability.

have rendered itself liable to the plaintiff. Whether those concerned in the operation of the car were competent or incompetent, experienced or inexperienced, the defendant would not be liable in this action in either event, in the absence of some negligent act or omission on their part. If there was no such act or omission, there would be no liability on the part of the defendant, however inexperienced, incompetent, and unfit for their tasks the defendant's employees may have been. If there was such act or omission contributing to the plaintiff's injuries, the defendant would be liable, however experienced and ideally competent the negligent act- or servant was. The liability of

the defendant, if any, must find its basis in negligent conduct on the part of its servant or servants. It cannot rest upon their want of qualification for their task alone. *Monroe v. Hartford Street R. Co.* 76 Conn. 201, 209, 56 Atl. 498.

The instruction given, considered in the abstract, is perhaps not open to criticism, and, if rightly understood and applied, would not be objectionable. As furnishing the rule for the guidance of a jury under concrete conditions like those presented by the case at bar, it is, however, open to the objections, of practical importance, that it was calculated to give the jury the impression that actionable negligence on the part of the defendant might be predicated upon its employment of incompetent and inexperienced servants; that it tended to divert the attention of the jury from the real issue; that is to say, whether or not the defendant's employees were guilty of negligent conduct in the operation of its car, to one of itself immaterial, and impliedly, at least, invited them to find a ground of recovery in that which in and of itself would not create liability; and that it submitted to their consideration as constituting an issue matter which the evidence did not raise to the dignity of one.

With respect to the latter matter it is to be remembered that the only evidence upon which a finding of the motorman's and conductor's inexperience and incapacity could be predicated was that they were spare hands, who had been in the defendant's employ only a month and been on the South Windsor run only four or five days. For aught that appears they may have had long experience elsewhere and been fit and competent in a high degree. Manifestly the jury could not reasonably have found that they were

Evidence—  
sufficiency—  
inexperience of  
motorman.

either inexperienced or incapable upon such proof alone. An instruction which left the door even slight-

ly ajar for the entrance of a finding of negligence on the defendant's part which did not arise out of the acts of its servants was calculated to do the defendant harm. "It is the duty of the court to submit to the jury no issue foreign to the facts in evidence, or in respect to which no evidence has been offered." *Fine v. Connecticut Co.* 92 Conn. 626, 630, 103 Atl. 902.

Trial—issue for  
jury—absence of  
facts.

The third and fourth of the criticized passages were used in connection with the court's instructions touching the so-called last clear chance doctrine invoked by the plaintiff to avoid the effect of his own negligence in placing himself in the dangerous position in which he was when injured. Knowledge, actual or imputed, on the part of the defendant or its agents, of the plaintiff's exposure where he lay, was a vitally important factor in the application of the principles under consideration. Given that, it would be difficult indeed for the defendant to escape liability. In the first of the two passages the court plainly implies that such knowledge might be imputed to the defendant from the mere lapse of time during which he had lain where he was when injured. When it is remembered that the spot where he wittingly or unwittingly sought a resting place was one quite away from the traveled roadway and in the unlighted country; that his body was more or less concealed by the growing grass in which he lay; that the time was near midnight; that he had been there not more than one half to three quarters of an hour; that no car had passed meanwhile; that no servant or agent of the defendant had had occasion during that time to be in that vicinity; and that, as far as appears, no person knew of his whereabouts after he started to walk home,—it is clear that conditions justifying the im-

Negligence—  
last clear chance  
—necessity of  
knowledge.

that conditions justifying the im-

putation to the defendant of knowledge of the plaintiff's presence in the grass by the side of its tracks were absolutely wanting. Clearly the defendant could not, upon the evidence, reasonably be charged with knowledge that the plaintiff lay where he did, except as such knowledge was or ought to have been gained by the motorman as his car approached the scene of the accident.

Passing now to the second of the two passages which immediately followed the first, we find the court saying to the jury that, although the plaintiff, in remaining where he was, was guilty of continuing negligence, yet if his position was one which was or ought to have been obvious to the motorman, they must find that the latter's negligence, assuming that he was negligent, was the proximate cause of the plaintiff's injury without reference to any conduct of the latter, and that, in that event, the plaintiff must have a verdict. This instruction predicated liability upon the acquisition by the motorman of

knowledge, either actual or implied, of the plaintiff's exposed position, and ignored another condition of equal importance, to wit, that the motorman subsequently had the opportunity, by the exercise of reasonable care, to save the plaintiff from harm. *Fine v.*

*Connecticut Co.* 92 Conn. 626, 631, 103 Atl. 901. Under the charge the company would, in the application of the last clear chance doctrine, be liable, notwithstanding the plaintiff's contributory negligence, if the motorman failed to stop his car and thus save the plaintiff from harm, although the plaintiff was hit the very instant after the motorman became, or ought to have become, aware of the plaintiff's danger.

As there must be a new trial, it is unnecessary to inquire whether or not the defendant's third and fifth assignments of error are well made.

There is error, and a new trial is ordered.

The other Judges concur.

### ANNOTATION.

#### Employment of incompetent, inexperienced, or negligent employee as independent ground of negligence toward one other than an employee.

The present annotation is confined to cases which treat the question of employment of an incompetent, inexperienced, or negligent employee as an independent ground of negligence which itself will render the employer liable for injury to one other than an employee, regardless of any negligent act or omission upon the part of the servant at the time of the infliction of the injury. This limitation excludes cases such as *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338; *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417, 16 Am. Neg. Cas. 747; *Core v. Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596; *Kliefoth v. North Western Iron Co.* (1898) 98 Wis. 495, 74 N. W. 356, which relate solely to the duty of

a master to one servant in respect to the employment and retention of competent and experienced coservants,—fellow servant cases having been repeatedly held to belong to a class different from that into which the cases involving the liability of a master for injury to a third person resulting from the act or omission of a servant fall. For cases making such a distinction, see *Ragas v. Douglas* (1916) 139 La. 773, 72 So. 242; and *Fonda v. St. Paul City R. Co.* (1898) 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166.

It seems clear that at least so far as the liability of a master to a third person is concerned, his failure to hire only competent and experienced servants cannot in itself constitute actionable negligence, but that liability, if

Notice—presence of person on railway track.

Negligence—last clear chance—necessity of opportunity to avoid injury.

any, must be predicated upon the wrongful act or omission of the servant at the time of the infliction of the injury complained of, or at least upon an act or omission which in the case of an experienced or competent person would have been wrongful. (The qualifying clause is inserted to meet the situation where the servant, because of his inexperience or physical incapacity, is absolved from personal fault in doing or omitting what an experienced or competent servant in the exercise of reasonable care, would not have done or omitted. It does not vary the principle, but merely tests the question of negligence vel non upon the particular occasion by applying to the conduct of the inexperienced servant the standard of care applicable to the conduct of an experienced and competent person. If tested by that standard, and there was no negligence, the inexperience or incompetence of the servant is entirely immaterial.) This conclusion is supported not only by that great mass of cases in which it seemingly has been assumed that liability must be based on the negligent act or omission of the servant, but also by the comparatively limited number of cases which have been passed squarely upon the question whether or not the failure of an employer to furnish a competent and experienced servant in itself constitutes actionable negligence. As to the latter cases, which are the ones primarily under consideration, it is practically impossible to make a complete collection, but enough have been gathered to fully demonstrate the soundness of the rule that the employment of an incompetent, inexperienced, or negligent servant generally does not constitute an independent ground of negligence, at least with reference to third persons.

Perhaps no better illustration of the rule can be given than is afforded by the cases which involve the liability of the proprietor of a public conveyance for injuries to a third person predicated upon the alleged incompetence or inexperience of the employee or employees placed in charge of such a conveyance by the proprietor. In

this class of cases the rule clearly is, that while it is generally conceded that it is the duty of the owner of dangerous agencies or instrumentalities such as steam and electric trains and cars, stagecoaches, hacks, taxicabs, elevators, etc., to use reasonable diligence in the selecting of competent and careful operators, drivers, etc., such a carrier is liable, if at all, only for injuries to a third person which result from such incompetency, inexperience, or inefficiency; and that it is the incompetent or negligent act of the servant, and not the act of employment of the incompetent servant itself, that gives rise to the liability. To this effect is the decision in the reported case (*CARLSON v. CONNECTICUT CO.* ante, 569), wherein the court declared the rule to be that under a complaint charging defendant with negligence in failing to provide competent and experienced operators for its electric trolley car which ran over plaintiff, the liability of the defendant, if any, must find its basis in negligent conduct on the part of its servants, regardless of their inexperience or incompetency, since the employment of incompetent and inexperienced servants is not in itself a ground of negligence. And in *Denver City Tramway Co. v. Cowan* (1911) 51 Colo. 64, 116 Pac. 136, an action for injuries sustained in attempting to board a street car, in which the complaint, among other things, alleged that the servants in charge of the car were reckless, inexperienced, and inattentive to their duties,—all of which was known or ought to have been known to the company,—it was held that the right of recovery depended upon the negligence of the servants at the time of the accident, and that the general incompetency of the servants was not involved. *White, J.*, in reaching this conclusion said: "In the case at bar, neither the condition of the car nor the incompetency of the servants is involved. The plaintiff could recover only by showing that the servants of defendant in charge of the car were guilty of negligence, resulting in his injuries at the time and place alleged. The only way in which to establish

such negligence was by showing that such servants, then and there, started the car without giving plaintiff sufficient time to safely board the same. Indeed, that is the only issue made by the pleadings or sought to be sustained by the evidence. If defendant's servants were not negligent at the time plaintiff sustained the injuries of which he complains, it was wholly immaterial how habitually and recklessly negligent they might have been prior thereto; or, if they were negligent then, how careful and prudent they had previously been. The incompetency of the servants, and notice thereof on the part of defendant, because of the nature of the case, were wholly immaterial, and the case must necessarily be determined under the general rule." So, in *Minot v. Snavelly* (1909) 97 C. C. A. 30, 172 Fed. 212, 19 Ann. Cas. 996, which was an action based on the alleged incompetence and negligence of the operator of a passenger elevator, it was held that the liability of the master depended wholly upon the fact whether the person operating the elevator was negligent at the time of the accident, and not upon the question of his general competency or incompetency, that being immaterial. Again in *Davis v. Ohio Valley Bkg. & T. Co.* (1908) 127 Ky. 800, 15 L.R.A. (N.S.) 402, 106 S. W. 843, where it was contended that defendant was guilty of negligence in permitting a boy to run an elevator, the court said: "Whether or not the operator was qualified to discharge the duties of the place is not a material inquiry, under our conception of the law of the case. The operator was placed in charge of the elevator by appellee. It thus assumed responsibility for his acts. If he permitted boys to play on the elevator, or ride on it in dangerous places, his employer must be held to the same degree of accountability as if the person in charge of the elevator had been a careful and experienced man. The liability of appellee is to be tested in this particular case, not by the age, understanding, or fitness of its employee, but by his acts." And in both *Peck v. Neil* (1842) 3 McLean, 22, Fed. Cas. No. 10,892, 10 Am. Neg.

Cas. 664, and *Peck v. Neil* (1842) 3 McLean, 26, Fed. Cas. No. 10,893, which involved the question of the duty of a carrier by stagecoach to provide competent drivers, the court charged that a driver's "good or bad conduct can only be looked at, at the time the accident occurred, or as connected with the accident," which, of course, meant that it was the particular act or acts of the driver at the time of the accident which determined the liability of the carrier. And in this connection see *Holladay v. Kennard* (1871) 12 Wall. (U. S.) 254, 20 L. ed. 390, wherein it was said that whether the driver of a stagecoach was competent and such as should have been employed "could only be judged of by what he did or what he neglected to do" at the time complained of. The court, however, did say that since the position of driver of the coach was one requiring skill and capacity, it would be negligent not to employ a person having those qualifications.

And for a better reason it would seem that the same rule would apply as to servants coming in contact with the public, but not having charge of a so-called dangerous agency. Such a case was *Oakland City Agri. & Industrial Soc. v. Bingham* (1891) 4 Ind. App. 545, 31 N. E. 383, where in holding that an agricultural society could not be held liable for an assault on a third person on the theory that it had placed an incompetent policeman or keeper in charge of its gate, the court said that an employer cannot be held to account for failing to exercise care in the selection of a suitable person for a given position unless the failure to discharge the duties of the position properly resulted in an injury to another, the theory being that a master is responsible only for misconduct even in the case of an incompetent servant. And in both *McNally v. Colwell* (1892) 91 Mich. 527, 30 Am. St. Rep. 494, 52 N. W. 70, and *Cowley v. Colwell* (1892) 91 Mich. 537, 52 N. W. 73, it was held that there could be no question made as to whether the defendant had negligently employed an incompetent servant, where it does not appear that such

incompetency, if any, was the cause of the injury complained of.

However, it has been broadly held that the hiring of an incompetent servant is itself an act of negligence rendering the master liable to a third person for injuries resulting from a negligent act of the servant, the theory being that the master is liable for the consequences of his negligent act. Thus, in *Wanstall v. Pooley* (1841) 6 Clark & F. 911, note, 7 Eng. Reprint, 940, note, where a shopkeeper hired an incompetent person to deliver goods, and such servant negligently left a truck in the street whereby a traveler was injured by falling over it, it was held that the employment of the incompetent was an act of negligence, since by such employment the master set the whole thing in motion and must therefore answer for the consequences. It is to be observed, however, that the servant was guilty of negligence for which the master would be responsible under the doctrine of respondeat superior, regardless of whether he was competent or not.

In another line of cases the courts have held that persons or companies employing dangerous instrumentalities must exercise due care and diligence to have competent employees in charge thereof, and that failure to do so constitutes negligence; but such cases also hold that the master is not liable by reason of having employed incompetent servants unless such incompetency was the proximate cause of the injury, which qualification seems to imply that the recovery, if any, must be based on the incompetent servant's wrongful acts or omissions at the time of the infliction of the injuries complained of. Illustration of cases of this character is afforded by *Illinois C. R. Co. v. O'Neill* (1910) 100 C. C. A. 658, 177 Fed. 328; *Sloss-Sheffield Steel & I. Co. v. Bibb* (1910) 164 Ala. 62, 51 So. 345; *Alabama City, G. & A. R. Co. v. Bessiere* (1914) 190 Ala. 59, 66 So. 805; *Broadstreet v. Hall* (1907) 168 Ind. 192, 10 L.R.A. (N.S.) 933, 120 Am. St. Rep. 356, 80 N. E. 145; *Ewing & Sons v. Callahan* (1907) 32 Ky. L. Rep. 537, 105 S. W. 978; *Schafer v. Gilmer* (1878) 13 Nev. 330; 8 A.L.R.—37.

and *Hays v. Millar* (1874) 77 Pa. 238, 18 Am. Rep. 445. For instance, in *Illinois C. R. Co. v. O'Neill* (1910) 100 C. C. A. 658, 177 Fed. 328, a railroad crossing accident case, the court upheld a charge to the jury to the effect that if the engineer was incompetent or physically unfit to properly discharge his duties, it was negligence upon the part of the company to employ him for that work, but the court in the charge complained of also had stated that in order to recover upon this ground, the jury must also find that such negligent hiring was the cause of the accident.

Also of interest in connection with the present inquiry are those cases which merely determine the question of the admissibility of evidence as to the competency of the servant whose acts or omissions resulted in injury to a third person, and in which the decisions were based upon the theory that the only real issue was as to the negligence of the servant on the particular occasion under consideration, or, in other words, in which the liability of the master was regarded as resting on the wrongful act of the servant at the time of the accident, so that questions of general competency or incompetency were not elements for discussion or determination. However, no case of this kind has been discovered wherein there was a charge or allegation of negligence in the hiring of incompetent or inexperienced employees. Consequently, such cases, being based, as they are, on the alleged negligence of the servant, rather than on the hiring of an incompetent servant, have no direct bearing upon the question of annotation, the evidence having been offered in proof or disproof of the charge of negligence on the part of the servant. Illustrative of this class of cases are *Harriman v. Pullman Palace-Car Co.* (1898) 29 C. C. A. 194, 56 U. S. App. 313, 85 Fed. 353; *Towle v. Pacific Improv. Co.* (1893) 98 Cal. 342, 83 Pac. 207; *Dinsmore v. Wolber* (1899) 85 Ill. App. 152; and *American Straw Board Co. v. Smith* (1901) 94 Md. 19, 50 Atl. 414. For instance, in *Fonda v. St. Paul City R. Co.* (1898) 71 Minn. 438, 70 Am. St.

Rep. 341, 74 N. W. 166, an action based on the alleged negligence of a street car motorman, evidence of the general incompetence of such motorman was declared inadmissible. The court said: "If the motorman was negligent on this occasion, the defendant is liable, no matter how competent he was or how habitually careful he had been on other occasions. On the other hand, if he was not negligent on this occasion, the defendant is not liable, notwithstanding that he may have been incompetent or habitually careless on former occasions. The sole issue (aside from that as to plaintiff's contributory negligence) was whether or not the motorman was guilty of negligence at the time of the accident. When the act or omission is proved, whether it be actionable negligence is to be determined by the character of the act or omission itself, and not by the character of prior acts of the party committing it. If the plaintiff could offer testimony as to the general incompetency or as to prior negligent acts or omissions of the motorman, then with equal propriety the defendant, upon the issue of contributory negligence, might offer evidence of plaintiff's general carelessness, or of his negligent acts on other occasions. Indeed, we do not see why plaintiff would not, upon the same principle, have the right to introduce evidence that he himself was an habitually careful and cautious man. As the liability of a master for the acts of his servant rests upon the doctrine of respondeat superior, it can make no difference as to the admissibility of such evidence whether the alleged negligent act was committed by the servant or by the master in person. Hence, if the offered evidence was admissible in this case, it would have been equally competent had the defendant been a natural person, and operating the car himself, to prove that he was incompetent to perform such work, or had performed it negligently on former occasions." And in *Monroe v. Hartford Street R. Co.* (1903) 76 Conn. 201, 56 Atl. 498, an action for damages for

the alleged negligence of the motorman of a street car, it was said that an instruction permitting the jury to consider, in determining the care used in the management of the car at the time of the accident, "facts tending to prove negligence in the selection of competent servants," would be fatally erroneous. It should also be remembered that there are some cases in which the courts proceeding upon the theory that the proprietor of a public conveyance such as an electric street car must employ men of experience and competency have admitted evidence of this character, but it seems that such evidence is generally regarded as merely bearing on the question of negligence at the time of the injury complained of. See *Blumenthal v. Union Electric Co.* (1906) 129 Iowa, 322, 105 N. W. 588, 19 Am. Neg. Rep. 235, and *Fisher v. Waupaca Electric Light & R. Co.* (1910) 141 Wis. 515, 124 N. W. 1005. And the decisions such as *Jones v. Co-operative Asso. of America* (1912) 109 Me. 448, L.R.A. 1915E, 745, 84 Atl. 985, which lay down the rule that evidence of the hiring of an incompetent servant is competent, but not conclusive, evidence of negligence with respect to all consequences resulting from a failure of duty on the part of such a servant,—should not be confused with those cases which determine whether or not the hiring of an incompetent servant constitutes an independent ground of negligence. Also excluded for lack of bearing on the question under annotation are those cases where it appears that the servant actually was negligent at the time of the accident, and in which it was held that the incompetency of the servant was not a material element for the reason that the employer was responsible for the servant's negligence, whether he was or was not competent. See, for example, *Grand Rapids & I. R. Co. v. Ellison* (1889) 117 Ind. 234, 20 N. E. 135, 11 Am. Neg. Cas. 445, and *Chesapeake & O. R. Co. v. Francisco* (1912) 149 Ky. 307, 42 L.R.A.(N.S.) 83, 148 S. W. 46, 2 N. C. C. A. 636.

G. J. C.

**PILSEN BREWING COMPANY, Appt.,**  
v.  
**WILLIAM WALLACE.**

*Illinois Supreme Court — December 17, 1910.*

(— Ill. —, 125 N. E. 714.)

**Corporation — acting under changed name — effect.**

1. Failure legally to effect a change of corporate name does not render the officers acting under the new name liable for the corporate debts as partners, under a statute providing that all assuming to act as a corporation without complying with the provisions of the act before all stock named in the articles of incorporation shall be subscribed in good faith shall be so liable.

[See note on this question begining on page 583.]

**— acting without incorporation — partnership liability.**

2. When individuals act under a corporate from and in a corporate name when there is no corporation in fact, they are liable as partners.

[See 20 R. C. L. 844, 845.]

**— power to change name.**

3. A corporation has no power of itself to change or alter the name originally selected by it without complying with such form of proceeding as may be prescribed by law.

[See 7 R. C. L. 128.]

**Estoppel — acting under wrong corporate name — receiving consideration.**

4. A corporation will not be permitted to take advantage of having acted under a wrong name after receiving the consideration.

**— attempted change of name — liability on contracts.**

5. A corporation is not relieved from liability on its contracts by the fact that they are entered into under a name which it has attempted to assume without complying with the requirements necessary to effect a change of name.

**APPEAL** by plaintiff from a judgment of the Second Branch of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County (Gridley, J.) in favor of defendant in an action brought to recover the amount alleged to be due for grain sold and delivered by plaintiff to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Vincent D. Wyman, Harry C. Kinne, and Charles E. Carpenter, for appellant:

The name of a corporation is an essential element of the corporation's existence. It is in fact its very being.

Newby v. Oregon C. R. Co. Deady, 616, Fed. Cas. No. 10,144; Campbell v. J. I. Campbell Co. 117 La. 410, 41 So. 696; Cincinnati Cooperage Co. v. Rate, 14 Ky. L. Rep. 469, affirmed in 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 588; 1 Bl. Com. 474; Walker, Am. Law, 9th ed. 232.

A corporation has no power to change or alter its name except as provided by statute.

Beach, Priv. Corp. §§ 275, 373, 375; McGary v. People, 45 N. Y. 153; Reg. v. Registrar, 10 Q. B. 839, 116 Eng. Reprint, 318; De Bow v. People, 1 Denio, 9; Sykes v. People, 132 Ill. 35, 23 N. E. 391.

No change of corporate name is accomplished until certificates as required by statute, showing that the necessary steps have been taken, have been filed in the office of the secretary of state and the recorder of deeds.

Distilling & Cattle Feeding Co. v. People, 161 Ill. 101, 43 N. E. 779; W. Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221.

Contracts in the name of an alleged



corporation having no authority to do business impose personal liability upon the officers or agents transacting such business in the corporate name.

Joseph T. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650; Gunderson v. Illinois Trust & Sav. Bank, 199 Ill. 422, 65 N. E. 326; Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 N. E. 496; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Robinson v. Harris, 5 Ky. L. Rep. 928 (abstract); Fuller v. Rowe, 57 N. Y. 26; Robinson v. First Nat. Bank, — Tex. Civ. App. —, 79 S. W. 103; Cincinnati Cooperage Co. v. Bate, 14 Ky. L. Rep. 469, affirmed in 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538; Campbell v. J. I. Campbell Co. 117 La. 410, 41 So. 696; Senn v. Levy, 111 Ky. 324, 63 S. W. 776; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249; Moke-lumne Hill Canal & Min. Co. v. Wood-bury, 14 Cal. 424, 73 Am. Dec. 658; Harrill v. Davis, 22 L.R.A. (N.S.) 1153, 94 C. C. A. 47, 168 Fed. 189.

Defendants who are shown to have transacted business in a corporate name, the use of which has not been authorized by proper charter or proceedings, have the burden of showing they have complied with the statute.

McCormick v. Seeberger, 73 Ill. App. 95; Bigelow v. Gregory, 73 Ill. 197; Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 N. E. 496; Joseph T. Ryerson & Son v. Shaw, 277 Ill. 525, 115 N. E. 650.

There is no estoppel on the part of creditors to deny corporate existence.

Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Joseph T. Ryerson & Son v. Shaw, *supra*.

Messrs. Mayer, Meyer, Austrian, & Platt for appellee:

A change of name is not a change of corporate organization.

Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 16 L.R.A. 429, 31 N. E. 400.

A corporation, like an individual, may assume other names.

Clement v. Lathrop, 18 Fed. 835; William Gilligan Co. v. Casey, 205 Mass. 26, 91 N. E. 124; Minot v. Curtis, 7 Mass. 441; W. B. Clarkson & Co. v. Gans S. S. Line, — Tex. Civ. App. —, 187 S. W. 1106; 29 Cyc. 270; Graham v. Eiszner, 23 Ill. App. 269.

Defendant cannot be held as a partner.

Robinson v. First Nat. Bank, 98 Tex. 184, 82 S. W. 505; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99;

Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 N. E. 496.

Cartwright, J., delivered the opinion of the court:

This suit was begun in the superior court of Cook county by the Pilsen Brewing Company, the appellant, against William Wallace, the appellee, and R. D. Beaird. The declaration was the common counts in assumpsit and a special count averring that Wallace was president and Beaird secretary of a pretended stock corporation known as the Chicago Grains & Feed Company, and on October 1, 1912, entered into a contract with the plaintiff, in the name of the pretended corporation, to purchase brewers' wet grains, but no charter to conduct said pretended corporation was ever issued by the secretary of state, or filed for record in the office of the recorder of deeds of Cook county, where the principal office of the pretended corporation was located; that the plaintiff delivered to said corporation 10,000 tons of wet grains of the value of \$5,000, and by means of the premises and the statute the defendants became liable to pay said amount to the plaintiff. Wallace, only, was served with process, and he appeared and pleaded the general issue. A jury was waived, and the cause was tried by the court upon a stipulation of the facts. The court found for the defendant, and entered judgment against the plaintiff for costs. On appeal to the appellate court for the first district the judgment was affirmed and that court granted a certificate of importance and an appeal to this court.

The Farmers' Grain & Feed Company was incorporated under the Illinois statute with a capital stock of \$150,000. On May 26, 1911, the stockholders adopted a resolution increasing the capital stock to \$200,000, but never filed any certificate of the increase in the office of the secretary of state or the recorder of deeds of Cook county. On June 18, 1912, the stockholders adopted a resolution to change the name of the corporation to Chicago

(— Ill. —, 125 N. E. 714.)

Grains & Feed Company. No certificate of a change of name was made or filed in the office of the secretary of state or in the recorder's office of Cook county, but the corporation and its officers thereafter did business under the new name. Wallace was a stockholder, owning 1,386 shares of the capital stock, of the par value of \$100 each, and was president, director, and acting manager of the corporation until June 10, 1913, when he resigned as president and director. On October 1, 1912, a contract signed by Beaird as secretary, with the knowledge and consent of Wallace, was made with the plaintiff in the name of the Chicago Grains & Feed Company, for brewers' wet grains, and such grains were delivered under the contract to the amount of \$4,476.80. The plaintiff had no knowledge as to the steps taken for changing the name of the corporation. On September 5, 1913, an involuntary petition in bankruptcy was filed against the Chicago Grains & Feed Company, and it was adjudicated a bankrupt, and plaintiff filed its claim in the bankruptcy proceeding and received a dividend of 5 per cent.

The declaration stated a cause of action under § 18 of the Act Concerning Corporations (Hurd's Rev. Stat. 1917, chap. 32), on account of a failure to comply with provisions of that act, but the evidence did not establish a liability under that section. It provides that, if any person or persons being or pretending to be an officer or agent or board of directors of any stock corporation or pretended stock corporation shall assume to exercise corporate powers or use the name of any such corporation or pretended corporation without complying with the provisions of that act before all stock named in the articles of corporation shall be subscribed in good faith, they shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation.

The liability declared by that section is incurred only by a failure to comply with the provisions of that act, and as it does

not make any provision for the change of name of

Corporation—  
acting under  
changed name—  
effect.

a corporation, and there was no failure to comply with its terms in the organization of the Farmers' Grain & Feed Company, the defendant did not become liable by virtue of that section. If a liability existed, it was not statutory, but arose from a failure to comply with the provisions of another act authorizing changing the names of corporations, which contains no similar provision. If there was a liability, it rested upon the rule of law that when individuals act under a corporate form and in a corporate name, when there

is, in fact, no corporation, they have not thereby ab-

—acting without  
incorporation—  
partnership  
liability.

solved themselves from personal liability and are liable as partners. Independently of § 18, a company which is not a corporate body is a partnership composed of the officers and subscribers to the articles of association. *Bigelow v. Gregory*, 78 Ill. 197; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N.E. 99; *Joseph T. Ryerson & Son v. Shaw*, 277 Ill. 524, 115 N. E. 650.

The act concerning corporations, under which the Farmers' Grain & Feed Company was organized, provides that persons proposing to form a corporation under the act shall make a statement setting forth, with other things, the name of the proposed corporation, and the name so fixed is an essential part of the corporate existence. A corporation has no right or power, of itself, to change or alter the name originally selected

—power to  
change name.

by it, without complying with such form of proceeding as may be prescribed by law. 7 R. C. L. 128. A corporation cannot, except as authorized by law, change its name, either directly or by user; but if a

corporation acts by a wrong name it will not be permitted to avail itself of its own wrong after receiving the consideration. *Sykes v. People*, 132 Ill. 32, 23 N. E. 391.

**Estoppel—acting under wrong corporate name—receiving consideration.**

The name of the corporation, the Farmers' Grain & Feed Company, was not changed, but its business was continued by the same officers under the new name on the assumption that a change had been made. There may be circumstances perhaps justifying a conclusion that a change of name amounts to a destruction of the corporation. It was held in *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538, that an unauthorized change of name under the circumstances of that case was an abandonment not only of the corporate name, but of the corporation itself, and that an attempted substitution of a new name made the members of the corporation liable as partners, under contracts entered into in the substituted name. Individuals had acquired the entire stock of a corporation, and, without taking any legal steps, changed the name of the corporation to the names of the individuals, and by the substituted name accepted a draft, and it was held that the effect of the change of the name was an abandonment of both the corporate name and the corporation. That case was so different in its facts as to have no legitimate bearing on this case, in which there was an abortive attempt to change the name of the corporation as authorized by the statute. The law was complied with so far as the resolution of the stockholders was concerned, and the only failure to complete the change was in not having the change filed in the office of the secretary of state and recorded in the recorder's office. For that failure the name was not in fact changed, and the original corporation continued without any change of name and carried on business as before, under an unauthorized

name. If the corporation was liable on the contract, the defendant was not. If there had been an actual change of name, it would not have affected in any manner the identity of the corporation, or added to or detracted from its rights or obligations.

In *Mt. Palatine Academy v. Kleinschnitz*, 28 Ill. 183, the Mount Palatine Academy was incorporated, and land was conveyed to it. Afterward, in 1851, the act of incorporation was amended by including in the corporation a college by the name and title of Judson College, which amounted to a change of name of the corporation. The court said that, if in strictness of law there were two corporations in name, there was but one in fact, and that was the old one, and if all the acts done under the name of Judson College were the acts of the old corporation under a new name, then the note and trust deed in question in the case were executed by the old corporation under the new name, and it should be as much bound by it as if it had been done under the proper legal name. The court likened the case to a change of name by an individual, and said that if an individual should change his name without authority of law, or even against law, and give notes and execute deeds, they would be obligatory upon him and as effective in law as if all had been done in his proper name. The Farmers' Grain & Feed Company continued in existence with the same stockholders, officers, and agents, and carried on the same business as before, but under an unauthorized name. It was not relieved from liability on the contracts made in the name of the Chicago Grains & Feed Company, and, that being so, the defendant was not liable.

—attempted  
change of name  
—liability on  
contracts.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Petition for rehearing denied February 4, 1920.

## ANNOTATION.

**Personal liability of officers or stockholders for debts of corporation which has made an unauthorized change in its name.**

The decision in the reported case (*PILSEN BREWING CO. v. WALLACE*, ante, 579), that an unauthorized change of the name of a corporation does not destroy the corporate identity and render its officers or stockholders, who thereafter contract in the new name liable as partners, is supported by *Richards v. Minnesota Sav. Bank* (1899) 75 Minn. 196, 77 N. W. 822, and *Robinson v. First Nat. Bank* (1904) 98 Tex. 184, 82 S. W. 505, reversing (1904) — Tex. Civ. App. —, 79 S. W. 103. But the opposite conclusion was reached in *Cincinnati Cooperage Co. v. Bate* (1894) 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538, which is cited in the *PILSEN BREWING CO. CASE*.

In *Cincinnati Cooperage Co. v. Bate* (Ky.) supra, the court held that the effect of an unauthorized change of name of a corporation was an abandonment not only of the former corporate name, but of the corporation itself, and that the stockholders were individually liable for a debt thereafter incurred while they were doing business under the new name, since no new corporation was created and the business was being done by them as partners. It was said: "The contention of the appellant is that Bate and the other owners of the old concern, having abandoned the corporate name, and adopted a new name which gave special prominence to the names of the individuals composing the concern, are individually liable as partners in a venture, for the reason that no legal steps were taken to change the corporate name, as might have been done under the easy mode provided by the Indiana statute. . . . The parties assuming to do business as such company did not take a single step required by the statute for the purpose of creating a corporation, or of changing the name of the old corporation. The name of a corporation is 'the very being of its constitution, . . . without which it could not perform its cor-

porate functions.' . . . The effect of such change of name is an abandonment not only of the corporate name, but of the corporation itself. The identity of the creature authorized by the statute to do business is destroyed. It is in no sense like the case where an individual changes his name. The very being of its constitution is destroyed by an abandonment of its name, and an attempted substitution of a new name, without authority of law." To the same effect is an earlier appeal reported in (1892) 14 Ky. L. Rep. 469.

And in *Senn v. Levy* (1901) 111 Ky. 318, 63 S. W. 776, the court, citing *Cincinnati Cooperage Co. v. Bate* (Ky.) supra, said: "A corporation exists only in its corporate name, and a change of name was an abandonment not only of the corporate name, but of the corporation itself. The old creature was destroyed and a new one sprang into existence, clothed with all the new powers, and charged with all the new responsibilities, imposed by the statutes which gave it birth." The change of name in this instance, however, was not, it seems, unauthorized.

It is stated (obiter) in *Campbell v. J. I. Campbell Co.* (1906) 117 La. 402, 41 So. 696, that the members of a foreign corporation authorized to do business in certain counties of the state of its organization, who come into a state and do business under another name without complying with the laws of the latter state, are liable as members of a partnership.

But the decision in *Cincinnati Cooperage Co. v. Bate* (Ky.) supra, does not seem to be in accord with the principles declared in a number of cases, and is, as stated above, opposed to the holding in several cases, besides the reported case (*PILSEN BREWING CO. v. WALLACE*).

Thus, in *Richards v. Minnesota Sav. Bank* (Minn.) supra, it was said, regarding an attempted change in the name of a savings bank and of its

place of business, that if the change was void, because unauthorized, it would not affect the existence of the corporation, although it would affect its strictly legal right to exercise its corporate privileges under the new name. And in this case, the court, assuming for the purposes of the case the unconstitutionality of the statute under which a savings bank attempted to change its name, held that it gave the bank color of law for its action in changing its name, and if it thereafter, with the implied, if not the direct, consent of the state, in good faith exercised its corporate powers under the new name, it was a *de facto* if not a *de jure* corporation, and its stockholders were not individually liable to one who dealt with it as a corporation under the new name. The court said: "The case at bar, then, in its last analysis, is simply this: The Minnesota Savings Bank, a *de facto* corporation, in good faith assumes and exercises all of the functions and powers of a *de jure* corporation, with the acquiescence of the state; and the plaintiff contracts with it as such, on the faith of its corporate responsibility; and not otherwise. The contract is legally enforceable by him against the bank. But the bank becomes insolvent, and then the plaintiff seeks to repudiate his contract with it, and to charge innocent stockholders, who did not have, and were not permitted by law to have, any control of the affairs of the bank, as partners, with the entire liabilities of the bank. Whatever may be the rule in other jurisdictions, happily the laws of this state sanction no such injustice. It is the settled law of this state that a creditor who has dealt with a corporation *de facto* in its corporate name and capacity, and given credit to it, and not to its members or stockholders, cannot, in the absence of fraud, charge them as partners with the debts of the corporation."

And the unauthorized change of a name of a corporation, it was held in *Robinson v. First Nat. Bank* (1904) 98 Tex. 184, 82 S. W. 505, reversing (1904) — Tex. Civ. App. —, 79 S. W. 103, *supra*, would not render the stock-

holders liable as partners for a liability subsequently incurred by a loan to the corporation. The court said that if the name was adopted as a new name for the corporation, and if the understanding between the parties to the loan was that it was made to the corporation, and not to a partnership under the new name, then the stockholders were not individually liable; but that if the stockholders agreed to cease doing business as a corporation, and to carry it on as a partnership under the new name, all would be bound for the debt. It was held accordingly that an instruction was erroneous that if the jury believed from the evidence that prior to the note sued on the defendants (the individual stockholders) agreed to cease doing business under the old name, and to do business in another name, for their mutual benefit, this, in law, would make them partners whether they intended to become partners or not.

It was held in *Stafford Nat. Bank v. Palmer* (1880) 47 Conn. 443, that a stockholder in a Massachusetts corporation, who until long after its organization knew nothing of the formation of a joint stock company under the laws of Connecticut, which succeeded to the Massachusetts corporation's property and carried on the business at the same place until it became insolvent, and whose only connection with the new corporation was to receive a certificate of stock therein in lieu of his old certificate in the Massachusetts company, could not be held liable as a partner for a debt incurred by the new company, even though it was illegally organized.

Some cases not, on their facts, within the scope of the annotation, may profitably be examined in this connection, because of their value on the question whether by an unauthorized change of name the corporation loses its identity. These cases, however, are cited as illustrative only, and no attempt is made to cite exhaustively the cases on the questions involved.

In *O'Donnell v. C. R. Johns & Co.* (1890) 76 Tex. 362, 13 S. W. 376, it was held that an attempted change in a corporation's name, if unlawful,

would not destroy the corporate identity, but there would still be a lawful corporation under the original name, in which it might maintain an action.

And in *Marmet Co. v. Archibald* (1893) 37 W. Va. 778, 17 S. E. 299, the court quoted with approval the doctrine that the identity of a corporation is no more affected by a change of name than the identity of an individual, and that, while the agents of a corporation have no implied authority to use any name except that in the charter, the use of a wrong name is ordinarily not material if the corporation is really intended; and that a contract entered into by a corporation under an assumed name may be enforced by either of the parties, the identity of the company being established by the ordinary methods of proof.

Also, in *King v. Ilwaco R. & Nav. Co.* (1890) 1 Wash. 127, 23 Pac. 924, the court said that if the attempt to change the corporate name was futile, either because there was no law authorizing it or because the law was not complied with, it followed that the plaintiff's name was the old and not the new name.

And where a corporation which had attempted to change its name, but had not legally done so because it had not filed and recorded the resolution authorizing the change, made an assignment for creditors under the new name, the court in *Woodrough & H. Co. v. Witte* (1895) 89 Wis. 537, 62 N. W.

518, said that the true name of the corporation was the old name, and that by that name it should sue and be sued, thus apparently negating the idea that the corporation had lost its identity. The assignment was held valid under the rule that a corporation, like a natural person, can bind itself by contract under an assumed name. But this holding, it will be observed, is not necessarily incompatible with the view that a corporation is dissolved by an unauthorized change of name, and that the stockholders are liable as partners. That contention was made in the case, and in reply thereto the court said that this theory established the validity of the assignment, since it could not be questioned that, as partners, the stockholders might use the new name as a firm name, and that an assignment of the partnership property under that name would be valid.

And in *Speaker v. State* (1917) — Ala. App. —, 75 So. 178, it was held that an attempt by a corporation to change its name, which was futile because statutory requirements were not complied with, did not operate to dissolve the company, or convert it into a de facto corporation. The court said that the statute prescribed the method of dissolving a corporation, that the attempt to change the name could not affect the company's legal status, and that, irrespective of how the business was conducted, the legal name of the company was the old name. R. E. H.

## STATE OF MINNESOTA EX REL. TWIN CITY BUILDING & INVESTMENT COMPANY, Respt.,

v.

JAMES G. HOUGHTON, Inspector of Buildings of the City of Minneapolis, Appt.

*Minnesota Supreme Court—January 23, 1920.*

(— Minn. —, 176 N. W. 159.)

**Eminent domain — creation of restricted residence district.**

1. Laws 1915, chap. 128, provide for restricted residence districts in cities of the first class, in which certain classes of buildings shall not be

erected. Such restricted district is established by the exercise of the power of eminent domain, and apartment houses, among other classes of buildings, are prohibited therein. The Constitution permits the taking or destruction or damage of private property for public use alone. It is held that the restriction, as applied to an apartment house, is based upon a "public use," and that the statute providing for condemnation is constitutional.

[See note on this question beginning on page 594.]

**Constitutional law — title of act — sufficiency.**

2. The subject of Laws 1915, chap. 128 (Gen. Stat. Supp. 1917, §§ 1639-10 to 1639-16), relating to restricted residence districts in cities of the first class, for the establishment of which condemnation is provided, is sufficiently expressed in its title, within the constitutional requirement, though the

subject of condemnation is not mentioned in it.

[See 25 R. C. L. 847 et seq., 858.]

**Eminent domain — propriety of taking — question for legislature.**

3. The propriety and necessity of taking property for a public use, and the mode prescribed for the compensation, are questions for the legislature and not for the courts.

[See 10 R. C. L. 183.]

(Brown, Ch. J., and Dibell, J., dissent.)

**APPEAL** by defendant from a judgment of the District Court for Hennepin County (Hale, J.) in favor of relator in a mandamus proceeding to compel defendant to issue a building permit to it. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. C. D. Gould and R. S. Wiggin for appellant.

Messrs. Moore, Oppenheimer, & Peterson, O. H. O'Neill, and John A. Burns, amici curiæ:

The act is not void because it takes private property for purposes not public in character.

Nichols, Em. Dom. 2d ed. 1917, chap. 4, §§ 40 et seq.; Re New York, 167 N. Y. 624, 60 N. E. 1108; Re Clinton Ave. 57 App. Div. 166, 68 N. Y. Supp. 196; Dill. Mun. Corp. (1911) § 695; McQuillin, Mun. Corp. (1912) §§ 1479, 1485; Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440, 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77; 1 Lewis, Em. Dom. § 163; Talbot v. Hudson, 16 Gray, 417; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147, 1 Mor. Min. Rep. 691; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; County Ct. v. Griswold, 58 Mo. 175; Re Central Park Comrs. 63 Barb. 282; Re Rochester, 48 N. Y. S. R. 358, 20 N. Y. Supp. 506; Holt v. Somerville, 127

Mass. 408; Rowan v. Portland, 8 B. Mon. 232; Bunyan v. Palisades Interstate Park Comrs. 167 App. Div. 457, 153 N. Y. Supp. 622, 170 App. Div. 941, 154 N. Y. Supp. 1114; Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358; State ex rel. Latchman v. Houghton, 134 Minn. 226, L.R.A.1917F, 1050, 158 N. W. 1017; St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59; State Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. 874; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A.(N.S.)236, 133 N. W. 169, Ann. Cas. 1912D, 1029, affirmed in (1914) 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198; McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45.

Messrs. Roberts & Strong, Harlan P. Roberts, Manley L. Fosseen, John N. Berg, John E. Samuelson, Leonard McHugh, and M. T. O'Donnell, also amici curiæ.

Mr. A. B. Darelius for respondent.

Messrs. Baldwin, Baldwin, & Holmes, amici curiæ:

The act is unconstitutional and void because the proposed condemnation is not a "public use."

Minnesota Canal & Power Co. v.

Koochiching Co. 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; Lewis, Em. Dom. 3d ed. § 315; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 158, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; State ex rel. Lachtman v. Houghton, 134 Minn. 226, L.R.A. 1917F, 1050, 158 N. W. 1017; Bloodgood v. Mohawk & H. River Co. 18 Wend. 9, 31 Am. Dec. 813; Arnasperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 6 Atl. 413; Borden v. Trespalacios Rice & Irrig. Co. 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11; Shasta Power Co. v. Walker, 149 Fed. 568; Howard Mills Co. v. Schwartz Lumber & Coal Co. 77 Kan. 599, 18 L.R.A. (N.S.) 356, 95 Pac. 559; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Cooley, Const. Lim. 6th ed. p. 658.

Messrs. James Schoonmaker, C. D. O'Brien, M. D. Munn, E. B. Graves, William F. Hunt, and Thomas Fitzpatrick, also amici curiæ.

Holt, J., delivered the opinion of the court:

Mandamus, on relation of the Twin City Building & Improvement Company, against James G. Houghton, inspector of buildings of Minneapolis, to require him to issue it a building permit. There was an answer to the alternative writ, to which a demurrer was sustained, and judgment was then entered for the relator, from which the defendant appeals.

The only question is upon the constitutionality of Laws 1915, chap. 128 (Gen. Stat. Supp. 1917, §§ 1639-10 to 1639-16). The relator claims that the statute is unconstitutional, because its subject is not expressed in its title, and because the use for which it is proposed to exercise the power of eminent domain is not a public use.

The act is entitled: "An Act Authorizing Cities of the First Class to Designate and Establish Restricted Residence Districts and to Prohibit the Erection, Alteration and Repair of Buildings Thereon for Certain Prohibited Purposes."

It provides for establishing restricted residence districts by condemnation. The claim of the relator is that the subject of the act

is not expressed in its title, within the constitutional requirement. Const. art. 4, § 27. We have given this matter consideration, and reach the conclusion that the subject of the act is sufficiently expressed in its title. The matter has been gone over frequently, and the question does not call for discussion. Dunnell's Dig. (Minn.) and 1916 Supp. §§ 8906 et seq.

The remaining question is whether there is any public use in aid of which the right of eminent domain may be used.

On March 8, 1918, the city council passed a resolution, pursuant to Laws 1915, chap. 128, designating block 8, in J. T. Blaisdell's revised addition of Minneapolis, as a restricted residence district. The relator owns lot 13 and the south 84.9 feet of lot 12 in this block. It was proposing to erect a three-story apartment building, costing approximately \$50,000, and for this building a permit for certain parts of the structure was asked and denied. Laws 1915, chap. 128, provide for the designation by the common council of restricted residence districts and the prohibition of the erection therein of buildings of a certain class, including such as the apartment building intended by the relator. Sections 1 and 2 of the statute (Gen. Stat. Supp. 1917, §§ 1639-10, 1639-11), important here, are as follows:

"Section 1. Any city of the first class may, through its council, upon petition of fifty (50) per cent of the owners of the real estate in the district sought to be affected, designate and establish by proceedings hereunder restricted residence districts within its limits wherein no building or other structure shall thereafter be erected, altered or repaired for any of the following purposes, to wit, hotels, restaurants, eating houses, mercantile business, stores, factories, warehouses, printing establishments, tailor shops, coal yards, ice houses, blacksmith



shops, repair shops, paint shops, bakeries, dyeing, cleaning and laundering establishments, billboards and other advertising devices, public garages, public stables, apartment houses, tenement houses, flat buildings, any other building or structure for purposes similar to the foregoing. Public garages and public stables shall include those, and only those, operated for gain.

"Nothing herein contained shall be construed to exclude double residences or duplex houses, so-called, schools, churches, or signs advertising for rent or sale the property only on which they are placed.

"No building or structure erected after the creation of such district shall be used for any purpose for which its erection shall be prohibited hereunder.

"The term 'council' in this act shall mean the chief governing body of the city by whatever name called.

"Section 2. The council shall first designate the restricted residence district, and shall have power to acquire by eminent domain the right to exercise the powers granted by this act by proceedings hereinafter defined, and when such proceedings shall have been completed the right to exercise such powers shall be vested in the city."

The Constitution provides that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured." Const. art. 1, § 13.

The parties agree that the only question involved, the question of the title aside, is the constitutionality of the statute under the eminent domain provision of the Constitution. That question is the single question whether the legislature may authorize a common council to establish by condemnation a restricted residence district which shall exclude apartment buildings, and that question is whether there is a public use in such restriction.

That the public gets no physical use of the premises condemned is clear. It cannot travel upon or oc-

cupy them. The use acquired, so far as the general public is concerned, is rather negative in character, except, perhaps, that its sense of the appropriate and harmonious will not be offended by the erection in the condemned district of prescribed buildings. The condemnation does not take any part of the ground away from the owner; the taking consists in restricting its use. He is compensated for the restriction imposed, but compensation is merely an incident to the exercise of the right of condemnation, and without a public use to be served gives no right.

Naturally enough, we do not find parallel cases. It is not supposed that a considerable portion of the public will derive benefit from the restriction. This is evidenced by the requirement that the condemnation money ultimately be paid from assessments for benefits to the restricted district, which in this case is one block. It is not paid out of the general fund, though the city's credit is pledged for it. It is treated much as a local benefit or use; but this fact, or the fact that only a small part of the public is appreciably or directly benefited, does not make the use not public. 10 R. C. L. p. 31.

"In holding a use to be public, it has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in the improvement or enterprise." *Sisson v. Buena Vista County*, 128 Iowa, 442, 70 L.R.A. 440, 104 N. W. 454.

The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. Such a taking as here proposed could not possibly have been thought a taking for public use at the time of the adoption of our Constitution, when the state was practically a wilderness without a single city worthy of the name.

"The term 'public use' is flexible and cannot be limited to the public use known at the time of the forming of the Constitution." *Stewart v. Great Northern R. Co.* 65 Minn. 515, 33 L.R.A. 427, 68 N. W. 208.

What constitutes a public use at the time it is sought to exercise the power of eminent domain is the test. The Constitution is as it was when adopted; but, when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought. The Constitution of this state nowhere attempts to define what may be a public use, nor does it prohibit the legislature from determining what shall be deemed such a use.

In comparatively recent times it was questioned whether a public use extended so far as to justify the condemnation of property and the expenditure of money for public parks, or for boulevards, or for pleasure drives, or for public baths, or for playgrounds, or for libraries and museums, or for numerous other purposes which contribute to the general good. Now condemnation and expenditure for these and like or similar purposes are common, and recognized as lawful. Not so very long ago there would have been a revolt against restricting a property owner in the full use of his lot to the street line. But a condemnation for the purpose of widening a street by adding a strip on each side, which is not to be used for travel, but for ornament and beauty, and with the reservation of a limited use in the owner, is held valid. *Re Clinton Ave.* 57 App. Div. 166, 68 N. Y. Supp. 196, affirmed in 167 N. Y. 624, 60 N. E. 1108. The taking of land used as a stone quarry along the Palisades of the Hudson, for the purpose of preserving the scenic beauty of the river and of the park, has been sustained as a taking for public use. *Bunyan v. Palisades Interstate Park Comrs.* 167 App. Div. 457, 153 N. Y. Supp. 622. A case often cited is

*Atty. Gen. v. Williams*, 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77, where a statute limiting the height of buildings about Copley square, on compensation paid, was sustained; and condemnation was sustained for preserving and improving and ornamenting the battlefield of Gettysburg. *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427. The condemnation was thought clearly for a public use.

In the prevailing and dissenting opinions in *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, L.R.A. 1917F, 1050, 158 N. W. 1017, where the question was upon the propriety of the exclusion of a store from a restricted residence district under the police power, there was a thorough examination of the authorities, many of which are of value here; but they do not call for reconsideration. The right to restrict under the police power without compensation, and to restrict by condemnation with compensation, differ, but have much in common. It is likely that many of the businesses and buildings referred to in the statute could be excluded under the police power. It is unnecessary to cite or discuss authorities at length, but the following may be noted: *Nichols*, Em. Dom. §§ 40, 58, 100, 101; 1 *Lewis*, Em. Dom. §§ 271 et seq.; *Dill*, Mun. Corp. § 695; 10 *R. C. L.* 36; 4 *McQuillin*, Mun. Corp. 1485 et seq.; 20 *Harvard L. Rev.* 35; 27 *Harvard L. Rev.* 665; 15 *Mich. L. Rev.* 75; 1 *Minn. L. Rev.* 489.

The tendency is in the direction of extending the power of restriction, either through the exercise of the police power or the exercise of the right of eminent domain in aid of the so-called city planning, or the improvement of housing conditions. Our elaborate Housing Code of 1917 is an illustration of an effort on the part of the state, through the exercise of the police power, to so regulate the construction of buildings that living conditions shall be better. Chapter 137, Laws 1917

(Gen. Stat. Supp. 1917, §§ 4755-1 et seq.). The tendency is also illustrated by such decisions as *State ex rel. Banner Grain Co. v. Houghton*, — Minn. —, 170 N. W. 853, where we held that the exclusion of a factory manufacturing cereal products, from a residence district, was sustainable under the police power, although the district was sparsely settled and of the ordinary class of dwellings, and though the property was naturally suited for the use of such a factory, located as it was on a railway line.

The expression is often found in the decisions that whether a use is public is a judicial question. No doubt it needs be where the legislature has not attempted to designate or define the public use for which condemnation is sought. Justice Mitchell, in *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325, in speaking of the limitation upon the power of eminent domain, said: "Of course, there is the further limitation, necessarily implied, that the use shall be a public one, upon which question the determination of the legislature is not conclusive upon the courts."

This implies that in the first instance the legislature may designate what is a public use for which condemnation can be exercised.

"The question as it presents itself to the courts is not whether the use is public, but whether the legislature might reasonably have considered it public. The presumption is that a use is public if the legislature has declared it to be such, and the decision of the legislature must be treated with the consideration due to a co-ordinate department of the government of the state." 10 R. C. L. pp. 29 and 30.

And, among the cases there cited, we find Justice Marshall (in *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849) conceding that "the right to declare what shall be deemed a public use" is "vested primarily in the legislature." In *Bankhead v. Brown*, 25

Iowa, 540, Chief Justice Dillon said: "If a public use be declared by the legislature the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use."

Instead of it manifestly appearing that the legislature has authorized the taking for a use not public, by the law in question, we think good reason exists for saying that the restrictions which may be imposed upon the owner of property, under the provisions of the act, constitute a taking for a public use. That the act unmistakably implies that the taking, or the restricting, is deemed to be for a public use, is clear from the fact that condemnation is the means employed to achieve the end in view. No one will gainsay that the chief aim of all legislation is the general good or public welfare. Legislators must ascertain and determine what makes for public welfare in order to enact laws designed to promote and secure the same. Many reasons might be suggested as sufficient for the adoption of this statute. We will mention but one or two. It must be admitted that owners of land in congested cities have of late, through selfish and unworthy motives, put it to such use that serious inconvenience and loss result to other landowners in the neighborhood. In large cities, where the lots for residences must necessarily be of the minimum size, especially where the man of small means must dwell, it is readily seen that if a home is built on such a lot, and thereafter three-story apartments extending to the lot line are constructed on both sides of the home, it becomes almost unlivable and its value utterly destroyed. Not only that, but the construction of such apartments or other like buildings in a territory of individual homes depreciates very much the values in the whole territory. The loss is not only to the owners, but to the state and

municipality, by reason of the diminished taxes resulting from diminished values.

The absence of restrictions of use also gives occasion for extortion. The occurrences have been common in our large cities of unscrupulous and designing persons securing lots in desirable residential districts, and then passing the word that an apartment or other objectionable structure is to be erected thereon. In order to protect themselves against heavy loss and bitter annoyance, the adjacent owners, or parties interested in property in the neighborhood, are forced to buy the lots so held at exorbitant prices. The well-to-do may in this way be able, by financial sacrifice, to protect their homes against undesirable invasions. But when this occurs in territory occupied by people of modest homes and moderate means, where all they have is represented by the home, and that, perhaps, not free of mortgage lien, there is nothing to do but to submit to the loss and the injustice. There should be a lawful way to forestall such wrongs. Courts have often resorted to the rule, "sic utere tuo alienum non lædas," in administering justice between property owners. Why should not the legislature also make use of this rule?

Another reason is that giving the people a means to secure for that portion of a city wherein they establish their homes, fit and harmonious surroundings, promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride, and thus tends to produce a better type of citizens. It is time that courts recognized the esthetic as a factor in life. Beauty and fitness enhance values in public and private structures. But it is not sufficient that the building is fit and proper, standing alone; it should also fit in with surrounding structures to some degree. People are beginning to realize this more than before, and are calling for city

planning, by which the individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments.

Eminent domain  
—creation of  
restricted residence district.

The act in question responds to this call and should be deemed to provide for a taking for a public use. In *Com. v. Boston Adv. Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601, is this language: "We agree that the promotion of the pleasure of the people is a public purpose, for which public money may be used and taxes laid, even if the pleasure is secured merely by delighting one of the senses."

There it was sought to prevent billboards on private property adjoining parks; but the court held it could not be done without compensation. The inference from the reasoning is that the law authorizing the rule prohibiting the billboards would have been sustained, had the restriction upon the owners' use been acquired by condemnation.

Closely analogous to this law is the Drainage Act, which was upheld in *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094. It was there stated that all courts sustained such laws, "when enacted in the interest of the public health, convenience, or welfare." That act left the county commissioners to determine whether the proposed drainage would be "of public utility, or conducive to public health, or of public benefit or convenience." Many of the drainage projects established under this law have no direct effect on the public at large. In many cases the public acquires no more right to pass over or to occupy any part of the land of the drainage system than the public, as such, does under the taking in the act under consideration. The direct benefits are to the individuals owning the land comprising the drainage district, the same as to the owners of lots in

the restricted building district. The public health proposition is really of no more actual consequence in the one than in the other. We think there is a public use served by the taking authorized by chap. 128, Laws 1915. It does not seem to impinge any inhibition of state or Federal Constitution.

Given a public use, the propriety and necessity of the taking and the mode prescribed for the compensation are for the legislature. State ex rel. Ford Motor Co. v. District Ct. 133 Minn. 221, 158 N. W. 240. We are concerned only with the question of the constitutionality of the statute, as against the two objections urged and above disposed of. There may be some provisions in the act which permit of an oppressive use, under certain conditions; but we are not interested in them at present. The method of compensation might have been more attractive, had it afforded the right to a jury award. But the one provided was held constitutional as long ago as in Ames v. Lake Superior & M. R. Co. 21 Minn. 241.

The former opinion (— Minn. —, 174 N. W. 885) rendered here-in is overruled.

The judgment is reversed.

Brown, Ch. J., and Dibell, J., dissenting:

We adhere to the views expressed in the former opinion. — Minn. —, 174 N. W. 885.

The reargument brings nothing of moment that is new. It cannot be successfully urged that there is a public use upon which to rest a condemnation which will prevent an owner from building upon his private property an apartment, upon the sole claim, assumed to be well founded, that his building deteriorates property values in the vicinity. If this is so, the owner of vacant land may be restricted in its improvement to such a use as leaves values stationary or enhances them. The suggestion that a condemnation such as is sought

can be supported to prevent extortion we cannot accept as sound. No public use can be found, and condemnation money is not paid as tribute. Nor, unless the prevailing opinion changes the law of the state, can it be rightly said that the question whether a use is a public use is not strictly a judicial one. Dunnell's Dig. (Minn.) and 1916 Supp. § 3027.

The maxim, "sic utere tuo ut alienum non lædas," quoted in the prevailing opinion, is not a foundation principle of eminent domain. It finds application in the exercise of the police power, under which restrictions are imposed without compensation; and it states a principle which we apply in controversies between conflicting private owners. Under the police power, with some reference to this principle, we support restrictions upon the use of private property in a way substantially interfering with the rightful enjoyment by another of his private property. State ex rel. Banner Grain Co. v. Houghton, — Minn. —, 170 N. W. 858, where a cereal factory, the conduct of which substantially annoyed the residents of the community because of noise and dust, was excluded, is an illustration. And in a controversy between private parties, and without a resort to the police power, we restrict the use of private property when it brings substantial physical discomfort to residents of the community, as when it is used for a stone quarry or for stabling purposes. Brede v. Minnesota Crushed Stone Co. — Minn. —, 6 A.L.R. 1092, 173 N. W. 805; Lynch v. Shiely, 131 Minn. 346, 155 N. W. 390.

However far we follow the arguments, we return to the question whether a residence district, voluntarily organized under legislative authorization upon a 50 per cent vote, may exclude from its midst apartment buildings which are thoroughly sanitary, and which furnish satisfactory dwelling places to large numbers of our people,

who either cannot live or do not choose to live in detached dwellings, with more or less commodious grounds surrounding. If there may be such an exclusion, there may be a like exclusion of an unsightly cottage, which is the only possible home the owner of the land can build or have, whenever it is displeasing to the composite good taste of the community; and by a like exclusion the architectural fashion of a community may be fixed. Back of all the suggestion of esthetic considerations, and potent in urging the result here sought to be attained, is the disinclination of the exclusive district to have in its midst those who dwell in apartments. It matters not how mentally fit, or how morally correct, or how decorous in conduct they are, they are unwelcome. The exclusive district is unwilling to battle with the economic law which changes the character of residence districts as time goes, or the natural instinct which prompts flat dwellers to seek agreeable surroundings; and so it asks the exercise in its behalf of the state's power of eminent domain.

It is the same feeling which often finds expression in the making of distinctions based on race or nationality, or upon natural or artificial social status. All talk of beautifying parks and public squares and boulevards and establishing playgrounds is quite beside the present discussion. No one questions the public use which justifies condemnation and taxation for them. This court readily gives relief, in a proper case, to a private owner, whose right to the enjoyment of his property is interfered with by another private owner not using his own with a just regard to the enjoyment of his neighbor; but it has not given effect to class distinctions imposed by law.

In conclusion, and without further discussion, our judgment is that the present decision is without constitutional basis for its support, and is directly opposed to the fun-

damental principle that one may use and enjoy his property as best suits his convenience, so long as no unnecessary injury is done to his neighbor. The statute in question is aimed in the wrong direction, and not in promotion of the general welfare, as that term for many years has been understood and applied by the courts. The intelligent thought of the day notes with some concern the increasing unrest and discontent with the trend of our civil affairs, prevalent among the people, not only of this state and nation, but the world over. Yet that same intelligence, apparently without thought or reflection, at the same time demands the enactment and enforcement of laws the only tendency of which is to add to, and accentuate, in a measure, conditions made the basis of such discontent; legislation like the statute here involved, which in effect segregates the people into classes founded on invidious distinctions, extending to one thereof, by positive law, the powerful eminent domain arm of the state, by which one class may, on esthetic or fanciful grounds, exclude from their selected neighborhood members of the other classes, and thus deprive them arbitrarily of the free enjoyment of their property, although they may be of equal intelligence and moral standing with those thus temporarily vested with the use of that powerful state weapon. Heretofore the people in this country have been permitted to work out their own social relations, unaided by direct legislation. And those who are willing to take cognizance for the moment of the history of civil governments, and of the reasons for the downfall of many of them, cannot but be impressed that the general welfare will best be promoted by a continuance of that method of regulating matters of that kind.

This case, briefed favorably to the result by both lawyers and editors, will create no disturbance nor

attract any special attention. The statute which is sustained is but a straw indicating a drifting from constitutional moorings toward class distinctions created and fostered by law.

### ANNOTATION.

#### **Eminent domain: power to condemn against particular use of property.**

The books contain a number of cases relating to district prohibition of kinds of business and kinds of buildings, decided with reference to the police power; that is to say, to the power to prohibit certain kinds of buildings or business without compensation to the owner. It is not infrequent in these cases to find statements that the prohibition in question cannot be legal, without compensation. This, of course, does not necessarily mean that the prohibition would be legal, with compensation to the owner.

But, as will be seen, the decision in the reported case (*STATE EX REL. TWIN CITY BLDG. & INVEST. CO. v. HOUGHTON*, ante, 585) is one in the law of eminent domain. It is there held that a statute is constitutional which enables 50 per cent of the inhabitants of a city district to have it restricted so that apartment houses and other designated classes of buildings shall be prohibited therein, the right to build such buildings to be condemned by the city.

In *Parker v. Com.* (1901) 178 Mass. 199, 59 N. E. 634, where a Massachusetts statute to limit the height of buildings in the vicinity of the state house provided for the payment of damages for the deprivation of any rights existing under the Constitution, the court, in overruling the claim of the state that owners were entitled to no damages, said, *inter alia*: "In some of the arguments addressed to us it was assumed that the only view which it was possible to take of this statute was that it was intended to benefit the state house considered as a dominant estate, and to annex to it an easement or quasi easement, whether for prospect or security it does not matter. Manifestly, this is not true. It may be argued that the statute was passed at least as much in the interest of the public at large as travelers on the

highway, as it was in the interest of the commonwealth as an owner of property—that one object, at any rate, was to save the dignity and beauty of the city at its culminating point, for the pride of every Bostonian and for the pleasure of every member of the state. It is on this footing that it is argued for the commonwealth that the act is a valid exercise of the police power; that a building law would be valid within reasonable limits; . . . that a limitation to 70 feet is reasonable, and that such a law is no less valid when passed to satisfy the love of beauty than when passed to appease the fear of fire."

It may be noted that it was held in *Atty. Gen. v. Williams* (*Knowlton v. Williams*) (1899) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77, that the statutory restriction of the height of buildings adjacent to a square, if intended to benefit the public by promoting the beauty and attractiveness of a public park and preventing unreasonable encroachments upon the light and air which it had previously received, justifies the expenditure of public money to pay compensation for property rights thereby injured by thus creating an easement of light, air, and view, annexing it to the park in the exercise of eminent domain.

So, it was held in *Com. v. Boston Adv. Co.* (1905) 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601, that forbidding the use of land near a park or parkway for advertising purposes amounts to a taking of it for public use, for which compensation must be made.

But in *Pennsylvania Mut. L. Ins. Co. v. Philadelphia* (1913) 242 Pa. 47, 49 L.R.A. (N.S.) 1062, 88 Atl. 904, it was held that the power of eminent domain cannot be utilized to enable a municipal corporation to acquire property outside the limits of a parkway

for resale, with restrictions for the protection of the parkway or preservation of the view, appearance, light, air, health, or usefulness thereof, as this is not a public use.

It was held in *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 13 L.R.A. 590, 22 Atl. 561, that the purpose of preventing a new bridge from being marred by unsightly structures is not a public use.

As in line with the dissenting opinion in the reported case (*STATE EX REL. TWIN CITY BLDG. & INVEST. CO. v. HOUGHTON*, ante, 585), it may be permissible to quote from a case decided under the police power: "It cannot be pretended that the citizen has not the common-law right to acquire title

to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon and improve it as his taste, his convenience, or his interest may suggest, or as his means may justify, without taking into consideration whether his buildings and improvements will conform in 'size, general character and appearance' to the 'general character of the buildings previously erected in the same locality,' even though there might be those in whose 'judgment' his so building might in some way 'tend to depreciate the value of surrounding improved or unimproved property.'" *Bostock v. Sams* (1902) 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665.

B. B. B.

## CHRISTOPHER BAUMANN, Appt.,

v.

CITY OF NEW YORK, Respt.

*New York Court of Appeals—July 15, 1919.*

(227 N. Y. 25, 124 N. E. 141.)

### Landlord and tenant — lowering water level — right to recover.

1. One in possession of land as tenant at will may recover the diminished annual value of the property during his possession, by the wrongful lowering of the level of the water table under the property.

[See note on this question beginning on page 600.]

— tenant at will — cropping by permission.

2. One working his wife's land by her permission and receiving the proceeds thereof is a tenant at will.

[See 16 R. C. L. 611.]

Trespass — diminution of usable value — right of tenant.

3. That a continuing trespass by which the water table under a parcel of land was lowered commenced before a tenant took possession of the property does not prevent his holding the trespasser liable for diminution in the usable value of the property.

[See 16 R. C. L. 676.]

Damages — lowering of water table under real estate — value of crops.

4. Upon the question of diminution of usable value for which a trespasser is answerable to a tenant for lowering the water table under real estate, evidence may be considered as to the value of the crops raised before and after the injury.

[See 8 R. C. L. 482.]

Injunction — excessive prayer for relief — effect.

5. A landowner is not deprived of his right to enjoin a trespasser from lowering the water table under the property, to its injury, by the fact that he joined in the action a prayer for injunction with respect to other lands which he occupied as tenant.

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, reversing in part a judgment of a



Special Term for Queens County (Kapper, J.) in his favor, in an action brought to enjoin the operation by defendant of certain driven wells and pumping stations belonging to its water supply, and for the recovery of damages for injury to plaintiff's land. *Modified and affirmed.*

Statement by Hogan, J.:

The facts found by the trial justice are, in substance:

The plaintiff and one Johanna Baumann are husband and wife. On or about April 14, 1908, the plaintiff, by devise under the will of his father, became the owner of a piece of land of about 10 acres, and his wife, Johanna Baumann, under a devise in the same will, became the owner of a piece of land of about 10 acres adjoining the land of plaintiff on the south, the two pieces of land being separated by a ditch running east and west. Plaintiff has, since April, 1908, occupied the 10-acre parcel belonging to his wife, by her permission, in connection with his own land, for the cultivation of market garden crops, the proceeds whereof have been received and retained by plaintiff with the consent of his wife.

Since 1906, the defendant has maintained two driven-well pumping stations about 1,200 feet distant from the premises of plaintiff, and has used and operated said stations for the purpose of supplying water to the inhabitants of the city for household or other purposes, for a consideration paid by consumers.

The soil of said property of plaintiff and his wife is naturally well supplied with ground water and moisture therefrom, and is very fertile, and is particularly well adapted to the growing of garden vegetables for market. Prior to the construction and operation of said driven-well stations, said property bore abundant crops, and the business of market gardening thereon was profitable.

The operation of the well has abstracted, and does abstract and withdraw, from said property and its soil a large part of the natural underground and percolating waters belonging to the same, and

has lowered and lowers the normal water table thereon from 1 to 5 feet, and has rendered and renders said soil dry and unproductive, and has greatly injured the bearing qualities of 7 acres of said property, 4 acres of which are in the parcel owned by the plaintiff and 3 acres of which are in the parcel owned by plaintiff's wife, and has rendered the business of market gardening on said land much less profitable than before said driven wells were put in operation.

The diminution in the usable value of said lands, caused by the abstraction of the water therefrom and the consequent lowering of the natural underground water table and the interference with capillary moisture has been \$200 per acre for each of said 7 acres of land, for each of the years 1909 to 1915, both inclusive.

During the year 1916 defendant ceased the operation of the pumping stations, by which a large part of the natural moisture was restored to said lands.

As conclusions of law, the trial justice found: (1) Since February, 1906, and September, 1907, the city has been and now is a continuing trespasser. (2) Since April 14, 1908, plaintiff has been a tenant at will of the property belonging to his wife. (3) Plaintiff is not entitled to recover damages to the usable value of any portion of the property belonging to his said wife, and said damages belong to her as the owner of the fee of said land. (4) Awarded judgment to plaintiff for the sum of \$5,600 as plaintiff's past damages to the 4 acres for the years stated, and granted an injunction restraining the operation of the driven-well stations, unless within a reasonable time defendant take proceedings to acquire by the power of eminent domain such property rights of the plaintiff as it may lawfully acquire.

Upon appeal to the appellate division, the third conclusion of law was modified by the appellate division so as to provide that the plaintiff was not entitled to recover in this suit any damages to the land of his wife of which he was tenant at will, and, as thus modified, the judgment was affirmed by a divided court.

The city does not appeal from that part of the judgment allowing plaintiff to recover damages to the 4 acres. Plaintiff appeals from such part of the judgment only as determines that he is not entitled to recover damages to the lands of his wife.

Mr. Charles Coleman Miller, for appellant:

Plaintiff is entitled to the damages to the southerly half of the farm owned by his wife.

*Forbell v. New York*, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731; *Dosoris Pond Co. v. Campbell*, 25 App. Div. 179, 50 N. Y. Supp. 819, affirmed in 164 N. Y. 596, 58 N. E. 1088; *McRoberts v. Bergman*, 182 N. Y. 73, 30 N. E. 261; 2 *McAdam, Land. & T.* 1065; 28 Am. & Eng. Enc. Law, 2d ed. 523.

Plaintiff was entitled to recover damages in this action as matter of law.

*Tiffany, Land. & T.* § 13c, p. 118; *Hayes v. Atlanta*, 1 Ga. App. 25, 57 S. E. 1087; *New York Real Property Law*, § 228.

Messrs. Terence Farley and William E. C. Mayer with Mr. William P. Burr, for respondent:

Plaintiff was not a tenant at will of his wife. He was at most a mere licensee, who was permitted to go upon his wife's land for the purpose of raising crops.

18 R. C. L. 1188; 1 *McAdam, Land. & T.* 4th ed. 145; *Unglish v. Marvin*, 128 N. Y. 380, 28 N. E. 634; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Cook v. Stearns*, 11 Mass. 533, 17 R. C. L. 564; *Roberts v. Lynn Ice Co.* 187 Mass. 402, 73 N. E. 523; 3 *Farnham, Waters*, § 785; *French v. Carhart*, 1 N. Y. 96; *Foster v. South Glens Falls*, 35 Misc. 620, 72 N. Y. Supp. 125, affirmed in 72 App. Div. 629, 76 N. Y. Supp. 1014; 21 Cyc. 1418; *Putnam v.*

*Wise*, 1 Hill, 234, 37 Am. Dec. 309; *Freeman, Cotenancy & Partition*, § 100; 1 *Taylor, Land. & T.* 9th ed. § 24a; 2 *Reeves, Real Prop.* 932.

A lessee of premises located in the vicinity of the pumping stations forming part of the waterworks system of the city of New York, whose lease was executed after the operation of such pumping stations had been commenced, cannot maintain an action against the city to recover damages occurring during the term of the lease because of the withdrawal of surface and subsurface water from the leased premises, incident to the operation of the pumps.

*Sposato v. New York*, 75 App. Div. 304, 78 N. Y. Supp. 168, affirmed in 178 N. Y. 583, 70 N. E. 1109.

The general rule that a lessor cannot maintain trespass while his tenant is in possession does not apply if the tenancy is one at will merely, if the injury is to the reversion, and not a mere disturbance of possession.

28 Am. & Eng. Enc. Law, 2d ed. 575; 2 *Reeves, Real Prop.* 934.

*Hogan, J.*, delivered the opinion of the court:

The land owned by plaintiff's wife was, by permission of the latter, worked by plaintiff in connection with the plot of land owned by him, and he received the entire proceeds of the two pieces of land. The relation between the wife and husband as to the plot of land owned by the wife was

Landlord and tenant—tenant at will—cropping by permission.

that of landlord and tenant, the plaintiff being a tenant at will. *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318. As between a landlord and his tenant, the latter, in the absence of some contractual provision to the contrary, has an exclusive right to the control and possession of the leased premises, and may defend such particular estate until the same has been legally terminated. The tenancy of plaintiff never having been terminated, he was lawfully in possession of the 3-acre plot of land, and entitled to the annual product of the soil in the nature of emblements, and for

any injury inflicted by a wrongdoer —  
 —lowering  
 water level—  
 right to  
 recover.  
 resulting in a dim-  
 inution of his en-  
 joyment of the  
 premises he would

be entitled to redress. On the other hand, if the injury is one of a permanent character to the reversion, such as destruction of standing timber, etc., the right to recover for such wrong is vested in the landlord. Where both landlord and tenant sustain damages by the wrongful act of a third person, the law recognizes the right of each to maintain a separate action against the wrongdoer to redress his individual injury. *Miller v. Edison Electric Illuminating Co.* 184 N. Y. 17, 3 L.R.A.(N.S.) 1060, 76 N. E. 734, 6 Ann. Cas. 146; *Washb. Real Prop.* 3d ed. §§ 254, 255, 1517, 1519; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745.

Counsel for defendant argued that the rule stated is inapplicable to the case at bar for the reason that the tenancy of plaintiff did not commence until April 14, 1908, and, the city having constructed and operated the pumping stations in 1906-1907, the trespass having been committed at that time, the tenant cannot sustain a cause of action therefor. In support of his argument reliance is placed upon the case of *Sposato v. New York*, 75 App. Div. 304, 78 N. Y. Supp. 168, affirmed by this court in 178 N. Y. 583, 70 N. E. 1109.

In the *Sposato* Case, the plaintiff was lessee of land for a term of five years, commencing in 1898. The pumping stations from which the alleged damages resulted were erected in 1885-1894. The order in the *Sposato* Case was made October 10, 1902. On October 7, 1902, we decided the *Bly* Case, sustaining the principle heretofore stated (172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745), and, subsequent to our decision in the *Sposato* Case, 178 N. Y. 583, 70 N. E. 1109, we reiterated the rule of law in the *Miller* Case, 184 N. Y. 17, 3 L.R.A.(N.S.) 1060,

76 N. E. 734, 6 Ann. Cas. 146. A casual reading of the *Sposato* Case might lead to a conclusion that a conflict of decisions existed. Such, however, is not the case. In the *Sposato* Case the plaintiff alleged that the land in its natural condition, and before the time of the acts complained of (1885-1894), was well saturated with water; that by the act of the city two wells had been dried up, and the soil on the land had, by the abstraction of water, become so thoroughly dried up that it is comparatively worthless for the raising of crops, and by reason of such diversion of water the plaintiff, during the three years of his term of five years,—which term had not expired,—was deprived of his rightful use of the premises. The complaint did not allege the injury to or loss of any crops on the land during his possession of the same, and upon the opening of the case at trial term the complaint was dismissed on motion of counsel for the city, who argued in this court that upon the complaint the injuries sought to be recovered for were permanent to the fee, and thereby vested in the landlord.

The complaint in the case at bar, while not as specific in expression as might be desirable, nevertheless alleged injury to the possession of plaintiff, in that it asserts that the soil was, by reason of the abstraction of the water therefrom, made dry, rendering the same less productive and profitable for garden purposes than before the wells were put in operation, which caused a depreciation in the usable value of the premises, and in substance the trial justice so found, and, as a basis for damages, found the diminution in the usable value of the land caused by the abstraction of water therefrom.

My view is that the principle stated in the *Bly* and *Miller* Cases, cited, which are controlling in this case, is not in conflict with the *Sposato* Case.

In *Reisert v. New York*, 174 N.

Y. 196, 66 N. E. 731, the plaintiff, as owner and in possession of some 80 acres of land, sought to recover damages, as he alleged, by reason of the act of the city, through the construction of driven wells, in rendering the soil of his land dry and worthless for cultivation, and a stream on the land valueless for fish and game purposes. Upon the trial of that action, counsel for plaintiff contended that the plaintiff was entitled to recover his profits, as such, which he was able to prove during the six years prior to the commencement of the action, basing his argument upon the decision of this court in *Forbell v. New York*, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, which action was one by a lessee of land. An examination of that decision does not justify the argument made by counsel, as was determined by us when the case reached this court, though counsel made the same argument here. In the *Reisert Case*, counsel for the city argued that the plaintiff's recovery was limited to the loss in rental value which might be proved as resulting from the trespass, and the main question treated by us was the correct measure of damages. The judgment below was reversed for errors on the trial, and we held that evidence of the rental or usable value of the premises was competent; that if the land was commonly rented, the ordinary rentals received for the same would be admissible, as well as testimony tending to show the nature of the soil, the character and extent of the use made of the lands, the nature of the business conducted thereon when in their normal or usual condition as to surface or subterranean waters, and when deprived thereof, and was competent as proving or tending to prove usable value, and from such facts the court or a jury would be enabled to determine whether and to what extent the rental or usable value of the land as affected by the

diversion of the water had been substantially injured.

We also held that in such a case profits, as such, were not recoverable; that a plaintiff suffering from a tort or trespass of another is bound, so far as he reasonably can, to reduce his damages, and that the plaintiff would not be justified in efforts year after year to raise crops upon this damaged land, or portion thereof, if experience had demonstrated that they would not mature and produce a marketable or profitable article.

In the present case the courts below held that the trespass was a continuing trespass; that by reason thereof the bearing qualities of the land had been affected, and the usable value of the 7 acres, 4 acres of which were owned by plaintiff and 3 acres of which he occupied as tenant, by reason of the trespass, had been diminished \$200 per acre for each of the years 1909 to 1915, both inclusive, but the damages awarded were limited for diminution in usable value to the 4-acre plot.

To deny the plaintiff damages to the usable value of the 3-acre plot of land was error.

The defendant was a trespasser, and as such invaded the

Trespass—  
diminution of  
usable value—  
right of tenant.

possessory rights of the plaintiff and materially diminished the value of the use of the premises for the purposes for which the same were adapted and had been used. For damage sustained to such usable value the plaintiff was entitled to redress. *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731.

I do not deem it necessary to refer at length to the evidence adduced on the trial. My conclusion is that the evidence was ample to sustain the finding of the courts below that the diminution in the usable value of the premises was \$200 per year.

The plaintiff produced evidence tending to show the nature of the soil of the land, the character and extent of the use made of the same,

and the nature of the business conducted prior to, during, and subsequent to the commission of the trespass by the city, the extent of the crops raised, the prices received for the same in the market, and the expenses incident to the cultivation and marketing of the same. While evidence of the amounts realized from the crops before and after the trespass was admitted, the record does not justify a presumption that such amount was adopted as a basis of damages by the trial justice. The evidence

**Damages—**  
lowering of  
water table  
under real  
estate—value  
of crops.

was proper for consideration by him upon the question of usable value and as to whether or not the plain-

tiff had exercised proper judgment as a reasonable man in the management of the 7 acres, in view of the changed conditions produced by defendant's trespass.

Neither is it material that plaintiff sought injunctive relief as to the 7 acres. He was granted such relief so far as the 4-acre plot was concerned.

**Injunction—**  
excessive  
prayer for  
relief—effect.

The judgment should be modified so as to provide that plaintiff recover of defendant the sum of \$9,800, instead of \$5,600, and, as thus modified, affirmed, with costs.

**Hiscock, Ch. J., and Chase, Collin, Cuddeback, McLaughlin, and Crame, JJ., concur.**

## ANNOTATION.

### Right of tenant to recover damages from third person for injury to premises.

- I. Introductory, 600.
- II. General rule, 600.
- III. Application of rule:
  - a. Generally, 602.
  - b. Particular injuries:
    1. Injury to crops or grass, 605.
    2. Injury to trees, 608.

#### I. Introductory.

This note treats only of the rights of a tenant, as such, to recover damages from a third person for injuries to the leased premises. It excludes a treatment of those cases wherein merely the form of action is considered, aside from the right of the tenant, as such, to sue. It also excludes the right of a tenant to compensation for injuries to his estate in condemnation proceedings. So, damages suffered by a tenant by reason of the impairment or destruction of easements appurtenant to the leased property are beyond the scope of this discussion, as is a tenant's remedy by injunction for the protection of his rights in the leased premises.

#### II. General rule.

It is a general rule of the common law that, for any injury to leased

#### III. b.—continued.

3. Injury to structure, 609.
4. Nuisance, 611.
- IV. Effect of agreement between landlord and third person, 612.
- V. Nuisance existing at time of execution or renewal of lease, 614.
- VI. Injury to reversion, 620.
- VII. Tenant not in possession, 630.

premises in the possession of a tenant, there accrues to the tenant a right of action against the wrongdoer on account of the interruption of the enjoyment of his estate and the lessening of the value of the use for the term.

**United States.** — *California Dry Dock Co. v. Armstrong* (1883) 8 Sawy. 523, 17 Fed. 216.

**Alabama.** — *Crommelin v. Cox* (1857) 30 Ala. 318, 68 Am. Dec. 120; *C. W. Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 880, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858.

**Arkansas.** — *St. Louis, A. & T. R. Co. v. Graham* (1892) 55 Ark. 294, 18 S. W. 56; *St. Louis, I. M. & S. R. Co. v. Hall* (1903) 71 Ark. 302, 74 S. W. 293; *Clark v. St. Louis, S. F. & N. O. R. Co.* (1906) 79 Ark. 629, 94 S. W. 930; *McLaughlin v. Hope* (1913) 107 Ark. 442, 47 L.R.A.(N.S.) 137, 155 S. W. 910.

**California.** — *Heilbron v. Kings Riv-*

er & F. Canal Co. (1888) 76 Cal. 11, 17 Pac. 933; Sacchi v. Bayside Lumber Co. (1910) 13 Cal. App. 72, 108 Pac. 885; Stapp v. Madera Canal & Irrig. Co. (1917) 34 Cal. App. 41, 166 Pac. 823.

Georgia.—Central R. Co. v. English (1884) 78 Ga. 366; Bentley v. Atlanta (1893) 92 Ga. 623, 18 S. E. 1013; Pause v. Atlanta (1896) 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; Bass v. West (1900) 110 Ga. 698, 36 S. E. 244; Darnell v. Columbus Show-Case Co. (1907) 129 Ga. 62, 13 L.R.A.(N.S.) 333, 121 Am. St. Rep. 206, 58 S. E. 631; Daniels v. Perkins Logging Co. (1911) 9 Ga. App. 842, 72 S. E. 438; Beasley v. Central of Georgia R. Co. (1916) 17 Ga. App. 615, 87 S. E. 907.

Illinois.—McConnel v. Kibbe (1864) 33 Ill. 175, 85 Am. Dec. 265; St. Louis, A. & T. H. R. Co. v. Brown (1890) 34 Ill. App. 552; Indiana, I. & I. R. Co. v. Patchette (1894) 59 Ill. App. 251; Schwartz v. McQuaid (1905) 214 Ill. 357, 105 Am. St. Rep. 112, 78 N. E. 582; Funston v. Hoffman (1908) 232 Ill. 360, 83 N. E. 917; Ringering v. Cleveland, C. C. & St. L. R. Co. (1911) 161 Ill. App. 43; Renner v. St. Louis, I. M. & S. R. Co. (1915) 197 Ill. App. 11.

Indiana.—Lathrop v. Rogers (1849) 1 Ind. 554; Burbridge v. New Albany & S. R. Co. (1857) 9 Ind. 546; Chicago & W. M. R. Co. v. Linard (1883) 94 Ind. 319, 48 Am. Rep. 155; Salimonia Min. & Gas Co. v. Wagner (1891) 2 Ind. App. 81, 28 N. E. 158; Payne v. Moore (1903) 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

Iowa.—Foster v. Elliott (1871) 33 Iowa, 216.

Kansas.—Shomon v. Spring River Power Co. (1908) 78 Kan. 779, 99 Pac. 235.

Kentucky.—Fischer-Leaf Co. v. Caldwell (1894) 15 Ky. L. Rep. 542; Breyfogle v. Wood (1894) 15 Ky. L. Rep. 782; Louisville & N. R. Co. v. Moore (1907) 31 Ky. L. Rep. 141, 10 L.R.A.(N.S.) 579, 101 S. W. 934.

Maine.—Little v. Paliester (1824) 3 Me. 6; Hayward v. Sedgley (1837) 14 Me. 439, 31 Am. Dec. 64.

Maryland.—Zimmerman v. Shreeve (1882) 59 Md. 357; Baltimore & S. P. R. Co. v. Hackett (1898) 87 Md. 224,

39 Atl. 510; Green v. Shoemaker (1909) 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688.

Massachusetts.—Ashley v. Ashley (1855) 4 Gray, 197; Sherman v. Fall River Iron Works Co. (1861) 2 Allen, 524, 79 Am. Dec. 799; Howe v. Ray (1867) 110 Mass. 298; Darling v. Kelly (1878) 113 Mass. 29; Richards v. Gauffret (1888) 145 Mass. 486, 14 N. E. 535; Rockwood v. Robinson (1893) 159 Mass. 406, 84 N. E. 521; Anthony v. New York, P. & B. R. Co. (1894) 162 Mass. 60, 37 N. E. 780; Moeckel v. C. A. Cross & Co. (1906) 190 Mass. 280, 76 N. E. 447, 19 Am. Neg. Rep. 294.

Michigan.—Grand Rapids Booming Co. v. Jarvis (1874) 30 Mich. 308.

Mississippi.—Crowell v. New Orleans & N. E. R. Co. (1884) 61 Miss. 631.

Missouri.—Burt v. Warne (1860) 31 Mo. 296; McKee v. St. Louis, K. & N. W. R. Co. (1892) 49 Mo. App. 174.

New Hampshire.—George v. Fisk (1855) 32 N. H. 32; Albin v. Lord (1859) 39 N. H. 196; Wood v. Griffin (1865) 46 N. H. 231; Beach v. Morgan (1894) 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; Evans v. Watkins (1912) 76 N. H. 438, 41 L.R.A.(N.S.) 404, 83 Atl. 915.

New Jersey.—Halsey v. Lehigh Valley R. Co. (1883) 45 N. J. L. 26.

New York.—Cook v. Champlain Transp. Co. (1845) 1 Denio, 91; Cornes v. Harris (1848) 1 N. Y. 223; Gourdiere v. Cormack (1853) 2 E. D. Smith, 200; Hardrop v. Gallagher (1854) 2 E. D. Smith, 523; Ulrich v. McCabe (1856) 1 Hilt. 251; Austin v. Hudson River R. Co. (1862) 25 N. Y. 334; Beir v. Cooke (1885) 37 Hun, 38; Lewis v. Thompson (1896) 3 App. Div. 329, 38 N. Y. Supp. 316; Le Salg v. Dougherty (1900) 30 Misc. 455, 62 N. Y. Supp. 510; Bly v. Edison Electric Illuminating Co. (1902) 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745; Dumois v. New York (1902) 37 Misc. 614, 76 N. Y. Supp. 161; Hoffman v. Edison Electric Illuminating Co. (1903) 87 App. Div. 371, 84 N. Y. Supp. 437; Dix v. Jaquay (1904) 94 App. Div. 554, 88 N. Y. Supp. 228; Pritchard v. Edison Electric Illuminating Co. (1904) 179

N. Y. 364, 72 N. E. 243; *McPhillips v. Fitzgerald* (1904) 177 N. Y. 543, 69 N. E. 1126; *Daly v. Margolies* (1918) 169 N. Y. Supp. 448. And see the reported case (*BAUMANN v. NEW YORK*, ante, 595).

**North Carolina.**—*Bridgers v. Dill* (1887) 97 N. C. 222, 1 S. E. 767; *Dale v. Southern R. Co.* (1903) 132 N. C. 705, 44 S. E. 399.

**Oregon.**—*Townley v. Oregon R. Co.* (1898) 83 Or. 323, 54 Pac. 150.

**Pennsylvania.**—*Brown v. Powell* (1855) 25 Pa. 229.

**South Carolina.**—*Perry v. Jefferies* (1901) 61 S. C. 292, 39 S. E. 515; *Contos v. Jamison* (1908) 81 S. C. 488, 19 L.R.A.(N.S.) 498, 62 S. E. 867. And see *Childers v. Verner* (1878) 12 S. C. 1.

**Tennessee.**—*Garland v. Aurin* (*Carland v. Aurin*) (1899) 103 Tenn. 555, 48 L.R.A. 860, 76 Am. St. Rep. 699, 53 S. W. 940. See also *Nashville, C. & St. L. R. Co. v. Heikens* (1903) 112 Tenn. 378, 65 L.R.A. 298, 79 S. W. 1038.

**Texas.**—*Texas & P. R. Co. v. Bayliss* (1884) 62 Tex. 570; *Lockett v. Ft. Worth & R. G. R. Co.* (1890) 78 Tex. 211, 14 S. W. 564; *Gulf, C. & S. F. R. Co. v. Jones* (1885) 3 Tex. App. Civ. Cas. (Willson) 33; *Texas & P. R. Co. v. Torrey* (1891) 4 Tex. App. Civ. Cas. (Willson) 445, 16 S. W. 547; *Creswell Ranch & Cattle Co. v. Scoggins* (1897) 15 Tex. Civ. App. 373, 39 S. W. 612; *Parker v. Hale* (1903) — Tex. Civ. App. —, 78 S. W. 555. See also *Gulf, C. & S. F. R. Co. v. Smith* (1893) 3 Tex. Civ. App. 483, 23 S. W. 89.

**Vermont.**—*Weston v. Gravlin* (1877) 49 Vt. 507; *Guild v. Prentis* (1909) 83 Vt. 212, 74 Atl. 1115, Ann. Cas. 1912A, 313.

**Washington.**—*Froelich v. Morse* (1896) 15 Wash. 636, 47 Pac. 22; *Farnandis v. Great Northern R. Co.* (1906) 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18.

**Wisconsin.**—*Ganter v. Atkinson* (1874) 35 Wis. 48, 9 Mor. Min. Rep. 13.

**Wyoming.**—*Painter v. Stahley Bros.* (1907) 15 Wyo. 510, 90 Pac. 375.

**England.**—*Attersoll v. Stevens* (1808) 1 Taunt. 183, 127 Eng. Reprint, 302, 9 Revised Rep. 731, 10 Mor. Min.

Rep. 67; *West v. Treude* (1680) Cro. Car. 187, 79 Eng. Reprint, 764.

**Canada.**—*Fisher v. Grace* (1868) 27 U. C. Q. B. 158; *Ellice Twp. v. Hiles* (1894) 23 Can. S. C. 429; *McCann v. Chisholm* (1883) 2 Ont. Rep. 506.

In the case of a tenant, whether for life or for years, he may sue and recover for the injury to his possession and right of enjoyment. *Zimmerman v. Shreeve* (Md.) supra.

"The general rule of the common law is that, when real property is permanently injured, the tenant in possession, for life or a term of years, and the reversioner, each has a cause of action, to recover damages according to the extent of the injury to the estates of each." *Anthony v. New York, P. & B. R. Co.* (1894) 162 Mass. 60, 37 N. E. 780.

"One who is in exclusive possession of real estate as tenant under a lease is, during the continuance of his tenancy, to all intents and purposes the owner, and may maintain an action against a wrongdoer, which cannot be defeated by showing the title to be in someone other than the plaintiff. A tenant in possession is deemed the owner in law." *State v. Burns* (1890) 123 Ind. 427, 24 N. E. 154.

### III. Application of rule.

#### a. Generally.

Where the plaintiff and the defendant were tenants of adjoining lots owned by a common landlord, and the defendant piled boards on his premises in such a way as to cause rain-water to be thrown through the window of the plaintiff's bedroom, wetting his floor and furnishings and rendering his house unhealthy for use as a dwelling, it was held that there was a physical invasion and interference with the plaintiff's possession, for which he could recover damages from the adjoining tenant. *Darnell v. Columbus Show-Case Co.* (1907) 129 Ga. 62, 13 L.R.A.(N.S.) 333, 121 Am. St. Rep. 206, 58 S. E. 631.

Similarly, it has been held that a tenant might recover for injuries done to the leased premises, during the course of excavations preliminary to building on adjacent property, where

it appeared that the defendant in his operations dug up the walks and gravel on the demised premises, and deprived the plaintiff of the use and occupation of the yard. *Daly v. Margolies* (1918) 169 N. Y. Supp. 448.

So, a tenant for years may recover for injuries he has suffered because of the diversion of a stream from the demised premises by upper riparian owners, the diversion interfering with the possession and use of the leased property. *Heilbron v. Kings River & F. Canal Co.* (1888) 76 Cal. 11, 17 Pac. 938.

Where a railroad company put a pipe or culvert under its roadbed by which it diverted the water from its natural flow upon leased premises, the right of action for damages to the land, sustained on this account, was held to be in the tenant at will or by sufferance, in possession of the land, and not in the owner. *Louisville & N. R. Co. v. Moore* (1907) 31 Ky. L. Rep. 141, 10 L.R.A.(N.S.) 579, 101 S. W. 934.

Where a railroad company put a pipe or culvert under its roadbed, by which it diverted the water from its natural flow upon leased premises, the right of action for damages to the land, sustained on this account, was held to be in the tenant at will or by sufferance, in possession of the land, and not in the owner. *Louisville & N. R. Co. v. Moore* (1907) 31 Ky. L. Rep. 141, 10 L.R.A.(N.S.) 579, 101 S. W. 934.

A tenant of mining lands may maintain an action against a water power company for damming up a stream and causing the tenant's mine to be flooded. *Shomon v. Spring River Power Co.* (1908) 78 Kan. 779, 99 Pac. 235.

In *Green v. Shoemaker* (1909) 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688, a tenant of rooms in a dwelling house was allowed to recover for the damage to her property and the interference with her enjoyment of the premises, resulting from the defendant's blasting operations near by, causing concussions which jarred the premises and hurled rocks through the roof and windows of the house.

A lessee of mining property has been held to have a right of action

against a subsequent lessee of the same property, who, with knowledge of the former existing lease, entered the premises, worked the mine, and removed some of the minerals therefrom. *Breyfogle v. Wood* (1894) 15 Ky. L. Rep. 782.

In *Sherman v. Fall River Iron Works Co.* (1861) 2 Allen (Mass.) 524, 79 Am. Dec. 799, a lessee of a livery stable was allowed to recover damages resulting from the maintenance of leaky gas pipes in near-by streets, from which gas escaped through the ground into a well located on the leased premises, poisoning the water therein.

A complaint asking for damages done to realty by the overflowing of the lands should be sustained, although the complaint alleges that the complainant holds the lands only as a life tenant. *Howe v. Ray* (1872) 110 Mass. 298.

It was held in *Burt v. Warne* (1860) 31 Mo. 296, that a sublessee of the tenant of the owner of premises could recover for damages done by a third person to the premises after the owner had recognized the sublessee as his tenant.

In *Beach v. Morgan* (1894) 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349, a lessee of riparian lands was held to have sufficient title to maintain an action of trespass against persons going on the leased premises and fishing without license.

A petition which alleges that the defendant, with force and arms, entered and took possession of lands held by the plaintiff under a lease, and allowed defendant's cows to pasture thereon, excluding the plaintiff therefrom, states a good cause of action. *Creswell Ranch & Cattle Co. v. Scoggins* (1896) 15 Tex. Civ. App. 373, 39 S. W. 612.

In *Halsey v. Lehigh Valley R. Co.* (1883) 45 N. J. L. 26, it was held that a tenant of a mill located on a stream could recover, in an action for damages, the diminution in the value of the use of the property during the existence of the lease, caused by the diversion of water into a canal by an upper riparian owner.



Where the agent of a turnpike company enters demised premises and begins the construction of a road thereon, without complying with the mode of procedure provided by the statute, he is a trespasser, and the tenant in possession may recover for injuries he sustains on account of the trespass. *Brown v. Powell* (1855) 25 Pa. 229.

In *Ganter v. Atkinson* (1874) 35 Wis. 48, 9 Mor. Min. Rep. 13, it was held that lessees of a mine had sufficient interest in the land to maintain an action of trespass to recover damage sustained by reason of the defendant entering on the property and digging and removing ore therefrom.

It has been held that, where a tenant has set up a mill on the banks of a stream under a lease, with the right to use the water thereof in the operation of his mill, and the site has been rendered worthless, and its value, for which the land was leased, destroyed, by the draining of the sewage of a city into the branch, he has a sufficient title to maintain an action for damages for the injuries to his leasehold interest. *McLaughlin v. Hope* (1913) 107 Ark. 442, 47 L.R.A. (N.S.) 137, 155 S. W. 910.

In *Burbridge v. New Albany & S. R. Co.* (1857) 9 Ind. 546, the plaintiff, a tenant for years, claimed damages to his term, arising from the construction of a railroad through the demised premises. In showing his interest in the land, the plaintiff set forth a lease in which the lessor reserved the right to recover for all damages to the land as the result of the construction of the road, the premises being leased subject to the right of way of such railroads as might be constructed through them. While it was admitted by the court that a tenant may recover the damage to his term, yet, since the interest of the tenant depended on the construction of the lease, he had no right to recover for such damages by virtue of his term for years.

Under a statute (North Carolina Pub. Acts 1895, chap. 224, p. 297) which provides that, in actions for trespass on realty, "the jury shall assess the entire amount of damages

which the party aggrieved is entitled to recover by reason of the trespass upon his property," it has been held that a tenant may maintain an action against a railroad company for injuries to the land demised, rendering it less productive during his term, by obstructing a natural watercourse running through the premises. *Dale v. Southern R. Co.* (1903) 132 N. C. 705, 44 S. E. 399.

It has been held that the owner of the reversion, occupying premises as a tenant at will of the life tenant, may maintain an action for damages against an adjoining landowner who throws up an embankment which obstructs the natural flow of water, and thereby injures the land so occupied. *Ashley v. Ashley* (1855) 4 Gray (Mass.) 197.

In *Reynolds v. Egan* (1909) 123 La. 294, 43 So. 940, it was held that a statute (Civ. Code, art. 2703) gives to the lessee a right of action against third persons for the wrongful disturbance of his possession of leased premises.

Under a lease by which the owner of a mill pond "leased, demised, and let" to the plaintiff, for the term of one year, "the sole and exclusive right to cut and carry away from the Falls pond, so called, . . . all such ice as can be so cut in form and shape to use either for private use or as merchandise," and which provided that the "lessor may cut all ice needed for his own use from and off said pond," the lessee has a sufficient interest in the premises to maintain an action, as stated in the complaint, for "breaking and entering the plaintiff's close . . . and cutting and carrying away . . . ice, the property of the plaintiff." *Richards v. Gauffret* (1888) 145 Mass. 486, 14 N. E. 535.

A tenant is as much entitled to recover the flowage damage done to his land during his tenancy as though he were a freeholder. *Ellice Twp. v. Hiles* (1894) 23 Can. S. C. 429.

A tenant may recover for injuries by a third person to a cesspool located on the leased premises. *Stapp v. Madera Canal & Irrig. Co.* (1917) 34 Cal. App. 41, 166 Pac. 823.

It has been held that although a

lease is not recorded as required by statute, yet if a tenant is in possession, he has such an interest in the land, as against a stranger, as will entitle him to maintain an action of trespass for entering and fishing on the premises without permission from the lessee. *Beach v. Morgan* (1894) 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349.

So, in *Dumois v. New York* (1902) 37 Misc. 614, 76 N. Y. Supp. 161, it was held that in an action by a lessee in possession to recover for injuries to the use of leased premises, it is no defense that the lease had not been recorded. Possession by the lessee is enough to put the defendant on notice, and the lessee's interest in the property may, for this purpose, be proved by parol.

#### *b. Particular injuries.*

##### *1. Injury to crops or grass.*

Where a tenant's crops or grass growing on the demised premises are injured or destroyed through the negligence or wrongful act of another, the tenant may recover damages he suffers on that account.

**Arkansas.**—*St. Louis, A. & T. R. Co. v. Graham* (1892) 55 Ark. 294, 18 S. W. 56; *St. Louis, I. M. & S. R. Co. v. Hall* (1903) 71 Ark. 302, 74 S. W. 293; *Clark v. St. Louis, S. F. & N. O. R. Co.* (1906) 79 Ark. 629, 94 S. W. 930.

**Georgia.**—*Central R. Co. v. English* (1884) 73 Ga. 366.

**Illinois.**—*St. Louis, A. & T. H. R. Co. v. Brown* (1890) 34 Ill. App. 552; *Indiana, I. & I. R. Co. v. Patchette* (1894) 59 Ill. App. 251; *Ringer v. Cleveland, C. C. & St. L. R. Co.* (1911) 161 Ill. App. 43.

**Indiana.**—*Lathrop v. Rogers* (1849) 1 Ind. 554; *Chicago & W. M. R. Co. v. Linard* (1883) 94 Ind. 319, 48 Am. Rep. 155; *Salimonia Min. & Gas Co. v. Wagner* (1891) 2 Ind. App. 81, 23 N. E. 158.

**Maine.**—*Little v. Palister* (1824) 3 Me. 6.

**Maryland.**—*Baltimore & S. P. R. Co. v. Hackett* (1898) 87 Md. 224, 39 Atl. 510.

**Massachusetts.**—*Darling v. Kelly* (1873) 113 Mass. 29.

**Michigan.**—*Grand Rapids Booming Co. v. Jarvis* ((1874) 30 Mich. 808.

**Mississippi.**—*Crowell v. New Orleans & N. E. R. Co.* (1884) 61 Miss. 681.

**Missouri.**—*McKee v. St. Louis, K. & N. W. R. Co.* (1892) 49 Mo. App. 174.

**New Hampshire.**—*Evans v. Watkins* (1912) 76 N. H. 433, 41 L.R.A. (N.S.) 404, 83 Atl. 915.

**North Carolina.**—*Bridgers v. Dill* (1887) 97 N. C. 222, 1 S. E. 767; *Dale v. Southern R. Co.* (1903) 182 N. C. 705, 44 S. E. 399.

**Oregon.**—*Townley v. Oregon R. Co.* (1898) 83 Or. 323, 54 Pac. 150.

**South Carolina.**—*Childers v. Verner* (1878) 12 S. C. 1.

**Texas.**—*Texas & P. R. Co. v. Bayliss* (1884) 62 Tex. 570; *Gulf, C. & S. F. R. Co. v. Jones* (1885) 3 Tex. App. Civ. Cas. (Willson) 33; *Texas & P. R. Co. v. Torrey* (1891) 4 Tex. App. Civ. Cas. (Willson) 256, 16 S. W. 547; *Parker v. Hale* (1903) — Tex. Civ. App. —, 78 S. W. 555.

**Wyoming.**—*Painter v. Stahley Bros.* (1907) 15 Wyo. 510, 90 Pac. 375.

It was said in *Indiana, I. & I. R. Co. v. Patchette* (1894) 59 Ill. App. 251: "Wherever the owner of land may bring his suit for damages to it and to the crops growing thereon, caused by the wrongful act of another, we take it to be well established that a tenant may sue for the damages caused to his tenancy by a similar wrongful act."

"For an injury to crops grown or growing on demised premises, the right of action is in the tenant alone." *Frink v. Pratt* (1889) 130 Ill. 327, 22 N. E. 819.

It was stated in *Reynolds v. Williams* (1846) 1 Tex. 311, that "the tenant being in the possession, the right of action is in him for any trespass committed on the premises."

It was said in *Gulf, C. & S. F. R. Co. v. Smith* (1898) 3 Tex. Civ. App. 433, 23 S. W. 89, that the lessor has no property in the grass pending the lease, but grass and crops growing on leased premises are the property of the lessee, and he alone can sue for their destruction.

Thus, where a railroad company so constructed an embankment as to

cause an increased overflow of water on plaintiff lessee's land, destroying his crops growing thereon, the right of action against the railroad company for such injury was held to be exclusively in the tenant. *Ringer v. Cleveland, C. C. & St. L. R. Co.* (1911) 161 Ill. App. 43. The court, in sustaining the right of the tenant to recover, said: "We are of opinion that by the weight of authority there is no right of action in the landlord to recover against appellant, but that such right is in the tenant exclusively. It is only where some injury results from the tort to the reversion that the landlord may recover damages. It must be an injury to the reversion of such permanent character that it would lessen the value of the property on the expiration of the tenancy. *Dicey, Parties*, \* 340. The landlord has no title to the crops. He is not a tenant in common. The ownership is in the tenant, subject to the lien of the landlord given by statute. This lien invests him with no title, either general or special, and for any injury to the crops grown or growing the right of action is in the tenant alone."

In *Grand Rapids Booming Co. v. Jarvis* (1874) 30 Mich. 308, a lessee for a term of years brought an action against a booming company for damages caused by obstructing a river by the congestion of logs, and flooding the leased premises, and destroying the crops. In holding that the plaintiff might recover, the court said: "Though in speaking of the rights of riparian owners, we have said nothing of terms for years or other terms in the land, it is hardly necessary to say that, so far as regards any injury to the use of the land during the term, no distinction exists between them and the ownership of the fee. A term for years is as clearly property as ownership in fee, and just as much entitled to the protection of the law."

A tenant may recover damage done to his crops, even against a grantee of the landlord. *Chicago & W. M. R. Co. v. Linard* (1883) 94 Ind. 319, 48 Am. Rep. 155.

It has been held that a tenant from year to year could recover damages

suffered from "killing the crop and destroying the productive nature and capacity of the soil for the growing of the crops," resulting from the overflow caused by the negligent construction of an embankment by a railroad company. *Indiana, I. & I. R. Co. v. Patchette* (Ill.) *supra*.

In *St. Louis, A. & T. R. Co. v. Graham* (1892) 55 Ark. 294, 18 S. W. 56, it was held that a life tenant could recover for destruction of his crops, and injuries proved to be done to his life interest in the land, by an overflow of the land, resulting from the negligent construction of an embankment on defendant's roadbed.

Where crops are destroyed by an overflow caused by the unskillful construction of a railroad across a creek, the tenant on the land may recover against the railroad company, especially where it appears that the landlord has assigned to the tenant all his interest in the claim for damages. *Gulf, C. & S. F. R. Co. v. Jones* (1885) 3 Tex. App. Civ. Cas. (Willson) 33.

When several annual overflows of premises occupied by a tenant each resulted in injury to his crops, it was held that the tenant might sue for the injury occasioned by each overflow, though resulting from the same obstruction or diversion of waters; and that a former recovery was no bar to an action for damages arising subsequently to the former suit. *McKee v. St. Louis, K. & N. W. R. Co.* (1892) 49 Mo. App. 174.

It has been held that a tenant at will can maintain an action of trespass against one who, before the determination of the tenancy, unlawfully enters and cuts grass growing on the premises. *Evans v. Watkins* (1912) 76 N. H. 433, 41 L.R.A. (N.S.) 404, 83 Atl. 915.

A complaint which alleges that the defendant entered the premises rented to the plaintiff, and gathered and hauled away certain quantities of the crop, has been held to be good on demurrer. *Childers v. Verner* (1878) 12 S. C. 1.

In *Salimonie Min. & Gas Co. v. Wagner* (1891) 2 Ind. App. 81, 28 N. E. 158, the plaintiff lessee was held to have

sufficient title to maintain an action of trespass to recover damages for the wrongful entry and taking of potatoes growing on the demised premises, by one who had purchased the land from the lessee.

In *St. Louis, I. M. & S. R. Co. v. Hall* (1903) 71 Ark. 302, 74 S. W. 293, wherein it appeared that growing grass was burned by the negligence of the defendant railroad company, a tenant at will of the premises was allowed to recover for the injury.

A railroad company has been held answerable in damages to a tenant where its contractors negligently tore down fences and cattle guards on the leased premises, allowing cattle to enter and destroy the tenant's growing crops. *Clark v. St. Louis, S. F. & N. O. R. Co.* (1906) 79 Ark. 629, 94 S. W. 930.

An action for damages for the destruction of crops by a stranger on demised premises may be maintained by the lessee alone, without the joinder of the lessor, since the lessee is the "real party in interest," under § 177, North Carolina Code, although § 1754 provides that the crops shall be deemed vested in the landlord, the latter section being merely for the landlord's security. *Bridgers v. Dill* (1887) 97 N. C. 222, 1 S. E. 767. To the same effect, see *Dale v. Southern R. Co.* (1903) 132 N. C. 705, 44 S. E. 399.

In *Crowell v. New Orleans & N. E. R. Co.* (1884) 61 Miss. 631, it was held that a tenant could recover damages of a railroad company for entering on the leased premises for the purpose of constructing its railroad, tearing down a fence, and destroying crops.

So, in *Texas & P. R. Co. v. Bayliss* (1884) 62 Tex. 570, it appeared that the plaintiff had leased certain premises for which he was to pay to the owner, in lieu of rent, one third of the corn raised on the land. The defendant railroad company negligently failed to provide cattle guards along the tracks, whereby cattle were allowed to come on the leased premises and destroy the crops growing thereon. The lessee was held entitled to

recover for the value of the crops so destroyed.

A tenant has also been allowed to recover damage for the destruction of his growing crops by hogs, turned in on the premises by one who purchased the premises from the landlord during the pendency of the lease. *Lathrop v. Rogers* (1849) 1 Ind. 554.

Where a railroad company constructed a railroad over land occupied by the plaintiff, as tenant, and, by reason of the failure of the railroad company to provide sufficient gutters and drains for the natural drainage of the land adjacent to the railroad, the premises were flooded, and the crops of the tenant destroyed, the tenant was held to be entitled to recover from the railroad company. *Baltimore & S. P. R. Co. v. Hackett* (1898) 87 Md. 224, 39 Atl. 510.

In an action for damages sustained by breaking and entering a close and harvesting and taking away the crops growing thereon, plaintiff working the crops with the landlord "on halves," the following instructions were held to be correct: That if the jury found that the close was let to the plaintiff, and that he was the owner of one half of the crops when the defendant entered and took them away, the plaintiff was entitled to a verdict for the value of one half so taken, no damage being claimed for injury to the close. *Darling v. Kelly* (1873) 113 Mass. 29.

It has been held that an assignee of a lease, in possession of the leased premises, may maintain an action for damages done by negligently burning the grass and growing crops. *Townley v. Oregon R. Co.* (1898) 33 Or. 323, 54 Pac. 150.

Even where the lessor, after the demise, sells leased premises to a railroad company, if the purchaser enters the premises and destroys the crops of the tenant the tenant may recover from the railroad company for the damage. *Chicago & W. M. R. Co. v. Linard* (1883) 94 Ind. 319, 48 Am. Rep. 155.

It has been held that a lessee of pasture lands can recover damage from one who unlawfully herded his sheep on the demised premises, destroying

the grass and rendering the land of no value to the plaintiff during the term of his lease for grazing purposes. The only damage sought to be recovered was that suffered by the plaintiff as tenant for the term of the lease, in relation to his right to the use and benefit of the pasturage. *Painter v. Stahley Bros.* (1907) 15 Wyo. 510, 90 Pac. 375.

A tenant on shares has sufficient interest in growing crops to maintain an action for damages to the crops resulting from a wrongful levy thereon, although the landlord has a lien for a share of the crops and for supplies he has furnished the tenant. *Parker v. Hale* (1903) — Tex. Civ. App. —, 78 S. W. 555.

## 2. Injury to trees.

The right of a tenant to recover damages for the cutting of trees growing on the leased premises has been recognized in several cases. *Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Hayward v. Sedgley* (1837) 14 Me. 439, 31 Am. Dec. 64; *Zimmerman v. Shreeve* (1882) 59 Md. 357; *Albin v. Lord* (1859) 39 N. H. 196; *Wood v. Griffin* (1865) 46 N. H. 231; *Lewis v. Thompson* (1896) 3 App. Div. 329, 38 N. Y. Supp. 316; *Perry v. Jefferies* (1901) 61 S. C. 292, 39 S. E. 515.

In *Hayward v. Sedgley* (1837) 14 Me. 439, 31 Am. Dec. 64, it was decided that a tenant at will, in possession, might maintain an action of trespass against a stranger for wrongfully cutting and carrying off trees growing on the leased premises. The court said: "The objection in this case is that the injury is to the freehold, and that the owner only can maintain the action for such an injury. But the cases cited and relied upon tend only to show that the owner may have his action for his injury, although there be a tenant in possession; not that the tenant may not also have his action for his injury. The case in *Y. B. 19 Hen. VI. 45*, decides that a tenant at will may have an action for injury to the soil, and the landlord also for his injury. The same rule applies to the cutting of trees.

If trees are cut upon the land of a tenant at will, he may have an action of trespass. *Rolle, Abr. Trespass*, note 4; *Comyns's Dig. Trespass*, B. 2. The principle is quite explicitly stated in note 2, 1 Co. Litt. 57a: 'If a stranger cuts trees, the tenant at will shall have an action; as shall also the lessor, regard being had to their several losses.'

In *Perry v. Jefferies* (S. C.) *supra*, it was held that a tenant in possession of lands, under a deed which gave her at least a life estate, could maintain an action for damages caused by cutting down and carrying away growing timber from the premises.

It has been held that the purchaser of timber, growing on lands in possession of a tenant, is liable to the tenant for entering and cutting down the trees, but, if no actual injury was done to the soil or the tenant's possession, only nominal damages can be recovered. *Zimmerman Mfg. Co. v. Daffin* (Ala.) *supra*.

A tenant, though the lease is by parol and the nature of the tenancy and its terms are unknown, can recover damages for picking and carrying away cranberries from the premises, and also nominal damages for cutting and carrying away timber growing thereon. *Albin v. Lord* (1859) 39 N. H. 196.

In *Wood v. Griffin* (1865) 46 N. H. 231, it was held that a tenant might recover for damages by cutting trees on the premises, although, if the damage was to the inheritance only and none shown to be to the possession, the damages should be nominal.

In *Guild v. Prentis* (1909) 83 Vt. 212, 74 Atl. 1115, Ann. Cas. 1912A, 313, an action was brought under a statute (P. S. 5842) to recover for the cutting of trees on land held by the plaintiff under a lease. The objection was made that plaintiffs, being lessees, could not recover in this action. The court held that a lessee was the "owner" of the land, for the purpose of this act, and was, therefore, entitled to recover thereunder.

But in *Lewis v. Thompson* (1896) 3 App. Div. 329, 38 N. Y. Supp. 316, an action brought by a lessee under a

statute (Code Civ. Proc. § 1667) which provides that if anyone cuts down wood, trees, etc., on the land of another, without the owner's leave, he shall pay to the owner treble the amount of damages done, it was held that this provision applied only to the owner of the freehold, and that the lessee could not bring an action under this section, but would be entitled to his actual damages in a common-law count. See to the same effect, *Achey v. Hull* ((1859) 7 Mich. 423.

### 3. Injury to structure.

Recovery by a tenant is generally allowed for direct injuries to buildings or other structures on the leased premises.

**United States.**—*California Dry-Dock Co. v. Armstrong* (1883) 8 Sawy. 523, 17 Fed. 216.

**California.**—*Sacchi v. Bayside Lumber Co.* (1910) 18 Cal. App. 72, 108 Pac. 885.

**Georgia.**—*Daniel v. Perkins Logging Co.* (1911) 9 Ga. App. 842, 72 S. E. 438.

**Iowa.**—*Foster v. Elliott* (1871) 33 Iowa, 216.

**Maine.**—*Little v. Palister* (1824) 3 Me. 6.

**Massachusetts.**—*Anthony v. New York, P. & B. R. Co.* (1894) 162 Mass. 60, 37 N. E. 780; *Moeckel v. C. A. Cross & Co.* (1906) 190 Mass. 280, 76 N. E. 447, 19 Am. Neg. Rep. 294.

**New York.**—*Cook v. Champlain Transp. Co.* (1845) 1 Denio, 91; *Gour-dier v. Cormack* (1853) 2 E. D. Smith, 200; *Hardrop v. Gallagher* (1854) 2 E. D. Smith, 523; *Ulrich v. McCabe* (1856) 1 Hilt. 251; *McPhillips v. Fitzgerald* (1904) 177 N. Y. 543, 69 N. E. 1126.

**Vermont.**—*Weston v. Gravlin* (1877) 49 Vt. 507.

**Washington.**—*Froelich v. Morse* (1896) 15 Wash. 636, 47 Pac. 22.

**Canada.**—*Fisher v. Grace* (1868) 27 U. C. Q. B. 158.

A tenant may also recover for injuries resulting from the unlawful removal of the lateral or subjacent support. *Bass v. West* (1900) 110 Ga. 698, 36 S. E. 244; *Payne v. Moore* (1903) 31 Ind. App. 360, 66 N. E. 483, 8 A.L.R.—39.

67 N. E. 1005; *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334; *Contos v. Jamison* (1908) 81 S. C. 488, 19 L.R.A. (N.S.) 498, 62 S. E. 867; *Farnandis v. Great Northern R. Co.* (1906) 41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; *McCann v. Chisholm* (1883) 2 Ont. Rep. 506.

In *California Dry-Dock Co. v. Armstrong* (1883) 8 Sawy. 523, 17 Fed. 216, it appeared that a marine railway on leased premises was destroyed through the negligence of the defendant. The tenant was limited in his recovery to nominal damages, on failing to show any actual injury to the leasehold.

It has been held that a petition alleging possession by the plaintiff as tenant, and an illegal interference by the defendant in going on the land, tearing down a bridge and fence thereon, and using part of the premises as a log yard, is good as against a general demurrer, and states facts entitling the plaintiff to general damages. *Daniel v. Perkins Logging Co.* (1911) 9 Ga. App. 842, 72 S. E. 438.

The case of *Little v. Palister* (1824) 3 Me. 6, lays down the rule that the right of action against one who enters upon land in the possession of a tenant, and treads down the grass and throws down a fence built by the tenant for his own convenience, is in the tenant alone.

It has been held that a tenant has sufficient interest in the leased premises to maintain an action for damages by trespass, consisting of throwing down of fences inclosing lands held for agricultural purposes. *Foster v. Elliott* (1871) 33 Iowa, 216.

The lessee of a building used as a hothouse has an interest in the building which will entitle him to maintain an action against one whose negligence has resulted in damage to the buildings. *Moeckel v. C. A. Cross & Co.* (1906) 190 Mass. 280, 76 N. E. 447, 19 Am. Neg. Rep. 294.

In *Anthony v. New York, P. & B. R. Co.* (1894) 162 Mass. 60, 37 N. E. 780, the plaintiff, who was lessee of certain premises, on which were ice-houses which were burned by fire communicated from defendant's locomotive, was allowed to recover the

amount of the damage done, in an action of tort, under an act (Mass. Pub. Stat. chap. 112, § 214) which provides that "every railroad corporation . . . shall be responsible in damages to a person . . . whose buildings or other property may be injured by fire communicated by its locomotive engines."

It has also been held that a tenant may recover for the negligent destruction of bridges built by himself on the leased premises, although he intended to leave the bridges as a part of the freehold at the expiration of the lease. *Sacchi v. Bayside Lumber Co.* (1910) 13 Cal. App. 72, 108 Pac. 885.

An assignee of a lease for a term of years has been held to be entitled to recover damages for injuries to the premises resulting from the negligence of a steamboat company in the operation of one of its boats, causing fire and sparks to fall on the leased property and setting fire to a building thereon. *Cook v. Champlain Transp. Co.* (1845) 1 Denio (N. Y.) 91.

In *Gourdiere v. Cormack* (1853) 2 E. D. Smith (N. Y.) 200, an action was brought by a tenant of a house and lot for an injury to his possession by the blasting of rocks on the adjoining lot, by which pieces of rock were thrown upon the plaintiff's premises, the blasts extending underneath and forcing out the rock some 3 or 4 feet on the lot of the plaintiff, below the foundation of the house. The house was greatly injured and rendered insecure, and it was held that the plaintiff might recover such damages as he had suffered. In discussing the right of a tenant to recover, and its extent, the court said: "A tenant may have an action for an injury to his possession. The same wrongful act which injures the freehold, and for which the reversioner may, under our statute, have an action, is often,—nay, in general,—an injury to the possession also, and for the latter the tenant has an action. . . . So far as by such acts the plaintiff was deprived of the use of his house, he was entitled to the value of such use during the interruption; and so far as he

was put to expense in removing stones thrown upon the house or lot, or in repairing damages thus occasioned, he was entitled to indemnity."

In *Hardrop v. Gallagher* (1854) 2 E. D. Smith (N. Y.) 523, wherein the facts were similar, a declaration alleging possession of the injured premises in the plaintiff was held to be sufficient, since an action would lie for the recovery of damages, whether the plaintiff was the owner or merely a tenant.

In *Ulrich v. McCabe* (1856) 1 Hilt. (N. Y.) 251, it was held that one who built a house on leased premises might recover damages for injuries to the house by blasting done under the direction of the defendant.

In *McPhillips v. Fitzgerald* (1904) 177 N. Y. 543, 69 N. E. 1126, an action for damages for injuries done to plaintiff's building, it appeared that the plaintiff had leased certain property for a term of years and had erected a building thereon with the right to remove the building at the expiration of the lease. On account of the negligence of the defendant, who was an adjoining owner, a building on defendant's lot was allowed to collapse and greatly injure plaintiff's building. It was held that the plaintiff was entitled to recover damages he had sustained.

A tenant in occupation of a dwelling can recover damages for breaking in the windows and defacing the walls of the house, although the nature and duration of the tenancy does not appear. *Weston v. Gravlin* (1877) 49 Vt. 507.

In *Froelich v. Morse* (1896) 15 Wash. 636, 47 Pac. 22, the plaintiff, a lessee, was held to be entitled to recover damages sustained by reason of the tearing down of a building by the defendants, of which the plaintiff was the lessee.

It was held in *Fisher v. Grace* (1868) 27 U. C. Q. B. 158, that a tenant from year to year could recover for damage to the premises, occasioned by removing fences therefrom.

A lessee of a building can recover from a contractor damages resulting from the negligent excavation on ad-

joining property, causing the wall of the leased building to fall in. *Contos v. Jamison* (1908) 81 S. C. 488, 19 L.R.A. (N.S.) 498, 62 S. E. 867.

In *Bass v. West* (1900) 110 Ga. 698, 36 S. E. 244, the facts and the ruling of the court were stated as follows: "According to the allegations of the petition, the plaintiff was in possession of the premises in question as a tenant for a term of years, of the owner. He alleges that the defendant dug down and undermined the wall of the building and deprived it of its lateral support, and that it collapsed and fell. And, further, that the defendant, some time thereafter, totally destroyed and removed the building and evicted petitioner therefrom. As against a general demurrer, the petition sets forth a cause of action. Any wrongful interference with the possession of a tenant of real estate gives to him a right of action against the wrongdoer. 1 Sedgw. Damages, § 69; 3 Sutherland, Damages, § 1012."

A tenant of land for a term of years, who erected thereon a building which was caused to fall in on account of the negligent excavation of an adjoining landowner, can maintain an action for damages sustained on this account, though at the time of the injury the building was occupied by a sublessee. *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334.

A tenant can recover damages for injuries to leased property, resulting from tunneling underground near the premises, which caused the earth to give way and the building located on the demised land to collapse. *Farnandis v. Great Northern R. Co.* (1906) 41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18.

#### 4. Nuisance.

If a leasehold is injured by the maintenance of a nuisance, the tenant may generally recover from its author the damages resulting therefrom. *Crommelin v. Coxe* (1857) 30 Ala. 318, 68 Am. Dec. 120; *Bentley v. Atlanta* (1893) 92 Ga. 623, 18 S. E. 1013; *Pause v. Atlanta* (1895) 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; *Cornes v. Harris* (1848) 1 N. Y. 223; *Beir v. Cooke* (1885) 37 Hun (N. Y.) 38;

*Dumois v. New York* (1902) 37 Misc. 614, 76 N. Y. Supp. 161; *Garland v. Aurin* (*Carland v. Aurin*) (1899) 103 Tenn. 555, 48 L.R.A. 862, 76 Am. St. Rep. 699, 53 S. W. 940; *Lockett v. Ft. Worth & R. G. R. Co.* (1890) 78 Tex. 211, 14 S. W. 564.

"A lessee may maintain an action for a nuisance to the real estate which he occupies, which is injurious to his possessory interest; while the landlord must bring the action for any injury to the reversion. If the nuisance of which the plaintiff complains made the enjoyment of the estate less beneficial, or in any way rendered it expensive or inconvenient, without fault on his part, he is entitled to compensation therefor." *Sherman v. Fall River Iron Works* (1861) 2 Allen (Mass.) 524, 79 Am. Dec. 799.

A tenant, although he has no estate in the land, is the owner of its use for the term of his rent contract; and it is held that he can recover damages for any injury to such use occasioned by the erection and maintenance of a public nuisance in the street adjacent to, or in the immediate neighborhood of, the premises. *Bentley v. Atlanta* (1893) 92 Ga. 623, 18 S. E. 1013.

It has been held that a lessee has such an interest in leased property as will support an action against a city for damages to his estate resulting from the construction and maintenance of a public nuisance in the street by the municipal authorities. *Pause v. Atlanta* (1895) 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489.

In *Beir v. Cooke* (1885) 37 Hun (N. Y.) 38, the plaintiff, the lessee of a dwelling house, was held to have been properly awarded damages for injuries resulting to her occupancy of the building from the operation of a planing mill on adjoining property, which threw dust and cinders on and into the plaintiff's dwelling, and often enveloped it in smoke.

It has been held that a tenant in possession may recover for injuries which he sustains on account of the percolation of water into a cellar on his premises from a cellar on the adjoining lot, causing damage to his stock of goods and rendering the oc-



cupation of the leased premises unhealthy and unwholesome. *Crommelin v. Coxe* (1857) 30 Ala. 318, 68 Am. Dec. 120.

Where the defendant so constructed a railroad embankment as to cause water to collect and become stagnant near a dwelling occupied by a tenant, rendering the dwelling unhealthy and unwholesome, it was held that the tenant could recover damages for injuries resulting therefrom. *Lockett v. Ft. Worth & R. G. R. Co.* (1890) 78 Tex. 211, 14 S. W. 564.

In *Cornes v. Harris* (1848) 1 N. Y. 223, an action for damages sustained in consequence of the maintenance of a nuisance, the declaration alleged that plaintiff was possessed of a dwelling house which he inhabited with his family. After alleging the nature of the nuisance, the declaration concluded: "To the nuisance of the said dwelling house and premises of said plaintiff, and to his damage," etc. It was held that the plaintiff might maintain the action, although there was no allegation that he was the owner of the freehold.

In *Dumois v. New York* (1902) 37 Misc. 614, 76 N. Y. Supp. 161, a lessee of a part of a pier, the other part of which was used by the city as a dumping board, was held to be entitled to damages for injuries resulting from the nuisance.

Where water was obstructed in its natural flow, causing it to back up on demised premises, there forming a stagnant pond, impairing the use of the premises, the lessee was held to be entitled to recover for the injury so occasioned. *Garland v. Aurin* (*Carland v. Aurin*) (1889) 103 Tenn. 555, 48 L.R.A. 862, 76 Am. St. Rep. 699, 53 S. W. 940.

#### *IV. Effect of agreement between landlord and third person.*

The consent of the landlord to the doing of an act which results in injury to the leased premises will not relieve the wrongdoer from liability to the tenant for the injuries which he suffers on that account.

Indiana.—*Payne v. Moore* (1903) 31 Ind. App. 360, 66 N. E. 433, 67 N. E. 1005.

Kentucky.—*Fischer-Leaf Co. v. Caldwell* (1894) 15 Ky. L. Rep. 542.

Maryland.—*Baughner v. Wilkins* (1860) 16 Md. 35, 77 Am. Dec. 279.

Massachusetts.—*Darling v. Kelly* (1873) 113 Mass. 29.

Mississippi.—*Crowell v. New Orleans & N. E. R. Co.* (1884) 61 Miss. 631.

New Hampshire.—*Evans v. Watkins* (1912) 76 N. H. 433, 41 L.R.A. (N.S.) 404, 83 Atl. 915.

New Jersey.—*Central R. Co. v. Valentine* (1862) 29 N. J. L. 561.

New York.—*Campbell v. Porter* (1899) 46 App. Div. 623, 61 N. Y. Supp. 712; *Dumois v. New York* (1902) 37 Misc. 614, 76 N. Y. Supp. 161.

Pennsylvania.—*Brown v. Powell* (1855) 25 Pa. 229.

Vermont.—*Guild v. Prentiss* (1909) 83 Vt. 212, 74 Atl. 1115, Ann. Cas. 1912A, 313.

Where it appeared that the plaintiff held land as tenant at will, and the owner of the fee sold the grass growing on the premises to the defendant, such a sale and permission to enter and cut the grass is no defense to an action for damages by the tenant for injury for entering and cutting grass, when the acts complained of were done before the tenancy was at an end. Since the owner himself had no right so to enter the premises while the tenancy existed, he could not pass the right to another. *Evans v. Watkins* (N. H.) supra.

In *Central R. Co. v. Valentine* (N. J.) supra, it appeared that while a tenant was in possession of leased premises, the landlord made certain agreements with the defendant railroad company for the use of a part of the premises as an embankment, and subsequently, during the tenancy, executed a release for damages previously sustained by injury to the property. And it was held that such an agreement and release between the landlord and the defendant could not affect the right of the tenant to recover for injuries he had sustained previous to such agreement and release.

Where it appeared that one of the walls of a building leased by the plaintiff had been condemned by city au-

thorities and ordered to be torn down and rebuilt, and the defendant undertook the construction under a contract with the lessor, he was held liable to the lessee for injuries resulting from negligence in the operations. *Campbell v. Porter* (N. Y.) *supra*.

In an action by the lessee against a third party for an injury to the premises during the term, resulting from the maintenance of a nuisance by the defendant, it is no defense, as against the lessee, that in the lease there was an agreement whereby the lessee surrendered all rights to recover for "damages accruing heretofore," nor can the defendant plead as a bar to recovery an agreement and settlement with the lessor for damages on account of the nuisance. *Dumois v. New York* (N. Y.) *supra*.

In an action by a lessee to recover damages for the wrongful cutting of trees on the demised premises, it is no defense that the defendant, a former owner of the fee, having conveyed it to another, reserved the right to cut the timber therefrom. The owner of the fee had no right as against the lessee to cut the trees during the life of the lease, and he could not, therefore, concede the right to the defendant so as to release him from liability to the lessee. *Guild v. Prentis* (Vt.) *supra*.

And it was held in *Brown v. Powell* (Pa.) *supra*, that a license from the owner of the fee to go upon the demised premises is no defense in an action by the lessee against a third person to recover damages for the trespass and injury to the land.

Nor can the contributory negligence of the landlord be imputed to the lessee so as to defeat his recovery against a third person causing the injury. Thus, in an action by a tenant for damages caused by the falling in of the walls of a leased building on account of negligent excavation on adjoining property, it is no defense that the landlord had notice of the operations and made no objection to the manner of the work, and did nothing to protect the wall, which negligence and consent on his part were alleged to have contributed, as a proximate cause, to the

injury. *Contos v. Jamison* (1908) 81 S. C. 488, 19 L.R.A. (N.S.) 498, 62 S. E. 367.

In *Flowers Lumber Co. v. Bush* (1916) 18 Ga. App. 269, 89 S. E. 344, it appeared that plaintiff was in possession of timberlands on which he had leased turpentine privileges, and the lessor conveyed the land to one by security deed, which, in this state, passes legal title. The grantee under this deed then leased the timber-cutting privileges on the land to the defendant. In an action to recover for the cutting of the timber by the defendant under his lease, it has held that the plaintiff lessee had no legal interest whatever in the land, nor in the timber thereon, and could not maintain an action for such damage, which was to the realty.

Where an adjoining landowner makes excavations which cause a wall to fall on the leased premises, injuring the property of the tenant, it is no defense to the tenant's action to recover damages so sustained that the excavations were made with the knowledge and consent of his landlord. *Payne v. Moore* (1903) 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

In an action by a tenant against a railroad company for going on the leased premises and destroying growing crops thereon, it is no defense that such entry and acts committed on the premises were done by the consent of the landlord. In allowing the tenant to recover in this case, the court said: "The appellant, having leased the land for the year of 1882, was the owner of the term therein, and it was thereafter not within the power of the landlord to confer upon the company the right to construct its road on the land during the term. The landlord could confer no right which he himself could not exercise over the premises. He himself would have been a trespasser if he had done the acts complained of, and the company, acting under his authority only, is not protected by it from a recovery by the tenant for the injury inflicted." *Crowell v. New Orleans & N. E. R. Co.* (1884) 61 Miss. 631.

In *Fischer-Leaf Co. v. Caldwell*

(1894) 15 Ky. L. Rep. 542, where a wall was torn down between defendant's property and a house occupied by the plaintiff as tenant, an agreement between the plaintiff's landlord and the defendant, whereby the landlord indemnified defendant against all damage that the plaintiff might sustain, was held not to prevent the tenant from recovering of the defendant the damages so sustained.

It was held in *Baughner v. Wilkins* (1860) 16 Md. 35, 77 Am. Dec. 279, that where an injury results to a tenant from the pulling down of a party wall, the action for such injury must be brought against the person who did the act causing the injury, and not against the landlord who consented to the pulling down of the wall; and that such consent would not relieve the wrongdoer of his liability to the tenant for damages so sustained.

In an action by a tenant to recover damages for breaking and entering a close, and for gathering and taking away the crops growing thereon, it is no defense that the owner of the land consented to the trespass. Since the plaintiff was entitled to the exclusive possession of the land, even against the landlord, the landlord could not consent to the defendant's entry so as to relieve him from liability to the tenant for the tort. *Darling v. Kelly* (1873) 113 Mass. 29.

*V. Nuisance existing at time of execution or renewal of lease.*

On the question whether damages accruing during a tenancy, from a nuisance existing before the commencement of the term, or at the time of the renewal of the lease, are recoverable by the tenant, the authorities are not abundant, and there is some conflict in the decided cases. The rule in New York, which was announced in *Kernochan v. New York Elev. R. Co.* (1891) 128 N. Y. 559, 29 N. E. 65, involving the right, as between the landlord and tenant, to sue for damages caused by an elevated railroad, was at first deemed to have settled the question in favor of the right of the landlord to recover for such injuries. At least, relying on the authority of the *Kernochan Case*, it was held in *Yoos*

*v. Rochester* (1895) 92 Hun. 481, 36 N. Y. Supp. 1072, that a tenant who leased premises, knowing of the existence of a nuisance affecting the value of his use of the property during the term, cannot recover damages for injuries he sustains on that account if the nuisance is not perceptibly increased during the term. In that case the nuisance consisted of the pollution of a stream by the defendant, which gave rise to noxious odors, interfering with the enjoyment of the leased property by the plaintiff.

But in *Bly v. Edison Electric Illuminating Co.* (1902) 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745, the elevated railroad cases were disposed of by the statement that they were *sui generis* and the rule was laid down that a tenant who "comes to a nuisance" may recover damages to the property accruing during his term. And it was held immaterial to the tenant's right of recovery whether the nuisance originated before or after the beginning of the term. In that case it appeared that the plaintiff leased certain property to be used as a boarding house, with the knowledge that the manner in which the defendant was operating his power house caused the emission of smoke and cinders which soiled furniture and clothing, and created noise and vibration which interfered with the sleep and comfort of the plaintiff and her boarders, the same being a private nuisance and doing great damage to the business and comfort of the plaintiff. The court said: "In the case at bar we are not advised as to the effect of the nuisance upon the owner's reversion, but there is evidence from which the trial court has found that the plaintiff's right of occupancy has been impaired, and that her own personal effects have been injured to her substantial damage. This was not an injury for which the owner of the reversion could sue. If there was any right of action it belonged to the plaintiff. The injury to her right of occupancy was as separate and distinct from any injury to the reversion as the injury to her furniture and household belongings. During the term of the lease the premises be-

longed to the plaintiff, and the owner had no rights therein except such as were expressly reserved in the lease, or such as reverted to him after its expiration. . . . If the act complained of is a nuisance, it is a wrong the existence of which cannot be justified at any time as against anyone injuriously affected thereby. If this is the rule, is it any less applicable in favor of tenants whose term begins during the continuance of the nuisance, than in favor of subsequent owners? . . . Logically, there can be no more reason for denying such a right of action to a tenant who 'comes to the nuisance' than there can be for withholding it from the tenant whose occupancy precedes the nuisance. There can be no presumption that a wrong which may in fact be merely temporary will be permanent. Of course it may be permanent so long as no fault is found, but in a case like the one at bar, where the nuisance grows out of the method of operation rather than the character of the business or the structure in which it is carried on, the presumption, if any, is and should be that it is merely casual and temporary, and not permanent. If it is casual and temporary, then there is no reason why the landlord or owner should have a right of action for the injury, which is in fact suffered by his tenant, and by him alone. . . . In this state we have held that the owner of premises affected by a nuisance may recover his damages occasioned thereby, although he does not himself occupy the premises. *Hine v. New York Elev. R. Co.* (1891) 128 N. Y. 571, 29 N. E. 69; *Francis v. Schoellkopf* (1873) 53 N. Y. 155. But in the latter case the plaintiff's recovery was expressly limited to the rent for the time that the house was vacant, and to the diminution of the rent when she succeeded in obtaining a tenant, thus recognizing, by implication, the existence of a separate right to damages in the tenant. . . . Several propositions seem to be quite satisfactorily established, therefore, both upon principle and by authority: (1) That an owner of property affected by a nuisance may maintain an action to re-

cover his damages, or to abate the nuisance, or both, no matter whether he takes his title before or after the introduction of the nuisance; (2) that a landlord and his tenant have separate estates, for injuries to which each may have his appropriate remedy. If, then, an owner who 'comes to a nuisance' can maintain an action to redress his wrongs, why should a tenant who 'comes to a nuisance' be denied any remedy? The last owner or occupant, when he acquires his property or possession, acquires with it all the rights which by law belong to it, and exemption from wrongful injury by a contiguous proprietor is one of them."

In *Hoffman v. Edison Electric Illuminating Co.* (1903) 87 App. Div. 371, 84 N. Y. Supp. 437, a recovery by a lessee for damages resulting from the operation of the same plant was sustained, it appearing that the tenant leased the property subsequently to the creation of the nuisance.

The decision in the *Bly Case* was also followed in *Pritchard v. Edison Electric Illuminating Co.* (1904) 92 App. Div. 178, 87 N. Y. Supp. 225, affirmed in (1904) 179 N. Y. 364, 72 N. E. 243.

The decision in *Miller v. Edison Electric Illuminating Co.* (1906) 184 N. Y. 17, 3 L.R.A.(N.S.) 1060, 76 N. E. 734, 6 Ann. Cas. 146, that the landlord cannot recover damages to rental value in such case, notwithstanding that he was obliged to rent the premises for a lower rental than he would have received but for the nuisance, is the counterpart of the decision in the *Bly Case* that a tenant may, under such circumstances, recover for damages to the use and occupation.

In *Dumois v. New York* (1902) 37 Misc. 614, 76 N. Y. Supp. 161, wherein it appeared that the defendant maintained a dumping board on a pier which was a nuisance, likely to injure the use of the leased premises during the term, and the lessee had notice of the existence of the nuisance at the time of making the lease, he was nevertheless held entitled to recover for damage to his use of the premises resulting from the continuance of the nuisance during the term.

But the appellate division of the su-

stable for damages resulting from the maintenance of leaky gas pipes in near-by streets, from which gas escaped into a well on the leased premises, it was held to be no defense to the action that at the time of the lease the pipes leaked, although in a less degree than subsequently, during the term of the lease. *Sherman v. Fall River Iron Works Co.* (1861) 2 Allen (Mass.) 524, 79 Am. Dec. 799.

So, it has been held that a lessee of land may maintain an action against a railroad company which so constructed its embankment as to obstruct the natural flow of the water, and failed to provide sufficient artificial drains, thereby causing the crops of the lessee to be flooded and destroyed, although such embankment, with insufficient drains, existed at the time the lease was made. *Baltimore & S. P. R. Co. v. Hackett* (1898) 87 Md. 224, 39 Atl. 510.

Where a railroad company maintained a nuisance on property which it had leased, and a tenant of adjoining property, with full knowledge of the existence of the nuisance, rented the premises for another year, it was held that the tenant was entitled to recover for injuries resulting from the nuisance during his second contract term. And it was held to be no defense to an action against the railroad company that the tenant might have avoided the injury by moving away. He had a right to presume that the railroad company would abate the nuisance. *Central R. Co. v. English* (1884) 73 Ga. 366.

It is no defense to an action by a tenant for injury to his occupancy, resulting from the maintenance of a nuisance on adjoining lands, that the nuisance existed at the incipiency of the lease. *Crommelin v. Coxe* (1857) 30 Ala. 318, 68 Am. Dec. 120.

In *Davis v. Jewett* (1842) 13 N. H. 88, it was held that where, during a portion of the time for which damage from throwing backwater upon land was claimed, the plaintiff was in possession of the land, and that for the remaining period he had leased to a tenant, he cannot recover for damage during the time of the lease unless he

specifically alleges an injury to the reversion.

In *Morrison v. Chicago & N. W. R. Co.* (1902) 117 Iowa, 587, 91 N. W. 793, it was said: "That the lessee may maintain a suit for the injury to the use of the leasehold occasioned by the continuance of a previously existing nuisance appears to be well established."

*Baker v. Sanderson* (1826) 3 Pick. (Mass.) 348, was an action for damages caused by the erection of a dam below the plaintiff's mill, causing the water to flow back on the wheels of the mill. It appeared that during part of the time for which the damages were claimed the mill was in possession of the plaintiff, and during another part in possession of certain tenants under the plaintiff. The defendant's counsel contended that for the damages arising during the portion of the time the mill was in possession of tenants he was responsible to the tenants in possession, and not to the plaintiff, who had only a reversionary interest. The court said that the objection would have been insuperable had it not been alleged that the plaintiff, in consequence of the obstructions complained of, had reduced his rents at the request of the tenants, they having threatened to quit unless he would agree to a fair reduction.

In *Sumner v. Tileston* (1828) 7 Pick. (Mass.) 198, the court said, *arguendo*, that a tenant of a mill who had taken the same at a reduced rent because of the heightening of defendant's dam below the mill, in consequence of which the wheels of the mill were retarded, could not recover against the defendant, because he was not damaged.

In *Jones v. McCleary Mfg. Co.* (1900) Rap. Jud. Quebec 18 C. S. 130, it is held that a tenant is not entitled to recover for injuries resulting from the operation of a plant on a neighboring lot, where it appeared that the plant was in operation in the same manner at the time of the execution of the lease.

It was held in *Funston v. Hoffman* (1908) 232 Ill. 360, 83 N. E. 917, that, where a tenant leases the premises

after the wrongful act of the third person which caused the damage, he has no right against the third person for any damage caused thereby subsequently to the leasing, and that for such damages the action must be brought by the owner as an injury to his fee. In that case a tenant brought an action for damage occasioned by the flooding of his crops, due to the wrongful removal of the outlet of a drain. The tenant was not allowed to recover for injuries to his crops on this account, since it appeared that the outlet had been removed, to his knowledge, before the beginning of his present term, although it was said that he might recover for such injuries arising during a former term, during the pendency of which the outlet had been removed.

In *McConnel v. Kibbe* (1864) 33 Ill. 175, 85 Am. Dec. 265, wherein it appeared that a partition wall supporting the upper story of leased premises was removed before the tenant leased the premises, resulting in damages subsequent to the demise, the damage was held to be to the owner of the fee, and not to the tenant in possession. The reasoning of the court was, in substance, that when a wrongful act is done which results in an injury to leased premises, there can be no recovery by the tenant if the wrongful act was done before the lease began, although the injuries occur subsequently to the lease. But when the wrongful act occurs during the period of the lease, the tenant may recover for such portion of the damages as he sustains.

In *Kankakee & S. R. Co. v. Horan* (1890) 131 Ill. 288, 23 N. E. 621, a case wherein the owner of premises in the possession of a tenant at will recovered for damage to land resulting from the negligent construction of a railroad, it was said: "The roadbed, embankments, . . . and other appurtenances of a railroad, constructed and maintained in pursuance of lawful authority, are to be regarded in law as permanent structures. . . . And in case other property is damaged by its construction . . . such damage is in its nature equally permanent. . . .

Where deterioration of the value of land is occasioned by a nuisance created by the construction of a railroad, such nuisance is a permanent one, so that all damages for past and future injury to the property may be recovered in one suit, and such recovery is a bar to all future actions therefor. . . . An injury to land which is permanent in its nature is necessarily an injury to the entire estate, and that includes the estate in expectancy as well as the estate in possession."

See also *Chicago & E. I. R. Co. v. Loeb* (1884) 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460, holding that the improper construction of a railroad imposes a permanent injury on the land, for which there can be but one recovery and that by the owner of the fee.

The rule in Illinois seems to be well settled by the foregoing cases, that when a tenant leases property or renews his lease, with the knowledge that there is an existing nuisance liable to cause injury to the premises, he cannot recover for injuries so sustained. But there is a statute in that state, applicable to railroads, which provides as follows: "In no case shall any railroad company construct or maintain a railroad without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof." Section 19, Railroad Act (Jones & A. ¶ 8754). Under that act it is held that a tenant who leases land after the construction of a railroad which is provided with insufficient drains may yet recover from the railroad company for injury to his crops from an overflow resulting from such embankment. And it is held that the ordinary rule that a tenant cannot recover for damage already done to the premises by the erection of a nuisance does not apply to railroads under this act. *Renner v. St. Louis, I. M. & S. R. Co.* (1915) 197 Ill. App. 11.

So, it was held in *St. Louis, A. & T. H. R. Co. v. Brown* (1890) 34 Ill. App. 552, that a tenant who leases and occupies property, subject to the danger of overflow on account of a negligently constructed trestle across a stream on adjoining property, may recover from

a railroad company which maintains such defective structure, in case an overflow does occur on that account, resulting in damage to his growing crops, and the tenant's right of action is not defeated because he knew of the existence of the structure when he rented and entered into the possession of the demised premises. He is not bound to assume that the defendant would continue to keep the structure in its defective condition, but, rather, that it would perform the duty it owed to him and to the public not to allow an injury to them by the negligent use of its property.

#### *VI. Injury to reversion.*

While recognizing the right of a tenant to recover damages for injury which he sustains on account of the interruption of his term and the lessening of the value of the use, and courts are not in harmony in respect to the tenant's right to recover for injuries to the reversion, as such, aside from the injury to the leasehold estate. It is apparent that the same act may be an injury to both estates. Though, under the ancient common law, the owner of the fee could not maintain an action for an injury to the land while it was in the possession of a tenant, this right is now generally recognized, and it is usually conceded that when the same act results in an injury to both estates a right of action accrues to both the landlord and the tenant for the damages each has respectively suffered. At the same time, it is generally recognized that the tenant is liable to the landlord for injuries to the fee, and this liability is often imposed by contract. In some jurisdictions it is held that whenever the tenant is liable to the landlord for injuries to the freehold, either by contract or under the common law, he has a right of action against a third person causing such an injury. *Stapp v. Madera Canal Irrig. Co.* (1917) 34 Cal. App. 41, 166 Pac. 823; *Anthony v. New York, P. & B. R. Co.* (1894) 162 Mass. 60, 37 N. E. 780; *Moeckel v. C. A. Cross & Co.* (1906) 190 Mass. 280, 76 N. E. 447, 19 Am. Neg. Rep. 294; *Coale v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 227; *Cook v. Champlain Transp. Co.*

(1845) 1 Denio (N. Y.) 91; *Gourdier v. Cormack* (1858) 2 E. D. Smith (N. Y.) 200; *Ulrich v. McCabe* (1856) 1 Hilt. (N. Y.) 251; *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 834; *Le Salg v. Dougherty* (1900) 30 Misc. 455, 62 N. Y. Supp. 510; *Dix v. Jaquay* (1904) 94 App. Div. 554, 88 N. Y. Supp. 228; *West v. Treude* (1630) Cro. Car. 187, 79 Eng. Reprint, 764; *Attersoll v. Stevens* (1808) 1 Taunt. 194, 127 Eng. Reprint, 807, 9 Revised Rep. 731, 10 Mor. Min. Rep. 67.

In *Cook v. Champlain Transp. Co.* (1845) 1 Denio (N. Y.) 91; it appeared that plaintiffs were the assignees of a lease for a term of years, which provided that any buildings the lessees should erect, should, at the expiration of the demise, revert to the lessors, without damage to the same, ordinary wear excepted, but no such covenant was made by the assignees when the lease was assigned to them. A building erected by the lessees was burned by reason of the negligence of the defendants in allowing sparks and fire to be blown onto the building from their steamboat. In an action to recover the damages to the leased premises, the court held that the assignee of the lease might recover for the full value of the building destroyed, on the ground of the common-law liability of the tenant to the landlord for waste committed on the premises, saying: "There was no express covenant by the lessees to keep the premises in repair, nor to rebuild in any event whatever. The covenant was that all buildings which might be erected on the premises should revert to the lessors when they might come into possession. The unexpired term and all the interest of the lessees had been assigned to the plaintiffs, and they had taken possession; but no express covenant or agreement on their part, to pay rent or do anything else, was shown. The first term of years had not expired; and it did not appear that the lessees or the plaintiffs had indicated an intention to hold the premises for the second term, as was authorized by the lease. Upon this state of facts it was argued that the plaintiffs were bound to rebuild the

mill for the benefit of the lessors, and therefore were entitled to recover its full value from the defendants; and if such was the liability of the plaintiffs, the consequence stated would seem to follow. This liability of the plaintiffs was placed on two distinct grounds: (1) It was said the lessees were bound by their covenant to rebuild, that the covenant ran with the land and bound their assignees, and therefore the plaintiffs were liable. (2) That the destruction of the mill by tortious negligence was waste, for which the plaintiffs, being tenants for a term of years, were answerable to the reversioner, wholly irrespective of any express agreement, and therefore they were entitled to a corresponding redress from the defendants. I pass by the first ground stated, for the last seems decisive of the question. The plaintiffs claim that the mill was destroyed by the wrongful act of the defendants; and, if so, it was waste for which the plaintiffs, being tenants for years, were responsible. 'It is common learning,' said Heath, J., in *Attersoll v. Stevens* (1808) 1 Taunt. 198, 127 Eng. Reprint, 808, 10 Moir. Min. Rep. 67, 'that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on land in lease, by whomsoever it may be committed.' *Chambre, J.*, in the same case (p. 196) said: 'The situation of the tenant is extremely analogous to that of a common carrier; to prevent collusion (and not on the presumption of actual collusion), both are charged with the protection of the property intrusted to them, against all but the acts of God and the King's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud against which no ordinary degree of care and caution could have protected him.' Lord Coke is not less explicit, for he says: 'Tenant by the curtesy, tenant in dower, tenant for life, years, etc., shall answer for the waste done

by a stranger, and shall take their remedy over.' . . . The plaintiffs, thus being bound to answer to their landlord for the full value of the building which was destroyed, were entitled to recover a like amount from the defendants."

In *Gourdier v. Cormack* (1853) 2 E. D. Smith (N. Y.) 200, an action by a tenant to recover for damages to his possession by a third person, evidence was offered which tended to show "the amount of the damage done to the house itself," and it was held to have been properly admitted. However, the court seemed to qualify the opinion on this point, making the competency of the evidence depend on whether the tenant was in fact liable to the landlord for the injury, or bound to repair it, saying: "If it were proved to be one of the conditions of the plaintiff's estate in the premises that he should make all repairs rendered necessary by causes such as the defendants' acts in the matter in question, the evidence would, I think, be clearly admissible. If it were only proved that the plaintiff was bound to make the ordinary repairs rendered necessary, by use, the evidence would as clearly be irrelevant and incompetent."

The right in the tenant to recover for injuries to the reversion was also suggested as a basis of the rule in the case of *Ulrich v. McCabe* (1856) 1 Hilt. (N. Y.) 251, wherein it appeared that a house built on leased premises by the lessee was injured, and the lessee brought an action to recover damages suffered by the plaintiff in making repairs. It was held that he was entitled to recover such damages, the court declaring the right to arise from the fact that he was presumably bound to make repairs, thus: "The appellant is mistaken in supposing that the tenant was not bound to repair, if the house was part of the fee. There is no proof on that subject, and for that reason the presumption is that he was bound to uphold the premises in question from decay, and to render them, when his term expired, in such condition as reasonable use would permit. . . . At all events, the landlord was



not bound to repair during the term, without an agreement on his part so to do, and the tenant must either make the repairs, or lose the beneficial enjoyment of the premises. The latter circumstance entitles him to recover the expense of such repairs, whether the house was his or not, and whether or not the house could be removed by him at the expiration of the term."

In *Attersoll v. Stevens* (1808) 1 Taunt. 182, 127 Eng. Reprint, 802, 10 Mor. Min. Rep. 67, it appeared that the plaintiff was lessee of certain lands at an annual rental, for a term of years, under an agreement that he might dig half an acre of brick earth annually, and that if he dug more he would pay an increased rental. A stranger dug brick earth on the premises, and it was held that the lessee was entitled to recover the full value of the earth so taken. The basis of the defendant's liability to the plaintiff was held to be the liability of the plaintiff to the lessor; and the liability of the lessee to answer to the lessor was said not to be different from that which arises from the relation of landlord and tenant where waste is committed by a stranger, the tenant being answerable to the landlord, and having his action over against the stranger. The court said: "Lord Coke, 2 Inst. 303, says the lessee shall answer for the waste done by any stranger; for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrongdoer, and recover all in damages against him, and by this means the loss at last shall light upon the wrongdoer. If the lessee gave permission to a stranger to dig, no doubt it would be the act of the lessee, and he would be bound to pay the lessor the stipulated price. Then what is the difference between his agreeing to it, and his standing by while the stranger takes it? . . . If the lessee may take it, as against the lessor, and recovers damages as against a stranger, although the stranger took it in the first instance against the will of the lessee, he cannot say he does not so far confirm the act of the stranger that he ought to

pay the lessor for it. He has in fact the brick earth, since he is paid for it in damages in an action; and he could not avoid paying on his covenant for any brick earth beyond the half acre of which he has the advantage."

It was held in *West v. Treude* (1630) Cro. Car. 187, 79 Eng. Reprint, 764, that a tenant may, at his election, maintain an action of trespass or case to recover damages for injuries to leased premises by a sublessee in possession. Full indemnity was allowed on the ground that the plaintiff was subject to an action of waste by his lessor.

In *Coale v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 227, it was held that a tenant at will or by sufferance, not being liable to his landlord for waste committed on the premises by a stranger, could not recover from a railroad company for the burning of fences on leased premises by sparks from its locomotives. It is suggested in the opinion that if it were shown that the tenants were liable to their landlord for waste by a stranger, they would then be entitled to their action over against the stranger.

But in *McKee v. St. Louis, K. & N. W. R. Co.* (1892) 49 Mo. App. 174, it was held that a plaintiff who was a tenant for a year only, unless he had paid cash rent and was unable to cultivate the ground by reason of overflows of the premises, cannot recover for the depreciation in the rental value of the land occasioned by such flooding, although he can recover for damages to his crops which were growing on the premises.

In *Stapp v. Madera Canal & Irrig. Co.* (1917) 34 Cal. App. 41, 166 Pac. 823, a tenant was allowed to recover damages for injury to a cesspool located on the demised premises, the tenant having contracted to keep the premises in repair in lieu of rent, and the cesspool being susceptible of repair.

Under a contract of lease whereby the lessee agreed to return the premises at the end of the term in as good condition as they were at the time of the lease, fire and other unavoidable casualties excepted, the lessee may maintain an action for permanent in-

juries to the premises caused by an explosion on defendant's property, resulting from the negligent maintenance of a nuisance thereon, and it is not necessary as a condition precedent to his recovery that he has in fact made reparation, nor even that he was under obligation, under the terms of the lease, to make repairs for damage caused by the explosion. *Moeckel v. C. A. Cross & Co.* (1906) 190 Mass. 280, 76 N. E. 447, 19 Am. Neg. Rep. 294.

In an action by a lessee against a railroad company to recover for the destruction of buildings on the premises by fire from defendant's locomotive, it appeared that the lease contained the following stipulations: "And in addition to the rents to be paid as aforesaid the said party of the second part agrees to keep all the said buildings, appurtenances, and improvements in good repair, and also to maintain an amount of insurance upon all of said buildings sufficient to repair or replace them in case of destruction or damage by fire. Said repair and insurance to be at the cost of said party of the second part, and it is expressly understood and agreed by said party of the second part that, if any building shall be destroyed or damaged by fire, it shall be rebuilt or repaired by said party at once, unless this requirement shall be waived by the party of the first part, in which case all moneys received by and in the hands of the party of the second part for insurance on the damaged or destroyed property shall be promptly paid to said party of the first part, their heirs or assigns. If said party of the second part shall desire to alter or remove any building, appurtenances, or improvements on said premises, or to place any new building, appurtenances, or improvements upon the same, it shall be lawful and proper to do so, provided that all such operations shall in no wise impair the value of said premises, its buildings, appurtenances, and improvements as they now exist." The defendant's counsel asked one of the plaintiff's witnesses if the lessee had replaced the buildings in compliance with the lease, if there was any waiver on the part of the lessors of

the lessee's obligation to rebuild, and if the lessors had taken any insurance on the buildings. These questions were held to have been properly excluded as immaterial, on the grounds that the liability of the defendant to the plaintiff was to be determined on the facts as they existed at the time of the fire, and that what was done afterwards between the lessors and lessees did not concern the defendant, and that the insurance was wholly *res inter alios*. The lessee was allowed to recover the amount evidenced by his liability to the lessor, it being the actual damage to the property, and the question whether the liability had in fact been satisfied was said to be wholly immaterial to the defendant's liability to the lessee. *Anthony v. New York, P. & B. R. Co.* (1894) 162 Mass. 60, 37 N. E. 780.

However, in *Foley v. Wyeth* (1861) 2 Allen (Mass.) 131, 79 Am. Dec. 771, the declaration alleged that the plaintiff was seised and possessed of a parcel of land, and the defendant dug a pit on his own land, whereby a considerable portion of plaintiff's land caved in and was removed. It appeared from the facts reported that plaintiff held the land under a contract to purchase the premises for a valuable consideration, to be paid in the future. The court decided that plaintiff was a tenant at will, and held that a tenant at will could not recover for injuries to the reversion, although he subsequently purchased the land in pursuance of his contract.

The view was taken in *Dix v. Jaquay* (1904) 94 App. Div. 554, 88 N. Y. Supp. 228, that a life tenant might recover damages to the inheritance as well as to the life estate, in an action for waste by cutting down trees on the premises. The court said: "There are strong reasons for giving this right of action to the life tenant. With this absolute liability to make good to the remainderman waste committed, even by a stranger, the remainderman may trust to his liability and reserve his action until at any time within the Statute of Limitations. The remainder may be to an infant, and even to one not in being at the

time of the commission of the waste. The remainder may be a contingent one, so that it may not be known who will have the ultimate estate. By § 1665 of the Code of Civil Procedure, 'a person seised of an estate in remainder or reversion may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years.' A contingent remainderman can hardly be said to be seised of an estate in remainder. In such case, to whom would the wrongdoer respond? He is either liable to the life tenant for the waste committed, or he is liable to no one, and the life tenant, with a certain ultimate liability to the remainderman, whosoever he shall prove to be, is absolutely without recourse or indemnity for the liability imposed upon him by the wrongful act of the defendant. If the life tenant must wait for an action by the remainderman to determine his liability, his recourse against the wrongdoer must, in many cases, become ineffective by the delay. Nor can he perfect his right of action by satisfying the damages to the inheritance, and then suing. The damages are unliquidated. Any amount which he pays in satisfaction must be paid at his peril, with his chance of establishing such amount as the damage done in an action against the wrongdoer. If the remainder is contingent, to whom shall he make satisfaction of the liability? In such case I am unable to conceive of any satisfaction of that liability which would be binding, if perchance another became entitled to the remainder upon the happening or not of the contingency named. It will thus be seen that, if the judgment below be well rendered, a life tenant at the best is subjected to a dangerous hazard in being compelled to make satisfaction of an unliquidated claim to a remainderman, upon his chance of being able to establish that claim in full as damage in his action against the wrongdoer. At the worst the wrongdoer has burdened the life tenant with an absolute liability to one who, upon the happening of a contingency, shall thereafter become the remainderman,

without liability to the life tenant, and only with a remote liability to the person who shall, upon the contingency, thereafter become seised with the remainder. If these premises be sound, the conclusion is irresistible that the wrongdoer must answer to the life tenant for the full damage done, both to his life estate and to the inheritance, and the damage to the inheritance recovered by the life tenant is held by him as trustee for the remainderman. Other grounds might be urged upon which could be rested the liability of the wrongdoer to the life tenant for the injury to the inheritance. If, perchance, a building be burned by the negligence or wrong of a stranger, the life tenant is entitled to the moneys with which to rebuild that building, that he may have the life use thereof. Even if a recovery for such an injury should be had by the remainderman, it is not clear that the court would not require the remainderman to rebuild the building with the proceeds of such recovery that the life use given by the deed be not restricted. Again, one who has wrongfully imposed a liability upon a life tenant to make good to a remainderman should rightfully be required to provide him with the means whereby that liability could be satisfied. A life tenant thus injured should not first be required to satisfy the liability and take his chance of reimbursement from the wrongdoer. It cannot matter to the wrongdoer to whom he pays, if only he be not required to pay twice, and it will appear by the rulings in analogous cases . . . that a recovery of the wrongdoer by the life tenant is a bar to a recovery by the remainderman."

The right of a tenant to recover for an injury to the freehold was clearly recognized and affirmed in *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334. It appeared in that case that a tenant for years erected a building on leased premises, and the building was then sublet. An adjoining owner in making excavations on his lot caused the walls to fall in. The original lessees were held entitled to recover for injuries thus caused to the building, and the grounds of the decision were

thus stated by the court: "But if it were necessary to enable the plaintiffs to maintain the action that they should have held an interest in the premises at the time of the injury, such interest appeared. They were lessees of the land on which the warehouse was erected for an unexpired term of years. The injury occurred in 1852, and their lease did not expire until 1858. The destruction of the warehouse by tortious negligence was waste, for which the plaintiffs, being tenants for a term of years, were answerable to the reversioner, wholly irrespective of any express agreement to repair or rebuild. Being bound to answer to the heirs of Bloodgood for the injury to the building, they were entitled to a corresponding redress from the defendants.

A sublessee, who has covenanted, under a lease, to keep the premises in good repair, is entitled to recover for expenses incurred in replacing a plate glass window in the demised building, broken through the negligence of the defendant. *Le Salg v. Dougherty* (1900) 30 Misc. 455, 62 N. Y. Supp. 510.

Other courts, assuming the liability of the tenant to the landlord for injuries to the reversion by third persons, hold that reparation or satisfaction to the landlord is a condition precedent to the tenant's right to sue, and that until such reparation is made there has been no injury to the tenant. *California Dry Dock Co. v. Armstrong* (1883) 8 Sawy. 523, 17 Fed. 216; *Wood v. Griffin* (1865) 46 N. H. 231; *Weston v. Gravlin* (1877) 49 Vt. 507. And see *Nashville, C. & St. L. R. Co. v. Heikens* (1904) 112 Tenn. 378, 65 L.R.A. 298, 79 S. W. 1038.

In *California Dry Dock Co. v. Armstrong* (Fed.) supra, the plaintiff was the tenant of premises under a covenant to repair. A marine railroad, located on the premises, was damaged by the defendant's ship. The plaintiff brought his action in two counts, the first alleging injury to the inheritance, and setting forth the lease and covenant to repair, and his liability to the owner, the second count alleging injury to the possession. There was a

demurrer to the first count, and the demurrer was sustained on the ground that it failed to allege payment or repairs by the tenant. The court said: "Whether the liability in this case, to repair, rests upon the express covenant set out, upon implied covenants, or upon principles of public policy which hold the tenant responsible for a violation of duty to his landlord in failing to protect the freehold while in his possession as tenant, in my judgment, both upon reason and authority, no recovery can be had until the tenant has made repairs or made satisfaction to the landlord. It is argued that if this rule be adopted, then the tenant may never be able to recover, as he may not be able to agree with his landlord as to the amount to be paid, and he may not be able, for want of means, either to repair or make satisfaction. If this be so, his damages will never accrue, and he certainly ought not to recover. That is the very question presented. Clearly, the general rule in all matters is that damages cannot be recovered until they have actually accrued, and I can find no possible good ground for applying a different rule to cases of this kind."

In *Wood v. Griffin* (1865) 46 N. H. 231, an action by tenants to recover for injuries by the wrongful cutting of timber on the premises, the question arose whether the plaintiff could recover damages for the injury to his possession, and also for injury to the inheritance. It was held that, notwithstanding the liability of the tenant to the remainderman or reversioner, he could not recover for injuries to the inheritance without there having been satisfaction made to the remainderman or reversioner. The court said: "The question is whether the plaintiffs are entitled to include in their damages the full value of the wood and timber, upon the ground that they are liable over to the remaindermen or reversioner; or whether they are limited to damages for the injury to their possessory interest. There can be no controversy that the cutting of the wood and timber by a tenant for life or a stranger, for the purposes indicated in the case, is

waste, . . . and it seems equally clear that the tenants are liable to the person having the immediate remainder or reversion for such waste, whether committed by themselves or a stranger, or by a part of such tenants only. . . . It seems also to be settled that, although the remainderman or reversioner cannot maintain an action of waste against a stranger, yet he may maintain an action on the case in the nature of waste for an injury to his reversionary interest, while at the same time the tenant may sue for the injury to his possession. . . . It may also be considered as established that, while the tenant is answerable to the remainderman or reversioner for waste done by a stranger, such stranger is liable over to the tenant. . . . The precise question, then, is whether, in an action of trespass *quare clausum fregit* by the tenant against a stranger, he can recover damages for the injury to his possession, and also for the injury to the inheritance, without there having been any recovery against him by the remainderman or reversioner, or any satisfaction made by him in any form. In 1 Chitty Pl. 63, it is laid down that 'the tenant may support trespass against a stranger for an injury to his possession; and the immediate reversioner may at the same time support an action on the case, if the injury were sufficient to prejudice his right and interest; and a recovery by one will be no bar to an action by the other.' In *Attersoll v. Stevens* (1808) 1 Taunt. 190, 127 Eng. Reprint, 805, 9 Revised Rep. 731, 10 Mor. Min. Rep. 67, Chambers, J., holds that when different persons are entitled to compensation for an injury to each by the same act, a compensation to one is no bar to the action of the other; and this he applies to the case of injuries to the tenant and to the reversioner. In *Bedingfield v. Onslow* (1684) 3 Lev. 209, 83 Eng. Reprint, 654, which was a case for the injury to plaintiff's land by penning back the water of a rivulet, the defendant pleaded that one Stedman was in possession of the land of the plaintiff under a lease from his father, and that he, the de-

fendant, paid Stedman 20 shillings, which he accepted in satisfaction of the trespass; to which the plaintiff demurred, and the plea was held bad, upon the ground that, in respect to the prejudice done the reversion, the plaintiff may maintain an action, and Stedman another in respect of the possession; and so another, in respect of the shade, shelter, and fruit of the trees, for the same trespass; and the satisfaction given to one is no bar to the other. . . . In *Davis v. Jewett* (1842) 13 N. H. 91, it is laid down that, for an injury to land in possession of a tenant, both the tenant and the reversioner have separate actions for their several damages; and to the same effect is 1 Co. Litt. 57a. . . . This, indeed, is apparent from a consideration of the nature of the interests held by each; the tenant having the right to the possession of the land and to the enjoyment of the shade and fruit of the trees, and the reversioner the right to the trees themselves, subject to this use by the tenant. . . . If he [the tenant] has already been compelled to pay the reversioner for the injury done to him, it would seem that this should be stated, and that the tenant's claim in respect to that part of the injury should be limited to the amount so paid, for to that extent only is he injured. The suit by the tenant may or may not be designed to recover for the injury to the inheritance as well as to the possession, and it is therefore obviously important that it appear from the declaration whether it does or does not; and this accords too with the general rules of pleading. It is clear from the adjudged cases that the claims of the tenant and reversioner can be separated, that they are in fact distinct, and that each may maintain a suit for the injury done to him, and that both may be pending at the same time. How, then, can the tenant include in his damages the injury to the reversion? If he can in any case, how is the defendant to avail himself of the fact that another action is pending by him in remainder or reversion? Again, there is no necessity for arming the tenant with such power. If he is en-

titled to recover for the injury to the inheritance, whether he has satisfied the reversioner or not, his recovery must be a bar to a suit by the landlord, and still the trespasser might avail himself, by way of defense, of a license or admission by the tenant which might, in effect, defeat the landlord's claim against such trespasser, and, besides, the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his inability to obtain from the tenant himself the fruits of the suit against such third person. The fact that the tenant is answerable for the injury does not, we think, furnish an adequate reason for sanctioning such doctrines. Where waste is committed by cutting down timber trees by a stranger, the property in them at once passes to the landlord; and he may take them or maintain trover for them; and there surely can be no propriety in holding that the tenant also could have the same remedy, for he has no property whatever in them. If the tenant has been compelled to satisfy the landlord for the injury by a third person, he may have his remedy over, but, until then, we think he must be confined to damages for the injury to the possession. . . . But, beyond this, the authorities, so far as we have any, are opposed to the claim of the tenant to recover damages for an injury to the inheritance until he has first satisfied the landlord."

The rule laid down in the case last cited was approved in *Nashville, C. & St. L. R. Co. v. Heikens* (1904) 112 Tenn. 378, 65 L.R.A. 298, 79 S. W. 1038, wherein the minority opinion delivered by *Chambre, J.*, in *Attersoll v. Stevens* (1808) 1 Taunt. 194, 127 Eng. Reprint, 807, 9 Revised Rep. 731, 10 Mor. Min. Rep. 67, was also approved.

It was suggested in *George v. Fisk* (1855) 32 N. H. 32, that no damages could be recovered by a tenant for injuries to the reversion, as such, but that the recovery was limited to the actual injuries he had sustained to his estate, in the way of diminution of profits accruing from the land and the

interruption of the leasehold. It was held proper in that case for the court to instruct the jury to find such damages as the plaintiff had suffered, according to the title he had proved, and commensurate with the injury which he had sustained in his estate; although, for the permanent injury to the soil, the owner of the fee alone was entitled to recover.

In *Weston v. Gravlín* (1877) 49 Vt. 507, it appeared that the plaintiff was in the possession and occupancy of a house as a dwelling. He was not the owner, but the nature of his tenancy did not appear. The defendant unlawfully broke windows and blinds of the house and defaced the walls. An instruction that the plaintiff might recover for the actual damage to the house was held to be erroneous, the court saying: "The tenant can only recover for such damages as affect his possession and enjoyment of the premises. He cannot ordinarily recover for injuries to the inheritance. For such injuries, the reversioner has an action." But it was held that the error was harmless, since this injury did in fact affect the tenant's enjoyment, and the extent of recovery in this instance would be the actual damage to the house, for the injuries were such that the tenant would ordinarily be required to repair, in order to make the house habitable.

In still other jurisdictions, the right of the tenant to sue for injuries to the reversion is denied altogether, remitting the landlord and tenant each to his own action for injuries to his separate estate in the land. *Kansas City, Ft. S. & M. R. Co. v. King* (1896) 63 Ark. 251, 38 S. W. 13; *Beasley v. Central of Georgia R. Co.* (1916) 17 Ga. App. 615, 87 S. E. 907; *Zimmerman v. Shreeve* (1882) 59 Md. 357; *Townley v. Oregon R. Co.* (1898) 33 Or. 323, 54 Pac. 150; *Texas & P. R. Co. v. Torrey* (1891) 4 Tex. App. Civ. Cas. (Willson) 445, 16 S. W. 547; *Gulf, C. & S. F. R. Co. v. Smith* (1893) 3 Tex. Civ. App. 483, 23 S. W. 89; *Gulf, C. & S. F. R. Co. v. Cusenberry* (1894) 86 Tex. 525, 26 S. W. 43; *Vance v. San Antonio Gas Co.* (1900) — Tex. Civ. App. —, 60 S. W. 317; *Baldwin v. Rich-*

ardson (1905) 39 Tex. Civ. App. 406, 87 S. W. 746; *Fisher v. Grace* (1868) 27 U. C. Q. B. 158.

The extent of the right to recover is generally the injury to the estate of the plaintiff. Thus, in *Zimmerman v. Shreeve* (1882) 59 Md. 357, which was an action by a life tenant for damages caused by the cutting and carrying away of wood, the recovery was so limited, the court saying: "In the present case, the lot trespassed upon was an outlying, uninclosed mountain lot, used exclusively for its wood and timber, and which constituted its main value. Such timber lots are generally used in connection with separate farm land, and as means of supplying the necessary wood and timber to the farm. In such case, the injury to the possessory right, by cutting and carrying away the wood and timber, consists in the damage done to the right to use such wood and timber by the life tenant, according to the customary mode of user; such user to be reasonable, and confined to such wood and timber as could be taken for ordinary estovers; and any trespass that disturbs and impairs such beneficial user by the tenant for life is an injury for which he may recover."

It was held to be error for the court so to instruct the jury as to allow it to award damages for injuries to the estate in remainder.

It was suggested by the court in *Townley v. Oregon R. Co.* (1898) 33 Or. 323, 54 Pac. 150, that a lessee might not recover for injuries to the land itself, although it appears from the decision that this statement applied to the recovery for injuries to the reversion, as such, the lessee in that case being allowed damages for injuries, although to the land, which resulted in a decrease in the value of the leasehold.

It seems to be the rule in Texas that the tenant is not under obligation to make repairs of injuries caused by acts of strangers, and hence cannot recover for injury to the premises, which does not affect his leasehold. *Gulf, C. & S. F. R. Co. v. Smith* (1893) 3 Tex. Civ. App. 483, 23 S. W. 89.

In a hypothetical case assumed by

the court in *Texas & P. R. Co. v. Torrey* (1891) 4 Tex. App. Civ. Cas. (Willson) 445, 16 S. W. 547, the rule was announced that a tenant at sufferance might recover damages for injuries sustained from the burning of grass on the premises, such injury being the value of the grass during his term, but that he could not recover for injury to the turf.

It was held in *Gulf, C. & S. F. R. Co. v. Cusenberry* (1894) 86 Tex. 525, 26 S. W. 43, that a tenant at will cannot recover for injuries to the land by a trespasser, but that the landlord alone can recover damages for such injuries.

And in *Vance v. San Antonio Gas Co.* (1900) — Tex. Civ. App. —, 60 S. W. 317, it was stated that, although the tenant is bound to repair, the landlord may, nevertheless, have his action for an injury affecting his reversionary interest, thus denying by implication the right of the tenant to sue for such injuries.

It has been held that, in an action by a lessee of pasture lands for the recovery of damages arising from the destruction of pasturage on the leased premises, the extent of his right to recover was for the destruction of the grass to which he would be entitled during the term of his lease. *Baldwin v. Richardson* (1905) 39 Tex. Civ. App. 406, 87 S. W. 746.

In an action by a tenant for damages to the premises occasioned by removing fences therefrom, it has been held that his recovery should be limited to the diminished value of his interest in the property. *Fisher v. Grace* (1868) 27 U. C. Q. B. 158.

But in *Beasley v. Central of Georgia R. Co.* (1916) 17 Ga. App. 615, 87 S. E. 907, wherein it appeared that a railway company negligently set a fire on leased premises, causing the woodland to be burned over, destroying all the trash and litter, and exposing the land to the hot sun and damaging the timber on the land, it was held that the injury was to the freehold of the owner and not to the leasehold of the tenant, and that for such injury the tenant could not recover. The court, in disallowing recovery by the tenant, apparently based its decision on the

fact that, the injury being to the realty, the tenant, in order to recover, must have shown specifically how, why, and in what amount his lease was of less value after the injury, although it appeared that the tenant did allege in his petition that he had suffered loss by reason of his right, under the contract of lease, to cut and sell the timber, and his added expense in cutting and clearing the wooded land after it had been burned. The court referred to an official headnote for its reason, which is there stated as follows: "The same tortious act might injure both the freehold of the owner and the leasehold of a tenant, thus entitling each to a distinct right of action for damages,—in the one case for the injury to the freehold estate, and in the other to the leasehold estate. But one in possession under a lease for five years cannot recover for injury to the realty, though he may recover damages for the injury or destruction of any property included within his usufruct. In view of the plaintiff's failure to set forth the alleged contract of lease, and construing the petition as amended most strictly against the pleader, it does not appear that the fire set out by the defendant destroyed any wood or timber of the plaintiff which had been severed from the realty, or any other personalty of his situate upon the leasehold. The petition does not set forth specifically why, or how, or in what amount the value of the plaintiff's lease is less than it would have been had the fire not occurred. The probable profits from the sale of timber, as alleged, are too vague and contingent to be the basis of a recovery, and the right to recover for the damage to the land, caused by the burning of decaying trash and litter, is in the owner of the freehold. None of the allegations of the original petition were withdrawn by the plaintiff, and the petition as amended failed to show any injury for which the plaintiff, as a tenant, was entitled to recover."

In *Kansas City, Ft. S. & M. R. Co. v. King* (1896) 63 Ark. 251, 38 S. W. 13, the owner of certain leased premises brought an action against a rail-

way company for wrongfully fencing off its right of way over the premises, cutting off the approach to a spring situated thereon. Recovery by the landlord was denied, the court holding that this was an injury to the tenant in possession for which he could recover, and not an injury to the reversion which would give rise to a cause of action by the owner. The distinction between an injury to the freehold and that merely to the possession was made by the court, as follows: "It appears from the testimony in this case that the land of the appellee, upon which the appellant has a right of way, and upon which the spring is situated, was, at the time this suit was brought and the cause was tried, in the possession of a tenant of the appellee, and had been in the possession of such tenant since the building by the appellant of the fence inclosing the right of way and the spring thereon situate. It does not appear that there was any evidence that any damage had been done to the reversion, and, if there was any damage, it must have been to the right and interest which the tenant had in the possession of the land by virtue of his tenancy, and it follows, therefore, that there was no right of action in the plaintiff; that the right of action, if there was any, was in the tenant, who, as we understand, was in possession when the wrong was done of which the appellee complains, and held continuous possession until after the institution of this suit. It appears that the structure complained of was a fence which, according to the adjudged cases as we understand them, being temporary and not permanent in its character, gave to the party who might be entitled to sue for any damage consequent upon its erection a right to sue for such damages only as had accrued before the institution of the suit, and a right to bring successive actions for damages consequent upon the continuance of the structure thereafter, if the same was wrongful. It is not to be presumed that the railroad company would persist in the wrongful continuance of the fence, or that the party who might be entitled to damages for such wrong could fore-



see all the damages that might occur from a wrong which might occur in the future, and which might never occur."

*VII. Tenant not in possession.*

By the weight of authority, a tenant who is not in possession of the demised premises is not entitled to recover for injury thereto by a third person. *M'Laughlin v. Long* (1820) 5 Harr. & J. (Md.) 113; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Tobias v. Cohn* (1867) 36 N. Y. 363; *Wilson v. Douglas* (1847) 33 S. C. L. (2 Strobb.) 97; *McDougall v. Campbellton Water Supply Co.* (1898) 34 N. B. 467.

It was decided in *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449, that a tenant under verbal lease, prior to taking possession, has not sufficient interest in the leased premises to maintain an action against a railroad company for authorizing a trespass on the land, under which authorization, after the tenant went into possession, the defendant's servant entered the premises, and began the clearing of a right of way, and destroyed the tenant's growing crops.

In *McDougall v. Campbellton Water Supply Co.* (N. B.) supra, it appeared that the plaintiff had leased certain premises and had made a sublease to M., who was in possession at the time of the alleged trespass. The defendant entered the premises, dug ditches thereon, and laid pipes across the lot with the permission of the plaintiff's subtenant. In an action of trespass for the injury so occasioned, wherein the plaintiff did not allege an injury to the reversion, it was held that, not being in possession, he could not recover.

In the case of *Tobias v. Cohn* (1867) 36 N. Y. 363, a tenant for life, who had subleased the property for a term of years, brought an action of trespass alleging that the defendant entered the yard in the possession of the plaintiff, erected a fence thereon,

and deprived the plaintiff of the use of a portion of the premises. It was held that only the tenant in possession could maintain such an action, and hence the plaintiff was denied recovery.

In *Wilson v. Douglas* (1847) 33 S. C. L. (2 Strobb.) 97, it appeared that the defendant held land located within the plat leased to the plaintiff. The court instructed the jury that if the defendant's possession of the land held by him had begun before the lease of the whole to the plaintiff, then the plaintiff could not recover from the defendant for a trespass on the land which the defendant held. It was held that the instruction was properly given.

It was held in *M'Laughlin v. Long* (1820) 5 Harr. & J. (Md.) 85, that a tenant from year to year, who had subleased all of his interest in the premises, could not maintain an action for waste committed on the premises, since such an action could be brought only by one who had an estate in remainder or reversion, or a tenant in possession; that when he had transferred all the interest he had in the premises, nothing remained in him to be injured.

A lessee may maintain an action against a grantee of premises, who held the property by a deed from the purchaser at a master's sale, where the grantee forcibly entered the premises, the lessee being in jail, but still in possession. *Schwartz v. McQuaid* (1905) 214 Ill. 357, 105 Am. St. Rep. 112, 73 N. E. 582.

But in *West v. Treude* (1640) Cro. Car. 187, 79 Eng. Reprint, 764, it was held that a tenant for years might maintain an action of trespass or case against his subtenant in possession, to recover damages for injuries to the premises by the subtenant.

And see *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334, wherein recovery was allowed in an action by a lessee for an injury to the premises, although the land was in the possession of a sublessee at the time of the injury.

R. M. F.

FIRST STATE BANK OF SHELBY, Appt.,  
v.  
BOTTINEAU COUNTY BANK et al., Respts.

*Montana Supreme Court — October 30, 1919.*

(— Mont. —, 185 Pac. 162.)

**Homestead — enlarged — liability for debts.**

1. The enlarged Homestead Act of 1909 is to be read in connection with the original act, and therefore the enlarged homestead is not liable for debts of the homesteader, contracted before issuance of patent.

[See note on this question beginning on page 635.]

**Equity — jurisdiction — suit to enjoin sale under execution.**

2. A court of equity has jurisdiction of a suit to enjoin the sale under a judgment against one person of land belonging to another person.

[See 10 R. C. L. 1258.]

**Statutes — amendment — adding new provisions.**

3. In the absence of constitutional limitation a statute may be amended merely by adding new provisions.

[See 25 R. C. L. 904.]

**— intention of Congress.**

4. Whether an act of Congress is or is not an amendment of an existing

act must be determined by the intention of Congress.

**— supplemental statutes — definition.**

5. A supplemental act is one designed to improve an existing statute by adding something thereto without changing the original text.

[See 25 R. C. L. 904.]

**Exemption — Homestead Law.**

6. The statute exempting homesteads from liability for debts prior to the issuance of patent is not strictly an exempting act, but a condition attached to the granting of the public land as an inducement to secure settlers.

[See 22 R. C. L. 265, 266.]

**APPEAL** by plaintiff from a judgment of the District Court for Cascade County (Leslie, J.) dismissing an action brought to restrain defendants from proceeding with a sale of plaintiff's property to satisfy a judgment against another. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Jesse G. Henderson and Freeman & Thelen, for appellant:

The purpose of Congress was to allow its citizens to acquire the public domain and to establish homes for the benefit of themselves and their families.

Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Miller v. Little, 47 Cal. 350; Lewton v. Hower, 18 Fla. 872.

When an execution is levied on lands which are exempt from an execution or which belong to a third party, not a party to the original action under which the judgment was secured, the rule that one court of concurrent jurisdiction cannot interfere with the process of a court of concurrent jurisdiction does not apply.

Fannin County Bank v. Lowenstein,

— Tex. Civ. App. —, 54 S. W. 316; Corbett v. Provident Nat. Bank, 23 Tex. Civ. App. 602, 57 S. W. 61; Cooper Grocery Co. v. Peter, 35 Tex. Civ. App. 49, 80 S. W. 108; Bean v. Everett, 21 Ky. L. Rep. 1790, 56 S. W. 403; Chesapeake, O. & S. W. R. Co. v. Reasor, 6 Ky. L. Rep. 298 (abstract); Pixley v. Huggins, 15 Cal. 128.

Messrs. H. S. Kline and C. B. Elwell, for respondents:

The court has no jurisdiction over the subject-matter of the action, and the demurrer should be sustained on that ground.

Beck v. Fransham, 21 Mont. 117, 53 Pac. 96; Black v. Plunkett, 132 Ind. 599, 31 N. E. 567, 117 Ind. 14, 19 N. E. 537; Dodge v. Northrop, 85 Mich. 243, 48 N. W. 505; Wilson v. Baker, 64 Cal. 475, 2 Pac. 253; Crowley v. Davis, 37 Cal. 268.

Holloway, J., delivered the opinion of the court:

On July 25, 1913, Charles R. Wilbur made final proof upon 320 acres of land which he had theretofore entered under the Enlarged Homestead Act. On July 30, 1913, the Bottineau County Bank recovered judgment against Wilbur in the district court of the twelfth judicial district in and for Hill county, and a certified copy of the transcript of the original docket was filed in Toole county, where the land above mentioned is located. In January, 1914, Wilbur received patent, and on April 15, 1914, sold and conveyed the land by warranty deed to the First State Bank of Shelby. In November, 1914, the Bottineau County Bank caused execution to be issued on its judgment, placed the same in the hands of the sheriff of Toole county, who levied upon the land and advertised it for sale. The First State Bank of Shelby thereupon commenced this action in the district court of the eighth judicial district, to secure an injunction restraining the judgment creditor and the sheriff from proceeding with the sale.

To the complaint, which sets forth the history more in detail, the defendants interposed a demurrer, first, upon the ground that the court did not have jurisdiction of the subject-matter of the action; and, second, upon the ground that the complaint did not state a cause of action. The court sustained the demurrer as to the second ground, indicating in its order that a 320-acre homestead acquired under the Enlarged Homestead Act is liable for the debts of the homesteader contracted before patent issues. Plaintiff, declining to plead further, suffered a judgment of dismissal to be entered against it, and appealed.

There is no merit in the first ground of the demurrer. The purpose of this action is to restrain the sale of plaintiff's property to satisfy a judgment against Wilbur, and not

to restrain the enforcement of the judgment against Wilbur or against any property he may have.

This appeal presents the novel question: Is a 320-acre homestead liable for the debts of the homesteader, contracted prior to the issuance of patent? If this question is to be answered in the affirmative, then the judgment became a lien upon the land in controversy while owned by Wilbur, and the Shelby bank acquired its title subject to that lien, and is not entitled to the relief sought. If the question is to be answered in the negative, then the complaint states a cause of action for the relief demanded.

Under the original Homestead Act of May 20, 1862, chap. 75 (12 Stat. at L. 392), as it has existed from the date of its enactment to the present time, the land acquired thereunder (160 acres) cannot "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Section 2296, U. S. Rev. Stat. Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575. There cannot be a controversy over the purpose which the Congress had in enacting that statute. It was designed to provide the homesteader and his family sufficient land upon which to make a home (*Ruddy v. Rossi*, 248 U. S. 104, 63 L. ed. 148, 39 Sup. Ct. Rep. 46), and to secure that land against the homesteader's prior misfortune or improvidence (*Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905). It was designed solely for the benefit of the grantee and his family, and not for the benefit of antecedent creditors. *Lewton v. Hower*, 18 Fla. 872.

During most of the period when the homesteader might secure 160 acres under the original Homestead Act, he might also secure 160 acres under the Pre-emption Act, and an additional 160 under the Timber Culture Act, making in all 480 acres, practically of his own selection, and that, too, land for the most part susceptible of successful cultivation without artificial irrigation. Under

Equity—jurisdiction—suit to enjoin sale under execution.

these favorable statutes the public domain of the Mississippi valley and the humid regions of the Pacific coast were settled. It is a part of the public history of our country that during the forty years succeeding the enactment of the original Homestead Law, the best of the public lands were entered upon and title thereto secured from the government, leaving the later homeseeker to make his selection only from lands in semiarid regions, and lands so rough and broken that but a comparatively small portion of entryable units could be cultivated. In other words, it came to require more than 160 acres of the lands available to entry, to make a home upon which the entryman could reasonably expect to succeed. In the meantime the Pre-emption and Timber Culture Acts were repealed, leaving only the original Homestead Law under which public land might be acquired, and the area limited to 160 acres. These facts, greatly enlarged upon and emphasized in an extended message by the President, were presented to the first session of the Sixtieth Congress, and bills looking to the enlargement of the area obtainable under the Homestead Laws were introduced. The history of those measures and subsequent bills having the same general purpose is too extensive to be recited here. It is sufficient to say that the outcome of the agitation was the Enlarged Homestead Act of February 19, 1909, chap. 160 (35 Stat. at L. 639, Comp. Stat. §§ 4563-4568, 8 Fed. Stat. Anno. 2d ed. p. 613). As originally enacted, the statute applied only to the nonmineral, nontimbered, nonirrigable, unreserved, unappropriated, surveyed public lands in Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Arizona, and New Mexico, designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation, at a reasonable cost, from any known source of water supply. By subsequent amendments the act became appli-

cable to the same class of lands in other western states.

The act is entitled: "An Act to Provide for Enlarged Homesteads." It contains but 6 sections. Section 1 defines the lands subject to entry under the act. Section 2 provides that a person applying to make entry shall furnish the affidavit required by § 2290 of the United States Revised Statutes, and in addition shall make affidavit that the land sought is of the character described in § 1. Section 3 provides for an entry additional to one already made at the time the act went into effect, in order that the entryman might secure the full amount—320 acres. Section 4 provides that in addition to the final proof required under § 2291, United States Revised Statutes, the entryman shall disclose that he has cultivated the required area. Section 5 declares that the provisions of this act shall not be construed to prevent a qualified homesteader from making entry under the original Homestead Act in any of the states named, but that a person who makes entry under the Act of 1909 shall not be entitled to make entry under the original act. Section 6 relates only to the state of Utah. It will be seen at once that the Enlarged Homestead Act does not in terms change any of the provisions of the original act. The determination of the principal question before us, therefore, depends upon the proper construction of the Enlarged Homestead Act with reference to the original act.

Was it intended as an independent statute, or was it meant to become a part of the original Homestead Act as it existed at the time this new measure went into effect? Aside from any other consideration, the bare reading of the Act of 1909 would seem to be sufficient to convince one that it could not have been intended as an independent act. To illustrate: A prospective entryman cannot determine from this act whether he is qualified to secure its benefits. He must re-

Homestead—  
enlarged—liability for debts.

fer to the original act (§ 2289, U. S. Rev. Stat. Comp. Stat. § 4530, 8 Fed. Stat. Anno. 2d ed. p. 543) for the qualifications required. He is not advised by this act how to proceed. He must refer to the original act (§ 2290, U. S. Rev. Stat. Comp. Stat. § 4531, 8 Fed. Stat. Anno. 2d ed. p. 555). He is required by this act to make an affidavit, but he is not informed what the affidavit must contain. Again, he must refer to the original act (§ 2290, above) for the required information. He is advised by this act that he must pay certain fees, but the amount of the fees is not disclosed. He may only ascertain the amount by referring again to the original act (§ 2290, above). He is informed by this act of the amount of cultivation required before final proof, but he is not informed of anything further to be done by him; and if he depended upon this act alone he could never make final proof or secure patent. The procedure is all contained in the original act (§ 2291, U. S. Rev. Stat. Comp. Stat. § 4532). It cannot be said that an act so absolutely dependent upon a prior act is an independent statute. *State ex rel. Cuneo v. Wyandot County*, 16 Ohio C. C. 218, 9 Ohio C. D. 90.

In the absence of constitutional limitations, a statute may be amended merely by striking out portions of it, by inserting new provisions, by striking out portions and inserting new matter in lieu thereof, or by adding new provisions. *Fletcher v. Prather*, 102 Cal. 418, 36 Pac. 658; 36 Cyc. 1054; 26 Am. & Eng. Enc. Law, 706. There are practically no constitutional restrictions imposed upon the Congress as to the methods to be pursued in enacting statutes. Even the title of a Federal statute is not always a controlling, or even persuading, consideration in construing the act. *United States v. Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224. It not infrequently happens that a statute of the character of the one now under review is to be

found attached as a rider to an appropriation bill. Whether an act is or is not an amendment to an existing statute must be determined by the intention of the Congress. *Blake v. National City Bank*, 23 Wall. 307, 23 L. ed. 119.

If the Enlarged Homestead Act was intended as an amendment to the prior Homestead Laws, then the acts are to be construed as one—as originally in the amended form. The history of this act is fairly conclusive that it was never intended to be construed otherwise than as a part of the original Homestead Law as it was then in force. Without quoting from the committee reports or the debates in the Congress, we think it is apparent from them that it was the intention of the lawmakers by this act to supplement the existing statutes—to improve the Homestead Laws, and encourage the settlement of the vast areas of public lands in the semiarid regions by increasing the amount of land subject to entry, so that the homesteader in 1909, and thereafter, might acquire land approaching in value that of the more fortunate entryman who secured land which could be irrigated at reasonable cost, or land which could be cultivated successfully without irrigation, and which would produce a crop every year.

A supplemental act is one designed to improve an existing statute, by adding something thereto without changing the original text. *McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 453; *Loomis v. Runge*, 14 C. C. A. 148, 30 U. S. App. 133, 66 Fed. 856. Supplemental statutes include every species of amendatory legislation which goes to complete a legislative scheme. *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48, 20 Atl. 756.

Our conclusion is that the Enlarged Homestead Act is merely supplementary to the original Homestead Law, and is to be construed as a part of it. It follows that land acquired under it becomes subject

Statutes—  
amendment—  
adding new  
provisions.

—supplemental  
statutes—  
defense.

(— Mont. —, 185 Pac. 182.)

to the provisions of § 2296 of the United States Revised Statutes, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575, and that the land in controversy in this action could not in any event become liable to the satisfaction of any debt contracted by Wilbur prior to the date his patent was issued.

Our attention has been called to but a single adjudication upon this subject. Judge Bourquin gave this same construction to the Enlarged Homestead Act. *Re Auge* (D. C.) 238 Fed. 621. It is said that the same conclusion was reached by the United States district court for the district of North Dakota, but the opinion does not mention the fact that the homestead there involved was acquired under the Enlarged Homestead Act. *Re Cohn* (D. C.) 171 Fed. 568.

It is insisted by counsel for respondents that exemption from liability for debts is a special privilege or immunity granted by statute; that liability is the rule and exemption the exception, and that the

party claiming the immunity must be able to show that he comes clearly within the statute providing the exception. Granting that this is so, for the sake of argument, the rules have no application here.

Section 2296, United States Revised Statutes, is not, strictly speaking, an exemption statute. It was not enacted pursuant to the police <sup>Exemption—</sup>Homestead Law. powers of the government, but in virtue of the power conferred upon the Congress to dispose of the public lands. The non-liability declared by that section is one of the conditions attached to the grant as an additional inducement to secure settlement of the public domain. *Ritzville Hardware Co. v. Bennington*, 50 Wash. 111, 126 Am. St. Rep. 894, 96 Pac. 826.

The judgment is reversed and the cause is remanded, with directions to the District Court to overrule the demurrer.

Brantly, Ch. J., and Hurly, Pat-  
ten, and Cooper, JJ., concur.

## ANNOTATION.

### Enlarged Homestead Acts of 1909 and 1910.

The purpose of the enactment of the Enlarged Homestead Acts of 1909 and 1910 (8 Fed. Stat. Anno. 2d ed. pp. 613 et seq.) obviously was to encourage the settlement of the semiarid areas of public land in the far West, to which lands it is by its terms confined, by increasing the amount of land which may be secured by an entryman.

The only judicial consideration of the acts thus far seems to have been in the reported case (*FIRST STATE BANK v. BOTTINEAU COUNTY BANK*, ante, 631) and a single other decision, *Re Auge* (1916) 238 Fed. 621, both of these cases holding that the acts are to be construed as supplementary to the original Homestead Act, so that the provision therein contained (Rev. Stat. § 2296, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575), that "no lands acquired under the provisions of

this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," is applicable to an enlarged homestead acquired under the Acts of 1909 and 1910.

Thus, in the case of *Re Auge* (Fed.) supra, in holding that a bankrupt was entitled to an exemption of the full 320 acres acquired under the later acts, the court said: "The chapter referred to is the Federal original Homestead Law, providing for entries of 160 acres or less. Later homestead enactments (35 Stat. at L. 689, chap. 160, Comp. Stat. § 4563, 8 Fed. Stat. Anno. 2d ed. p. 613, 37 Stat. at L. 123, chap. 153, Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. p. 557) permit entries for as much as 320 acres—enlarged homesteads—of public lands of certain quality, and subject to somewhat different conditions. These latter are

but additions to and amendments of the original law, and upon settled principles all form a whole, to be taken and read together as though the later enactments were part of the original law from the beginning, so far as the protection extended by § 2296 is concerned. Said section provides protection; other sections define the area protected. Changes in the latter affect not the former. Hence enlarged homesteads are 'lands acquired under the provision of this chapter,' within § 2296, and are entitled to its protection, even as lesser or ordinary homesteads are."

On the same principle it is held in the reported case (*FIRST STATE BANK v. BOTTINEAU COUNTY BANK*) that the grantee of a patentee of lands under

the Enlarged Homestead Act is entitled to enjoin a sale thereof, under an execution issued on a judgment entered against the patentee before the transfer, for a debt contracted before he received a patent.

In *Callison v. Ronstadt* (1920) — *Ariz.* —, 188 Pac. 266, it was held that one who had performed the acts of settlement on 320 acres of unsurveyed land so as to acquire a three months' preference right to enter the same under the act of February 19, 1909 (Comp. Stat. §§ 4563-4568, 8 Fed. Stat. Anno. 2d ed. pp. 613-616), could not be enjoined from fencing the land so as to prevent the plaintiff's cattle from passing over the same in going to and from the open range and water troughs on plaintiff's land. E. C. B.

## COURTLAND J. YEARSLEY

v.

REBECCA A. GIPPLE, Appt.

*Nebraska Supreme Court — December 26, 1919.*

(— Neb. —, 175 N. W. 641.)

### Accretions — rights of land becoming riparian.

1. If lands become riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, even though they extend beyond the original boundary line of his land.

[See note on this question beginning on page 640.]

Common law — riparian rights — existence.

2. The common law as to the rights

and duties of riparian owners is in force in this state, except when altered or modified by a statute.

Headnotes by LETTON, J.

APPEAL by defendant from a judgment of the District Court for Otoe County (Begley, J.) in favor of plaintiff, and dismissing the cross petition in an action brought to quiet title to certain land, and to enjoin defendant from trespassing upon such land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William H. Pitzer, Earl M. Cline, and Varro E. Tyler, for appellant:

Where a conveyance of land is made by definite boundaries, whether by metes and bounds, by government subdivision, or even by limitation to a river bank, accretions to or a part of the lands conveyed, but lying beyond

such boundaries, do not pass by the deed.

*Bissell v. Fletcher*, 27 Neb. 582, 43 N. W. 350; *Harrison v. Stipes*, 34 Neb. 431, 51 N. W. 976; *Gilbert v. Eldridge*, 47 Minn. 210, 13 L.R.A. 411, 49 N. W. 679.

By common law in force in Nebraska, the owner of shore land on one

side of the stream, whether navigable or unnavigable, owns the land to the thread of the stream.

Kinhead v. Turgeon, 74 Neb. 580, 1 L.R.A.(N.S.) 762, 7 L.R.A.(N.S.) 316, 121 Am. St. Rep. 740, 104 N. W. 1061, 109 N. W. 744, 13 Ann. Cas. 43.

Such riparian ownership is not affected, either by encroachment or recession of the waters of the stream. If the bed of the stream becomes dry, the riparian owner may come into possession and claim to his boundary. If the shore land to which the riparian rights attached is submerged, neither the title to the shore land nor the riparian rights are thereby destroyed, but on reappearance of the land it may be reclaimed and such rights restored.

Kinhead v. Turgeon, *supra*; Chicago v. Ward, 169 Ill. 392, 38 L.R.A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; Crandall v. Allen, 118 Mo. 403, 22 L.R.A. 591, 24 S. W. 172; Fowler v. Wood, 73 Kan. 511, 6 L.R.A.(N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; Mulry v. Norton, 100 N. Y. 426, 53 Am. Rep. 206, 3 N. E. 581.

The submergence of shore land to which riparian rights attach does not vest riparian rights in the owner next removed from the water's edge.

Stockley v. Cissna, 56 C. C. A. 324, 119 Fed. 812; Ocean City Asso. v. Shriver, 64 N. J. L. 550, 51 L.R.A. 425, 46 Atl. 690; Crandall v. Allen, 118 Mo. 403, 22 L.R.A. 591, 24 S. W. 172.

Mr. George E. Hager also for appellant.

Mr. D. W. Livingston, for appellee:

Where original boundary lines have become submerged by the river, they cease to exist, the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and land at any former period.

Welles v. Bailey, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; Bouvier v. Stricklett, 40 Neb. 792, 59 N. W. 550; Nebraska v. Iowa, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; Peuker v. Canter, 62 Kan. 371, 63 Pac. 617.

These cases also announce the rule that "nonriparian lands become riparian when the stream washes its soil, and as such is entitled to all accretions formed on its shores even though these extend beyond the original boundaries."

Letton, J., delivered the opinion of the court:

The purpose of this action is to quiet the title to certain lands lying in the valley of the Missouri river, together with accretions, and to enjoin the defendant from trespassing upon the accreted lands. The defendant denies the title of plaintiff to the premises, and by way of cross petition alleges title in herself by deed from Mary A. Topping to that portion of the accreted lands which lies east of the original boundary of plaintiff's land. The court found that plaintiff was a riparian owner, and entitled to all accretions, that the defendant's grantor, Mary A. Topping, was not possessed of any title or interest in the accreted land, and that her deed conveyed no title to the defendant. The title of the plaintiff was quieted, defendant was enjoined from entering or trespassing upon the premises, and her cross petition was dismissed, from which decree she appeals.

In 1908 a tract of land 200 rods square, in the northwest corner of section 31, described as "government lot No. 1, and accretions, in section 31," and also by a sectional description which would have applied to it if it had been in existence and surveyed when the original survey was made, was conveyed by Mary A. Topping to John M. Livingston. This title is held by the plaintiff by mesne conveyance from Livingston.

At the time of the government survey, there was only a small portion of land in the northwest corner of section 31, the remainder of the section being occupied by the Missouri river. Afterwards a large body of accreted land, part of it occupying the place where defendant now claims, was formed to the south and east of this tract. Still later, that vagrant and inconstant stream, by a gradual change of channel, moved westward again, and washed away these accretions to a large extent.

In September, 1912, when the plaintiff purchased, there was some



of the accreted land belonging to the Toppings lying to the east of the 250-acre tract. The river continued to encroach westward. In November, 1912, a survey of the land was made, and a plat drawn by the county surveyor. This plat and the testimony of the surveyor show that at that time all of the accretions east of the 250-acre tract had been washed away, and the west bank of the river was some distance within the east boundary of the tract. Afterwards the river receded again, and accretions formed to the eastward. The title to the accretions which lie to the east of the original line of plaintiff's land is the matter in controversy in this action.

Plaintiff's contention is that, after the land to the east had been washed away, so that the river formed the eastern boundary of his land, he became a riparian owner, and as such was entitled to all accretions which thereafter formed in front of his property, without regard to the original boundary lines.

Defendant contends that where a conveyance of land is made by definite boundaries, accretions extending beyond such boundaries do not pass by the deed; that the riparian owner may claim to this original boundary line only, and that the original owner of the soil so washed away and gradually replaced may again assert title.

A critical examination of the cited decisions by defendant shows that a number of general expressions are used, which if considered without reference to the facts in each case might mislead. They are mostly cases in which the several courts considered that the stream had changed its course by avulsion. The principles applying to avulsion do not apply where the original soil was gradually disintegrated and washed away, the river taking its place, and as it receded leaving accretions.

Accretions—  
rights of land  
becoming  
riparian.

When, by gradual erosion, the river became the boundary of plaintiff's land, he then became a riparian owner, and

was entitled to all accretions. "The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied, on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain." *New Orleans v. United States*, 10 Pet. 662, 717, 9 L. ed. 573, 594. This decision was quoted from and approved in *Lammers v. Nissen*, 4 Neb. 250.

The contention of defendant that, where there are known boundaries of land which has been submerged, this principle does not apply, has been carefully considered by the courts of England and Ireland, and a contrary conclusion reached. *Gifford v. Yarborough*, 5 Bing. 163, 130 Eng. Reprint, 1023, 2 Bligh, N. R. 147, 4 Eng. Reprint, 1087, 1 Dow. & C. 178, 6 Eng. Reprint, 491, affirming 3 Barn. & C. 91, 107 Eng. Reprint, 668, 4 Dowl. & R. 790, 27 Revised Rep. 292, 1 Eng. Rul. Cas. 458. This case was decided in the same manner in the King's bench, and afterwards brought by writ of error to the House of Lords. Lord Eldon and Lord Chancellor Lyndhurst took part in the decision in the House of Lords, which was unanimous. See also *Re Hull & S. R. Co.* 5 Mees. & W. 327, 151 Eng. Reprint, 139, 8 L. J. Exch. N. S. 260, and *Atty. Gen. v. McCarthy*, [1911] 2 Ir. R. 260, in which it was held that the existence of marks, bounds, or other evidence by which the former boundary line could be ascertained did not prevent a private owner of lands acquiring title to the accreted land. This is the general rule in this country. *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565. Courts in other states bordering upon the Missouri river take the same view. The exact point is decided in *Widdecombe v. Chiles*, 173 Mo. 195, 61 L.R.A. 309,

96 Am. St. Rep. 507, 73 S. W. 444; Buse v. Russell, 86 Mo. 209; Naylor v. Cox, 114 Mo. 232, 21 S. W. 589; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; Peuker v. Canter, 62 Kan. 363, 63 Pac. 617; Fowler v. Wood, 73 Kan. 511, 6 L.R.A. (N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; Nebraska v. Iowa, 145 U. S. 519, 36 L. ed. 798, 12 Sup. Ct. Rep. 976; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518.

The common law as to the rights and duties of riparian owners is in force in this state, except when altered or modified by a statute. This

**Common law—  
riparian rights  
—existence.**

court from its earliest decisions on this subject has followed

the common law. Lammers v. Nissen, *supra*; Gill v. Lydick, 40 Neb. 508, 59 N. W. 104; Meng v. Coffee, 67 Neb. 500, 60 L.R.A. 910, 108 Am. St. Rep. 697, 93 N. W. 713; Kinkead v. Turgeon, 74 Neb. 580, 1 L.R.A. (N.S.) 762, 7 L.R.A. (N.S.) 316, 121 Am. St. Rep. 749, 104 N. W. 1061, 109 N. W. 744, 13 Ann. Cas. 43. In *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550, both accretion and avulsion had taken place. The fourth paragraph of the syllabus is: "Where the middle of the channel of a stream of water constitutes the boundary line of a tract of land, and the water undermines the banks and the soil 'caves in' and mixes with the water and is washed away, the owner of the land must stand the loss; and the middle of the new channel formed for the river by such process, if a new channel is thus formed, will constitute the boundary line of the tract of land."

In *Ocean City Asso. v. Shriver*, 64 N. J. L. 550, 51 L.R.A. 425, 46 Atl. 690, which is the principal case relied upon by defendant, and other cases making the same quotations, there is a misconception as to the

rule laid down in *De Juris Maris*, a work ascribed to Lord Hale, in that the text quoted to support the decision is taken from that part of the treatise relating to sudden changes by avulsion or by submergence. The writer treats first, of "alluvio maris," next of "recessus maris." As to land acquired by accretions, or, as he says, "by insensible degrees," it is said "that such an acquisition lies in custom and prescription; and it hath a reasonable intendment, because these secret and gradual increases of the land adjoining cedunt solo tanquam majus principali; and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the civil law."

He then takes up the subject of "recessus maris," saying: "This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of alluvio, or increase per projectionem." "But in the case of alluvio maris, it is otherwise, because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite and an accession to the land, and, therefore, in case of private rivers, it seems by the very course of the common law, such a gradual increase cedit solo adjacenti."

Chapter 6, *De Juris Maris*, containing the above quotations, is reprinted in 16 Am. Rep. 60. It is under that part of the chapter treating of the sudden retreat of the sea, recessus maris, that the quotation in the New Jersey case, and in the other opinions to the same effect, is found, and it is inapplicable to the facts in cases of pure accretion.

The judgment of the District Court is affirmed.

Sedgwick, J., not sitting.

Petition for rehearing denied.

## ANNOTATION.

**Right to follow accretions across division line previously submerged by action of water.**

The authorities on the present question are in conflict and somewhat confused. This confusion arises in part from the peculiar circumstances of individual cases. It arises also from the application under somewhat similar circumstances of principles which, as applied, are conflicting, though under other circumstances they may be well established.

There are a number of cases supporting the general proposition that where land bordering on a stream is washed away, and an accretion to the land of another subsequently extends over the same place, the newly formed land belongs to the owner of the land to which it is an accretion, and not to the one originally owning the land in that place. *Bush v. Alexander* (1918) 134 Ark. 307, 203 S. W. 1028; *Welles v. Bailey* (1887) 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; *Peuker v. Canter* (1901) 62 Kan. 363, 63 Pac. 617; *Wood v. McAlpine* (1911) 85 Kan. 657, 118 Pac. 1060, affirmed on rehearing in (1912) 86 Kan. 804, 121 Pac. 916; *Buse v. Russell* (1885) 86 Mo. 209; *Naylor v. Cox* (1892) 114 Mo. 232, 21 S. W. 589; *Rees v. McDaniel* (1893) 115 Mo. 145, 21 S. W. 913; *Widdecombe v. Chiles* (1903) 173 Mo. 195, 61 L.R.A. 309, 96 Am. St. Rep. 507, 73 S. W. 444; see also *Cox v. Arnold* (1895) 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592, and *Frank v. Goddin* (1906) 193 Mo. 390, 112 Am. St. Rep. 493, 91 S. W. 1057; *YEARSLEY v. GIPPLE* (reported herewith) ante, 636; *Hempstead v. Lawrence* (1911) 147 App. Div. 624, 132 N. Y. Supp. 615, reargument denied in (1912) 149 App. Div. 922, 133 N. Y. Supp. 1146.

The rule is implied also in *Fowler v. Wood* (1906) 73 Kan. 511, 6 L.R.A. (N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763, holding that if the owner of land, a part of which has been submerged, convey the upland and retain title to the remainder, the purchaser, upon the reappearance of the submerged portion, can include it within

his boundaries only by the processes of accretion or reliction.

And the right of a grantee of land, described as bounding on the ocean, to follow accretions thereto, even though they extend across the place where the grantor's land had been before it was lost by erosion, is recognized in *Dewey Land Co. v. Stevens* (1914) 83 N. J. Eq. 314, 90 Atl. 1040, concurring opinion in (1914) 83 N. J. Eq. 656, 91 Atl. 934. But the point was not directly involved in the case, as the land was not claimed by accretion, the contest being between the grantee in a riparian grant from the state and one who claimed under a deed from the former owner of the submerged land after it had been restored.

In *Widdecombe v. Chiles* (1903) 173 Mo. 195, 61 L.R.A. 309, 96 Am. St. Rep. 507, 73 S. W. 444, supra, the court approved the principle that accretions belong to the owner of the land against which the deposits are made, and not to the owner of land against which they are not made, although they cover a space where the land of the latter was before it was washed away.

And in *Buse v. Russell* (1885) 86 Mo. 209, supra, it was held that where a portion of an island is washed away, and accretions forming from the mainland extend over the place where such portions stood, they will belong to the owner of the shore land, and not to the owner of the island. To the same effect is *Rees v. McDaniel* (1893) 115 Mo. 145, 21 S. W. 913. And the same principle was applied to the converse of this proposition in *Naylor v. Cox* (1914) 114 Mo. 232, 21 S. W. 589, where the accretions forming from an island extended over the place where the mainland had been before it was washed away.

The doctrine that where land on opposite sides of a navigable stream is owned by different proprietors, and the river gradually encroaches on one

side and forms accretions on the other, the accretions belong to the owner to whose land they are formed, although they cover some of the area originally covered by the land of the owner on the opposite side of the river, is applied in *Hempstead v. Lawrence* (1911) 147 App. Div. 624, 132 N. Y. Supp. 615, reversing (1910) 70 Misc. 52, 127 N. Y. Supp. 949. Reargument was denied in (1912) 149 App. Div. 922, 133 N. Y. Supp. 1146. In this case the so-called river was formed by the ocean's breaking through an outer beach, which was separated from the mainland by a shallow channel. This passage or river, which became navigable, was originally entirely on the land of one proprietor, but by erosion and accretion at the rate of about 400 feet a year, it extended over the land of an adjoining owner. It was held that the accretions belonged to the owner of the land to which they formed, although they extended over the old division line.

In *Wallace v. Driver* (1896) 61 Ark. 429, 31 L.R.A. 317, 38 S. W. 641, a portion of an owner's land bordering on the Mississippi river caved into the stream, and twenty-five years later an island formed in the river in front of the mainland, and in the place where the land had been washed away. It was held that the island did not belong to the owner of the mainland unless the washing away was sudden and perceptible and the limits of the change of channel of banks could be determined, or unless the formation of the island was made by accretions beginning at the water line of the remaining land.

And rights to accretions which, under the law, as interpreted in *Wallace v. Driver* (Ark.) supra, had vested, were held in *Bush v. Alexander* (1918) 134 Ark. 307, 203 S. W. 1028, not affected by the subsequent enactment of a statute providing that all land which had formed, or might thereafter form, in the navigable waters of the state and within the original boundaries of a former owner of land bordering upon navigable streams, should belong to the former owner or his successor in interest.

In *Minton v. Steele* (1894) 125 Mo. 181, 28 S. W. 746, a riparian owner recovered land reformed upon a place formerly occupied by lands washed away, as against the claims of an adjoining owner, who insisted that the formation commenced against his land, but the decision turned upon the finding of the jury that the accretions were to the land of the former owner, rather than upon the law involved.

To an effect somewhat similar to the reported case (*YEASLEY v. GIPPLE*, ante, 636), supporting the rule therein laid down that, if land becomes riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, even though they extend beyond the original boundary line of his land, are: *Welles v. Bailey* (1887) 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; *Peuker v. Canter* (1901) 62 Kan. 368, 68 Pac. 617, and *Widdecombe v. Chiles* (1908) 173 Mo. 195, 61 L.R.A. 309, 96 Am. St. Rep. 507, 73 S. W. 444.

In *Peuker v. Canter* (1901) 62 Kan. 368, 68 Pac. 617, supra, where a non-riparian owner of land near the Missouri river became a riparian owner by the gradual washing away of a part of the intervening land, and the river then receded, forming alluvion from the line of contact with such owner's land within the original surveyed line of the former riparian land, it was held that the owner whose land had become riparian was entitled not only to such alluvion as formed within his original lines, but also to an equitable proportion of that formed beyond his original boundary line.

And in *Welles v. Bailey* (1887) 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565, supra, it was held that when a river has gradually washed away all of the tract belonging to one person, and continues to change in that direction until it has worked so far into the land of an adjoining owner that all of the land of the former and part of that of the latter is now on the other side of the river, the title of the latter will not stop at the place of his old division line, but he will continue to follow the river, and will remain a riparian owner, although by so doing he

absorbs land formerly belonging to the other owner. The court said: "If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. . . . If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole by the law of accretion would belong to the remoter but now proximate lot. Having become riparian, it has all riparian rights."

Where a small strip of land which lies between a government grant and a river is washed away so that the granted land becomes riparian, and then accretions to the granted land carry the river boundary far beyond its old location, they will belong to the grantee, and no title will vest in the government which it can grant to a third person. *Widdecombe v. Chiles* (1903) 173 Mo. 195, 61 L.R.A. 309, 96 Am. St. Rep. 507, 73 S. W. 444, supra.

But in *Allard v. Curran* (1918) — S. D. —, 168 N. W. 761, it was held that an owner of land which, by the gradual washing away of land between it and the Missouri river, extended to the river, was not entitled to follow accretions across the former boundary line when the river thereafter receded, and the intervening land was restored. The court referred to *Welles v. Bailey* (Conn.) and *Peuker v. Canter* (Kan.) supra, but declined to follow these cases, and followed rather the decision in *Ocean City Asso. v. Shriver* (N. J.) infra. It was said regarding the rule as declared by the Connecticut and Kansas courts: "This rule appears, as is indicated by some of the above-quoted language, to have sprung from the fact that, when the riparian estate is destroyed and carried away, the boundary line between that and the adjacent estate is obliterated and lost, and that, in case of

restoration by accretion or reliction, there is no way of identifying the original estate, and therefore it is deemed to have been entirely destroyed and lost. But no such reason exists in this case. The boundary line between the lands of appellant and respondent was a government section line, and of course can be re-established without difficulty. In the absence of the reason, there is no justification for the rule. Without holding that, in all cases where land has been carried away or submerged by the action of the water in a lake or river and afterward restored by the action of such water, such land belongs to the original owner thereof, we can see no reason, in justice or equity, why the land involved in this case, after it had been restored by the river, should be given to respondent merely because the river had at some time touched her land. After her land had been fully restored to her, she had all that she was entitled to or in good conscience could demand. . . . We believe that, after appellant's land had been restored by the action of the river, being capable of identification, it belonged to appellant and should be treated as though it had never been submerged at all."

So, in *Stockley v. Cissna* (1902) 56 C. C. A. 324, 119 Fed. 812, it was contended that the washing away of land bordering on the Mississippi river, until the river reached the land of an adjoining owner, operated as a complete destruction of the title to the submerged land, and that the adjoining owner, as a riparian proprietor, was entitled to accretions thereafter formed, although they occupied the site of the land which had been washed away. But the court held that the accretions occupying the situs of the old land which had been submerged inured to the benefit of the former owner of that land. The court said it could not be pretended that because the surface of the land had been washed away the owner lost beyond recovery his title to the land so submerged; that land lost by erosion or submergence is regained to the original owner of the fee when by reliction or accretion the water disappears

and the land emerges, and that the new land inured to the former owner by virtue of his title to the bed upon which the accretion deposited. And the court followed the rule that an owner of land adjoining the sea does not lose his right thereto by the fact that it is for a time submerged, if upon being restored it can be identified. It will be observed that this conclusion was reached, although the title to land bordering on the river was held to extend only to low-water mark.

It is stated also in *Van Deventer v. Lott* (1909) 172 Fed. 574, affirmed in (1910) 103 C. C. A. 524, 180 Fed. 373, that property reformed by the sea, after having once been taken away, is to be considered as restored, rather than as a growth or addition to different property to which the actual accretion may have attached. But this statement may apparently be regarded as obiter, in view of the fact that it was found that the accretions in question were not within the former boundaries of the claimant.

And in other cases, where the stream or water's edge was not the boundary, the doctrine that the owner of land to which accretions formed may follow them across the former boundary line and over the place formerly occupied by land of another has not been applied.

Thus, where a plat is made of upland and land beneath the water, and land is sold with reference to the plat, the fact that the shore is washed away until interior land becomes riparian will not give it the riparian right of reclaiming the land lying beneath the water, and sold to third parties according to the plat. *Gilbert v. Eldridge* (1891) 47 Minn. 210, 13 L.R.A. 411, 49 N. W. 679.

The same principle was applied in *Ocean City Asso. v. Shriver* (1900) 64 N. J. L. 550, 51 L.R.A. 426, 46 Atl. 690, where the owner of a lot which had been deeded with reference to a plat showing separation from the ocean by a street and other intervening land claimed the right to follow accretions to the lot across the former boundary, where the ocean had encroached upon the lot, making it, as he claimed, ri-

parian, and then receded. It was held that the owner of the lot had no equity beyond the restoration by accretions to the limit of his lot, and that beyond that boundary the accretions belonged to the grantor, although the lot owner was a remote grantee, and at the time he acquired title the ordinary high water came up to the lot. The court quoted and applied the common-law rule as stated in Lord Hale's *De Jure Maris*, to the effect that if a subject hath land adjoining the sea, and the violence of the sea swallow it up, the subject will not lose his property if there are reasonable marks to continue the notice of it, or if its extent can be ascertained.

*Ocean City Asso. v. Shriver* (N. J.) supra, was distinguished in *Dewey Land Co. v. Stevens* (1914) 83 N. J. Eq. 814, 90 Atl. 1040, concurring opinion in (1914) 83 N. J. Eq. 656, 91 Atl. 934, where the contest was between the grantee in a riparian grant from the state and one who claimed under a deed from the former owner of the submerged land after it had been restored. The court held that as the land was bounded by the ocean and not by fixed lines, as in the former case, the grantor had lost the title to his land by its submergence, and that his grant after the restoration conveyed no interest. There were, however, special circumstances in the case, and the right to follow accretions was not directly involved.

It has been held that where the bank of a river is suddenly washed away, its owner does not lose his title to the locus in quo, but if subsequently land is formed in the stream over the place where the land formerly was, he will have the title to it, and such title cannot be claimed by the owner of an island on the opposite side of the river in another state, by the mere fact that the land is attached by accretion to such island in the process of formation. *St. Louis v. Rutz* (1890) 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337, affirming (1888) 85 Fed. 188. But in that case it appeared that the island was a mere mass of alluvial deposits, and had traveled for more than a mile from one state into another; and the

court said that in such a case the law of title by accretion can have no application, for its progress is not imperceptible in a legal sense.

The court in *St. Louis v. Rutz* (U. S.) *supra*, said that the right to accretions to an island in a river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below the island from access to the river.

And in *Mulry v. Norton* (1885) 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581, affirming (1883) 29 Hun, 660, it is said that, however accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his coterminous neighbor. In that case a bar, separated from the mainland by a lagoon, was claimed as an accretion by the owner of the portion of the bar where the formation began. It appeared that the bar merely replaced a formation which had been in part washed away, and the court said that the owner of the nucleus of the bar could not, even if the process of its enlargement and extension was effected by accretion, claim beyond the point where such accretion began to be adjacent to the property of adjoining owners.

Also in *Crandall v. Allen* (1898) 118 Mo. 408, 22 L.R.A. 591, 24 S. W. 172, it was held that where land is so situated on a river bend that the current washes away a portion of it until former nonriparian land becomes riparian, and then, beginning on the shore of the latter, the land reforms until it extends across the former line, the nonriparian owner will not be entitled to claim the whole of it, but can follow it only to the former

division line between the two estates, if the effect of such division will be to give the former riparian owner his original water front.

The reason that the authorities on the present question are not agreed in their conclusions seems to be due, in part at least, to the confusion of the common-law rule above referred to, as to the title to submerged land on its reappearance, with the rule as to the right of a riparian owner to accretions. It will be observed that the annotation does not cover such cases as *Chicago v. Ward* (1897) 169 Ill. 392, 38 L.R.A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; *Randolph v. Hinck* (1917) 277 Ill. 11, 115 N. E. 182; *Chicago Real Estate Bd. v. Mullenbach* (1918) 184 Ill. App. 487, and *Hughes v. Birney* (1902) 107 La. 664, 32 So. 30, which present the question of the ownership of land on its reappearance after it has been submerged, but do not involve the question of the right to follow accretions over former boundary lines.

And the rule that a riparian owner whose land is in part washed away is entitled to new land forming in the same place, only if such land is formed by accretions to the shore line of his remaining land; is supported by some cases not within the scope of the present annotation. For example, see *Frank v. Goddin* (1906) 193 Mo. 390, 112 Am. St. Rep. 493, 91 S. W. 1057, holding that a riparian owner on a navigable stream, whose title extends only to low-water mark, is not entitled to an island subsequently formed within the old boundaries after a part of his land has washed away. To a similar effect, see *Cox v. Arnold* (1895) 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592.

R. E. H.

JAMES B. SEWARD et al., Plffs. in Err.,  
v.

W. H. JOHNSON, Individually and as Guardian of Roy Henry Anderson.

*Oklahoma Supreme Court — November 25, 1919.*

(— Okla. —, 186 Pac. 212.)

**Divorce — alimony — estate of wife in land awarded her.**

Section 4969, Rev. Laws 1910, authorizes and empowers the district court in a divorce action, where the wife sues the husband for divorce, the custody of their minor child, and for permanent alimony, and where the wife is granted a divorce on account of the aggression of the husband, and awarded the exclusive custody of their minor child, and the court awarded to the wife as permanent alimony the undivided one-half interest of the husband in a tract of land owned by them jointly for the support of herself and the minor child, held, that the wife took all the title of the husband in and to said land, and her deed to the same, made to the plaintiffs after said decree became final, conveyed the land to the plaintiffs free from all claims of said minor child for support and maintenance.

[See note on this question beginning on page 651.]

Headnote by JOHNSON, J.

**ERROR to the District Court for McClain County to review a judgment in favor of defendant in an action brought to recover possession of certain land. Reversed.**

The facts are stated in the opinion of the court.

Messrs. Shartel, Dudley, & Shartel, for plaintiffs in error:

The divorce decree entered nunc pro tunc in the case of Anderson v. Anderson vested absolute title in the wife to the real estate referred to therein, and their minor child has no interest therein.

Derritt v. Derritt, — Okla. —, 168 Pac. 455; Warne v. Warne, 36 S. D. 573, 156 N. W. 60; Poloke v. Poloke, 37 Okla. 70, 180 Pac. 535, Ann. Cas. 1915B, 793; Davis v. Davis, — Okla. —, 161 Pac. 190; Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Pom. Eq. Jur. § 1009; Greenwood v. Greenwood, 96 Kan. 591, 152 Pac. 657.

Messrs. L. T. Cook and T. P. Pace for defendant in error.

Johnson, J., delivered the opinion of the court:

The plaintiffs in error commenced this proceeding against the defendant in error to reverse the following judgment rendered in the district court of McClain county on the 4th day of March, 1916: "Wherefore it

is ordered, adjudged, and decreed by the court that defendant, W. H. Johnson, as guardian of the estate of Roy Henry Anderson, minor child of Della May Anderson, is entitled to the possession of the 4 acres of land sued for herein, and, as guardian of the estate of said minor child, is entitled to the rents and profits on the undivided one-half interest of said lands awarded to Della May Anderson, for the support of herself and minor child, as shown by the order nunc pro tunc ordered on the 17th day of February, 1916, until said minor child reaches the age of twenty-one years, and there is a lien hereby declared to exist on that portion of land in controversy, which the court in said divorce action awarded to said Della May Anderson, for the rents and profits from said land, for the support of said minor child until said child has reached the age of twenty-one years. It is further ordered, adjudged, and



decreed by the court that plaintiffs herein pay the costs of this case."

The parties will hereinafter be referred to as plaintiff and defendant as they respectively appeared in the trial court.

The judgment was rendered upon an agreed statement of facts. The essential facts are that the plaintiffs purchased the land in controversy from one Alta Trautwein; that the latter purchased the same from one Della May Anderson, who was at the time the divorced wife of Nels Anderson, and about sixteen months after being divorced; that the Andersons, while husband and wife, acquired title to the land, a deed to which was taken to them jointly.

Mrs. Anderson sued her husband in the district court of McClain county for divorce, for the care and custody of their minor child, and for permanent alimony. In that action the plaintiff was granted an absolute divorce, awarded the custody of the minor child, and a decree for permanent alimony; the same being the land in controversy. That case was docketed in said court as follows: "Della May Anderson, Plaintiff, v. Nels Anderson, Defendant. No. 1108."

On October 24, 1913, the following proceedings were had in said cause:

"At this time the court grants decree of divorce, custody of minor child, injunction against defendant, and gives plaintiff farm in McClain county, grants plaintiff's attorneys judgment against defendant in the sum of \$200 attorneys' fees.

"Recorded in Journal 4, page 176, October 24, 1913. W. A. Wilcoxson, Clerk, District Court."

On February 15, 1915, a journal entry in said cause, though not signed by the trial judge, granting the plaintiff an absolute divorce from the defendant, awarding to her exclusive custody of the minor child, Roy Henry Anderson, and perpetually enjoining the defendant from interfering with her in such custody, and after making findings that the defendant was the owner of an un-

divided one-half interest in the land in controversy and that the plaintiff was the owner of the other undivided one-half interest, and that the same was mortgaged for \$2,500 in favor of the Alliance Trust Company, made the following order and decree: "It is further considered, ordered, adjudged, and decreed by the court that the defendant's undivided one-half interest in and to the above-described real estate be, and the same hereby is, set aside to and vested in the plaintiff herein, as her own individual property as permanent alimony, and that the defendant be, and he hereby is, divested of any right, title, interest, lien, or estate whatever therein or thereto, and that said defendant be and he hereby is, perpetually enjoined and restrained from claiming or asserting any right, title, interest, lien, or estate in and to said premises or any part thereof adverse to the plaintiff; and it is further considered, ordered, adjudged, and decreed by the court that the plaintiff have judgment against said defendant for the sum of \$150 attorneys' fees and for costs of this action."

And thereafter, on March 2, 1916, another journal entry of judgment was filed in said cause wherein the court made findings that the defendant was owner of an undivided one-half interest in the land in controversy, and that the plaintiff was owner of the other undivided one-half interest therein, and that there was a mortgage upon the premises for \$2,500 in favor of the Alliance Trust Company, and that the plaintiff was entitled to permanent alimony, an order and decree granting the plaintiff absolute divorce and awarding her the custody of the minor child, and enjoining the defendant from interfering with such custody, and wherein it was further ordered and decreed as follows: "It is further considered, ordered, adjudged, and decreed by the court that the defendant's undivided one-half interest in and to the above-described real estate be, and the same is hereby, set aside to and

vested in the plaintiff herein for the support of plaintiff and her minor child, as permanent alimony, and that the defendant be, and he hereby is, divested of any right, title, interest, lien, or estate whatever therein or thereto, and that said defendant be, and hereby is, perpetually enjoined and restrained from claiming or asserting any right, title, interest, lien, or estate in and to said premises, or any part thereof, adverse to the plaintiff; and it is further considered, ordered, adjudged, and decreed by the court that the plaintiff have judgment against said defendant for the sum of \$150 attorneys' fees and for costs of this action. And it appearing that through mistake and error said order was not entered of record in the office of the clerk of the district court of said county on the 24th day of February, 1913, and was not contained in the minutes of the judge of said district court on the 24th day of October, 1913, and it appearing to the court that said judgment of the court should be entered of record in the office of the clerk of the district court of McClain county, Oklahoma, as of the 24th day of October, 1913, it is therefore ordered, adjudged, and decreed by the court that the judgment of said court as above set forth, and found by this court now to be the judgment of the said court, be recorded as the judgment of said court as of the 24th day of October, 1913, and that the said record be corrected to and in all things show the rendition, filing, and recording of said judgment of the court as above set forth on the 24th day of October, 1913, the same as if said order as above set forth had been reduced to writing and recorded in full in the office of said district court clerk on the said 24th day of October, 1913. To which judgment of the court applicants James B. Seward and Mary Seward except. Exceptions allowed by the court. James B. Seward and Mary Seward are hereby given ninety days to prepare and serve case made, and W. H. Johnson, guardian, is given ten

days to suggest amendments thereto; case to be settled on five days' notice. Supersedeas bond fixed at \$100, and forty-five days given in which to give same. F. B. Swank Judge."

From which judgment and decree an appeal was lodged in this court and is still pending, the number of said case upon the docket of this court being No. 8,535. See *Seward v. Anderson*, — Okla. —, 186 Pac. 215.

The plaintiffs in their brief make eight assignments of error as follows:

"(1) Irregularity in the proceedings of the court, by reason of which plaintiffs in error were prevented from having a fair trial.

"(2) That the judgment and findings of the court were not sustained by the evidence.

"(3) Errors of law occurring at the trial and excepted to by plaintiffs in error.

"(4) The findings and judgment of the court were contrary to law.

"(5) Were contrary to the evidence.

"(6) Judgment not supported by the evidence.

"(7) Court erred in not rendering judgment for plaintiff.

"(8) The court erred in overruling motion of plaintiff in error for a new trial."

All of which were discussed under one proposition, which is stated as follows: "That the divorce and decree entered nunc pro tunc in the cause of *Anderson v. Anderson* vested absolute title in the wife to the real estate referred to therein, and their minor child has no interest therein."

In support thereof they say: "In a divorce proceeding, where an absolute decree of divorce is granted the wife on account of the fault of the husband, the court may, under § 4969, Rev. Laws 1910, set aside to vest in the wife as permanent alimony specific real property of the husband and divest him of any interest therein. The correctness of

this rule is unchallenged in this proceeding."

Counsel for plaintiffs in error state the controversy involved as follows: "Anderson and wife jointly owned the real estate and premises in controversy at the time of the commencement of the divorce suit hereinbefore referred to, and it is the contention of the plaintiffs in error that by virtue of the divorce decree entered nunc pro tunc the wife was vested with the husband's interest in this property, and that she has a perfect right to convey the same, and her conveyance passed absolute title, whereas, upon the other hand, it is the contention of the defendants in error that under this decree the child has an interest in the rents and profits from this property during its minority; so the sole question presented is the proper construction of the nunc pro tunc decree."

Counsel for the defendants' statement of the controversy involved, as contained in their brief, is substantially the same, as follows: "The principal question involved in this case is whether or not alimony awarded to a wife in a divorce proceeding for the support of herself and minor child can be assigned by the wife alone. Of course, if this court should decide that property awarded to a wife as alimony in a divorce proceeding for the support of herself and minor child is assignable, then this case should be decided in favor of plaintiffs in error, but, on the other hand, if this court should take the view that such property is not assignable, then we take it that it will be the duty of the court to decide this case in favor of defendants in error. This case comes to this court upon agreed statement of facts, and we assume that the court can render such judgment as is proper in the case."

The authority of the trial court in a divorce proceeding to award permanent alimony to the wife out of the property of the husband is by virtue of § 4969, Rev. Laws 1910, which is as follows: "When a di-

vorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before her marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in instalments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties, respectively, as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof."

This statute has frequently been construed by this court to the effect that it meant what it said. In the case of Johnson v. Johnson, — Okla. —, 179 Pac. 599, wherein the same question as here was involved, the court said: "We think that at the time the judgment was rendered the plaintiff was the equitable owner in fee of the 40 acres of land in controversy, and as such owner had the power to alienate or encumber the same at will, and that the trial court had the power to decree the same to the defendant as permanent alimony and future support for herself and the minor children. Germania Nat. Bank v. Duncan, — Okla. —, 161 Pac. 1077; Jones v. Jones, — Okla. —, L.R.A.1917E, 921, 164 Pac. 463; Davis v. Davis,

— Okla. —, 161 Pac. 190; Vick v. Vick, 45 Okla. 412, 145 Pac. 815."

We think it is clear that, where an award for permanent alimony is made to the wife from the real estate owned by the husband, the entire estate in the land owned by the husband is conveyed to the wife, and that the statute *supra* does not confer upon the court the power to convey the real estate of the husband to their children. The court, however, by virtue of another section of the statute, has the power to provide for the guardianship, custody, support, and education of the minor children of the marriage, either before or after final judgment in a divorce action. Section 4968 of the statute, *supra*.

The precise question here involved is: Where such an award for permanent alimony was made to the wife for the support of herself and minor child from the land of the husband, after such judgment has become final, had the wife the power to sell and convey the land? Counsel for the defendant say in their brief: "We do not know of any decisions of the supreme court of Oklahoma that has decided this question."

They take the position that the land is nonalienable by the wife. They cite the case of Fournier v. Clutton, 146 Mich. 298, 7 L.R.A. (N.S.) 179, 117 Am. St. Rep. 638, 109 N. W. 425, 10 Ann. Cas. 392, as sustaining their contention. In that case the court had ordered that the husband give to the wife as permanent alimony the sum of \$1,000, and awarded to her the custody of the minor children. The wife sold the judgment for \$200, and afterwards she brought suit, joined by the children, to recover from the party the amount of the award on the ground that decree for alimony is nonassignable. The supreme court of Michigan upheld her contention, and in an opinion by Carpenter, Ch. J., after stating the contention made in the case, said: "The briefs of counsel and my own research have enabled me to find but two cases touching the question of the assign-

ability of decrees for alimony, viz.: *Re Robinson*, L. R. 27 Ch. Div. 160, 53 L. J. Ch. N. S. 986, 51 L. T. N. S. 787, 33 Week. Rep. 17, and *Kempster v. Evans*, 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327. Each of these cases holds that such a decree is not assignable. In each of them the alimony assigned was an annuity not yet due. While the circumstances distinguish these decisions from the case at bar, it cannot be said that the reasoning upon which they rest is altogether inapplicable to this case."

Further on in the opinion, and as a basis therefor, the learned judge said: "It is based on the ground, as heretofore stated, that the existence of the right to assign frustrates the purpose of the law that alimony shall be used for the maintenance of the wife, or of the wife and children."

This section of our statute was borrowed from Kansas (Kan. § 4756; Stat. 1893, § 4550).

The supreme court of that state, in the case of *Greenwood v. Greenwood*, 97 Kan. 380, 155 Pac. 807, syl. 2 thereof, stated as follows: "A divorce decree providing that 'there is hereby set apart' to plaintiff 'as her separate estate as and for her alimony,' certain realty to be held by her 'in trust' for her two children until the younger child became of age, 'and at the expiration of said time, or upon the death of both of said children before said time, the title of said property shall vest' in plaintiff 'absolutely and in fee,' being utterly barren of any description of the nature and purpose of the trust, failed to meet the requirements of a declaration of trust."

In that case the supreme court of California is quoted with approval in the case of *Simpson v. Simpson*, 80 Cal. 237, 22 Pac. 167, wherein it was said: "When, upon a decree of divorce in favor of the wife for extreme cruelty and habitual drunkenness of the husband, the homestead property is awarded to the wife, and the decree declares that the property so awarded to her is to

'be held . . . in trust for her support, and for that of the children of the parties,' no definite or certain trust is created, but an absolute and unlimited estate in the homestead property is transferred to the wife."

A statute of Ohio on the subject is almost identical with ours, and the supreme court of that state, in the case of *Herron v. Herron*, 47 Ohio St. 544, 9 L.R.A. 667, 21 Am. St. Rep. 854, 25 N. E. 420, construing the statute, wherein the facts are similar to the facts in the instant case, said: "The legal effect upon the allowance was to grant to the wife the entire interest of the husband in the land. It was not necessary that a conveyance should be made, because the decree itself operated as a conveyance, and the title passed to the wife *eo instanti*. This transfer of title was not by any act of the husband, but by the fiat of the court. Hence it is to the purpose of the court we must look, and not to the purpose of the husband. The decree is not difficult of construction. It explains itself. The title received by the wife was as full and ample as though a conveyance from the husband had been made, and she took a title in fee simple.

. . . We are of the opinion that the decree gives the wife title to the land as a purchaser, and that she stands in regard to the crop of wheat in the attitude of a vendee receiving title and possession from a vendor, without reservation as to the growing crop, and hence the husband had no interest in the crop after the decree, and no right to enter upon the land to gather it."

The agreed statement of facts sets out the chain of title of the land in controversy, showing that the parties claim the same from a common source, and contains the following stipulations: "That the above suit is brought by plaintiffs to recover possession of said 4 or 5 acres of land, the possession of which is held by said W. H. Johnson, and against the will of plaintiffs James B. Seward and Mary Seward; that plaintiffs rely upon their rights to the possession of and

title to said land by virtue of their deed from Alta Trautwein, above set forth, and by virtue of a deed executed by Della May Anderson, as above set forth, and by virtue of the orders of the court as above set forth in this stipulation; that W. H. Johnson claims a right to the possession of and title in said land by virtue of being the guardian of said Roy Henry Anderson, a minor, and by virtue of the orders of the court as above set forth. It is further agreed that said W. H. Johnson held possession of said 4 or 5 acres of land as above set forth, adversely, and against the will of plaintiffs herein at the time this suit was filed, and has ever since held said possession. Prior to the commencement of this action plaintiffs demanded possession of said land of defendant, and same was refused."

We think it is clear from a careful examination of the entire record that, by virtue of the orders of the court awarding her as permanent alimony for the support of herself and her minor child, all the husband's interest in

the land was conveyed to the wife, and that the trial court erred in the judgment rendered herein decreeing the possession of the 4 acres of land sued for to the defendant, W. H. Johnson, as guardian of the estate of Roy Henry Anderson, and in awarding to the said defendant the rents and profits on the undivided one-half interest of said land, and decreeing a lien upon the same in favor of the defendant until the minor reached the age of twenty-one years.

The cause is therefore reversed, and judgment is rendered in favor of the plaintiffs, quieting their title to the land in controversy and for all costs incurred herein.

Owen, Ch. J., and Pitchford, McNeill, Bailey, and Higgins, JJ., concur.

Petition for rehearing denied, January 6, 1920.

**Divorce—  
alimony—estate  
of wife in land  
awarded her.**

## ANNOTATION.

**Right of wife to dispose of property awarded to her as support for herself and child.**

Whether a wife may legally dispose of property awarded to her by a decree for alimony, as support for herself and child, depends entirely on the terms of the decree. The question has arisen in but a few cases, and, since the form of the decree has varied in each instance passed on, it is impossible to lay down a general rule.

In *Simpson v. Simpson* (1889) 80 Cal. 287, 22 Pac. 167, the decision depended on the construction of a decree by which it was ordered that "homestead property hereby awarded to the plaintiff be held by her in trust for her support and for that of the children of the parties to this action." It was held that the court, in rendering the decree, did not intend to create a trust, or to limit or qualify the absolute assignment of the property to the wife. The court said: "Another consideration tending to support the construction here given to the decree is that the law did not authorize the court to assign the homestead or any equitable interest in it to the children, nor to the wife in trust for any purpose; and in the absence of a reasonably clear expression to the contrary, the court must be presumed to have intended to act within the scope of its authority, and not to exceed it. The authority of the court, in actions for divorce, to transfer the property of either party to the other, or otherwise to dispose of it, is purely statutory; and the statute did not authorize the court to create a trust in the homestead or community property, but only to assign it directly to the innocent party 'absolutely or for a limited period.'"

A like construction was, in *Greenwood v. Greenwood* (1915) 96 Kan. 591, 152 Pac. 657, rehearing denied in (1916) 97 Kan. 380, 155 Pac. 807, given to a divorce decree which provided that the wife should have the custody, maintenance, and education of two minor children, and stipulated that there should be set apart to her as her

separate estate, as and for her alimony, a certain described tract of land, to be held by her in trust for her two minor children until the younger should attain her majority, at which time, or on the death of both children before this time, the title to the property should vest in the wife absolutely and in fee. It was held that the decree failed to meet the requirements of a declaration of trust, since the nature and quantity of the children's interests were not defined, and the manner in which the trust was to be performed was not described, and that accordingly the wife had a power of disposal. The court said: "The divorce decree was very indefinite respecting the interests the children were to have in the land. The nature and quantity of their interests were not defined, and the manner in which the trust was to be performed was not described. These are necessary elements in the declaration of a trust, and when the language is so vague, general, or equivocal that they are left in uncertainty, the trust fails."

The same result was reached in *Coffey v. Cross* (1913) 185 Ala. 86, 64 So. 95, wherein it appeared that the complainant in a divorce proceeding was allowed the value of \$5,000 out of the real estate of her husband, "to be laid off and set apart as hereinafter directed, for the maintenance of herself during her natural life, or until she marries again, and for the support of her said child born of the wedlock of complainant and defendant, and, in the event of her death or marriage, the title in said land shall vest in said boy child of complainant and defendant, and in the event of his death, should he die after the death or marriage of his mother, it shall revert to complainant." It was held that by the terms of the decree the wife was vested with the fee-simple title to the land, on condition that, if she died or married before her son's death, the son should take a life estate with remainder to

the mother. Likewise in the reported case (*SEWARD v. JOHNSON*, ante, 645), it is held that a divorce decree providing that the husband's interest in certain land was "vested in the plaintiff herein for the support of plaintiff and her minor child, as permanent alimony," gave a fee to the wife so that her grantee was not chargeable with a claim of the minor for support.

But a contrary view was taken in *Arnold v. Arnold* (1910) 83 Kan. 539, 112 Pac. 163, rehearing denied in 113 Pac. 147, with respect to a decree of divorce which granted the control and custody of the minor children to the wife during their minority, and further provided that the legal title to the homestead real estate should be vested in the wife "in trust for and to the use and benefit of said children and any that may be hereafter born unto the plaintiff and defendant, or the survivors of them, until the youngest of said children of the survivor shall come to the age of maturity, to be held and used as the home of the plaintiff and the said children until said children or the youngest survivor of them shall come to his majority." It was held that this judgment did not give the title to the mother in fee simple, but gave only the use of the property. The court said: The language of the decree is clear and leaves no room for construction; it vests the legal title in her as trustee for the use and benefit of the children until the youngest shall come to the age of maturity, to be used as a home for her and her children until that time. The trust,

the use, and the limitation are clearly stated."

In *Bittier v. Myers* (1908) 33 Ky. L. Rep. 380, 109 S. W. 1181, it appeared that in a divorce suit the husband was ordered by the decree to convey to the wife for life, with remainder to the children, certain described property. Except by inference, it did not appear that the judgment was agreed to by the parties. At a subsequent term a consent judgment provided for the conveyance of the property to the wife in fee on condition that she release her interest in certain life insurance, the husband agreeing to maintain a certain amount of insurance for the benefit of the children. It was held that the children did not receive a vested interest in the property under the terms of the first judgment, since, under statute, the court did not have the power to make an order for alimony, or for the care and maintenance of the infant children, which, in effect, would divest the husband of the fee-simple title to the property, but that a conveyance by the husband to the wife, pursuant to the consent judgment, vested the fee in the wife; and the minor children, having received no vested interest under the first judgment, and having obtained a greater interest in the life insurance by reason of the consent judgment, which greater interest equaled their interest in the real property, had no valid objection.

The right to assign a money decree for alimony is not within the scope of this note. W. F. F.

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### STATE OF WASHINGTON, Resp't.,

v.

INEZ PETERSON, Appt.

*Washington Supreme Court (Dept. No. 2) — December 15, 1919.*

(— Wash. —, 186 Pac. 264.)

**Larceny — obtaining goods in name of another.**

1. One telephoning an order to a store for goods in the name of a credit customer, and one who receives the goods with knowledge that the pur-

pose is to get them without paying for them, are equally guilty of larceny by false pretenses.

[See note on this question beginning on page 656.]

— attempt — failure to deceive owner — effect.

2. One may be convicted of attempting to obtain goods by larceny through false pretenses by telephoning a store and ordering goods in the name of a credit customer, although the storekeeper is not deceived and attempts to make a delivery of them for the purpose of entrapping the guilty party.

[See 11 R. C. L. 835.]

Evidence — telephone conversation — attempted larceny.

3. Upon prosecution for larceny in attempting to secure goods from a merchant in the name of a credit customer by telephoning an order for them, the telephone conversations are admissible, although accused has not been directly connected with them.

[See 1 R. C. L. 77.]

**APPEAL** by defendant from a judgment of the Superior Court for King County (Smith, J.) convicting her of an attempt to commit larceny by false pretenses. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Howard O. Durk, for appellant:

The evidence was insufficient to show attempted grand larceny.

State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Bridgham, 51 Wash. 21, 97 Pac. 1096; State v. Kulbe, 67 Wash. 21, 120 Pac. 510; State v. Elliott, 68 Wash. 603, 123 Pac. 1089; 25 Cyc. 88; 17 R. C. L. pp. 10, 14, §§ 9, 14; Edmonson v. State, 18 Ga. App. 233, 89 S. E. 189; State v. Hull, 83 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159; Topolewski v. State, 180 Wis. 244, 7 L.R.A.(N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1087, 10 Ann. Cas. 627; State v. Loeb, — Mo. —, 190 S. W. 299; People v. Proctor, 1 Cal. App. 521, 82 Pac. 551; Lowe v. State, 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956; State v. Waller, 174 Mo. 518, 74 S. W. 842; Chalk v. State, — Tex. App. —, 18 S. W. 864; Love v. People, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710; 8 R. C. L. § 292, p. 281; Clark & M. Crimes, 2d ed. § 129; Bishop, Crim. Law, 7th ed. § 747, p. 447; People v. Jaffe, 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 848; State v. Stowe, 83 N. J. L. 14, 84 Atl. 1063; May v. Pennell, 101 Me. 516, 7 L.R.A.(N.S.) 286, 115 Am. St. Rep. 334, 64 Atl. 885, 8 Ann. Cas. 351.

With no proof to identify defendant as the individual with whom the store conversed over the telephone, at the time the merchandise was ordered, the testimony of the two witnesses as to the statements then made was incompetent and immaterial.

Young v. Seattle Transfer Co. 83 Wash. 225, 63 L.R.A. 968, 99 Am. St. Rep. 942, 74 Pac. 875; Dunham v. Mc-

Michael, 214 Pa. 485, 63 Atl. 1007; People v. McKane, 143 N. Y. 455, 38 N. E. 950; Murphy v. Jack, 142 N. Y. 215, 40 Am. St. Rep. 590, 36 N. E. 882; Stepp v. State, 31 Tex. Crim. Rep. 849, 20 S. W. 753; Planters Cotton Oil Co. v. Western U. Teleg. Co. 126 Ga. 621, 6 L.R.A.(N.S.) 1180, 55 S. E. 495; Willner v. Silverman, 109 Md. 841, 24 L.R.A.(N.S.) 895, 71 Atl. 962; Obermann Brewing Co. v. Adams, 85 Ill. App. 540; Shawyer v. Chamberlain, 118 Iowa, 742, 86 Am. St. Rep. 411, 84 N. W. 661; 12 Enc. Ev. 478; 2 Jones, Ev. § 211, p. 211.

The mere act of communicating a false pretense to an intended victim, to obtain money or property, is not in itself a crime, but becomes criminal only when it has the effect of deceiving.

Ricks v. State, 15 Ga. App. 645, 84 S. E. 86; Chicago v. Westergren, 173 Ill. App. 562; State v. Freeman, 103 Miss. 764, 60 So. 774; State v. Young, 266 Mo. 723, 183 S. W. 305; State v. Budaly, — Mo. —, 188 S. W. 110; Mason v. State, 99 Neb. 221, 155 N. W. 895.

Messrs. Fred C. Brown and John A. Frater, for the State:

The crime of grand larceny would have been committed had not defendant's false pretenses and representations been discovered.

Re Rudebeck, 95 Wash. 433, 163 Pac. 930; 8 R. C. L. 277; Clark & M. Crimes, p. 177; State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

Testimony of the telephone conversations had between employees of the store with some person representing



herself to be Mrs. Edgar Ames was admissible.

8 R. C. L. 179; State v. Baker, 69 Wash. 589, 125 Pac. 1016; State v. Pettit, 77 Wash. 67, 187 Pac. 835.

Fullerton, J., delivered the opinion of the court:

The appellant was accused by information of the crime of larceny, and upon a trial before a jury was convicted of an attempt to commit the crime of larceny. From the judgment and sentence pronounced upon the verdict she appeals.

The evidence tended to show the following facts: On December 24, 1918, some woman called by telephone the merchandise store of McDougall & Southwick in the city of Seattle, and, representing herself to be Mrs. Edgar Ames, a person whom the employees of the store knew to be the wife of a member of a shipbuilding company of the city named and a credit customer of the store, stated that she desired to purchase and have sent to the wife of a sick employee of the shipbuilding company certain merchandise as a Christmas present. She further stated that the person for whom the goods were intended lived out of the city of Seattle near the town of Kent, and inquired whether delivery could be made to her there. She was informed that the delivery wagons of the store did not go to Kent, but as a special favor to her, if she desired it, a wagon would be sent out to make the delivery on Christmas morning. The woman speaking then said that there was a Miss Ellenberger employed in the office of the shipbuilding company who lived at Kent, and that she thought possibly she might induce her to take the package out to Kent, and would call the store up later and let them know. She then inquired the name of the person speaking, and being given the name, closed the telephone. Later on she again called the store and inquired for the person with whom she had previously talked. On being put in communication with him she informed him that Miss Ellenberger had consented

to take the package and would receive it at the interurban depot at 4 o'clock. The person answering for the store was the superintendent, and he desired her to give the place and number of the telephone at which she then was, also her home address, saying he would later put her in communication with the mail order department of the store, from which her order could be more conveniently given attention. She gave her then location as the Y. M. C. A. building, the telephone number of the place from which she was speaking, and the telephone number of her home, but stated that she objected to waiting, as she was very busy and desired to give the order immediately. The superintendent at once recognized that the numbers given were not the numbers of the telephones at the places indicated, but nevertheless put her in communication with another employee of the store, where an order was given for merchandise appropriate for women's wear amounting to \$26.10. Both the superintendent and the employee taking the order reached the conclusion that it was not Mrs. Ames who had given the order, and later on Mrs. Ames was called, when the fact was positively ascertained. The goods ordered were packed, and at the appropriate time sent to the depot named by a young man connected with the delivery department of the store. In the meantime the police department of the city was communicated with, and detectives were sent to the depot to arrest the person who should receive the package. When the messenger reached the depot he sought to deliver the package to the station agent. The agent declined to receive it, when the appellant approached the counter, and, to paraphrase the language of the messenger, snatched the package out of his hand. Just then the appellant discovered the presence of the city detectives, when she dropped the package and walked back to a seat in the depot. She was then arrested and taken to the police station. The evidence also goes

somewhat minutely into the conduct of the appellant after her arrest, both at the depot and at the police station. This we shall not detail. Its tendency was to connect the appellant with knowledge of the telephone messages given the employees in the store earlier in the day.

It is the appellant's first contention that the evidence fails to connect the appellant with the person who ordered the merchandise over the telephone. There was no direct evidence of the fact, it is true, but the indirect evidence to our minds hardly leaves the matter in doubt. Her conduct at the time of the attempted delivery to the station agent, her subsequent explanations, and her behavior generally, all tended to show that she was either the person who telephoned, or that she had intimate knowledge of the

Larceny—  
obtaining goods  
in name of  
another.

act and the purpose  
sought to be accom-  
plished thereby.

Either conclusion  
would justify the verdict of the  
jury.

A further contention is that the facts shown do not constitute an attempt to commit a crime. The argument is that, since the employees of the store were not deceived by the false pretense, and since they did not part with the goods because thereof, there would have been no crime of larceny had the appellant procured the goods from the messenger and carried them away, and that the rule is there can be no attempted crime in cases where there could be no crime if the attempt had been successful. But this argument overlooks the fact that the attempt to deceive by the telephone order is as much a part of the offense as was the attempted taking and asportation of the goods at the depot. Had the ruse succeeded in its entirety, there

would have been a consummated offense, and it does not follow from the fact that the employees of the merchandise house were not deceived there is taken away from the transaction the element of attempt to deceive.

—attempt—  
failure to de-  
ceive owner—  
effect.

A further contention is that the court erred in admitting evidence of the telephone conversations, and erred in refusing to strike the evidence on a subsequent motion made to that effect. The objection is that the appellant was in no way connected with the conversations. Our conclusion to the effect that the evidence does sufficiently connect the appellant with the conversations is probably a sufficient answer to the objection, but the evidence was properly admitted in any event. It was a part of the circumstances of the transaction,

Evidence—  
telephone  
conversation—  
attempted  
larceny.

necessary to an understanding thereof, and as much entitled to be shown as any other circumstances connected therewith. Its probative effect to establish the appellant's guilt depended upon the evidence connecting her therewith, but it was admissible regardless of this question.

As explanatory of the case as a whole it may be proper to add that the offense of obtaining money or property by false pretenses is now denominated larceny by the Criminal Code (Rem. § 2801), and that under the express provisions of the same Code a person informed against for a consummated offense may be convicted of an attempt to commit the offense (id. § 2263).

The judgment is affirmed.

Holcomb, Ch. J., and Mount, Tolman, and Bridges, JJ., concur.

Petition for rehearing denied.

## ANNOTATION.

**Conversation by telephone as false pretense.**

Apparently there is but one case in addition to the reported case wherein a prosecution for obtaining money or property by false pretenses was based on statements alleged to have been made by the accused over the telephone, both cases applying the general rule (see 1 R. C. L. p. 477) that communications made by telephone stand on the same footing as those made face to face provided the identity of the person sought to be charged is shown.

In *People v. Ward* (1885) 3 N. Y. Crim. Rep. 488, the defendant was charged with fraudulently obtaining by means of false pretense the certification of a bank check. The former cashier of the bank was called as a witness and testified that he called the defendant on the telephone at his office, and over objection he was allowed to relate the substance of the conversation, in which were made the statements on which the prosecution was based. The witness testified that he had conversed over the telephone with the defendant several times before the conversation in question, that he was able to recognize distinctly the defendant's voice, and did recognize it on this occasion. On appeal it was held that this testimony was properly admitted.

To the same effect is the reported case (*STATE v. PETERSON*, ante, 652), where the defendant was accused of the crime of larceny and was convicted of an attempt. It appeared that she ordered by telephone goods in the name of a credit customer of the store. An

employee of the store was allowed to testify to the substance of the telephone conversation, and it is held on appeal that this testimony was admissible, but that its probative force to establish the defendant's guilt depended on the other evidence connecting her with the conversation.

Closely related to the subject under discussion is the case of *People v. Andre* (1909) 157 Mich. 362, 122 N. W. 98, a prosecution for obtaining goods by false pretenses, wherein the question arose as to the admissibility in evidence of a telephone conversation between the complaining witness and another. It appeared that the defendant had made a false bank statement as to his assets and liabilities, and thereafter referred the complaining witness, from whom he had purchased a bill of goods on credit, to the bank for information. The complaining witness was allowed to relate a conversation which he had over the telephone with a person who represented himself to be the cashier of the bank, in which conversation the complaining witness was informed of the statement made by the defendant to the bank. It was held that this conversation was not admissible to prove that the bank statement had been made, but was competent to prove that the complaining witness received information from an apparently authentic source which might well have influenced his action in selling the goods to the defendant. W. F. F.

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STATE OF SOUTH CAROLINA, Respt.,

v.

ELIJAH DOUGLAS et al., Appts.

*South Carolina Supreme Court — December 22, 1919.*

(— S. C. —, 101 S. E. 648.)

**Homicide — justifiable — prevention of elopement.**

1. A man and his son have the right to stop the attempted carrying out of a conspiracy to steal his infant daughter for the purpose of marrying her to a man objectionable to him.

[See note on this question beginning on page 660.]

**Evidence — homicide — surrounding circumstances.**

2. Upon prosecution for homicide, where the defense is that deceased conspired to steal the infant daughter of accused for the purpose of marriage, evidence is admissible as to who brought on the difficulty, the mental attitude of the parties towards each other, and the general circumstances surrounding the killing, showing the conspiracy and that deceased was at the place of the difficulty to carry out the conspiracy.

[See 18 R. C. L. 906.]

**Homicide — right to prevent interference with elopement.**

3. One accompanying an expedition

to carry out a conspiracy to steal an infant for the purpose of marrying her to a man objectionable to her father has no right to interfere with members of the family who attempt to prevent the wrongful act.

— defense of son.

4. A man may take life in defense of his son.

[See 18 R. C. L. 836.]

— reasonable doubt.

5. One accused of homicide is entitled to every reasonable doubt on the whole case.

[See 8 R. C. L. 218; 13 R. C. L. 908.]

**Jury — placing witness in charge.**

6. A witness should not be put in charge of the jury in a criminal case.

**APPEAL** by defendants from a judgment of the General Sessions Circuit Court for Orangeburg County (Bowman, J.) convicting them respectively of murder and manslaughter. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Wolfe & Berry and Brantley & Zeigler, for appellants:

It is competent to show a conspiracy between one or more parties, whether under indictment or not, if reasonably connected in point of time and place, for the purpose of laying a foundation for the admission of testimony establishing or tending to establish any necessary allegation in the indictment or in the plea.

5 R. C. L. 1087; State v. Ruck, 5 Ann. Cas. 976, note; State v. Thraikill, 71 S. C. 140, 50 S. E. 551; State v. McDaniel, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384; State v. Adams, 68 S. C. 421, 47 S. E. 676; State v. Smith, 46 S. C. L. (12 Rich.) 430; State v. Lee, 85 S. C. 101, 137 Am. St. Rep. 869, 67 S. E. 141; State v. Kennedy, 85 S. C. 153, 67 S. E. 152.

The jury should be instructed that, while the plea of self-defense must be made out by a preponderance of the testimony, yet if the jury entertain a reasonable doubt upon the whole testimony, considering both that of the state and of the defense, whether or not such plea has been established by such required preponderance, the defendant must be allowed the benefit of such doubt.

State v. Gadsden, 70 S. C. 432, 50 S. E. 16; State v. Latimer, 88 S. C. 79, 70 S. E. 409; State v. Anderson, 59 S. C. 230, 37 S. E. 820; State v. Way, 38 S. C. 346, 17 S. E. 39; State v. Way, 76 S. C. 94, 56 S. E. 653; State v. Hutto, 8 A.L.R.—42.

66 S. C. 454, 45 S. E. 13; State v. Lee, 79 S. C. 226, 60 S. E. 524; State v. Strother, 84 S. C. 504, 66 S. E. 877; State v. Jones, 90 S. C. 294, 73 S. E. 177.

Messrs. Thomas M. Raysor and Adam H. Moss, for respondent:

Testimony of Donnie Barrs was incompetent to establish a conspiracy, and was properly rejected.

State v. Kennedy, 85 S. C. 153, 67 S. E. 152; State v. James, 34 S. C. 49, 12 S. E. 657; Poole v. State, 45 Tex. Crim. Rep. 348, 76 S. W. 565; Tetterton v. Com. 28 Ky. L. Rep. 146, 89 S. W. 8; Edmonds v. State, — Ala. App. —, 75 So. 873; Consford v. State, — Ala. —, 75 So. 335; Allsup v. State, 15 Ala. App. 121, 72 So. 599; State v. Roe, — Mo. —, 180 S. W. 831.

The judge is only required to charge the law applicable to the case as made.

State v. Lee, 29 S. C. 118, 7 S. E. 44.

And the judge is not bound to charge the jury all the law which might under any circumstances be applicable, but only such principles as are applicable under the evidence.

State v. Dawkins, 32 S. C. 17, 10 S. E. 772; State v. Hutto, 66 S. C. 449, 45 S. E. 13; State v. Murrell, 33 S. C. 83, 11 S. E. 682; State v. Wyse, 33 S. C. 582, 12 S. E. 556.

Even if requests, specifically submitted, presented correct propositions of law, there is no error in refusing to charge them, where the same princi-

ples have already been presented to the jury in a general charge.

State v. Bodie, 33 S. C. 117, 11 S. E. 624; State v. Glenn, 88 S. C. 162, 70 S. E. 453; State v. Powers, 59 S. C. 200, 37 S. E. 690; State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; State v. Cannon, 52 S. C. 452, 30 S. E. 589; State v. Thompson, 76 S. C. 116, 56 S. E. 789; State v. Bethune, 86 S. C. 143, 67 S. E. 466.

It was not error to put Hall, who was a material witness for the state, in charge of the jury during the trial.

State v. Way, 38 S. C. 346, 17 S. E. 39; State v. Nance, 25 S. C. 172; McCarty v. McCarty, 38 S. C. L. (4 Rich.) 598; Smith v. Culbertson, 43 S. C. L. (9 Rich.) 106; State v. Tindall, 44 S. C. L. (10 Rich.) 212; State v. Bates, 87 S. C. 432, 69 S. E. 1075; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; 20 R. C. L. 251; State v. Wilson, 42 Wash. 56, 84 Pac. 409, 7 Ann. Cas. 418; Easterly v. Gater, 10 Ann. Cas. 891, notes; Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628, 16 Ann. Cas. 177; 17 Am. & Eng. Enc. Law, 1200; State v. Snyder, 20 Kan. 306; People v. Beverly, 108 Mich. 509, 66 N. W. 379; State v. Rush, 95 Mo. 199, 8 S. W. 221; State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; Washington v. State, 19 Tex. App. 521, 53 Am. Rep. 387; State v. Lockwood, 58 Vt. 378, 3 Atl. 539; State v. Flint, 60 Vt. 304, 14 Atl. 178; State v. Shores, 31 W. Va. 491, 13 Am. St. Rep. 875, 7 S. E. 413; Edwards v. Territory, 1 Wash. Terr. 196; 12 Cyc. 670; People v. Coughlin, 65 Mich. 704, 32 N. W. 905; Reed v. Com. 98 Va. 817, 36 S. E. 399; Speer v. State, 57 Tex. Crim. Rep. 297, 123 S. W. 415; Galan v. State, 68 Tex. Crim. Rep. 200, 150 S. W. 1171; Holmes v. State, 70 Tex. Crim. Rep. 214, 156 S. W. 1172.

Mr. E. C. Mann also for respondent.

Watts, J., delivered the opinion of the court:

The defendants were indicted for murder and tried before Judge Bowman and a jury at the May term of the court, 1919, for Orangeburg county. The trial resulted in a verdict of guilty with recommendation to mercy as to Elijah Douglas, and guilty of manslaughter as to Otis Douglas.

After sentence both appealed. The exceptions, 11 in number, raise four questions: First, exclusion of

competent testimony. The appellants impute error in excluding the evidence of Donnie Barrs offered on the part of the defendants. The theory of the defense was there was a conspiracy between Sanford and Segrest to "steal" the daughter of Douglas for the purpose of marriage. The evidence shows this daughter was under eighteen years of age, and should have obtained the consent of her father to marry, and was not entitled to obtain a marriage license without his consent. The defendants had the right to have the evidence of this witness, in order that the jury might determine

**Evidence—  
homicide—sur-  
rounding cir-  
cumstances.**

the question as to who brought on the difficulty, and whether or not the defendants were without fault in bringing it on, and as to the mental attitude of the parties one to the other, and to throw light on the general circumstances surrounding the killing, as to whether or not the deceased was engaged in a conspiracy and acting in concert with Sanford, by a prearranged plan, to take the daughter of Douglas away from her father's home in order that she might marry a man whom her father objected to, and to ascertain whether the deceased was casually or designedly at the place where the difficulty occurred, whether he just happened to be there, or whether he was there by prearrangement, all of which the defendants were entitled to have before the jury, to throw light on the general circumstances surrounding the circumstances.

If the deceased was engaged in carrying out an unlawful act by prearrangement and design on his part, acting in concert with the others, going to the house, or near it, after dark, for the purpose of assisting in the elopement of the daughter, under eighteen years of age, for the purpose of marrying her to a man objectionable to the father and without his consent, then the father

and son were clearly within their rights in going out to stop it and prevent its accomplishment. It was for the jury to say whether the defendants went out for this purpose and whether or not the deceased stopped them or obstructed them. The evidence shows deceased was beating the son.

From all the evidence in the case no other inference can be drawn; that they did not meet by accident. It was for the jury to say whether or not the deceased was not there by a preconceived agreement with another or others, to assist in an unlawful act. If the son went out to prevent his sister from eloping, and not to raise a row, then he was acting within his rights. If he was obstructed or stopped by the deceased, then it could not be inferred that he brought on the difficulty. He was engaged in a lawful act, and if deceased was there by a preconceived agreement, to assist in participating in an unlawful act, he had no right to obstruct or stop the de-

—right to prevent interference with elopement.

fendants or either of them. Both defendants, father and son, had the right to prevent the elopement of daughter and sister, and were not to be prevented by strangers engaged in an unlawful act, and, if either were assaulted under the circumstances, they had the right to protect themselves and to protect each other. This exception is sustained.

The second group of exceptions complains of erroneous instructions to the jury, and third, of refusal to charge certain written requests.

The requests refused should have been charged. The jury were clearly entitled to consider the plea of self-defense. If Douglas shot in defense of his son, it is within the province of the jury to pass on that.

A father or son has the right to protect each other. If the son was without fault in bringing on the difficulty,

and was assaulted under such circumstances as would justify a person of ordinary prudence and reason in believing he was in immediate danger of loss of life, or receiving serious bodily harm, from which he had no probable means of escape by retreat or otherwise, then, under circumstances of this sort, he has a right to take life. And under similar circumstances the son can kill to protect his father. The defendants were entitled to every reasonable doubt on the whole case, and the requests embodied this principle, and requests to charge were not covered by his Honor's general charge. These exceptions are sustained.

The fourth group of exceptions complains of error in failure to grant new trial because of improper conduct with the jury. We cannot say under all the facts, as brought out, that his Honor was in error. or that putting the witness in charge of the jury in this particular case was prejudicial to the defendants, but such practice generally is not to be commended, but to be condemned.

Jury—placing witness in charge.

In the trial of a case involving human life or any other felony the trial should be conducted in a manner free from wrongdoing, or even a suspicion of wrongdoing. This general rule should prevail. In this case the exceptions are overruled.

Judgment reversed.

Gary, Ch. J., and Gage, J., concur.

Hydrick, J., concurring:

I concur in the result. The first exception should be sustained and the eleventh should be overruled, and I think all the other exceptions should be overruled, because, when considered as a whole, there was no error in the charge which was prejudicial to appellants. Some of the requests were properly refused because they were faulty in statement of the law; others merely restated, in different words, propositions that had been given in requests that had

been charged, or in the general charge, and they were properly refused, on the ground, stated by the

court, that giving them would tend to confuse the jury.

Fraser, J., concurs.

### ANNOTATION.

#### Homicide or assault in attempting to prevent elopement.

Search has failed to disclose any cases besides the reported case (*STATE v. DOUGLAS*, ante, 657) strictly within the scope of the title.

The following cases, however, have been cited for their analogy:

A brother has not only the right, but it is his duty, to resort to all reasonable means to prevent his sister, although she is of mature years, from having unlawful sexual intercourse with a man, provided he does not commit a breach of the peace in attempting to prevent them. He does not have the right to use physical force to prevent their cohabitation, unless in his presence and after he has protested. And even in that case he can only use such physical force as is reasonably necessary to prevent the act of sexual intercourse. But the mere fact that his protest or his conduct may be calculated to bring on a difficulty, and actually does have that effect, will not deprive him of the right of self-defense, in case he is in danger of losing his life or suffering serious bodily harm, nor is he bound to retreat, although the difficulty takes place on the land of the deceased. *State v. Burdette* (1919) — S. C. —, 101 S. E. 664.

A father may protect his minor female child from seduction or debauchery, and, if necessary to prevent the criminal act, may slay the wrongdoer.

*Gossett v. State* (1905) 123 Ga. 431, 51 S. E. 394.

If the killing of one man by another is necessary, or apparently so, to a reasonable person, to prevent sexual intercourse by the former with the latter's wife or daughter, the homicide is justifiable. *Patterson v. State* (1910) 134 Ga. 264, 67 S. E. 816.

In *Alberty v. United States* (1896) 162 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. Rep. 864, where it appeared that, prior to the homicide, the deceased had been paying such attention to the defendant's wife that it caused them to separate, it was held that, if defendant found the deceased trying to obtain access to his wife's room in the nighttime, by opening a window, he had the right not only to remonstrate with deceased, but to employ such force as was necessary to prevent his doing so; and, if deceased threatened to kill him, and made a motion as if to do so, and put him in fear of his life, or of great bodily harm, he was not bound to retreat, but had the right to use such force as was necessary to repel the assault.

And it is held in *Duncan v. State* (1908) 171 Ind. 444, 86 N. E. 641, that a man has the right under the law to prevent by reasonable means, which include apparently physical force if necessary, illicit sexual intercourse with his wife.

G. V. L.

J. W. THOMPSON, Appt.,

v.

R. B. DAY, Sheriff and Tax Collector, et al.

*Louisiana Supreme Court — November 4, 1918.*

(143 La. 1086, 79 So. 870.)

#### Tax — on wrecked vessel.

1. A vessel engaged in overseas trade ceases to be a seagoing vessel

Headnotes by SOMMERVILLE, J.

when it is wrecked and sunk and sold by the owners to third parties. It then becomes simply valuable wreckage, and subject to assessment and taxation as the property of the new owners, situated within the state.

[See note on this question beginning on page 663.]

— irregularities — what considered.

2. Only those irregularities charged against an assessment of property which are alleged in the petition will

be considered by the court, especially where there is no evidence to support the irregularities alleged in the argument.

**APPEAL** by plaintiff from a judgment of the Judicial District Court for the Parish of East Baton Rouge (Brunot, J.) in favor of defendants in a suit to enjoin the seizure and sale of a certain steamship for taxes. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. T. Jones Cross, for appellant:

The ship in question did not, by reason of its sinking in the port of Baton Rouge in 1912, and remaining partially submerged, but retaining her identity, become incorporated in the mass of the property of the state so as to become liable for state and local taxation for the years 1915-1917.

Teagan Transp. Co. v. Board of Assessors, 69 L.R.A. 431, note; North American Dredging Co. v. Taylor, 29 L.R.A. (N.S.) 105, note; Old Dominion S. S. Co. v. Virginia, 3 Ann. Cas. 1100, note; Johnson v. DeBary-Baya Merchants' Line, 37 L.R.A. 518, note; Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 18; Yost v. Lake Erie Transp. Co. 50 C. C. A. 511, 112 Fed. 746.

Messrs. A. V. Coco, Attorney General, A. J. Thomas, W. Carruth Jones, and Harry P. Sneed for appellees.

Sommerville, J., delivered the opinion of the court:

Plaintiff, domiciled and residing in St. Louis, Missouri, enjoins the seizure and sale of the steamship Gut Heil for taxes for 1915, 1916, and 1917. The vessel had been rammed and sunk in 1912, and has been lying partially submerged in the Mississippi river since that time, within the parish of East Baton Rouge. Plaintiff became the owner in November, 1916.

Plaintiff claims exemption from taxation for his property under the Federal and state Constitutions, and he alleges irregularities in the assessments thereof.

There was judgment in favor of the defendants, dissolving the pre-

liminary injunction, and the suit was dismissed. Plaintiff has appealed.

The Constitution provides for the taxing of all property, and the revenue statute imposes taxes upon all vessels for which taxes have not been paid at their domicils.

The Gut Heil ceased to be engaged in overseas trade in 1912, when she was rammed and sunk in the Mississippi river. At that time, she became valuable wreckage, owned by German citizens, who subsequently sold her to others; and she finally became the property of the plaintiff.

As the vessel was not engaged in overseas trade at the time it was assessed for taxation, and as it is not alleged or shown that she was registered at any port whatever, or that taxes had been paid thereon in any place, the action of the defendant in assessing the property is not violative of the commerce clause of the Federal Constitution. The assessment and taxation of her is not an interference with interstate or foreign commerce to any extent.

Until the vessel has been raised and she is engaged in interstate or overseas trade and commerce, which may now be her true condition, she was not exempt from taxation under the amendment of the state Constitution. Act No. 253, p. 38, Ex. Sess. 1917. Only ships engaged in overseas trade and commerce, and domiciled in a Louisiana port, are exempted from taxation under the amendment.



The Gut Heil has not been engaged in commerce since 1912; she has not been a vessel incidentally or temporarily detained in the parish of East Baton Rouge for any cause. Her owners took or sent her there for the purpose of commerce; but after she was sunk and had become a wreck they abandoned their intention of engaging her further in commerce, and they sold the wreck. The present owner bought a

**Tax—on wrecked vessel.**

wrecked vessel, perhaps with the intention of raising her and engaging her in overseas commerce; but as such wreckage she is subject to taxation, until she is engaged in overseas trade and commerce.

In argument, it was stated that the assessments were supplemental, and that they had been made in the name of an unknown owner for two of the three years, and for all three years on the roll, instead of on separate rolls in 1917. But these matters were not alleged in the petition,

**—irregularities  
—what con-  
sidered.**

and there was no evidence on these points, except, in answer to the question by the counsel for the defendant, "Did you know, at the time she was assessed to unknown owners, who her owner was?" the assessor answered, "I did not."

It is alleged in the petition that the defendant, the tax assessor, "assessed said steamship for the years of 1915, 1916, and 1917, at a valuation of \$100,000 for each of said years. . . . That the assessment and levy of said taxes upon said ship are illegal, null, and void because, under the manner in which said assessment and levy have been made by the assessor of the said parish of East Baton Rouge, no review of said assessment had been had; the owner had no opportunity or means of inspection and correction of said assessment and levy; and, particularly, had not published a notice in a newspaper published in this parish that the listing of this property has been completed and the estimated valuation made there-

in by the assessor, and that said list shall be exposed in the office of the assessor," etc.

Plaintiff offered no evidence in support of these allegations, except to examine the assessor, as on cross-examination; and he testified that the property was listed and valued by him in April, and that the rolls were subsequently submitted to the police jury, sitting as a board of reviewers, who reviewed the assessment rolls for 1917 in his office. The assessor published a notice in the State-Times, a daily newspaper published in the city of Baton Rouge, on Wednesday, May 2, 1917, notifying "all persons liable to taxation" that the assessment rolls had been completed, and that the lists would be exposed in his office for inspection and correction, for a term of twenty days beginning next after ten days' notice shall have expired. All taxpayers were invited to examine the rolls and to test the correctness of the same in a manner prescribed by law.

A similar notice was published in the same paper August 22, 1917, stating that a board of state affairs had officially passed on the assessments for state purposes, and that the rolls were in the assessor's office and open for inspection for twenty days; and taxpayers were notified to examine their assessments prior to meeting of the police jury, sitting as a board of review, the meeting to be held September 11, 1917.

The irregularities in the assessments as set forth in the plaintiff's petition were disproved by the above-referred-to evidence, and the assessments must therefore stand.

The judgment appealed from is affirmed, at appellant's cost.

O'Niell, J., takes no part, having been absent during the argument.

Provesty, J., absent on account of illness, takes no part.

Dismissed by the Supreme Court of the United States, November 17, 1919 (U. S. Adv. Ops. 1919-20, p. 65) — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 55.

## ANNOTATION.

## Where wrecked vessel taxable.

The reported case (*THOMPSON v. DAY*, ante, 660) seems to have been the only one to have determined the situs of a wrecked vessel for purposes of taxation, but the decision therein to the effect that a vessel owned in a foreign country and engaged in transatlantic trade ceased to be a seagoing vessel when wrecked and sunk in Louisiana waters and sold to a local party, but then is simply valuable

wreckage which is subject to taxation as the property of the purchaser in the state, is in accord with the general rule that property is taxable in a state when it becomes a part of the mass of property thereof. Likewise, the holding conflicts in no way with the rule that a vessel may acquire an actual situs apart from the place of enrolment and registration or residence of the owner. G. J. C.

JAMES H. BOOTH  
v.  
GEORGE SCHEER, Appt.

*Kansas Supreme Court—December 6, 1910.*

(195 Kan. 643, 185 Pac. 898.)

**Sale — duty to defend action against vendee.**

1. The defendant traded a stallion to plaintiff and warranted the animal to be sound. The plaintiff, relying upon defendant's representations and warranty, traded the stallion to a third person, giving his subvendee the same sort of warranty as he had received from defendant. The third party sued the plaintiff for breach of warranty. Plaintiff notified defendant of the suit and requested him to take charge of the defense. Defendant declined. Plaintiff was subjected to a judgment, and in this action seeks recoupment against the defendant. Held, that the defendant was not bound to defend in the action of the third party against the plaintiff, nor is he concluded by its result; his warranty to plaintiff was personal; and he may defend against an alleged breach of his warranty without regard to the consequences which flowed from the suit of the third party on a similar alleged breach of warranty made by plaintiff to his subvendee.

[See note on this question beginning on page 667.]

**— warranty — right of remote grantee.**

2. Ordinarily there is no privity of contract between the original vendor of personal property and third persons who may purchase or acquire the property from the original vendee; and

the original vendor's warranty is a personal obligation between him and his own vendee, and it does not run with the property like covenants concerning real estate.

[See 24 R. C. L. 159.]

Headnotes by DAWSON, J.

**APPEAL** by defendant from a judgment of the District Court for Brown County (Stuart, J.) in favor of plaintiff in an action seeking recoupment, against defendant, of an amount which plaintiff was compelled to pay a

third party in an action against him for breach of warranty of the soundness of a horse. *Reversed.*

The facts are stated in the opinion of the court.

Mr. W. E. Archer, for appellant:

The court should have overruled plaintiff's motion for judgment and sustained the defendant's motion for judgment on the general verdict and special findings of fact.

*Billings v. Atchison*, T. & S. F. R. Co. 76 Kan. 325, 91 Pac. 72; *Osburn v. Atchison*, T. & S. F. R. Co. 75 Kan. 746, 90 Pac. 289; *Clementson*, Special Verdicts, p. 1313; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 680, 26 Pac. 16.

The warranty of a vendor of personalty does not run with the property.

*Dukes v. Nelson*, 27 Ga. 463; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; *Roberts v. Anheuser Busch Brewing Asso.* 211 Mass. 449, 98 N. E. 96; *Post v. Burnham*, 27 C. C. A. 455, 55 U. S. App. 71, 88 Fed. 79; *Walrus Mfg. Co. v. McMehen*, 51 L.R.A.(N.S.) 1111, note; *Nelson v. Armour Packing Co.* 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; 35 Cyc. 370.

Mr. W. F. Means, for appellee:

A warrantor who has been duly notified to defend a suit will be bound by the result thereof, and the judgment rendered in such action will be conclusive against him.

8 Am. & Eng. Enc. Law, 206; 11 Cyc. 1104; *Chamberlain v. Preble*, 11 Allen, 370; *Jackson ex dem. Vredenburg v. Marsh*, 5 Wend. 44; *Salle v. Light*, 4 Ala. 700, 39 Am. Dec. 317.

*Dawson, J.*, delivered the opinion of the court:

This action grows out of an alleged breach of warranty in a horse trade.

The plaintiff, Booth, traded a stallion, "Cranmore King," and gave \$550 in cash to the defendant Scheer, for a stallion, "Nig," and a breeding jack.

Plaintiff alleged that defendant represented to him that the stallion "Nig" was sound and healthy and suitable for breeding purposes, and that plaintiff relied thereon, but that such representation was false and fraudulent, and that defendant made such statement knowingly and for the purpose of cheating the plaintiff. He further alleged that three days after making this trade,

plaintiff, still believing and relying on Scheer's representations, traded "Nig" to one Earl Walters for an agreed value of \$400, and in that trade he represented that "Nig" was in good health and sound physical condition. He alleged that "Nig" was not a sound and healthy horse, that he was a windbroken "whistler" of little or no value, and soon thereafter Walters sued the plaintiff for damages on account of the false representation made to him by the plaintiff Booth, and Booth notified defendant of that action and requested him to appear and take charge of the defense. This Scheer failed to do, and Booth hired a lawyer and made a defense, but was defeated, and judgment was entered against him for \$250 and interest. Plaintiff prayed for recoupment against Scheer.

Defendant admitted the trade, but denied the misrepresentation, and set up a cross claim for damages on account of alleged false representations of Booth touching the soundness of "Cranmore King."

The jury returned a verdict for \$1 in defendant's favor, and answered certain questions:

(1) Was there any change in the condition of health and soundness of the stallion traded by the defendant Scheer, to the plaintiff Booth, from the time the defendant traded such stallion to plaintiff until the plaintiff traded him to Earl Walters?

Answer: No.

(2) Did the defendant represent to plaintiff that the stallion which defendant traded to plaintiff was sound when such trade was made?

Answer: Yes.

(3) Did the plaintiff believe and rely upon such representation as being true when he traded for such stallion?

Answer: Yes.

(4) What, if any sum, do you allow to the defendant by reason of

any alleged unsoundness of the horse, "Cranmore King?"

Answer: Nothing.

Special questions submitted by defendant:

(1) Was the wind of the stallion "Nig" sound at the time defendant traded him to plaintiff?

Answer: Yes.

(2) If the wind of said stallion "Nig" was unsound at the time of the trade, did the defendant know it?

Answer: No.

Plaintiff's motion non obstante for judgment on the special findings and admitted facts was sustained, and judgment was entered for plaintiff for the sum he had to pay Earl Walters in the action which Scheer had declined to defend. Defendant's motion for judgment on the verdict was denied.

The defendant appeals. He complains of various matters, but his chief contention is that a warranty of a vendor of personalty does not run with the property, and therefore he was not bound by the judgment which Walters recovered against plaintiff.

The question presented by appellant has not heretofore required much attention in this jurisdiction. In *Thisler v. Keith*, 7 Kan. App. 363, 52 Pac. 619, *Thisler and Schneider* sold a stallion to Coder and warranted it to be sound. Coder sold the horse to Keith upon the same warranty. The horse proved to be unsound. Coder assigned to *Thisler and Schneider* certain notes given by Keith for the horse. They sued Keith on the notes, and he brought a cross action against them for a breach of the warranty which they had given to Coder, and which in similar terms Coder had given to Keith. Keith prevailed three times before a jury, and the late court of appeals summarily ended the controversy, so far as the cross action was concerned, by holding, without discussion, that *Thisler and Schneider* were not liable to Keith on the warranty of the horse which they had given to Coder.

The general doctrine contended for by appellant seems to be settled in this country.

With certain exceptions like warranties in the sale of staple or trademarked goods (*Nixa Canning Co. v. Lehmann-Higginson Grocer Co.* 70 Kan. 664, 70 L.R.A. 653, 79 Pac. 141; *Roberts v. Anheuser Busch Brewing Asso.* 211 Mass. 449, 98 N. E. 95; *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 13 L.R.A. 438, 22 Atl. 868; *Mazetti v. Armour & Co.* 75 Wash. 622, 48 L.R.A. (N.S.) 213, 135 Pac. 633, Ann. Cas. 1915C, 140— and some of these cases sound more in tort than in breach of warranty), the rule that warranties run with the property, like covenants concerning real estate or like indorsements on negotiable paper, does not apply in successive sales of ordinary chattel property. See note in 51 L.R.A. (N.S.) 1111. There is no privity of contract between the vendor in one sale and the subvendees of the same property in subsequent sales. Although the warranty may be couched in the same terms in each successive sale, the obligation of the warrantor in each sale is personal to his own vendee, and it is no concern of the warranting vendor that his vendee may have been subjected to liability by a reiteration of the same warranty in a later sale of the property. Each seller is liable for his own contract and to the extent thereof, but that alone will not determine his prior vendor's obligation to him. Every succeeding vendor takes the chances on his own warranty; and he may, without having those chances foreclosed, decline to concern himself with litigation which arises between his vendee on a similar independent warranty given by the latter to a subsequent vendee. *Smith v. Moore*, 7 S. C. 209, 24 Am. Rep. 479; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394. On the general doctrine that a warranty upon the sale of personal property does not run with the property, but that each reiteration of the warranty is a

Sale—warranty  
—right of re-  
mote grantee.

merely personal, independent obligation between each warrantor and his personal vendee, and creates no obligation on the part of the original warrantor to subsequent vendees, see *Nelson v. Armour Packing Co.* 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; *Van Winkle v. Wilkins*, 81 Ga. 93, 105, 12 Am. St. Rep. 299, 7 S. E. 644, 24 R. C. L. 159, 161.

In 35 Cyc. 370, the rule is stated: "Ordinarily a warranty is addressed to some particular person, and the buyer alone can avail himself thereof. A warranty on the sale of personalty does not run with the property, and assignees of or purchasers from the buyer cannot avail themselves thereof as against the original seller, unless the assignee or purchaser assumes payment of the original purchase price, or the warranty is specifically assigned to the second purchaser, or by a usage of the trade a warranty inures to the benefit of subsequent purchasers."

In our examination of the law of this case we have noted traces of a doctrine that a warranty of title sometimes runs with personal property (*Boyd v. Whitfield*, 19 Ark. 447, and citations therein; 23 Cyc. 1272), but we have not pursued that inquiry, as we have only to consider a warranty of soundness.

The soundness of a horse is so much a matter of opinion, and is so easily affected by change of care, or change of work, or of feed, water, or weather,—surely this does not yet need to be elaborated, for the generation of lawyers and judges who are also experienced horsemen has not yet vanished,—that it would never do to extend or apply the doctrine of warranties of title, if that doctrine be well founded, to warranties of soundness to run with so changeable a form of property as a stallion.

From the foregoing it is clear that the fact that the plaintiff was subjected to a liability on his personal, independent warranty to his sub-

vendee is not a controlling circumstance in this action against the defendant, on the warranty of the latter to plaintiff. The jury's special findings show that the stallion "Nig" was sound at the time defendant traded it to plaintiff; consequently defendant's personal warranty to plaintiff was not breached, and hence defendant has incurred no liability. That another jury, in another case, on facts which were presumably the same, came to a different conclusion as to the soundness of the stallion, is one of the mischances which attend the affairs of a workaday world where men do not always see alike.

The judgment is reversed, and the cause remanded, with instructions to enter judgment for defendant.

**Mason, J., concurring specially:**

I agree that a warranty of quality given by the vendor on a sale of chattels does not run with the property. That is, a buyer from the vendee cannot recover from the original vendor on such warranty, whether or not he received a similar warranty from his immediate vendor. But that does not seem to me to decide the question in controversy.

A warranty of title to personal property does not run with the property. 24 R. C. L. 159. That is, a buyer from the vendee cannot successfully sue the original vendor on his warranty, whether or not he received a similar warranty from the person from whom he purchased. But the recognized rule appears to be that, if the buyer of personalty under such a warranty is sued by one claiming a superior title, and loses, the vendor is concluded by the judgment, if he was given notice and an opportunity to defend. 23 Cyc. 1272, 1273; 24 Am. & Eng. Enc. Law, 743; 24 R. C. L. 233; 15 R. C. L. 1019. The only reason that I find given by courts for not following the same practice with respect to warranties of quality is that a change in that respect might have

taken place between the two sales. *Smith v. Moore*, 7 S. C. 209, 24 Am. Rep. 479, cited in the opinion, and *Morgan v. Winston*, 2 Swan, 472. In the present case, however, it was specifically found that there had been no such change. It may be that the fact that ordinarily a change of condition would be involved is a sufficient reason for not

applying the rule at all in this situation; or the reason may be that in the nature of things it is only in regard to title and related matters that a warranty implies an obligation to defend. I concur in the result with some doubt, but cannot see that the problem is solved by saying that the warranty does not run with the property.

### ANNOTATION.

#### Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor.

##### In general.

It is a general rule that warranties relating to the quality, condition, or soundness of chattels or goods do not inure to the benefit of subsequent purchasers of the property, but they are personal to the warrantee. Cases of this character are not within the scope of the note, and it is not exhaustive of such cases. The following are referred to as supporting this rule:

**United States.** — *Post v. Burnham* (1897) 27 C. C. A. 455, 55 U. S. App. 71, 83 Fed. 79, writ of certiorari denied in (1898) 169 U. S. 735, 42 L. ed. 1215, 18 Sup. Ct. Rep. 945.

**Arkansas.**—*Nelson v. Armour Packing Co.* (1905) 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; *Boyd v. Whitfield* (1858) 19 Ark. 447.

**Connecticut.**—*Welshausen v. Charles Parker Co.* (1910) 83 Conn. 231, 76 Atl. 271.

**Florida.**—*Kendig v. Giles* (1860) 9 Fla. 278.

**Georgia.** — *Broughton v. Badgett* (1846) 1 Ga. 75; *Smith v. Williams* (1903) 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394.

**Illinois.** — *Zuckermann v. Solomon* (1874) 73 Ill. 130.

**Iowa.** — *Fulton Bank v. Mathers* (1918) 183 Iowa, 226, 166 N. W. 1050.

**Kansas.**—*Thisler v. Keith* (1893) 7 Kan. App. 363, 52 Pac. 619.

**Kentucky.** — *Prater v. Campbell* (1901) 110 Ky. 23, 60 S. W. 918; *Asher Lumber Co. v. Cornett* (1900) 22 Ky. L. Rep. 569, 56 L.R.A. 672, 58 S. W. 438.

**Missouri.**—*Ranney v. Meisenheimer* (1895) 61 Mo. App. 484.

**New York.** — *Bordwell v. Collie* (1871) 45 N. Y. 494.

##### Warranty of soundness, condition, quality, etc.

It follows that since warranties of soundness, condition, quality, etc., of goods or chattels are personal to the warrantee, if he subsequently sells the property and gives a similar warranty, and is sued for a breach thereof, he cannot cast the burden of the defense upon his warrantor, and if judgment is rendered against him in such action it is not conclusive against the warrantor, and the latter may show that at the time the property left his possession it complied with the warranty. This is the holding of the reported case (*BOOTH v. SCHEER*, ante, 663).

It is also the holding of *Morgan v. Winston* (1852) 2 Swan (Tenn.) 472, a case very similar as to facts to the preceding case. The case involved a warranty of the soundness of a slave. The purchaser having sold the slave with a similar warranty, a judgment was rendered against him for the breach of this latter warranty. In a subsequent action upon the original warranty, it was held that the plaintiff was not entitled to introduce in evidence the record of the judgment recovered against him. The court said that evidence of this judgment was not evidence against the defendant to prove that the slave was unsound at the date of the warranty; nor, that fact appearing by proof aliunde, was it the measure of damage to which the plaintiff was entitled. For the dis-

ease at those different periods of time might not have been the same, or continuous, and if it were, the defendant was not notified and required to defend. It will be noted that this case goes further in extending the rule than the *BOOTH CASE*, which merely holds that the judgment against the original purchaser was not conclusive in an action by the original buyer against the person from whom he purchased the property. The *Morgan Case* holds that the judgment rendered against the original purchaser upon the subsequent warranty which he gave when he sold the property was not admissible in evidence in his behalf, in an action by him for a breach of the warranty given when he purchased.

In *Ft. Worth Grain & Elevator Co. v. Walker Grain Co.* (1914) — *Tex. Civ. App.* —, 168 S. W. 470, it appeared that a car of grain was sold under a warranty as to quality; the seller purchased a car with a similar warranty, to fulfil the sale. Upon being sued for a breach of this warranty, he set up these facts, and asked that the person from whom he purchased be made a party thereto, and that, if judgment were rendered against him on the subsequent warranty, judgment be rendered over against such additional party on the original warranty; the additional defendant, or interpleaded defendant, appeared in the action and made a defense; judgment was, however, rendered against both defendants, the judgment being separate as to each warranty. The original buyer having settled by compromise with the person to whom he sold, the original seller, having refused to enter into the compromise and having appealed from the judgment against him, and being cast upon this appeal, was held not entitled to the benefit of the favorable compromise made by the purchaser, but to be liable for the entire amount of the judgment originally awarded against him, with interest, costs, etc.

#### **Warranty of title.**

It has been held that the seller of personal property is bound to make

good to the purchaser his losses resulting from breach of the implied warranty of title; hence, if the purchaser of any subsequent vendee is sued in replevin or trover, or in any action involving the question of title, and he gives notice to his vendor of the pendency of the action and its nature, a judgment rendered against the original purchaser is conclusive evidence against him. If, however, no notice is given, it is not conclusive against him, and he may show that the original purchaser, in a suit against him on his warranty, ought not to recover the amount paid, because the previous case was not properly defended, and judgment was suffered unnecessarily. *Thurston v. Spratt* (1863) 52 Me. 202. The court said: "It can make no difference that there are intermediate purchasers and that the suit is against the last one, if the question of title is the sole matter in controversy. . . . The law will not tolerate a succession of long lawsuits to determine, as in this case, the title to a single horse, in all of which precisely the same issue is to be tried, when all the parties have had due notice and an opportunity to defend. It requires that every warrantor who is notified shall act at once in defending himself, or in aiding the party sued to defend the action. This is the rule in real actions. . . . Where there is a succession of transfers, and judgment against the last holder, and notices to all the vendors, it may be competent for the first, or any seller, to show that the defect in the title arose after he sold the property, and that therefore he had no interest in the determination of the question tried. However this may be, the defect in the case before us was in the title of the defendant. That was the only question in issue. He was notified and did nothing to aid in the defense. This case illustrates the wisdom of the rule. After being notified, he stands by and keeps to himself the facts which he now says would show a right in him to sell the property. If he had disclosed them or testified to them at the trial, the result might have been different. He allows a final judg-

ment to pass, by which the other innocent purchasers lose the property and damages and costs, and now asks to be allowed to prove them, when it is too late for his vendee to use them in his defense."

A case, which may be of some interest in this connection, although it was a sale of standing timber, is *Rust Land & Lumber Co. v. Wheeler* (1911) 111 C. C. A. 53, 189 Fed. 321. In this case the purchaser notified the seller

of a suit against him, involving the title to the timber, and requested him to defend the suit. This request was acceded to, but the defense was unsuccessful, and judgment was rendered against the purchaser. Under these circumstances it was held that the judgment against the purchaser was conclusive upon the seller in a subsequent action by the purchaser against him upon his warranty of title. A. G. S.

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EPH MEREDITH, Appt.,  
v.  
WILLIAM H. MCCORMICK.

*Michigan Supreme Court — December 23, 1919.*

(— Mich. —, 175 N. W. 280.)

**Landlord and tenant — lease of house by number — what included.**

1. A lease of a house by the street number includes only so much of the lot upon which the building stands as is necessary for the complete enjoyment of the building for the purpose for which it was let.

[See note on this question beginning on page 673.]

**Evidence — parol — intention as to lease.**

2. Upon construction of a lease of a house by street number, evidence is not admissible of the intention of the parties with respect to what is included within its terms.

[See 16 R. C. L. 708.]

**Landlord and tenant — right to use of yard in rear.**

3. A lease of a building for a rooming house by street number includes the right to use a portion of the yard in the rear for the storage and seasoning of wood to be used as fuel in the house.

[See 16 R. C. L. 710, 711.]

**— use of walk to alley.**

4. A lease of a house by street number includes a right to use of a walk leading from the house to an alley in the rear for the purposes of ingress and egress, the removal of garbage, and other like uses.

[See 16 R. C. L. 715.]

**— right of landlord to use yard for garage.**

5. A lessee of a house by street number cannot enjoin the erection by the landlord of a garage on the lot in the rear, if a walk to furnish access to the alley in the rear is furnished in lieu of the walk which would be obstructed by the garage.

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**APPEAL** by plaintiff from a decree of the Circuit Court for Wayne County, in Chancery (Chester, J.) dismissing a bill filed to enjoin defendant from building a garage upon the rear of certain premises alleged to have been leased to plaintiff, and from further interfering with plaintiff's rights as tenant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Benjamin & Betzoldt, for appellant:

A description of premises in a lease of a building by the street number includes so much of the lot upon which

the building is situated as is necessary to the complete enjoyment of the building for the purposes for which it was let, and nothing more.

24 Cyc. 1024; *Kuschinsky v. Flani-*



gan, 170 Mich. 245, 41 L.R.A.(N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228; Patterson v. Graham, 40 Ill. App. 399, 140 Ill. 531, 30 N. E. 460; Oliver v. Dickinson, 100 Mass. 114; Houghton v. Moore, 141 Mass. 437, 6 N. E. 517; Armstrong v. Crilly, 152 Ill. 646, 38 N. E. 936.

If all the other tenants, occupants of the terrace, including defendant, were tenants in common of the entire land in the rear of the entire terrace, then no one of the cotenants would have the right to exclusively occupy any portion of the common property; neither would he have the right to erect any buildings or structures on any or part of the common property, without the consent of all the other cotenants.

38 Cyc. 17, 18; Bell v. Reed, 199 Mich. 35, 165 N. W. 789; Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; Capen v. Leach, 182 Mass. 175, 65 N. E. 63; Bennett v. Clemence, 6 Allen, 18.

Messrs. Lodge & Brown for appellee.

Stone, J., delivered the opinion of the court:

The bill of complaint herein was filed to obtain an injunction restraining the defendant from building a garage upon the rear of certain premises, alleged to be leased to the plaintiff; also, to restrain defendant from interfering with, molesting, or removing any wood or other materials that plaintiff might put on the premises involved, for his own personal use, that would not interfere with the use of said premises by other tenants. The plaintiff is the tenant and occupant of the house and premises known as 145 Harper avenue, Detroit, under and by virtue of a written lease for five years from the 1st day of April, 1916, wherein Walter W. Smith was the lessor and the plaintiff was lessee. The defendant has succeeded to the rights of Smith in the premises. The written lease contains the following by way of description of the premises: "The following described premises situated and being in the city of Detroit, county of Wayne, and state of Michigan, to wit: House No. 145 Harper avenue, . . . for the term of five years from and after the 1st

day of April, 1916, on the terms and conditions hereinafter mentioned, to be occupied for a rooming house."

The 8th and 9th paragraphs of the bill of complaint are as follows:

"(8) Your petitioner further shows that for the purpose of his home, and in order to supply fuel for next winter, he has caused certain green wood to be piled up temporarily, to dry, along the easterly line of said premises, and east of the cement walk which your petitioner has to go to and from said alley, and that said William H. McCormick, the present owner, defendant herein, now claims that your petitioner has no right to leave said wood there, or to use the back yard of said premises, and has removed some of the wood of your petitioner from off the rear end of said lot, or court.

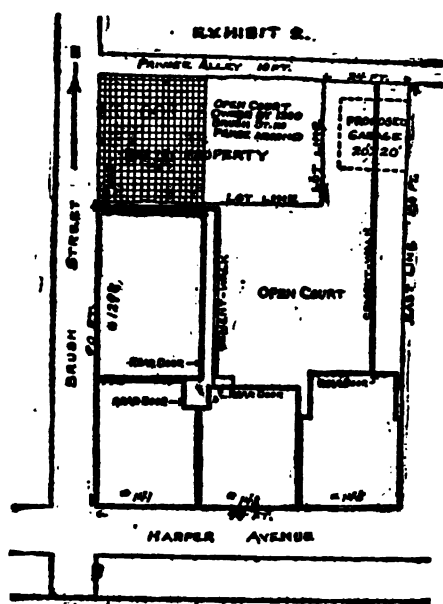
"(9) Your petitioner further shows that the said William H. McCormick, in derogation of your petitioner's rights as a tenant, has torn down the easterly and rear fence, has cut down certain shade trees, and, against the express objection and protests of your petitioner, is proceeding to build a large garage on the rear of said lot, which will occupy more than 400 square feet, and will thereby deprive your petitioner of the use of 400 square feet of said small back yard or court which now exists, and that if the said William H. McCormick is permitted to build said garage it will interfere with the quiet and peaceful possession of your petitioner, and will cut off the enjoyment of a large portion of the present back yard, to which he is lawfully entitled, which loss cannot be fully compensated in damages, and which would be irreparable."

The defendant, by his answer, virtually admits the acts above charged, but claims that the same were not in derogation of any of plaintiff's rights, and denies that plaintiff has acquired any rights by reason of said acts.

The testimony was taken in open court, and the bill of complaint was

dismissed; the decree stating that the defendant have power and authority to proceed with the erection of the structure in said bill of complaint mentioned, allowing plaintiff access to the alley in the rear of said premises by the 4-foot way mentioned in said proofs.

A diagram of the premises, known as Exhibit 2, hereto appended, will aid in an understanding of the situation:



The house leased and occupied by plaintiff is on the easterly end of a terrace of houses situated on the corner of Brush street and Harper avenue, and there are three separate and distinct houses on the terrace facing on Harper avenue and one facing on Brush street. The width of the house, No. 145, is 30 feet. The other three houses in the terrace are occupied by the defendant for rooming-house purposes, and in the rear of No. 145 there is a cement walk that goes direct from the kitchen door to the alley on the north. This sidewalk is used exclusively by the plaintiff and the occupants of his house. There is another cement walk on Brush street that comes around the rear for the accommodation of the other three houses, including the one on

Brush street. The other tenants in the terrace do not use any portion of the lot in the rear of the terrace east of the line, if it were extended 24 feet from the east line of the lot. Plaintiff has used exclusively the entire east 24 feet of the lot in the rear of No. 145 Harper avenue. He does not use the other portion of this lot west of the 24-foot line. Plaintiff's business is that of a cement paving contractor, and he had been in the habit of storing, for a short time, wheelbarrows, etc., on the rear of the lot, in what he claimed was his portion thereof. He also piled green wood on the rear end of the lot, between the sidewalk and fence on the east line, and would leave it there until it got dry, and then would put it in the basement of No. 145. Referring to the wood, plaintiff testified as follows: "This spring I had some wood piled on the rear end of this lot, between the sidewalk and the fence, a space of about 4 feet east of the sidewalk. It was green wood sawed in 2-foot lengths for the grate. I put it there until it got dry, and then I put it in the basement. While that wood was there, Dr. McCormick asked me to remove it. I did not remove it, and the doctor started some proceedings in the circuit court commissioners' court, and from that court it has been appealed to the circuit court."

He further testified that the defendant interfered with and removed some of the wood which the plaintiff had piled there. The full width of the rear end of the lot on the alley on the north is 24 feet. The defendant tore down the fence upon the alley upon the east side near the northeast corner of the premises, and had brought material, and had taken steps to erect a garage 20x20, intending to set it back some 8 or 10 feet from the alley line, and directly over the cement walk used by the plaintiff in carrying garbage to his garbage can, which was kept in the alley in the rear of the premises. As soon as the plaintiff found that the defendant had torn down

the fence and put some building material upon the premises, preparatory to building the garage, this bill was filed, and a temporary injunction was obtained.

The defendant testified as follows: "My plans contemplate a garage 20x20 in the northeast corner of the lot. That will leave 4 feet up to my line on the west side of the garage. It is vacant beyond that to the side for 35 feet. Then I will have to set in a little from the alley because it is a narrow alley. I plan to deflect this cement walk where it comes to the garage, and build it around the front of the garage, and then at the side, so that the tenant in 145 will have access to the alley the same as before. The distance from the front of the garage to the back end of the house is 42 feet; that would leave the plaintiff still 42 feet of back yard for clotheslines."

He estimated that setting the garage back 8 feet from the alley would make the space occupied 28x20, or 560 square feet. The defendant testified that that would leave ample room between the garage and the back end of No. 145.

The plaintiff has appealed, and it is claimed that, both as to the interference with the wood which he had piled east of the cement walk, and with reference to the garage proposed to be built over the walk, he is entitled to injunctive relief, and that the court erred in dismissing the bill of complaint.

Counsel upon both sides of the case have cited numerous authorities from other jurisdictions. We are of the opinion that the law of the case is substantially settled by the recent case of *Kuschinsky v. Flanigan*, 170 Mich. 245, 41 L.R.A. (N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228. That was a case of leasing by the street number, and

Landlord and tenant—lease of house by number—what included.

it was held that it included so much of the lot upon which the building was situated as was necessary to the complete enjoyment

of the building for the purpose for which it was let, and nothing more.—citing 24 Cyc. 1044.

Upon the subject of description of premises, see also *Nowicki v. Kopalczak*, 195 Mich. 678, 162 N. W. 266.

It is the contention of the defendant that the plaintiff, having leased 145 Harper avenue, did not lease the building and its appurtenances, but only the house. He contends: "He therefore had no right to anything but the house, and he has not been denied any right in the occupancy of the house."

We think this is too narrow a view of the matter. There was testimony offered and received tending to show the understanding of the parties independent of the written lease. We think evidence could

Evidence—parol not be introduced—intention as to vary the terms lease.

of the lease. The intent of the parties is to be found by an examination of the lease. There ought not to be much question about the law that should govern this case, for defendant's counsel say: "We accept counsel's statement of the law applicable to this case. The general rule is that a description of premises in a lease of the building by the street number includes so much of the lot upon which the building is situated, as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more."

Defendant's counsel contend, however, that a different rule should be applied to a rooming house from that of a dwelling house. It is very apparent that a rooming house in Michigan climate must be heated, as well as a dwelling house. We think the use of the portion of the back yard between the cement walk

Landlord and tenant—right to use of yard in rear.

and the east line of the premises might lawfully be used by the plaintiff for the purpose of piling wood to be seasoned for use. That was, in our opinion, necessary to the complete

enjoyment of the building for the purpose for which it was let.

We think that plaintiff was also entitled to the unobstructed use of the cement walk extending from the rear of No. 145 to the alley, for the purposes of ingress

—use of walk to alley.

and egress, and for the purpose of removing garbage, and other like uses; and when the defendant proposed to build a garage over the cement walk, thus interfering with access to the alley, he encroached upon the plaintiff's rights as a tenant.

It is true that the defendant testified that he planned to deflect this cement walk where it comes to the garage, and built it around the front of the garage and then at the side, so that the tenant would have access to the alley the same as before. There is no claim by defendant that this has been done. We are of the opinion that the plaintiff will have no just cause to complain of the garage when such proposed cement walk is built around the south and

—right of land-  
lord to use yard  
for garage.

west sides of the garage to the alley.

Until that is done, the plaintiff has a right to have the defendant restrained. We think the

decree below should be reversed; and instead of dismissing the bill, we think the plaintiff is entitled to an injunction restraining the defendant from interfering with, or molesting or moving, any wood that the plaintiff may put on the east side of the cement walk for the purposes described; and that such piling does not in any manner interfere with the use of said back yard or court by the other tenants in the terrace.

We are also of the opinion that the plaintiff is entitled to an injunction restraining the defendant from erecting the garage at the place mentioned, until such time as he shall have built upon the south and west sides of the proposed garage a walk to the alley. When that is done so that the plaintiff has access to the alley over the cement walk, we think the injunction as to the garage should be dissolved, as the same would not materially interfere with the covenant for peaceable possession contained in the lease.

The decree below will be reversed, and a decree prepared in accordance with this opinion, with costs of both courts to the plaintiff.

## ANNOTATION.

### Property included in a lease of premises described by street number.

Cases are not generally included in the present annotation, where, although there may have been a reference to the street number, there were other descriptive clauses which constituted the ground of the decision.

In accord with the reported case (MEREDITH v. McCORMICK, ante, 669), supporting the rule that a lease of a house by a street number includes only so much of the lot upon which the building stands as is necessary for the complete enjoyment of the building for the purpose for which it is let, are: *Patterson v. Graham* (1892) 140 Ill. 581, 30 N. E. 460; *Hesher v. Hestermann* (1895) 58 Ill. App. 265; and *Kuschinsky v. Flanigan* (1912) 170 8 A.L.R.—43.

*Mich.* 245; 41 L.R.A. (N.S.) 480, 186 N. W. 362, Ann. Cas. 1914A, 1228.

In *Patterson v. Graham* (Ill.) supra, the lessee of a building by street number, for use as a music store, claimed the right to the use of a passageway in the rear of the building. It was held that, since the lease did not in terms convey any right to such use; nor give the tenant any right whatever to that part of the lot in the rear of the building, all that could be claimed was that, by construction, the lease conveyed so much of the lot on which the building stood as was necessary to the complete enjoyment thereof for the purpose for which it was rented; and that whether the passageway,

or any part of the lot in the rear, was so necessary was a question of fact, as to which the decision of the lower court was final.

But a demise of premises, by street numbers of residences which form the main or principal feature of the lease, has been held to include stables situated in the rear of the lot on which the residences stand. *Armstrong v. Crilly* (1893) 51 Ill. App. 504, affirmed in (1894) 152 Ill. 646, 38 N. E. 936.

But the doctrine of the case last cited was held in *Hosher v. Hestermann* (1895) 58 Ill. App. 265, *supra*, not applicable to a corner lot in the business portion of a large city, occupying a considerable frontage on two streets and occupied by both business and dwelling houses separate and distinct from each other, and fronting on different streets. Under those circumstances, the rule first stated was held to apply. It was specifically held that a lease of a saloon building by street number, located on a corner lot, did not include an unoccupied structure formerly used as a blacksmith shop, separated by a few feet from the rear of the saloon, on the same lot but fronting on the other street, the shop never having been used in connection with the saloon, and being known by another number.

In *Kuschinsky v. Flanigan* (Mich.) *supra*, it was held that a lease of a dwelling house by a street number, standing on a lot on the rear of which was a barn, with no opening into the lot, but between which and the dwelling was a vacant space 40 by 30 feet, carried with it the vacant portion of the lot.

It was said in *Houghton v. Moore* (1886) 141 Mass. 437, 6 N. E. 517, that when a house or building is described in a lease by a number over the outside doors on a street, the inference is that a building is intended access to which is had by these doors from that street. In this case the lessor had acquired by separate deeds a parcel of land on a street corner, and another parcel adjoining it in the rear; before he bought these parcels a building had been erected on them with a solid brick partition wall on the lot line extending

from cellar to roof, the entrance to and the numbers of the two portions of the building being on different streets; before granting the lease, he had removed the partition wall on the first floor, but otherwise the wall remained intact. It was held that the separate character of the two parts of the building above the first story remained unimpaired, and that a lease of the "building," described by the street number of the corner part, did not include the upper stories of the other part of the building, which were accessible only from the other street.

Although basing its decision on other grounds, the court in *Chesebrough v. Pingree* (1888) 72 Mich. 438, 1 L.R.A. 529, 40 N. W. 743, expressed the opinion that a lease which designates the property as a certain building, describing it by street and number, is a lease for the whole premises, and not for the building alone, where the building covers the land, and the exclusive possession of the land is necessary to the enjoyment of the demise.

And in the syllabus by the court in *Snook & A. Furniture Co. v. Steiner* (1903) 117 Ga. 363, 43 S. E. 775, it is said that where there is nothing to indicate an intention to limit the possession to buildings, the lessee of city premises described by street numbers takes an interest in the yard, garden, subjacent land, and appurtenances. Both this and the preceding case involved the question of the rights of the parties after the buildings were destroyed by fire.

A lease of "house No. 324" on a certain street was held in *People ex rel. Murphy v. Gedney* (1877) 10 Hun (N. Y.) 151, to be not limited merely to the land covered by the house, but to include an alleyway extending to a side entrance and to the rear, and separated from the adjoining lot by a fence. The court said: "The piece of ground constituting the alleyway was inclosed with the house by a high board fence, and was in the possession of [the lesser]; it was occupied in part by the stoop leading to the side door of the house, and by a walk of flagging extending to the gate on the street, and it appears without dis-

pute to have been pointed out to the lessee as a part of the demised premises. There seems to be no doubt that, by the grant or demise of a house, the curtilage, or garden, will pass without the words, 'with the appurtenances,' added. The curtilage is the courtyard in the front or rear of a house or at its side, or any piece of ground lying near, inclosed and used with the house and necessary for the convenient occupation of the house. . . . It was competent to prove the statement of the landlord, made at the time of pointing out the demised premises, for the purpose of identifying the subject of the lease."

So in *Okie v. Person* (1904) 23 App. D. C. 170, where the lease was of "premises No. 3219 U street," it was held that, as the subject-matter of the lease was a dwelling house situated in the midst of a comparatively large tract of land, there was a latent ambiguity as to the extent of the premises, which parol evidence was admissible to explain.

And parol evidence was held admissible in *Cary v. Thompson* (1860) 1 Daly (N. Y.) 85, to show that a lease of houses by street number was intended by the parties to include a back yard on which woodsheds were erected. The situation is thus stated in the opinion: "In the rear of each of the houses was a small yard, extending back about 12 feet and running across the whole width of each lot, and in the rear of this, again, was another yard, extending back about 20 feet, and extending across the width of the lots. In the first yards the privies were placed; in the second, there were woodhouses and posts for clotheslines, and there was an open entrance or passageway between the first and second yards. The plaintiff offered to show that, before he leased the premises, the defendant pointed out to him the woodhouses in the second yard as used by the tenants or occupants of the houses which he afterwards leased." The court held this and other evidence to a similar effect admissible to show the intention of the parties as to the property included in the lease.

In *Crabtree v. Miller* (1907) 194

*Mass.* 123, 80 N. E. 225, holding that a covered "court" between a theater building and a hotel, situated on adjacent lots and belonging to the same owner, was not included in a lease of the hotel, the decision was based, not on any rule as to what property is included in a lease by street number, although the premises were so described, but upon the construction of the descriptive clause which followed the description by number.

So, the construction of other descriptive clauses in the lease, rather than the mere street number of the leased property, seems to have been the basis of the decision in *Morris v. Kettle* (1898) 56 N. J. Eq. 826, 34 Atl. 376, 42 Atl. 1117, where the lease was of the "house and premises" in a certain city, known or designated by a certain street number, and "all the buildings, outhouses, and premises of said place, with the appurtenances." The number given in the lease corresponded to a small lot on which a house had been built, covering practically the entire lot; west of it was another lot upon which were outhouses used by the occupants of the former lot; and east of the latter was a vacant lot,—all being the property of the lessor. In the absence of clear proof that the lessor intended to include the vacant lot to the east, the court refused to reform the lease so as to include it.

And where a corner store 15 by 45 feet, occupying part only of a building belonging to the lessor, was leased, but in addition to the street number the descriptive part of the lease stated that the store had a frontage of 15 feet "and a uniform depth of 75 feet," the question arose in *Blair v. Wessinger* (1919) — Cal. App. —, 178 Pac. 545, whether a store 15 by 15 feet in the rear of that described in the lease by street number, in the same building, but numbered on the other street, was included in the terms of the lease. It was held that there was an extrinsic ambiguity which might be explained by parol evidence; and that in this case the evidence supported a finding that the smaller store was not included in the lease.

Cases like *Riddle v. Littlefield*

(1873) 53 N. H. 503, 16 Am. Rep. 338, holding that the lease of a store by street number gave the lessee the right to control the use of the exterior wall, and that he, and not the lessor, might

use it for advertising purposes, either to advertise his own goods or to hire it to others for the posting of bills, are not within the scope of the note.

R. E. H.

STATE OF OHIO EX REL. ROY R. CARPENTER, Prosecuting Attorney,  
Plff. in Err.,

v.

EDWARD C. KREUTZER et al.

*Ohio Supreme Court — July 8, 1919.*

(— Ohio St. —, 126 N. E. 54.)

**Corporations — annual meeting — directors' control over.**

1. Regulations for the government of corporations, adopted by the stockholders, are not subject to repeal or amendment by the board of directors, and where such regulations designate the time and place of the annual meeting of the stockholders of the corporation, no authority being conferred upon the board of directors relative thereto, such board is without power to postpone the same.

[See note on this question beginning on page 678.]

— notice of meeting — necessity.

2. Where the regulations of a corporation definitely fix the place, the day, and the hour of the annual meeting at which members of the board of

directors are to be elected, no further notice of such meeting to the stockholders of the corporation is necessary unless required by such regulations.

[See 7 R. C. L. 336.]

Headnotes by the COURT.

ERROR to the Court of Appeals for Jefferson County to review a judgment in favor of defendants in a quo warranto proceeding to test the validity of their election as directors of a certain corporation. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. C. Lewis and E. E. Erskine for plaintiff in error.

Messrs. D. M. Gruber and Kennon & Kennon, for defendants in error:

The directors of the company have no authority under the law, or under the provisions of the regulations of said corporation, to postpone or change the time of the annual meeting of the stockholders for the election of directors of said corporation, for in so doing they would be changing the regulations.

Citizens' Nat. Bank v. Cincinnati, N. O. & T. P. R. Co. 11 Ohio Dec. Reprint, 703; Cronin v. Potters' Co-op. Co. 11 Ohio Dec. Reprint, 748; Morris v. Griffith & W. Co. 69 Fed. 181; State v. Standard Life Asso. 38 Ohio St. 281; Wiswell v. First Cong. Church, 14 Ohio

St. 81; State ex rel. Wachenheimer v. Toledo & L. C. Burial Asso. 8 Ohio C. C. N. S. 250.

Where the time and place are provided for in the regulations, notice to the stockholders need not be given unless the regulations provide for notice.

State ex rel. Atty. Gen. v. Bonnell, 55 Ohio St. 10; Wiswell v. First Cong. Church, 14 Ohio St. 81.

Directors of the corporation must act honestly and are precluded from taking secret advantage.

Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311.

They assume the relation and obligation of a trust toward the company and those who shall come into the enterprise as stockholders.

(— Ohio St. —, 126 N. E. 54.)

Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; Shawnee Commercial & Sav. Bank Co. v. Miller, 1 Ohio C. C. N. S. 580; Simons v. Vulcan Oil & Min. Co. 61 Pa. 202, 100 Am. Dec. 628, 6 Mor. Min. Rep. 633.

Shareholders constitute the corporation, and not the directors.

Simons v. Vulcan Oil & Min. Co. supra.

The courts will not interfere in the internal policy, management, and control of a corporation, unless it is manifest that it is about to exceed its corporate powers and do an act which would be in fraud of the rights of stockholders.

Lowe v. Pioneer Threshing Co. 70 Fed. 646.

Matthias, J., delivered the opinion of the court:

This proceeding in quo warranto was instituted in the court of appeals of Jefferson county. It was charged that the defendants usurped and lawfully held and exercised the offices of directors of the Bertram Coal Mining Company, and that they assumed to do and perform all and singular the duties pertaining to said offices, to the exclusion of Samuel C. Bigger, E. Rowland Cole, Isaac D. Barricklow, William Johnson, and Charles M. Barger, under the claim that they had been duly elected as such directors and as successors in office of the persons just named.

Issue of the validity of the election of said defendants as such directors was made by answer, and upon hearing was determined by the court of appeals favorably to the defendants, and plaintiff's petition was dismissed. This proceeding in error is prosecuted to reverse that judgment.

The Bertram Coal Mining Company is an Ohio corporation, having its principal office and place of business in the village of Smithfield, Jefferson county, Ohio. The regulations adopted by the stockholders designate the first Monday in October of each year, at 2 o'clock, as the time, and its office at Smithfield, Ohio, as the place, for the annual meeting of the stockholders, and au-

thorize special meetings to be held upon the call of the board of directors, or by the stockholders. The regulations further provide that the number of directors shall be five, and the election thereof held annually at the annual meeting of the stockholders, or at a special meeting called for that purpose; that the term of office shall be one year, and the directors shall hold office until their successors are elected and qualified. They further provide that a written or printed notice of every regular or special meeting of the stockholders, stating the time and place thereof, and, in case of special meetings, the object thereof, shall be given to the stockholders by mailing the same to the last known address ten days before such meeting, "provided, however, no failure or irregularity of notice of any meetings shall invalidate the same or any proceeding thereat."

The persons above named were elected directors of the corporation in September, 1917, and because of no election being called or held in October, 1917, they continue to hold office.

On September 27, 1918, said board of directors adopted a resolution attempting to postpone the annual meeting of the company to October 28, 1918, and notified the stockholders thereof. Ignoring the action of the board of directors, stockholders representing a majority of the stock, and constituting a quorum as provided by the regulations of the corporation, met at the time and place provided by such regulations for the annual meeting, October 7, 1918, and elected the defendants as directors of said corporation. On October 28, 1918, the date to which the directors had attempted to postpone the annual meeting of the corporation, it is conceded that a quorum was not present, and no election of directors was had or attempted. It is claimed by the relator that failure to give notice of the annual election invalidated the election of the defendants as directors, and that because of the fact that no quorum



was present on October 28th the old directors continue in office.

This action in quo warranto is based upon the contention that the election of the defendants as directors was illegal, because the annual meeting had been postponed to a subsequent date by resolution passed by the board of directors, and because a notice in writing was not given the stockholders that such election would be held at the time and place fixed therefor by the regulations of the company. Under the provisions of our statute (Gen. Code §§ 8701 et seq.), regulations for the government of corporations are adopted by the stockholders, and can be changed or amended only by the method prescribed. The directors of a corporation may adopt by-laws for their government, but they must be consistent with the regulations of the corporation. They have no power to amend those regulations. It follows that the resolution of the board of directors, whereby it was attempted to postpone the date of the annual meeting,

Corporations  
—annual meet-  
ing—directors'  
control over.

which was definitely fixed in the regulations adopted by the stockholders, and which conferred no authority upon the directors relative thereto, was wholly invalid, and the stockholders were therefore justified in disregarding it. The shareholders, not the board of directors, constitute the corporation.

As we have seen, the time and

place of the annual meeting and the business to be transacted, to wit, the election of directors, was precisely fixed and stated in the regulations of the corporation, and, unless further action was required by the regulations, this was sufficient notice to the stockholders of such meeting and the purpose thereof. Cook, Stock & Stockholders, 3d ed. § 594.

The regulations do make provision for notice, but also provide that "no failure or irregularity of notice of any meetings shall invalidate the same or any proceeding thereat." Hence the requirement as to notice was not mandatory, and where there is no claim or suggestion of fraud or deception the election of directors under circumstances such as are disclosed by the record will not be held invalid because no written notice was given, and that is especially true in view of the fact that the former directors, who owned substantially half of the outstanding stock, and in behalf of whom this action seems to have been instituted, had actual knowledge that the annual meeting and election was proceeding in accordance with the regulations which they had assumed authority to annul.

The judgment of the Court of Appeals is affirmed.

Nichols, Ch. J., and Jones, Johnson, Donahue, Wanamaker, and Robinson, JJ., concur.

## ANNOTATION.

### Power of directors to change time for regular meetings of stockholders.

The power of the directors of a corporation to change the time for the regular meetings of the stockholders is exhaustively discussed in 2 A.L.R. 558. With the exception of the reported case, no recent case appears to have considered this proposition.

In the reported case (STATE EX REL. CARPENTER v. KREUTZER, ante, 676) it appears that the regulations adopted by the stockholders of a corporation

provided that the annual meeting of the stockholders should be held on the first Monday in October. Prior to the time for an annual meeting, the corporate directors notified the stockholders that the annual meeting would be postponed until October 28th. A majority of the stockholders, however, ignored this action of the directors, and on the day appointed by the corporate regulations elected the defend-

ants as directors. An action in quo warranto was then brought, it being alleged that the election of the defendants was illegal, as the meeting had been postponed. The court holds that

the board of directors had no power to postpone the annual meeting, and hence that the defendants were legally elected as directors. E. C. B.

A. V. COCO, Attorney General, Appt.,

v.

R. E. ODEN, Sheriff of Allen Parish.

*Louisiana Supreme Court — April 20, 1918.*

(143 La. 718, 79 So. 287.)

**Carrier — pass — public officer — policy.**

1. It is against the public policy and the law of the state for public officers to accept or receive free passes, or discriminatory rates, from passenger, telegraph, and telephone companies.

[See note on this question beginning on page 682.]

**Definition — free pass.**

2. A "free pass," or discrimination in rates, is one for which a full consideration is not given, and the transportation paid for in the usual way, at the usual time, and at tariff rates; it "means the privilege of riding over a railroad without payment of the customary fare."

**Carrier — contract by sheriff for pass.**

3. A contract between a sheriff and a railroad corporation to perform legal services in suits where the company is a party in exchange for a free pass is contrary to morals, the law, and the public policy of the state, and it is null and void.

**Officer — suit for forfeiture — proper plaintiff.**

4. A suit against a sheriff for forfeiture of his office because he accepted, received, and used a free pass or free transportation, or accepted discriminatory passenger rates, is properly brought by the attorney general, or district attorney, under article 191 of the Constitution.

**— constitutional provision.**

5. Article 191 provides that the forfeiture to office shall be "at the suit of the attorney general, or district attorney."

Headnotes by SOMMERVILLE, J.

(O'Niell, J., dissents.)

**APPEAL** by plaintiff from a judgment of the Judicial District Court for the Parish of Allen (Overton, J.) in favor of defendant, dismissing plaintiff's demand, in a suit to have the office of defendant declared forfeited. *Reversed.*

The facts are stated in the opinion of the court.

Mr. A. V. Coco, Attorney General, in propria persona.

Messrs. Cline & Bell and Thomas Arthur Edwards for appellee.

Sommerville, J., delivered the opinion of the court:

The attorney general, in his official capacity, brings this suit against R. E. Oden, sheriff of the parish of Allen in this state, to have

the office of the latter declared forfeited, because defendant accepted from and used a free pass on, and accepted discriminating passenger rates from, the St. Louis, Iron Mountain, & Southern Railway Company in this state, during the incumbency of defendant in office.

Defendant excepted to the jurisdiction of the district court ratione

*materiæ*, which exception was properly overruled. He further excepted on the ground that article 191 of the Constitution, under which the proceeding was brought, is not self-enforcing or self-operative. This exception was also properly overruled. He then filed an exception of no cause of action, which was also overruled.

The law forbids the use of free passes by members of the general assembly and by public officers of the state; and the allegation that the defendant used a free pass states a sufficient cause of action for the forfeiture of his office. Defendant next excepted, that plaintiff is without power, authority, or right in law to institute and prosecute this suit in his own name and person, and that he is likewise without authority or right to stand in judgment herein; that said suit, under the law, should and must be brought in the name and on relation and on behalf of the state of Louisiana. This exception was also overruled.

The defendant then answered, denying that he had used a free pass, or had received any discrimination in rates from the railroad company mentioned in the petition, but specially answered "that all transportation solicited, received, or used by appearer on the line of said railway corporation was fully and legally paid for under a legal, valid, enforceable, and executory contract, with a legal, valid, and ample consideration, and that said transportation was neither free nor discriminatory; that to force a forfeiture of appearer's office and the emoluments thereof for receiving and using such transportation under such contract will be to deprive him of his liberty of contract and rights of property without due process of law, in violation of article 5 of the Federal Constitution, and in violation of article 2 of the Constitution of the state of Louisiana, and deprive him of the equal protection of the law in violation of Amendment 14 to the Constitution of the United States, and

in contravention of the Constitution of the state of Louisiana."

Defendant asked for trial by jury, which request was granted. There was judgment in favor of defendant, dismissing plaintiff's demand, and plaintiff has appealed.

Article 191 of the Constitution under which the attorney general proceeded in this case is, in part, as follows:

"No member of the general assembly, or public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly, ask, demand, accept, receive, or consent to receive, for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another.

"Any person who violates any provision of this article shall forfeit his office, at the suit of the attorney general, or the district attorney, to be brought at the domicile of the defendant, and shall be subject to such further penalty as may be prescribed by law."

The authorization of the attorney general to sue for the forfeiture of the title to office of the persons named in the article is clear. It is not therein intimated that the proceeding should be in the name of the state, or on behalf of the state.

The exception filed to the right of the attorney general to proceed against defendant seems to be based on the theory that the suit should have been filed under Rev. Stat. § 2593, which provides for suits against usurpers and intruders into office, in which case it appears to be provided that the suit must be brought in the name of the state. But this is not a suit against a usurper or an intruder into office. It is a suit to destitute an officer of his office, and it was properly brought by the attorney

Officer—suit for forfeiture—proper plaintiff.

general under article 191. The attorney general has literally complied with the article in bringing the suit. He expressly states that the suit is instituted under authority of the article of the Constitution providing for "forfeiture of office," and, if the state should be a party to the suit, it has been made so, impliedly, by the attorney general proceeding in the manner in which he has done.

The house of representatives has the sole power of impeachment of the governor and other named officers (art. 218), and, under article 222, the impeachment of other officers must be sued for in court. As the state is mentioned in the last article as a party to such suit, it is necessary that the state should be made a party in the impeachment of such officers.

The exception to the right of the attorney general to file the suit was properly overruled.

The exception to article 191, not being self-operative, is without merit. It provides in terms for the forfeiture of office on the commission of certain offenses against the law therein stated, and it provides the remedy. "The suit of the attorney general or the district attorney" must be brought in the courts of the state, and may not be brought elsewhere, at the domicile of the defendant. The article is self-operative.

The admission of the defendant in his answer, and the evidence introduced at the trial of the case on the merits, is conclusive that defendant accepted and used a free pass from the St. Louis, Iron Mountain, & Southern Railway Company in the years 1915-16, during his incumbency in office as sheriff of the parish of Allen. He therefore violated the law of the state, which forbade the acceptance and use of such free pass.

The defense that the defendant entered into a contract with the railroad company whereby the pass

accepted by him from the railroad company was to be full consideration for all sheriff's fees which might be incurred by said railroad company in suits in the court of which defendant was sheriff is absolutely without merit. It was incompetent on the part of the sheriff to charge any other fees than those fixed in the fee bill, and which were to be charged to all litigants and collected from them in cash by the sheriff. It was not competent for the sheriff to make the contract alleged to have been made. And the pass which he received from the railroad company in consideration of such fees was a free pass, and there was discrimination in passenger rates in his favor under such illegal, null, and void contract.

A free pass or discrimination in rates is one for which a full consideration is not given, and the transportation is not paid for in the usual way, at the usual time, and at tariff rates.

"A 'free pass' means the privilege of riding over" a railroad "without payment of the customary fare." Perkins v. New York C. R. Co. 24 N. Y. 196, 203, 82 Am. Dec. 281; Words & Phrases, p. 2967.

The contract set up by the defendant is contra bonos mores, it is immoral, and it is against the public policy of the state.

The law forbids the acceptance of a free pass for use by an officer of this state, and defendant has forfeited his office by the acceptance and use of such pass.

Defendant has moved to dismiss the appeal on the ground that this court is without jurisdiction. There was an admission on the trial of the case "that the emoluments of office of sheriff for the unexpired term in this case are worth over \$2,000, as fixed by statute." There is more than the right to office therefore involved. The right to the fees of the office, which exceed \$2,000, is involved, and the court has jurisdiction.

Defendant—  
free pass.

Carrier—  
contract by  
sheriff for pass.

—constitutional  
provision.

Carrier-pass—  
public officer—  
policy.

tion. The motion to dismiss is denied.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment based thereon be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that there be judgment in favor of plaintiff and against R. E. Oden, sheriff of Allen parish, declaring the office of sheriff held by him to be forfeited and vacated, and that he be dispossessed thereof.

O'Neill, J., is of the opinion the proceeding should have been brought in the name of the state, by or on the relation of the attorney general, or district attorney, and, therefore, he respectfully dissents.

Petition for rehearing denied, June 29, 1918.

Petition for a writ of certiorari dismissed by the Supreme Court of the United States, April 14, 1919, 249 U. S. 587, 63 L. ed. 790, 39 Sup. Ct. Rep. 386.

### ANNOTATION.

#### Carriers: free passes to public officials or employees.

In some states statutes or constitutional provisions prohibit public officers from accepting or using a free railroad pass. For instance, the Constitution of New York, effective in 1895, provides that "no public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates from any person or corporation, or make use of the same himself or in conjunction with another."

This constitutional provision, it has been held, applies to notaries public, who are appointed by the governor and take an official oath, and whose term of office, powers, and duties are fixed by law. *People v. Rathbone* (1895) 145 N. Y. 484, 28 L.R.A. 384, 40 N. E. 395; *People v. Wadhams* (1908) 176 N. Y. 9, 68 N. E. 65. In the latter case, it was held that a notary public who paid his railroad fare, but used a pass entitling him to ride in a sleeping car without charge, violated the above constitutional provision, and might for such act be ousted from office.

It applies also to a railroad policeman appointed under the Railroad Law by the governor to protect railroad property, although he is employed and

paid by the railroad company. *Dempsey v. New York C. & H. R. R. Co.* (1895) 146 N. Y. 290, 40 N. E. 867. But while holding the policeman a public officer within the constitutional provision, the court held that he was not prohibited from accepting a pass from the railroad company where he had been commissioned several years prior to the enactment of the provision, in order to carry out a contract made between him and the railroad company by which he agreed to perform services for it in preventing depredations on its property, in consideration of a monthly salary and the delivery to him of an annual pass for transportation on the railroad, to be used by him whether engaged on business of the railroad or on his private affairs, since such a pass was not a "free pass."

The provision of the New York Constitution above cited was held in *Re Railroad Comrs.* (1895) 11 Misc. 103, 32 N. Y. Supp. 1115, not to prohibit the transportation of members of the state Railroad Commission on free passes, under a statute previously enacted providing that in the discharge of the duties of their office such commissioners should be transported over the railroads of the state free of charge, on passes signed by the secretary of state. The court said: "The office of the word 'own,' when following a possessive pronoun, is to emphasize or intensify the idea of peculiar or per-

sonal interest. It suggests, what was undoubtedly the intention of the framers of this constitutional provision, that the practice of giving passes to public officers for their individual use, and to save them from personal expense, should be stopped, but the power of the legislature to provide for the necessary traveling and other expenses of public officers while engaged in public business should not be abridged. This provision of the Constitution must not only be construed in the light of existing public statutes, but it will be presumed that it was drafted with full recognition of them." And the court referred to a provision of the general railroad law that the railroad commissioners should not accept or receive any pass for themselves or for any other person, while another section of the law declared that such officers, in the discharge of their official duties, should be transported over the railroads of the state free of charge.

The reported case (*COCO v. ODEN*, ante, 679) holds that a contract between a sheriff and a railroad company to perform legal services in suits in which the company is a party, in exchange for a free pass, is contrary to morals and the public policy of the state, as well as statute, and is void; and that an officer who, in violation of a statute permitting the acceptance of a free pass by officers, accepted and used such a pass, forfeited his office by such act.

It was held in *Oklahoma City v. Oklahoma R. Co.* (1907) 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48, that it is not against public policy for a municipality, in granting a street railway franchise, to contract for the free transportation by the railway company of policemen, firemen, and mail carriers, and that such a contract was not abrogated by a constitutional provision prohibiting railway companies from issuing free passes except in certain specified cases, such as to employees and to persons engaged in charitable or religious work. The court said that the free transportation did not come from the railway company, but from the municipality, which was not prohibited by the constitu-

tional provision from granting free transportation.

The provision of the New Jersey Railroad Law of 1910 requiring railroad companies to carry the secretary to the governor free of charge was held unconstitutional in *Pennsylvania R. Co. v. Herrmann* (1916) 89 N. J. L. 582, 99 Atl. 404, reversing (1916) 88 N. J. L. 526, 96 Atl. 665.

The same conclusion was reached in *Delaware, L. & W. R. Co. v. Public Utilities Comrs.* (1913) 85 N. J. L. 28, 88 Atl. 849, as to a member of the State Water Supply Commission, it being held that the statute constituted a taking of property without due process of law.

It was held in *Pfister v. Central P. R. Co.* (1886) 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686, that a county treasurer en route to the state capitol with public funds for delivery to the state treasurer was not a "public messenger" within the meaning of the statute requiring the carriage free of charge of certain classes of persons including "public messengers."

In *Wilson v. United Traction Co.* (1902) 72 App. Div. 233, 76 N. Y. Supp. 203, a statute authorizing the mayor of a city or incorporated village to issue to a policeman a certificate of his official position, and making it the duty of street railway companies to carry him free upon his presenting such certificate, was held to be unconstitutional and void on the ground that it deprived companies of their property without due process of law.

But the opposite view was taken in *State v. Sutton* (1912) 83 N. J. L. 46, 84 Atl. 1057, where the court referred to *Wilson v. United Traction Co.* (N. Y.) supra, but declined to follow it, holding that it was within the power of the legislature to require street railway companies to transport, free, members of the police force, when on duty. The court said: "It is not strictly accurate to say that the company receives no compensation for carrying police officers if they pay no fare. It may well be that there is an indirect compensation in the protection afforded by the mere presence of the officer, against pickpockets, or even

against assaults on passengers by the company's own servants for which the company would be liable, . . . and in the help thus given to the company in the performance of its duty to its passengers. Indirect compensation of this character has been recognized as compensation within the meaning of the Constitution. . . . The Statute of 1912 may fairly be regarded as an exercise of the police power of the state. Policemen are frequently required to be on street cars in the execution of their duties to preserve the peace, to enforce ordinances, and to prevent or detect crime. It would be difficult to say that the mere presence of a police officer might not be of value for securing these objects, and it would be difficult, if not impossible, to distinguish in principle between his right, for example, to be on a crowded car to arrest pickpockets and his right to be on a car not crowded to enforce the ordinance against spitting. If he has the right to be there for these purposes, it is impossible to say that his services may not at any time be required to prevent violations of law; at any rate, the legislature might reasonably think so, and legalize his presence on the car without payment of fare." The decision was affirmed in (1915) 87 N. J. L. 192, L.R.A.1917E, 1176, 94 Atl. 788, Ann. Cas. 1917C, 91, on the ground that the statute was a constitutional exercise of the police power, although the court was of the opinion that it could not be sustained on the ground of indirect compensation to the railway company. The decision of the New Jersey court of appeals is affirmed by the United States Supreme Court in (1916) 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508, in which the court said: "Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby inure to both the company and the general public. without imposing upon the former an appreciable burden. If any evidence of the reason-

ableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act." And the Supreme Court also held specifically that the requirement that city detectives not in uniform be carried free on the street cars, when in the discharge of their duties, was not an arbitrary or unreasonable exercise of the police power.

In an action against a street railway company for alleged negligent killing of a policeman who was riding on a pass at the time the injury occurred, it was held in *Marshall v. Nashville R. & Light Co.* (1907) 118 Tenn. 254, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675, that the possibility that the presence of police officers on street cars might tend to preserve peace and good order was not sufficient to constitute a valuable consideration for the pass given by the carriers to the officer, so as to constitute the policeman a passenger for hire.

In *Bradburn v. Whatcom County R. & Light Co.* (1907) 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020, an action for injury to a policeman while riding on a street car, it was contended that the provisions of the ordinance granting the franchise by which the company agreed to carry policemen free of charge was in violation of a provision of the state Constitution, prohibiting public officers from accepting or using a pass on a railroad, as well as against public policy, but the court found it unnecessary to determine the validity of the franchise, holding that the carrier could not escape liability for negligently injuring one whom it had accepted as a passenger, although he claimed transportation under a contract which violated the constitutional provision against free passes.

Although not directly in point with the present annotation, attention is called to *Re Maine C. R. Co.* (1915; Me.) P.U.R.1915A, 135, where the Maine Commission held that a railroad

company could not grant free transportation to members of the staff of the Maine agricultural experiment station, supported by state and Federal

aid, under the statute authorizing transportation of property of the state or Federal government free or at reduced rates.  
R. E. H.

DIAMOND ICE & STORAGE COMPANY, Appt.,

v.

KLOCK PRODUCE COMPANY, Respt.

*Washington Supreme Court (Dept. No. 1) — August 13, 1918.*

(103 Wash. 369, 174 Pac. 435.)

**Judgment — right to recover compensation for storage.**

1. A judgment against a storage warehouse for damages for injury to the stored property is not conclusive against a right to recover compensation for storage services which was not set up as a set-off or counterclaim in that action.

[See note on this question beginning on page 694.]

— res judicata — judgment denying lien — effect on right to compensation.

2. Merely setting up a lien for storage in an action for conversion of

property stored does not render a judgment denying the lien res judicata of the right to recover compensation for the storage.

[See 15 R. C. L. 977.]

APPEAL by plaintiff from a judgment of the Superior Court for King County (Mackintosh, J.) dismissing an action brought to recover an amount alleged to be due for storage charges. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James B. Howe and A. J. Falknor, for appellant:

A judgment in a former action between the same parties is not res judicata as to a set-off or counterclaim which defendant might have pleaded, but did not.

Deaver v. Trahey, 98 Wash. 63, 167 Pac. 68; 23 Cyc. 1202; Minnaugh v. Partlin, 67 Mich. 391, 34 N. W. 717; Kennedy v. Davisson, 46 W. Va. 433, 33 S. E. 291; Shankle v. Whitley, 131 N. C. 168, 42 S. E. 574; Witte v. Lockwood, 39 Ohio St. 141; New England Mortg. Secur. Co. v. Fry, 143 Ala. 637, 111 Am. St. Rep. 62, 42 So. 57; Summet v. City Realty & Brokerage Co. 208 Mo. 501, 106 S. W. 614; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78; Bertles v. Hawkins Motor Car Co. 94 Wash. 680, 163 Pac. 3.

Mr. Samuel H. Steele for respondent.

Parker, J., delivered the opinion of the court:

The plaintiff, Diamond Ice & Stor-

age Company, seeks recovery of the sum of \$402 claimed as a balance due it from the defendant, Klock Produce Company, for the storage of cheese, butter, and eggs, between March 20, 1914, and April 23, 1915. The case was disposed of by the superior court upon the pleas of res judicata, pleaded in the defendant's second and third affirmative defenses, and plaintiff's reply thereto. The defendant demurred to the plaintiff's reply, which demurrer was sustained by the court, and, the plaintiff having elected to stand upon its reply and not plead further, judgment of dismissal was rendered against it, from which it has appealed to this court.

The questions here to be determined are: (1) Does plaintiff's reply negative the defendant's plea that the claim of appellant here sued upon was actually put in issue by



the defendant and adjudicated in either of the two prior actions mentioned in the second and third affirmative defenses? and (2) does appellant's reply negative the defendant's plea that the claim of appellant here sued upon was in any event, in legal effect, adjudicated in either of these actions, because of the fact that it was so closely related to the issue therein involved as to estop appellant from asserting that it was not adjudicated by the judgment rendered therein? To avoid confusion we shall refer to appellant as the storage company, and to respondent as the produce company.

The complaint of the storage company in this action is in the simplest form, and contains only those allegations necessary in such cases. It does not specifically inform us whether the balance of \$402, claimed as owing to the storage company by the produce company, is a balance due upon a single or upon several storage contracts. It does, however, inform us that the account sued upon consists of numerous separate charges for storage at different times, of different lots of produce.

It appears from the allegations of the produce company's second affirmative defense that on August 5, 1915, it commenced an action in the superior court for King county, seeking recovery from the storage company of the value of fifty-four cases of cheese, which it had in storage with the storage company and which it claimed that company had converted. We shall assume that the further allegations as to the issue tendered in that action and judgment rendered therein stated a good defense of *res judicata* in this action.

It appears from the denials, admissions, and allegations of the storage company's reply to this second affirmative defense as follows: The storage company in its answer in that action admitted that it had received the cheese in storage for the produce company, and that the contract of storage was evidenced

by a negotiable warehouse receipt, and further pleaded as an affirmative defense therein as follows: "This defendant [the storage company] alleges that between March 20, 1914, and May 23, 1915, this plaintiff had in storage with the defendant various quantities of eggs, butter, and cheese, and that on April 23, 1915, and all times since there was due this defendant from the plaintiff for the storage of such eggs, butter, and cheese, the sum of four hundred and sixteen and 5/100 dollars (\$416.05), no part of which has been paid. That this defendant, on the 22d day of April, 1915, refused to surrender and deliver said fifty-four (54) cases of cheese, being the only article of plaintiff's then, or since, in storage with the defendant, for the reason that the plaintiff failed and refused to pay the storage charges of four hundred and sixteen and 5/100 dollars (\$416.05) due this defendant from the plaintiff on said 23d day of April, 1915, and at all times since due and unpaid. That this defendant stands ready and willing, and at all times has stood ready and willing, to deliver to the plaintiff, or the plaintiff's assignee, said fifty-four (54) cases of cheese upon the payment to this defendant of said storage charges of four hundred and sixteen and 5/100 dollars (\$416.05), and that this defendant has not converted said cheese, or any part thereof, to the defendant's use, but holds the same solely by virtue of its warehouseman's lien."

The storage company in its answer in that action did not set up its claim of \$416.05 as a set-off or counterclaim against the produce company's claim for the alleged conversion of the cheese, but set up that claim only as a justification for withholding the cheese and refusing to deliver it to the produce company upon the surrender of the negotiable warehouse receipt evidencing the contract of storage and the tender of payment of \$6.61, claimed by the produce company to be all that was due to the storage company for the storage of the cheese under that

contract of storage. The prayer of the storage company in its answer was simply that the action be dismissed and for its costs. It did not ask for recovery of the storage charges claimed by it for the storage of the other produce; but, on the trial of the cause upon the merits, the storage company moved for permission to amend its answer so as to ask for equitable relief, and that its claim for storage of the other produce, as well as the cheese in question, be declared a lien upon the cheese, and that it be sold to satisfy such lien. This amendment was permitted, and at the close of the case the trial court denied to the produce company recovery for conversion of the cheese, and awarded foreclosure of the claimed lien of the storage company as against the cheese. Thereupon the produce company appealed from that judgment to this court, and thereafter this court reversed the judgment so rendered, with directions to the trial court to enter a judgment in favor of the produce company against the storage company in the sum of \$812.92, the value of the cheese retained and converted by it. It was pointed out in our decision that no set-off or counterclaim was pleaded as a defense in that action, and that "all that the defendant [the storage company] set up was that it had a right to retain the cheese under its lien." The theory of that decision was that the storage company did not have a lien upon the cheese in question for storing the other produce. See 90 Wash. 67, 155 Pac. 414. The denials in the storage company's reply to this second affirmative defense plainly negative the alleged adjudication, either actually or constructively, of the claim here sued upon.

It appears from the allegations of the produce company's third affirmative defense as follows: In October, 1915, the produce company commenced another action in the superior court for King county against the storage company, seeking recovery of damages, the depreciated val-

ue of 1,124 cases of eggs which it had stored with the storage company, claiming that the eggs had been spoiled by reason of improper storage. The trial of that action upon the merits resulted in the awarding of judgment in favor of the produce company against the storage company in the sum of \$900, which action was pending in this court upon appeal at the time of the commencement of this action. We here note that the judgment rendered therein has since then been affirmed by this court. See 98 Wash. 676, 168 Pac. 476. The claim of the storage company here sued upon was in no way referred to or claimed as a defense by way of set-off or counterclaim as against the damage claim of the produce company in that action. That adjudication is pleaded in this action, however, as the produce company's third affirmative defense of *res judicata*, accompanied by allegations in an attempt to show that it was so closely related to the produce company's claim of damages in that action that it became in effect adjudicated by the judgment rendered therein, in the sense that the storage company is estopped thereby from now asserting that it was not so adjudicated.

It appears from the denials, admissions, and allegations of the storage company's reply to this third affirmative defense, as follows: The storage company denies all the allegations of this affirmative defense, except it admits that the issues determined by the judgment rendered in the action therein referred to were as shown by the pleadings therein, copies of which are made a part of its reply. Plainly, those pleadings do not show that the claim of the storage company here sued upon had any relation to the issues raised by the pleadings or determined by the judgment rendered in that action.

Assuming that the denials and allegations of the storage company's reply in this case are true, as we must assume for present purposes, we first inquire, Was the claim of

the storage company actually put in issue and adjudicated upon as a set-off or counterclaim in its defense made in the first action? We have seen that according to the allegations of the storage company's reply to the produce company's affirmative defense in this action its storage claim was set up in that action only as a claimed lien for storage upon the cheese there in question, and as a justification for the refusal to deliver the cheese to the produce company; that no personal judgment upon the claim was sought against the produce company; and that it was finally decided in that action that the storage company had no enforceable lien against the cheese converted by it. The storage company's reply, in effect, goes further, and denies that its claim here sued upon was the claim sought to be enforced as a lien in that action. Plainly, the allegations of the storage company's reply negative the allegations of the produce company's second affirmative defense in so far as that defense pleads that the claim here sued upon was actually litigated therein. What the proof may show upon the trial of the issues in this action is another question. It follows that the storage company's reply to the produce company's second affirmative defense is good as against the produce company's demurrer. What we have already said calls for the same conclusion with reference to the storage company's reply to the produce company's third affirmative defense.

Was the claim of the storage company here sued upon so closely related to the issues determined in the two former actions that it was in legal effect adjudicated in either of those actions? It seems to us that it cannot be so determined from the pleadings in this action in view of the denials and allegations of the storage company's reply. What we have already said we think renders

further notice of this question unnecessary.

Was the storage company bound to actually plead and put in issue in either of the former actions, as a set-off or counterclaim, its claim here sued upon, or be thereafter estopped from asserting it in this separate action? It is here so contended by counsel for the produce company, upon the theory that it was at the time of the commencement of the first of these actions a claim arising upon contract, then existing in favor of the storage company and against the produce company, between whom a several judgment might have been had in one or the other of those actions. This contention is rested upon the provisions of the following sections of Rem. Code:

"Sec. 264. The answer of the defendant must contain,—

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief,

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

"Sec. 265. . . . The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

It is argued that the words, "the answer of the defendant must contain," as used at the beginning of § 264, rendered it mandatory upon

Judgment—  
res judicata—  
judgment deny-  
ing lien—effect  
on right to  
compensation.

—right to  
recover  
compensation  
for storage.

the storage company, as defendant in the two former actions, that it actually plead and put in issue in one or other of those actions, as, a set-off or counterclaim against the claims therein sued upon, its claim here sued upon, even though this claim is one arising wholly independent of the claims therein asserted. Our recent decision in *Deaver v. Trahey*, 98 Wash. 63, 167 Pac. 68, seems to answer this contention. We there held that the note sued upon not having been actually set up as a counterclaim or set-off by way of defense in the former action, the judgment in which was pleaded as *res judicata*, the note having been given in settlement of a matter wholly independent of the matter involved in that action, and the holder of the note being the original payee, he was not estopped from thereafter suing thereon in an independent action. In our decision in that case we said: "This note constitutes a cause of action in favor of appellant and against respondent wholly independent of all matters drawn in question in that action. It being clear that this note was not in fact drawn in question in that action, either by pleadings or evidence, the question here is, Was it necessarily involved therein in the sense that the judgment to be rendered in that action would become *res judicata* of appellant's right to recover in this action upon the note? It seems settled by the great weight of authority, in the absence of statute, that a defendant, having a cause of action against a plaintiff wholly independent of the claim and relief sought by the plaintiff in the particular action, is not bound to set up such independent cause of action as a defense in the action, even though his cause of action is such that he may be permitted to do so, but may bring an independent action to enforce his claim without being subjected to the plea of another action pending, or of *res judicata* as a defense thereto."

It is true it was not suggested in 8 A.I.R.—44.

argument in that case that § 264, above quoted, is mandatory in the sense here claimed by counsel for the produce company, but we think the holding in that case would have been the same had such argument been made therein. It will be noticed that the two subdivisions of § 264, stating what the answer must contain, are not joined by the conjunction "and," nor are they separated by the disjunctive "or." Reading the two sections as a whole, it seems quite clear to us that these two subdivisions of § 264 are merely alternatives, and that in answering a defendant may plead one or the other, and is not bound to plead as a defense any counterclaim or set-off which he may have against the plaintiff, and which is wholly unrelated to the claim of the plaintiff. This, we think, is in harmony with the overwhelming weight of authority. It seems to us that these sections of the statute do not evidence a legislative intent to make the law otherwise. In *Bertles v. Hawkins Motor Car Co.* 94 Wash. 680, 163 Pac. 3, observations are made quite in harmony with this view, though we do not cite that case as being exactly in point.

We have not lost sight of our decision in *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661, cited by counsel for the produce company, from which he quotes as follows: "It is the settled law of this state that, in an action between the same parties, a judgment therein is *res judicata* as to all points in issue, and also as to all points which might have been raised and adjudicated in such action."

This is but the statement of a general rule which it seems to us has always been subject to the exceptions noticed in *Deaver v. Trahey*, in the absence of a statute expressly providing otherwise. In *Perlus v. Silver*, however, the second action was brought upon a claim which was manifestly so closely related to the one adjudicated upon in the former action as to necessarily become *res judicata* by the

judgment rendered therein; and the same may be said of all the cases decided by this court, cited as following the language above quoted from *Perlus v. Silver*.

We are of the opinion that, in view of the denials and allegations contained in the storage company's reply to the second and third affirmative defenses of the produce company in this action, it cannot be decided upon the pleading that the claim of the storage company here sued upon has been actually adjudicated in either of the former actions, or that it is such a claim that, at the commencement of either of those actions, the storage company was bound to plead or in any manner put it in issue as a set-off or counterclaim in either of those actions, or suffer estoppel from thereafter seeking recovery thereon in this independent action.

The judgment of dismissal is reversed and the action remanded to the Superior Court, with directions to overrule the demurrer to the storage company's reply to the produce company's second and third affirmative defenses, and for such further proceedings as shall not be inconsistent with the views herein expressed.

Main, Ch. J., and Fullerton, Tolman, and Mitchell, JJ., concur.

#### NOTE.

The question whether a prior action in which a claim might have been asserted by counterclaim, set-off, or cross petition bars or abates a subsequent independent action thereon is treated in the annotation following *SEAGER v. FOSTER*, post, 694.

GEORGE L. SEAGER

v.

HERBERT E. FOSTER, Appt.

*Iowa Supreme Court — December 14, 1918.*

(— Iowa, —, 169 N. W. 681.)

#### Election of remedies — injuries by collision.

1. A defendant in an action for damages for injuries arising out of an automobile collision is not bound, in order to protect his claim for injuries growing out of the collision, to set it up by way of set-off or counterclaim in that action, but may maintain an independent action to recover his damages.

[See note on this question beginning on page 694.]

#### Abatement — former action pending — counterclaim.

2. An action to recover damages for injuries growing out of an automobile collision cannot be abated by the pendency of a former action by the owner of the other car to recover the damages accruing to him from the collision.

[See 1 R. C. L. 13.]

#### Municipal corporation — ordinance — conflict with statute.

8. An ordinance prescribing which of two vehicles crossing intersecting streets shall have the right of way is

not in conflict with a statute fixing the right of way in case of vehicles turning into one street from another.

#### Evidence — speed of automobile.

4. A witness cannot testify as to whether or not an automobile was traveling fast or slow.

[See 2 R. C. L. 1202.]

#### — comparison of speed.

5. A witness cannot be permitted to state whether or not one automobile in collision was going faster than the other, but must state the speed of each and permit the jury to make the comparison.

**APPEAL** by defendant from a judgment of the Superior Court for Cedar Rapids County (Robbins, J.) overruling his plea in abatement and motion for new trial, in an action brought to recover damages for injuries sustained in a collision alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Treichler & Treichler, for appellant:

Where two actions are pending for the recovery of damages sustained in an automobile collision, the action first begun will abate the second, notwithstanding that the parties in the two actions are reversed, for the reason that the evidence in both cases relating to the identical collision would necessarily be the same, and an adjustment in one case would adjudicate all the rights of either party growing out of said collision.

Guinn v. Elliott, 128 Iowa, 179, 98 N. W. 625; Van Vleck v. Anderson, 186 Iowa, 366, 118 N. W. 853; Boone v. Boone, 160 Iowa, 284, 137 N. W. 1059, 141 N. W. 938; Paecalona v. Peninsula Bark & Lumber Co. 171 Mich. 605, 137 N. W. 518; J. J. Smith Lumber Co. v. Sisters of Charity, 146 Iowa, 454, 125 N. W. 214.

Where the witness has fixed the speed of one car, it is error to refuse to permit witness to testify as to whether another car was at the time "going faster" than the car of which the speed had been fixed by the witness.

Livingstone v. Dole, — Iowa, —, 167 N. W. 639.

Plaintiff was guilty of negligence in not exercising due care in keeping a proper lookout for vehicles approaching the intersection, and in driving his car at an unlawful and negligent rate of speed, and a verdict of the jury for plaintiff is contrary to the evidence, and cannot, as a matter of law, be sustained.

Stearns v. Chicago, R. I. & P. R. Co. 166 Iowa, 566, 148 N. W. 128.

Messrs. Barnes, Chamberlain, & Hanzlik, for appellee:

A second suit, in either the same or a different court, should not be abated by the first suit where the first suit will not necessarily determine all the issues between the parties.

Cree v. Bradley's Bank, 141 Iowa, 232, 119 N. W. 614; 1 C. J. 70; Pollock v. Kinman, 176 Ill. App. 361; Kaplan v. Coleman, 180 Ala. 267, 60 So. 885; Pratt v. Howard, 109 Iowa, 504, 80 N. W. 546; Fink v. Allen, 4 Jones & S. 350.

It is not error to refuse to permit a witness to testify whether a car was going fast or slow in comparison with another object.

Livingstone v. Dole, — Iowa, —, 176 N. W. 639.

Ladd, J., delivered the opinion of the court:

The plaintiff drove his automobile, weighing about 800 pounds, along Bever avenue in an easterly direction, as the defendant with his car, weighing about 3,395 pounds, came northerly up Fourteenth street, which intersects Bever avenue. The plaintiff, as he approached the intersection, looked to the north and thereafter to the south, and testified that he did not observe defendant's car until about 16 feet west of the west curbing of Fourteenth street, and when defendant was about the same distance south of the intersection. He estimated his speed at about 12 miles an hour, and was unable to say whether he looked toward the south previously to observing the approach of defendant's car. Zook, who was riding with plaintiff, estimated the speed of the car at 15 miles per hour, and swore that it was about halfway between Third avenue and Fourteenth street, or about 60 feet from the west of the intersection, and defendant's car was then about 40 feet south therefrom, and that he called plaintiff's attention to the approach of defendant's car. On the other hand, defendant testified to having been about 50 feet south of the intersection when he looked as far west as the intersection of Bever avenue and Third avenue, but did not see the car until after looking to the east and when about 70 feet west of the intersection, and when he was about 40 feet south of it. Defendant's son, who sat in the back seat, testified that he saw the plaintiff's

car at the intersection of the avenues, or about 117 feet west of the intersection, and that he immediately told his father. Defendant estimated the speed of his car at 12 miles per hour and that of plaintiff at 25 miles per hour, while his son thought plaintiff's car was moving at the rate of 14 or 15 miles per hour. The automobiles collided in the intersection, but somewhat south of the street railway track, and both cars were injured. Plaintiff claimed in his petition the expense of repairing his car as damages, and the defendant, putting in issue such claim, demanded judgment for the damages done his vehicle, and also pleaded by way of abatement another action pending.

I. This action was begun in the superior court of Cedar Rapids, December 21, 1916. Prior thereto, November 17, 1916, defendant began suit as plaintiff to recover in that action the damages claimed in his cross petition, and issue was joined thereon by plaintiff in this action, as defendant in that. The defendant in the action at bar pleaded the pendency of the suit begun November 17, 1916, in abatement, and the plea was denied. The plaintiff in this action had not, as defendant in the prior suit, asserted any claim to damages consequent on the collision, either by way of counterclaim, set-off, or cross petition, and

**Election of  
remedies—in-  
juries by  
collision.**

was not required so to do in order to protect such claim. He might so have done, but was not bound to, for he might have elected whether he would assert his claim for damages in that action or proceed in an independent action to recover the damages, if any he had suffered. *Jones v. Witousek*, 114 Iowa, 14, 86 N. W. 59; *Smeaton v. Cole*, 120 Iowa, 368, 94 N. W. 909. Having elected to prosecute his claim for damages in another and independent action,

**Abatement—  
former action  
pending—  
counterclaim.**

as was his right, it might not be abated because of the pendency of defendant's suit previously brought. Os-

born v. Cloud, 23 Iowa, 104, 92 Am. Dec. 413; Code, § 8440, 1 C. J. 83.

II. An ordinance of the city of Cedar Rapids, § 393, was received in evidence over objection that it was void because of being covered by paragraphs 11 and 12 of § 1571m18 of the Code Supplement (1913). The ordinance declares that "except as otherwise provided, vehicles traveling on thoroughfares running at right angles to the Cedar river, which are designated and known as 'avenues,' have the right of way over vehicles traveling on thoroughfares known as 'streets,' or other thoroughfares which intersect 'avenues.'"

The court instructed the jury: "You are instructed that such ordinance means that where drivers of vehicles, one being on an avenue and one on a street, approach an intersection where they must pass each other, wherever it intersects at the same moment, it is the duty of the person driving the vehicle upon the street to permit the vehicle driven on the avenue to pass in front of the vehicle on the street."

The contention is that this is invalid for that the subject is covered by paragraphs 11 and 12 of said § 1571m18 of the Code Supplement, which read:

"In cities and towns, motor vehicles turning to the right from one street into another shall have the right of way over vehicles traveling on the street into which same are turning.

"In cities and towns, motor vehicles turning to the left into another street shall give the right of way to vehicles traveling on the street into which same are turning."

It will be observed that these paragraphs do not cover the situation where the automobiles approach on different streets intersecting, as at right angles, without turning but continuing in their course, and the question presented is whether, this not having been touched by the paragraphs quoted, it was competent for the city council of Cedar Rapids to enact the ordinance with respect thereto. Section 755 conferred up-

on the city the power to regulate the driving of vehicles within the limits of the corporation, and surely rules defining which shall have the right of way in a situation like that involved in this case are within the terms of this statute, for it concerns the safety of drivers in passing on the intersection of the streets. Nothing to be found in § 1571m20 of the Code Supplement (1918) obviates this conclusion. The forepart of that section forbids the exaction of any fee, license, or permit for the use of public highways or exclusion for the free use thereof by local authorities with certain exceptions, and declares that "no ordinance, rule or regulation, contrary or in any wise inconsistent with the provisions of this act, now in force or hereinafter enacted, shall have any effect."

As seen, this ordinance is not in conflict with any provision in the act known as chapter 2-B of title 8. Therein appears no purpose on the part of the general assembly to withdraw the power to regulate the driving of automobiles as conferred by § 755 of the Code save as therein specified. We are of opinion that the enactment of the ordinance is within the authority of the city council of Cedar Rapids, and the instruction referred to in so saying to the jury has our approval.

III. Plaintiff, having testified that he could not judge the rate of speed at which defendant's car was moving, was asked: "In your opinion, was it going fast or slow?" Objection "as relative in form, and there is nothing to compare it with," was overruled, and the witness answered: "He was coming pretty fast." The ruling was erroneous, for there is no criterion that we know of by which to determine whether an automobile is moving fast or slow. Fifteen or 20 miles per hour seems quite fast to some folks, while others would deem a 40 or 50 mile rate scarcely to be denominated as fast driving. Plaintiff's ideas on this subject do not

appear, and the jury derived no information from the answer given and could not have based a finding as to any definite speed from the answer given. By these reasons we are persuaded that the ruling, though erroneous, was without prejudice.

IV. Defendant's son swore that in his judgment the automobile in which he was riding was moving at a speed of 14 or 15 miles per hour, not over 15. "Q. Was it (the Ford) going faster than the car that you were in?"

An objection as incompetent, irrelevant, and immaterial, as asking for a comparison, was sustained, and the witness was asked: "Was it going fast or slow?" And a like objection was sustained. Possibly a difference in the objection interposed to the last question and that propounded to plaintiff may explain the difference in the ruling.

At any rate, the court, as seen, was correct this time. The ruling on the first above question, however, is the one complained of. The question called for a conclusion arrived at by comparing the speed of one car with the other, and for this reason the objection should have been sustained, as the speed of the car should have been shown and the jury allowed to make the comparison.

V. The evidence was sufficient to carry the issue as to whether the defendant was negligent in not yielding the right of way to plaintiff. He observed the plaintiff's automobile approaching in ample time to enable him to have exercised ordinary care, in yielding the right of way, to have avoided the collision. As to whether plaintiff was guilty of contributory negligence the evidence is closed; but we think, in view of the fact that he was entitled to the right of way, the jury might have found him without fault contributing to the injury.

The judgment is affirmed.

Preston, Ch. J., and Evans and Salinger, JJ., concur.

Municipal corporation—ordinance—conflict with statute.

Evidence—speed of automobile.

—comparison of speed.



### ANNOTATION.

**Prior action in which claim might have been asserted by counterclaim, set-off, or cross petition, as barring or abating subsequent independent action thereon.**

#### I. Introductory, 694.

#### II. General rule:

##### a. Rule stated, 695.

##### b. Application of rule:

##### 1. Prior action on contract; claim on contract:

###### (a) In general, 698.

###### (b) Prior action on contract; claim for breach of warranty, 706.

###### (c) Prior action for breach of contract; claim for purchase price, 709.

###### (d) Prior action for rent; claim for breach of covenant in lease, 709.

###### (e) Prior action for breach of covenant in lease; claim for rent, 710.

###### (f) Prior action on promissory note; claim for breach of contract, 710.

##### 2. Prior action on contract; claim in tort, 712.

##### 3. Prior action on contract; claim in equity, 713.

##### 4. Prior action on contract; claim for foreclosure, 714.

##### 5. Prior action in tort; claim on contract, 714.

##### 6. Prior action in tort; claim in tort, 715.

##### 7. Prior action in equity; claim on contract, 716.

##### 8. Prior action in equity; claim for dower, 717.

##### 9. Prior action in equity; claim in tort, 717.

##### 10. Prior action in equity; claim in equity, 718.

##### 11. Prior action in equity; claim for foreclosure, 719.

#### I: Introductory.

In confining the scope of this note to those cases in which it appeared

#### II. b—continued.

##### 12. Prior action for possession; claim in equity, 719.

##### 13. Prior action for possession; claim for possession, 720.

##### 14. Prior action for possession; claim on contract, 720.

##### 15. Prior action for possession; claim in tort, 720.

##### 16. Prior action for foreclosure; claim on contract, 721.

##### 17. Prior action for foreclosure; claim in equity, 721.

##### 18. Prior action for divorce; claim for divorce, 721.

##### 19. Miscellaneous, 722.

#### III. Limitation of rule:

##### a. Claim arising out of subject of former action, 725.

##### b. Matter necessarily adjudicated in prior proceeding, 727.

##### c. Necessity of pleading adverse claim in particular action:

###### 1. Action to determine title to real property, 731.

###### 2. Action for accounting or to settle partnership affairs, 733.

##### d. Recovery of unclaimed balance of set-off or counterclaim, 734.

#### IV. Rule in Vermont as to proceeding in probate court, 734.

#### V. Rule where prior action is brought in court of justice of peace, or other inferior court:

##### a. General rule, 735.

##### b. Limitation of rule:

###### 1. Claims for unliquidated damages, 738.

###### 2. Claim dismissed or abandoned before justice, 740.

###### 3. Claim against party not litigant in prior action, 740.

###### 4. Recovery of balance of claim in excess of justice's jurisdiction, 741.

#### VI. Rule in Arkansas, 743.

#### VII. Rule in New Jersey, 744.

that the plaintiff sought to recover on a claim which was available in a prior action against him by way of

set-off, counterclaim, or cross petition, no little difficulty has been experienced in distinguishing between matter constituting the proper subject of set-off or counterclaim, and matter which existed solely as a defense to the prior action. Not infrequently actions have been brought to recover a payment made by a defendant which was not asserted in an action, on the claim on which the payment was made. This class of litigation, involving the right to recover a payment made, or to enforce its credit on a judgment rendered against the payer, has been excluded from consideration herein, since such a payment does not constitute the subject of a set-off, but is solely a defense. Thus, in *Broughton v. McIntosh* (1840) 1 Ala. 103; the court in discussing this matter said: "The charge of the circuit court seems to have been predicated on the supposition that the payment created a right of action which could be enforced as a set-off against the demand of the party to whom the payment was made. There is no question but it would be a good defense, in whole or in part, to the action; but the defense would bear no resemblance to a set-off, which may be used or omitted at the pleasure of the defendant."

Except those cases wherein the courts have held that matter to constitute a counterclaim, this note excludes that class of cases wherein judgments in favor of physicians for their services have been held to be a bar to action for damages for malpractice in the performance of such services. These cases proceed on the theory that the two claims cannot co-exist; so that, if the plaintiff was entitled to have his claim allowed, the defendant would be precluded from recovering. See 24 R. C. L. 883, § 92; also *Schwinger v. Raymond* (1880) 88 N. Y. 192, 38 Am. Rep. 415.

## II. General rule.

### a. Rule stated.

The general rule is that a defendant, having a claim available by way of set-off, counterclaim, or cross petition, has an election so to plead it, or

to reserve it for a future independent action, and a prior action in which a claim might have been asserted as a set-off, counterclaim, or cross petition is no bar to a subsequent independent action thereon.

**United States.**—*Merchants Heat & Light Co. v. J. B. Clow & Sons* (1907) 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 235; *Virginia-Carolina Chemical Co. v. Kirven* (1909) 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78, affirming (1907) 77 S. C. 498, 58 S. E. 424; *Robinson v. Wiley* (1826) *Hempst.* 38, Fed. Cas. No. 11,968a; *Washburn & M. Mfg. Co. v. Scutt* (1884) 22 Fed. 710; *Fitzhugh v. McKinney* (1890) 43 Fed. 461; *Kauffman v. Raeder* (1901) 54 L.R.A. 257, 47 C. C. A. 278, 108 Fed. 171; *Davis v. Bessemer City Cotton Mills* (1910) 102 C. C. A. 232, 178 Fed. 784. See also *Hendrickson v. Hinckley* (1855) 17 How. 443, 15 L. ed. 123.

**Alabama.**—*Garrow v. Carpenter* (1885) 1 Port. 359; *De Sylva v. Henry* (1886) 3 Port. 182; *McLane v. Miller* (1847) 12 Ala. 643; *Robbins v. Harrison* (1857) 81 Ala. 160; *Rapier v. Gulf City Paper Co.* (1879) 64 Ala. 330; *Wharton v. King* (1881) 69 Ala. 265; *Weaver v. Brown* (1888) 87 Ala. 533, 6 So. 354; *Reach v. Privett* (1896) 90 Ala. 391, 24 Am. St. Rep. 819, 7 So. 808; *New England Mortg. Secur. Co. v. Fry* (1904) 143 Ala. 637, 111 Am. St. Rep. 62, 42 So. 57; *Kaplan v. Coleman* (1912) 180 Ala. 267, 60 So. 886. Compare *Crawford v. Simonton* (1838) 7 Port. 110.

**California.**—*Hobbs v. Duff* (1863) 23 Cal. 596; *Stoddard v. Treadwell* (1864) 26 Cal. 294; *Gregory v. Clabrough* (1900) 129 Cal. 475, 62 Pac. 72; *Broanan v. Kramer* (1901) 135 Cal. 36, 66 Pac. 979; *Ocean Shore Development Co. v. Hammond* (1918) — Cal. App. —, 175 Pac. 706; *Rauer's Law & Collection Co. v. Sheridan Proctor Co.* (1919) — Cal. App. —, 181 Pac. 71.

**Colorado.**—*Ornauer v. Penn Mut. L. Ins. Co.* (1912) 52 Colo. 632, 123 Pac. 650.

**Connecticut.**—*Betts v. Connecticut L. Ins. Co.* (1905) 78 Conn. 442, 62 Atl. 345; *Lownes v. City Nat. Bank* (1907) 79 Conn. 696, 66 Atl. 514.

**Delaware.**—*Jones v. Charles Warner Co.* (1912) 2 Boyce, 566, 83 Atl. 181.

**Georgia.**—*Johnson v. Reeves* (1901) 112 Ga. 690, 37 S. E. 980; *Moon v. Starnes* (1916) 17 Ga. App. 679, 87 S. E. 1091.

**Illinois.**—*Morton v. Bailey* (1885) 2 Ill. 213, 27 Am. Dec. 767; *Crabtree v. Kile* (1859) 21 Ill. 180; *Chicago, D. & V. R. Co. v. Field* (1877) 86 Ill. 270; *Quick v. Lemon* (1883) 105 Ill. 578; *Galena & S. W. R. Co. v. Ennor* (1886) 116 Ill. 55, 4 N. E. 762; *Sheetz v. Baker* (1890) 38 Ill. App. 349; *Tompkins v. Gerry* (1892) 43 Ill. App. 255; *Pollock v. Kinman* (1912) 176 Ill. App. 361; *Stauffer v. State Bank* (1916) 201 Ill. App. 306.

**Indiana.**—*Judah v. Brandon* (1841) 5 Blackf. 506; *McKinney v. Springer* (1851) 3 Ind. 59, 54 Am. Dec. 470; *Epperly v. Bailey* (1851) 3 Ind. 72; *Rankin v. Harper* (1853) 4 Ind. 585; *Lloyd v. Reynolds* (1868) 29 Ind. 299; *Axtel v. Chase* (1882) 83 Ind. 546; *Wright v. Anderson* (1889) 117 Ind. 349, 20 N. E. 247; *Collier v. Cunningham* (1891) 2 Ind. App. 254, 28 N. E. 341; *Indiana Farmers' Live Stock Ins. Co. v. Stratton* (1891) 4 Ind. App. 566, 31 N. E. 380; *Manchester F. Assur. Co. v. Koerner* (1895) 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848. See also *Franke v. Franke* (1896) 15 Ind. App. 529, 43 N. E. 468.

**Iowa.**—*Osborn v. Cloud* (1867) 23 Iowa, 104, 92 Am. Dec. 418; *Fairfield v. McNany* (1878) 37 Iowa, 75; *Savery v. Sypher* (1874) 39 Iowa, 675; *Folsom v. Winch* (1884) 63 Iowa, 477, 19 N. W. 305; *Jones v. Witousek* (1901) 114 Iowa, 14, 86 N. W. 59; *Smeaton v. Cole* (1903) 120 Iowa, 868, 94 N. W. 909; *Ferguson v. Epperly* (1905) 127 Iowa, 214, 103 N. W. 94; *Price v. Macomber* (1914) 165 Iowa, 189, 144 N. W. 1020; *Secor v. Siver* (1914) 165 Iowa, 678, 146 N. W. 845; *Harris v. Schrimper* (1918) — Iowa, —, 169 N. W. 750. And see *SEAGER v. FOSTER* (reported herewith) ante, 690.

**Kentucky.**—*Barclay v. Blackburn* (1831) 6 J. J. Marsh. 115; *Dorsey v. Reese* (1853) 14 B. Mon. 157. Compare *Rogers v. Wiggs* (1853) 12 B. Mon. 504; *Emmerson v. Herriford* (1871) 8 Bush. 229; *City Nat. Bank v.*

*Gardner* (1884) 5 Ky. L. Rep. 682 (abstract); *Paxton v. City Nat. Bank* (1884) 5 Ky. L. Rep. 682 (abstract); *Dedman v. Nally* (1892) 14 Ky. L. Rep. 229; *United States Bldg. & L. Asso. v. United States Bldg. & L. Asso.* (1900) 108 Ky. 380, 56 S. W. 422; *Truesdale v. Brady* (1907) 81 Ky. L. Rep. 1386, 105 S. W. 122; *Jefferson v. Western Nat. Bank* (1911) 144 Ky. 62, 138 S. W. 308; *Bishop v. Bishop* (1915) 162 Ky. 769, 178 S. W. 180.

**Louisiana.**—*Delahoussaye v. Judice* (1827) 6 Mart. N. S. 251.

**Maine.**—See also *Bartlett v. Pearson* (1848) 29 Me. 9.

**Maryland.**—*Davidson Chemical Co. v. Andrew Miller Co.* (1913) 122 Md. 184, 89 Atl. 401.

**Massachusetts.**—*Minor v. Walter* (1821) 17 Mass. 237; *Berley v. Balch* (1839) 23 Pick. 283, 84 Am. Dec. 56; *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587; *Fiske v. Steele* (1890) 152 Mass. 260, 25 N. E. 291; *Riley v. Hale* (1893) 158 Mass. 240, 33 N. E. 491; *Gilmore v. Williams* (1894) 162 Mass. 351, 38 N. E. 976. See also *Gary v. Bancroft* (1833) 14 Pick. 815, 25 Am. Dec. 393, and *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.* (1911) 208 Mass. 593, 95 N. E. 108.

**Michigan.**—*Ward v. Fellers* (1854) 3 Mich. 281; *Barker v. Cleveland* (1869) 19 Mich. 230; *McEwen v. Bigelow* (1879) 40 Mich. 215; *Baker v. Morehouse* (1882) 48 Mich. 334, 12 N. W. 170; *Mimnaugh v. Partlin* (1887) 67 Mich. 891, 34 N. W. 717; *Seventh Day Adventist Pub. Asso. v. Fisher* (1893) 95 Mich. 274, 54 N. W. 759; *Perkins v. Oliver* (1896) 110 Mich. 402, 68 N. W. 245; *Jennison Hardware Co. v. Godkin* (1897) 112 Mich. 57, 70 N. W. 428. See also *Huntoon v. Russell* (1879) 41 Mich. 316, 2 N. W. 38.

**Minnesota.**—*Douglas v. First Nat. Bank* (1871) 17 Minn. 35, Gil. 18; *Thoreson v. Minneapolis Harvester Works* (1882) 29 Minn. 341, 13 N. W. 156. See also *Trautwein v. Twin City Iron Works* (1893) 55 Minn. 264, 56 N. W. 750.

**Missouri.**—*Hall v. Clark* (1855) 21 Mo. 415; *Wright v. Salisbury* (1870) 46 Mo. 26; *Grady v. McCorkle* (1874) 57 Mo. 172, 17 Am. Rep. 676; *Mason v.*

Summers (1887) 24 Mo. App. 174; Wright v. Broome (1896) 67 Mo. App. 32; Barber Asphalt Pav. Co. v. Field (1906) 132 Mo. App. 628, 97 S. W. 179; Long v. Lackawanna Coal & I. Co. (1910) 233 Mo. 713, 136 S. W. 678. See also Berry v. Henslee (1866) 38 Mo. 392; Emery v. St. Louis, E. & N. W. R. Co. (1883) 77 Mo. 389; and Summet v. City Realty & Brokerage Co. (1907) 208 Mo. 501, 106 S. W. 614.

Nebraska.—Uppfalt v. Woremann (1890) 30 Neb. 189, 46 N. W. 419.

New Hampshire.—Bascom v. Manning (1872) 52 N. H. 182; Metcalf v. Gilmore (1884) 63 N. H. 174; Parsons v. Crawford (1885) 64 N. H. 23, 3 Atl. 632; Parker v. Roberts (1885) 63 N. H. 431. See also Blodgett v. Berlin Mills Co. (1872) 52 N. H. 215.

New York.—Ives v. Van Epps (1839) 22 Wend. 155; Batterman v. Pierce (1842) 3 Hill (N. Y.) 171; Halsey v. Carter (1853) 1 Duer, 667; Lignot v. Redding (1855) 4 E. D. Smith, 285; New York v. Mabie (1855) 13 N. Y. 151, 64 Am. Dec. 538; Gillespie v. Torrance (1862) 25 N. Y. 306, 82 Am. Dec. 355; McDonald v. Christie (1863) 42 Barb. 36; Barth v. Burt (1865) 43 Barb. 628; Morgan v. Powers (1867) 66 Barb. 35; Foster v. Milliner (1868) 50 Barb. 385; McKnight v. Devlin (1873) 52 N. Y. 399, 11 Am. Rep. 715; Malloney v. Horan (1872) 49 N. Y. 111, 10 Am. Rep. 335; Livermore v. Bainbridge (1873) 44 How. Pr. 361; Inslee v. Hampton (1876) 8 Hun, 230; Brown v. Gallaudet (1880) 80 N. Y. 413; Watson v. Cowdrey (1880) 23 Hun, 169; Weston v. Turner (1887) 8 N. Y. S. R. 296; Carlin v. Richardson (1888) 17 N. Y. S. R. 399, 1 N. Y. Supp. 772; Frost v. McGinnis (1889) 15 Daly, 113, 3 N. Y. Supp. 241; De Graaf v. Wyckoff (1889) 118 N. Y. 1, 22 N. E. 1118; Potter v. Gates (1890) 56 Hun, 639, 2 Silv. Sup. Ct. 389, 9 N. Y. Supp. 87; John Douglass Co. v. Moler (1893) 3 Misc. 373, 30 Abb. N. C. 293, 22 N. Y. Supp. 1045; Cantoni v. Forster (1895) 12 Misc. 376, 33 N. Y. Supp. 645, affirmed without opinion in (1895) 146 N. Y. 405, 42 N. E. 543; Smith v. Fleischman (1897) 28 App. Div. 355, 48 N. Y. Supp. 234; Notara v. De Kamalaris (1898) 22 Misc. 387, 49 N.

Y. Supp. 216; Gordon v. Van Cott (1899) 38 App. Div. 564, 56 N. Y. Supp. 554; Consolidated Fruit Jar Co. v. Wisner (1899) 38 App. Div. 369, 56 N. Y. Supp. 723; Gay v. Riehmman Mantel Co. (1900) 53 App. Div. 507, 31 N. Y. Civ. Proc. Rep. 31, 65 N. Y. Supp. 964; Jordan v. Underhill (1904) 91 App. Div. 124, 86 N. Y. Supp. 620; Jones v. Leopold (1904) 95 App. Div. 404, 88 N. Y. Supp. 568; Ogden v. Pioneer Iron Works (1904) 91 App. Div. 394, 86 N. Y. Supp. 955; Levy v. Hühweisher (1906) 101 App. Div. 82, 91 N. Y. Supp. 552; Walkup v. Mesick (1905) 110 App. Div. 326, 97 N. Y. Supp. 142; Leask v. Dew (1905) 102 App. Div. 529, 92 N. Y. Supp. 891, affirmed in (1906) 184 N. Y. 599, 77 N. E. 1190; Miller v. Baillard (1908) 124 App. Div. 555, 108 N. Y. Supp. 973; Sowden v. Murray (1909) 114 N. Y. Supp. 164; Newgent v. Alsberg (1916) 173 App. Div. 878, 160 N. Y. Supp. 71; Rosenberg v. Slotchin (1917) 181 App. Div. 137, 168 N. Y. Supp. 101; Goodman v. Benjamin Rutchik (1918) 171 N. Y. Supp. 152; Bloom v. Arthur Walker & Co. (1919) 175 N. Y. Supp. 150; Distributing Corp. v. Perez (1919) 175 N. Y. Supp. 537. See also Carpenter v. Butterfield (1802) 3 Johns. Cas. 146; Fabbricotti v. Lauritz (1851) 8 Sandf. 743; Collyer v. Collins (1864) 17 Abb. Pr. 467; Lawrence v. Bank of Republic (1865) 8 Robt. 142; Gutches v. Daniels (1872) 49 N. Y. 605; Sinclair v. Neill (1874) 1 Hun, 83, 3 Thomp. & C. 77; Morgan v. Smith (1874) 7 Hun, 244; Dunham v. Bower (1879) 77 N. Y. 76, 38 Am. Rep. 570; Schwinger v. Raymond (1880) 83 N. Y. 192, 38 Am. Rep. 415; Ruppert v. Haug (1881) 1 N. Y. Civ. Proc. Rep. 411; Reiner v. Jones (1899) 38 App. Div. 441, 56 N. Y. Supp. 423; McMagh v. Fensterer (1920) 180 N. Y. Supp. 20.

North Carolina.—Woody v. Jordan (1873) 69 N. C. 189; Blackwell Durham Tobacco Co. v. McElwee (1886) 94 N. C. 425; Shankle v. Whitley (1902) 131 N. C. 168, 42 S. E. 574; Shakespeare v. Caldwell Land & Lumber Co. (1907) 144 N. C. 516, 57 S. E. 213; Cook v. Cook (1912) 159 N. C. 46, 40 L.R.A. (N.S.) 83, Ann. Cas. 1914A, 1137, 74

S. E. 639. See also *Francis v. Edwards* (1877) 77 N. C. 271.

**Ohio.**—*Sykes v. Bonner* (1871) 1 Ohio L. J. 464; *Witte v. Lockwood* (1888) 89 Ohio St. 141. See also *Covington & C. Bridge Co. v. Sargent* (1875) 27 Ohio St. 233.

**Oregon.**—*Hill v. Cooper* (1876) 6 Or. 181; *La Follett v. Mitchell* (1902) 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; *Campbell's Gas Burner Co. v. Hammer* (1915) 78 Or. 612, 153 Pac. 475; *Stillwell v. Hill* (1918) 87 Or. 112, 169 Pac. 1174; *Jacobs v. Jacobs* (1919) — Or. —, 180 Pac. 515. See also *Kafka v. Simon* (1869) 3 Or. 555.

**Pennsylvania.**—*Stevenson v. Klepinger* (1836) 5 Watts, 420; *M'Credy v. Fey* (1838) 7 Watts, 496; *Himes v. Barnitz* (1839) 8 Watts, 39; *Kauff v. Messner* (1869) 4 Brewst. 98; *Connery v. Brooke* (1873) 73 Pa. 80; *Stewart v. Turner* (1917) 67 Pa. Super. Ct. 255.

**Rhode Island.**—*Dewsnap v. Davidson* (1892) 18 R. I. 98, 26 Atl. 902.

**South Carolina.**—*Rabb v. Patterson* (1894) 42 S. C. 528, 46 Am. St. Rep. 743, 20 S. E. 540; *Kirven v. Virginia-Carolina Chemical Co.* (1907) 77 S. C. 493, 58 S. E. 424.

**Tennessee.**—*Clement v. Clement* (1904) 113 Tenn. 40, 81 S. W. 1249.

**Texas.**—*Stone v. Darnell* (1860) 25 Tex. Supp. 430, 78 Am. Dec. 582; *Anderson v. Rogge* (1894) — Tex. Civ. App. —, 28 S. W. 106; *Simman v. Braunagel* (1894) — Tex. Civ. App. —, 27 S. W. 1032; *McCord-Col-lins Commerce Co. v. Levi* (1899) 21 Tex. Civ. App. 109, 50 S. W. 606; *Kelly Furniture, C. & Hardware Co. v. Shel-ton* (1901) — Tex. Civ. App. —, 82 S. W. 794; *J. S. Mayfield Lumber Co. v. Carver* (1901) 27 Tex. Civ. App. 467, 66 S. W. 216; *Dilley v. Ratcliff* (1902) 29 Tex. Civ. App. 545, 69 S. W. 237; *Norton v. Wochler* (1903) 31 Tex. Civ. App. 522, 72 S. W. 1025; *Standefer v. Aultman & T. Mach. Co.* (1904) 34 Tex. Civ. App. 160, 78 S. W. 552; *Seiber v. Johnson Mercantile Co.* (1905) 40 Tex. Civ. App. 600, 90 S. W. 516; *Morgan v. Tims* (1906) 44 Tex. Civ. App. 308, 97 S. W. 832; *Olschewske v. King* (1906) 43 Tex. Civ. App. 474, 96 S. W. 665; *Mutual L. Ins. Co. v. Hargus*

(1907) — Tex. Civ. App. —, 99 S. W. 580; *Kerr v. Blair* (1909) 55 Tex. Civ. App. 349, 118 S. W. 791; *Providence-Washington Ins. Co. v. Owens* (1919) — Tex. Civ. App. —, 210 S. W. 558. See also *Powell v. Davis* (1857) 19 Tex. 380.

**Vermont.**—*Taggart v. Rice* (1864) 37 Vt. 47; *Carver v. Adams* (1866) 38 Vt. 500; *Davenport v. Hubbard* (1873) 46 Vt. 200, 14 Am. Rep. 620; *Kezar v. Elkins* (1879) 52 Vt. 119; *Hutchins v. George* (1918) — Vt. —, 104 Atl. 103.

**Washington.**—*Munson v. Baldwin* (1916) 93 Wash. 36, 159 Pac. 1070; *Deaver v. Trahey* (1917) 98 Wash. 63, 167 Pac. 68; *DIAMOND ICE & STORAGE Co. v. KLOCK PRODUCE Co.* (reported herewith) ante, 685.

**West Virginia.**—*Kennedy v. Davis-son* (1899) 46 W. Va. 433, 33 S. E. 291. See also *Baltimore & O. R. Co. v. Bit-ner* (1879) 15 W. Va. 455, 36 Am. Rep. 820; *Zinn v. Dawson* (1899) 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784.

**Wisconsin.**—*Dudley v. Stiles* (1873) 32 Wis. 371; *North Baltimore Bottle Glass Co. v. Altpeter* (1907) 133 Wis. 112, 113 N. W. 435; *Huntzicker v. Crocker* (1908) 135 Wis. 38, 115 N. W. 340, 15 Ann. Cas. 444.

**Canada.**—*La Fleche v. Barnardin* (1911) 21 Manitoba L. R. 315, 17 West. L. R. 394.

**England.**—*Sintzenick v. Lucas* (1793) 1 Esp. 44; *Rigge v. Burbidge* (1846) 15 L. J. Exch. N. S. 309, 15 Mees. & W. 598, 153 Eng. Reprint, 988; *Thornton v. McKewan* (1862) 1 Hem. & M. 525, 71 Eng. Reprint, 230, 1 New Reports, 16, 32 L. J. Ch. N. S. 69, 11 Week. Rep. 140; *Baker v. Alexander* (1866) 35 L. J. C. P. N. S. 217, 12 Jur. N. S. 692; *Davis v. Hedges* (1871) L. R. 6 Q. B. 687, 40 L. J. Q. B. N. S. 276, 25 L. T. N. S. 155, 20 Week. Rep. 60; *Green v. Law* (1805) 2 Smith, 668.

#### *b. Application of rule.*

##### *1. Prior action on contract; claim on contract.*

###### *(a) In general.*

In a leading case in New York, *Brown v. Gallaudet* (1880) 80 N. Y. 418, it appeared that the defendant had prevailed against the plaintiff in a prior action for money loaned, in

which the plaintiff did not counterclaim for a money demand here made the basis of his action. The court held that he was not required so to do, but, at his option, could reserve his claim for an independent and subsequent action. It was said: "It is only by reason of the statute relating to actions in justices' courts that a defendant was required in those courts to avail himself of his offsets, and the cases cited by the respondent arose under that statute. No such rule existed before the Code, in actions in courts of record, and the Code did not change the law in this respect."

So, in *Carlin v. Richardson* (1888) 17 N. Y. S. R. 899, 1 N. Y. Supp. 772, the court held that the defendant in a prior action on a contract was not required to set up a cause of action by way of counterclaim for the unpaid balance of a sum due on the same contract; he might do so, or he could resort to a cross action to recover on his claim,—citing and following *Brown v. Gallaudet* (N. Y.) *supra*.

And in *Cantoni v. Forster* (1895) 12 Misc. 376, 33 N. Y. Supp. 654, affirmed without opinion in (1895) 146 N. Y. 405, 42 N. E. 543, citing *Brown v. Gallaudet* (N. Y.) *supra*, the court held that a defendant, having cause of action on an agreement which could be made the proper subject of a counterclaim in the pending action on the same agreement, was not bound so to use it, but could reserve his claim for a subsequent and independent action thereon, except in actions instituted in a court of a justice of the peace.

In *Delahaussaye v. Judice* (1827) 6 Mart. N. S. (La.) 251, wherein the plaintiff claimed as a creditor of her deceased husband's estate on an instrument purporting to be a donation, and it appeared that in a former action the claim was not set up by the present plaintiff as defendant therein, the court held that the failure to plead the same in set-off constituted no bar to the maintenance of a subsequent independent action to recover thereon.

In *Ferguson v. Epperly* (1905) 127 Iowa, 214, 103 N. W. 94, wherein it appeared that the plaintiff, as the vendee under a sale of real property,

had neglected to set up a claim for rents and profits as a counterclaim in a prior action brought against him to recover a balance due on the purchase price of the property, the court held that his omission did not bar him from maintaining a separate original action to recover on his claim, saying: "There is no rule of law with which we are familiar that holds to the doctrine that a failure to plead an existing cause of action as a counterclaim, when presented with an opportunity to do so, operates *ipso facto* to cancel or satisfy such cause of action."

In *Leask v. Dew* (1906) 102 App. Div. 529, 92 N. Y. Supp. 891, affirmed in (1906) 184 N. Y. 599, 77 N. E. 1190, an action by the executors under the will of a deceased party against the defendant as the maker of a promissory note, the latter contended that the action could not be maintained, as the note in question was offered in evidence in a hearing on a claim prosecuted by the defendant against the testator's estate. The court held that in the prior proceeding the claim on the note was not presented as a counterclaim, but only offered in evidence to rebut the presumption that there was a large indebtedness in favor of the defendant against the testator, and consequently it was not discharged by any judgment or determination in that proceeding.

In *Lignot v. Redding* (1855) 4 E. D. Smith (N. Y.) 285, an action for money lent, balance of account stated, and goods sold and delivered, the defense was that another action was pending in which the plaintiffs should have set off their demands. The court held that the plaintiffs were not required to plead their demands in the former suit as a counterclaim, but could elect to bring an action thereon independent of the pending proceedings.

In *Brown v. Creekmore* (1920) — Ark. —, 217 S. W. 774, it was held that an adjudication on the items embraced in a counterclaim, in an action to recover the balance on a note, was res judicata as to such items, but that a counterclaim for rent, not embraced in the counterclaim in the prior suit,

was not barred by the judgment in that action, the court stating that the fact that the cause of action for rent was then existent, and might have been asserted with other items, did not bar the assertion of it in a subsequent action.

And in this case a statute providing that, where a defendant fails to plead as a set-off a claim against the plaintiff, he shall be "forever barred from recovering costs in any suit which he may thereafter institute," was held not to bar the right to assert the counterclaim itself.

In *Notara v. De Kamalaris* (1898) 22 Misc. 837, 49 N. Y. Supp. 216, an action against an agent by his employers for the conversion of stock assigned to him for the purpose of sale, it appeared that the defendant had instituted a prior action against the plaintiffs in a court of record, to recover the amount of commissions due him under the contract of employment, and the agent pleaded the pendency of that action as a bar to this proceeding. It was held that in the prior action in a court of record the then defendants were not required to plead a cause of action available as a counterclaim, but could, at their option, maintain a separate suit thereon.

In *Kelly Furniture, Carpet & Hardware Co. v. Shelton* (1901) — Tex. Civ. App. —, 62 S. W. 794, it appeared that the plaintiff company, in a former action on contract against the defendant, did not plead in set-off a claim based on an unpaid balance of a judgment in its favor. An action having been brought to compel the set-off of the plaintiff's claim as against the judgment rendered in the defendant's action, the court held that the mere fact that the plaintiff failed to assert the claim in the former proceedings as a set-off or counterclaim was not sufficient ground to refuse the relief sought.

In *Metcalf v. Gilmore* (1884) 63 N. H. 174, it was held that a defendant having a claim in assumpsit by way of recoupment or set-off could elect to interpose it as such in the present action on contract, or reserve his cause of action for a subsequent independent

suit, and, further, that where it appeared that the claim of a defendant in a prior action was divisible, he could plead as a set-off, or in recoupment, so much of it as would defeat the plaintiff's action, and could thereafter maintain an independent action to recover the balance.

An early case, *Garrow v. Carpenter* (1835) 1 Port. (Ala.) 359, declared the general rule in the following terms: "It has often been decided that a party is not compellable to plead what is strictly a set-off, and not a payment, in any case. It is optional with him to do so or not." In that case the plaintiff sued for moneys due under a contract to build certain stores for the defendant, since deceased, and here represented by his administrators. It appeared that the present plaintiff had not asserted his claim in a prior action brought against him by the deceased party to recover for a failure to perform within the time agreed upon.

In *Halsey v. Carter*. (1853) 1 Duer (N. Y.) 667, the court held that §§ 149 and 150 of the New York Code of Civil Procedure did not vary or affect the right of a defendant in an action on contract, to elect to set up a claim on contract in his favor as a counterclaim, set-off, or in recoupment, or to reserve his cause of action and maintain an independent action thereon.

And in *Gordon v. Van Cott* (1899) 38 App. Div. 564, 56 N. Y. Supp. 554, wherein it appeared that the defendants had asserted a part of their counterclaim for services rendered as a set-off in a former action on contract, the court held that they were not precluded from recovering the balance of their claim.

In *Munson v. Baldwin* (1916) 93 Wash. 36, 159 Pac. 1070, an action to recover for the rental of furniture, it appeared that a prior suit had been brought by the defendants against the plaintiff for the rental value of a certain apartment, which was furnished with the articles leased of the plaintiff, and in that action, the claim for rent of the furniture was not asserted. The court held that the judgment in the defendants' action was not an ad-

judication of the plaintiff's claim, saying: "When the facts relied upon in the subsequent action are neither inconsistent with nor in direct opposition to the facts involved in the former suit, but are facts which may be equally true with the former facts, then there is no bar."

In *Himes v. Barnitz* (1839) 8 Watts (Pa.) 39, it was held that the right to deduct from the plaintiff's claim on contract, the amount due by him to the defendant under the contract, was a privilege given by the act of assembly (Pa.) 1706, and afterwards by the English Statutes of Set-off; not an obligation.

The rule was well illustrated in *Roach v. Privett* (1899) 90 Ala. 391, 24 Am. St. Rep. 819; 7 So. 308, wherein it was held that a set-off in contract may or may not be pleaded in an action on contract, at the election of the defendant; and that, unless it is pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense to another cause of action by the same plaintiff, is in no wise affected or impaired by a judgment against the defendant. The court stated this rule as the well-settled doctrine of the court, and as in harmony with the ruling in other jurisdictions, holding that the ruling in earlier cases, notably *Crawford v. Simonton* (1838) 7 Port. (Ala.) 110, is unsound in principle, and cannot be reconciled with later adjudications.

In *Londes v. City Nat. Bank* (1907) 79 Conn. 693, 66 Atl. 514, it was held that a defendant was not compelled to set off a claim for money due and owing against a plaintiff in a prior action on a contract, but could elect to reserve his cause of action for a subsequent independent suit, saying that "while the law encourages, it does not compel, the settlement of all controversies between the same parties by a single action."

In *Galena & S. W. R. Co. v. Ennor* (1886) 116 Ill. 55, 4 N. E. 762, wherein the plaintiff sought to set off a claim on a note held by him against a judgment rendered in a prior action on contract in favor of the defendant company, the latter claimed that the plain-

tiff should not be granted the relief he sought, as the set-off could have been interposed in the former action, and his failure to do so constituted a bar to any further proceedings thereon. The court held that although the claim could have been set up in the action at law, that was permissive only, and not compulsory on the defendant.

So, in *Chicago, D. & V. R. Co. v. Field* (1877) 86 Ill. 270, the court granted to the plaintiff relief in the nature of a set-off to a judgment rendered against him in a former proceeding on contract, wherein he neglected to set up his claim for an indebtedness, although it was the proper subject of a set-off.

In *Morton v. Bailey* (1835) 2 Ill. 213, 27 Am. Dec. 767, it was held that an administratrix, on the presentation of a claim on contract of a creditor of the decedent's estate, was not required to set off a demand for a debt that existed against the creditor and in favor of the estate, but could maintain a separate and original action on the claim, the court saying: "At common law a defendant could not set off his demand against the plaintiff's debts, and our Statute of Set-off is permissive, but not compulsory. According, then, to the general law of the land, a party defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace. Is there a provision in the 'Act Relating to Wills and Testaments, Executors and Administrators, and the Settlement of Estates,' and the several acts amendatory thereof, requiring administrators, upon the exhibition by a creditor of his claim against the estate, to set off any debt or demand such estate may have against such creditor? The court have looked in vain for any such provision in the acts above enumerated, and are accordingly of opinion that the administratrix was not barred of her action by the proceedings before the judge of probate."

In *Dewsnap v. Davidson* (1892) 18 R. I. 98, 26 Atl. 902, the court held that the plaintiffs were not estopped from recovering on a breach of contract



where it appeared that in a prior action against them to establish a mechanic's lien in favor of the present defendant, the claim sued on was not set up by way of recoupment. The court said: "The plaintiffs were not barred by the decree in the lien suit from bringing an action for the damages sustained by the failure of the defendant to comply with his contract. While they might have offered evidence in the lien suit to recoup the damages sustained, they were not bound to do so, but were at liberty to reserve their claim and to bring suit on it as they have done."

In *Frost v. McGinnis* (1889) 15 Daly, 113, 3 N. Y. Supp. 241, it appeared that the defendant contracted with a builder to erect certain buildings for him, and, in order to facilitate the completion of the property by the contractor, had made himself personally liable to persons furnishing the materials. It appeared, further, that in a prior action to foreclose certain mechanics' liens upon the buildings the defendant did not plead his demands held against the contractor as a set-off, but in this action brought by a receiver of the builder to recover for work, labor, and services, he attempted to assert the debt due him in set-off. The court held that he could properly do so, as he was not required to plead the claim as a set-off in the former action to foreclose the mechanics' liens, but could elect to reserve his claim for use in a future action as a set-off, or as the basis of an affirmative recovery.

In *United States Bldg. & L. Asso. v. United States Bldg. & L. Asso.* (1900) 108 Ky. 330, 56 S. W. 422, wherein it appeared that a loan association had suffered judgment in a prior action for usury paid to it by a shareholder, and the association had failed to set up a claim for the proportionate share of the losses and expenses of the concern owed by the shareholder, by way of set-off, the court held that the failure to assert the claim in the prior suit did not bar the association from setting off the amount of its claim in a subsequent action to recover on the judgment rendered in the original suit.

So, in *Seiber v. Johnson Mercantile*

*Co.* (1905) 40 Tex. Civ. App. 600, 90 S. W. 516, wherein it appeared that the plaintiff's claim for moneys paid was the proper subject of a set-off, which he omitted to assert in a prior action on contract, brought against him by the defendant, the court held that nevertheless the plaintiff could recover, for a defendant in a prior action, having a claim which might be asserted as a set-off or counterclaim, was not obliged so to plead it, but could reserve it for a future suit.

So too, in *Thornton v. M'Kewan* (1862) 1 Hem. & M. 525, 71 Eng. Reprint, 230, 1 New Reports, 16, 32 L. J. Ch. N. S. 69, 11 Week. Rep. 140, wherein it appeared that the plaintiff, as a surety, could have filed his claim for a proportionate part of a dividend on the amount guaranteed as a set-off in a prior action instituted by the defendant on the contract, but failed to do so, the court held that he was not barred from recovering on the claim in an independent suit, for, if he had such independent right of action, he was not precluded from enforcing it merely because he did not choose to plead it as a set-off in the defendant's proceedings.

In *Deaver v. Trahey* (1917) 98 Wash. 63, 167 Pac. 68, the court held that the plaintiff was not estopped from recovering on a promissory note, by reason of his failure to assert the same as a set-off or counterclaim in a prior action brought against him by the defendant, wherein he might have so pleaded his claim. The court said: "It seems settled by the great weight of authority, in the absence of statute, that a defendant, having a cause of action against a plaintiff wholly independent of the claim and relief sought by the plaintiff in the particular action, is not bound to set up such independent cause of action as a defense in the action, even though his cause is such that he may be permitted to do so; but may bring an independent action to enforce his claim, without being subjected to the plea of another action pending, or of res judicata, as a defense thereto."

In *Indiana Farmers' Live Stock Ins. Co. v. Stratton* (1892) 4 Ind. App. 566,

31 N. E. 380, wherein it appeared that the defendant, as plaintiff had previously brought suit against the plaintiff in the case at bar, an insurance company, on a policy of insurance, and in that action the company had failed to assert, by way of set-off, a claim on a promissory note made by defendant, the court held that the failure to claim the set-off did not preclude the insurance company from maintaining this action to recover on the note.

In *Carver v. Adams* (1866) 38 Vt. 500, an action in the state of Vermont to recover on an account which the plaintiff had neglected to plead as a set-off when sued on contract in the state of New York, the court held that under the Vermont rule the plaintiff did not forfeit his right to maintain an independent suit on his claim, by failing to plead it as a set-off in the former action.

Also in *Baker v. Alexander* (1866) 35 L. J. C. P. N. S. (Eng.) 217, 12 Jur. N. S. 692, an action brought on an award decreed in a prior suit on contract against him, the defendant pleaded by way of set-off a claim on contract which he might have asserted in the original proceedings. The court held that the defendant's failure to assert his claim in the former action constituted no estoppel to his pleading the same as a set-off, for while he had a right to bring the matter in a set-off in the previous suit he was not required to do so.

In *Dorsey v. Reese* (1858) 14 B. Mon. (Ky.) 157, wherein the plaintiff sought to set off a note to a judgment rendered against him by default in a prior action on contract, the court held that under the Kentucky Code (§ 151), which provides that he "may set forth in his answer as many grounds of defense, counterclaim, and set-off, whether legal or equitable, as he shall have," the plaintiff was permitted, but not required, to assert his claim in the former action, and a judgment therein was no bar to the relief sought in this independent proceeding.

In *La Fullett v. Mitchell* (1902) 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916, the court held that the plaintiff,

as defendant in a prior action on a contract brought against him by the defendant herein, was not required to set up in his defense a cause of action existing in his favor for a breach of the contract by the prior plaintiff, saying: "Where . . . the action, although between the same parties, is upon a different claim or demand, the judgment in the prior action operates as a bar or estoppel only as to those matters directly in issue, and not those collaterally litigated."

In *Folsom v. Winch* (1884) 63 Iowa, 477, 19 N. E. 805, wherein it appeared that the defendant, when sued in a prior action on contract in another state, had suffered judgment without asserting a counterclaim for an indebtedness which existed in his favor, the court held that his failure to set up his claim did not preclude him from asserting it in this action brought by the same plaintiff on the judgment obtained in the foreign jurisdiction.

In *Inslie v. Hampton* (1876) 8 Hun (N. Y.) 230, wherein it appeared that there was an action on contract pending, in which the present plaintiff was defendant, and the defendant herein plaintiff, and in which action the claim on contract here prosecuted could have been interposed as a counterclaim, the court held that the then defendant was not obliged to file his demands in set-off or counterclaim in the former proceeding, but, if he so elected, could maintain a separate action thereon; that the preclusion under the statute (2 Rev. Stat. 236, § 57) for failure to plead a cause of action as a set-off or counterclaim must be confined to cases, as specified therein, commenced in justices' courts.

In *Distributing Corp. v. Perez* (1919) 175 N. Y. Supp. 537, wherein it appeared that the defendant had interposed a counterclaim on contract, in an action for money had and received, but subsequently, and before judgment was rendered, withdrew the same, the court held that as the matter stood the defendant was entitled to bring an action on his claim.

In *Stuart v. New York Community Mausoleum Constr. Co.* (1919) 179 N. Y. Supp. 78, the withdrawal by the

defendant, in an action to recover an assessment for stock subscription, of a counterclaim for the amount of the subscription paid, was held not to preclude the bringing of another action to recover the amount of the subscription paid, where the main issue in the prior action was whether subscriptions to a certain amount had been obtained, so as to make the subscriptions binding.

In *Goodman v. Benjamin Rutchik* (1918) 171 N. Y. Supp. 152, the court held that the provisions of the New York Code of Civil Procedure relative to counterclaims included what was formerly known at common law as recoupment and set-off, and therefore, where it appeared that claims on contract made the basis of the suit at bar had been pleaded in set-off by the plaintiff as defendant in a prior action on contract, but without claiming affirmative relief thereon, it must be held that, the plaintiff having been unable to obtain a judgment in the prior action on his claims, the pendency of that action constituted no bar.

In *John Douglass Co. v. Moler* (1893) 3 Misc. 973, 22 N. Y. Supp. 1045, it was held that § 507 of the Code of Civil Procedure permitted, but did not compel, a defendant to assert a cause of action by way of counterclaim. The court held that there was no rule of law or practice that required a person having a claim on contract against another, to counterclaim for the same when sued on contract by the other party; but he could defend such action and, whether successful in his defense or not, still retain his right of action for such claim against such person.

In *Norton v. Wochler* (1903) 81 Tex. Civ. App. 522, 72 S. W. 1025, the court held that the plaintiff's omission to plead as counterclaim in a prior action brought against him on contract by the defendant, matters in contract comprising the basis of his present action, did not bar the plaintiff's right to recover, as the statute authorizing a defendant to plead a claim existing in his favor as a counterclaim was permissive only, and not mandatory.

See, to the same effect: *Merchants*

*Heat & Light Co. v. J. B. Clew & Sons* (1906) 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285; *Robinson v. Wiley* (1826) Hempst. 38, Fed. Cas. No. 11,968a; *Stoddard v. Treadwell* (1864) 26 Cal. 294; *Pollock v. Kinman* (1912) 176 Ill. App. 361; *Manchester F. Assur. Co. v. Koerner* (1895) 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1010, 41 N. E. 848; *McEwen v. Bigelow* (1879) 40 Mich. 215; *Seventh Day Adventist Pub. Asso. v. Fisher* (1893) 95 Mich. 274, 54 N. W. 759; *Batterman v. Pierce* (1842) 3 Hill (N. Y.) 171; *Potter v. Gates* (1890) 56 Hun, 639, 2 Silv. Sup. Ct. 339, 9 N. Y. Supp. 87; *Rosenberg v. Slotchin* (1917) 131 App. Div. 187, 168 N. Y. Supp. 101; *Kauff v. Messner* (1869) 4 Brewst. (Pa.) 98; *Providence-Washington Ins. Co. v. Owens* (1919) — Tex. Civ. App. —, 210 S. W. 558; *Taggart v. Rice* (1864) 37 Vt. 47; *Hutchins v. George* (1918) — Vt. —, 104 Atl. 108.

In *Rauer's Law & Collection Co. v. Sheridan Proctor Co.* (1919) — Cal. App. —, 181 Pac. 71, wherein it appeared that in a former action on contract, the defendant had pleaded as a counterclaim the claim on contract set up in the case at bar, but that at the time the claim had not accrued and was not pressed, the court held that the facts did not constitute *res judicata*, and the defendant was not barred from setting up his claim, as, to constitute a bar, it must be shown that the matter was adjudicated in the prior action.

So too, in *Davis v. Bessemer City Cotton Mills* (1910) 102 C. C. A. 232, 178 Fed. 784, the court held that setting up a counterclaim on contract in a subsequent action does not violate the well-settled principle that it is not open to a defendant to offer any matter of defense or objection which could have been interposed in the original action on contract, as a counterclaim is a cross action entirely independent of the plaintiff's cause of action, saying: "A defendant is not bound to assert a counterclaim in an action brought against him, nor will the plaintiff's recovery bar a subsequent action on a cause of action which he might have set up as a coun-

terclaim,"—quoting from the decision of the court in *Woody v. Jordan* (1873) 69 N. C. 189, *infra*.

Also, in *Jones v. Leopold* (1904) 95 App. Div. 404, 88 N. Y. Supp. 568, it appeared that while an action on contract was pending, the defendants brought suit in another and inferior court on a similar cause of action which could have been interposed as a counterclaim in the pending suit. The court held that the action in the inferior court could not be stayed, as the defendants had a legal right to elect to enforce their claim in an independent action, rather than by counterclaim, especially as it appeared that full relief could not be granted them therein.

In *Quick v. Lemon* (1883) 105 Ill. 578, it was held that a defendant in an action on contract could elect to plead and prove a claim on contract as a set-off, or reserve the same until after judgment and sue the plaintiff in a separate action, except where the plaintiff's action was brought before a justice of the peace, in which case, the statute required a defendant to bring in all his demands against the plaintiff, unless they exceeded the jurisdiction of the justice, and a failure to do so constituted a bar to a subsequent action maintained thereon.

Where it appeared that a plaintiff attempted without the consent of the defendant, to apply a set-off consisting of a claim in contract existing in favor of the latter as against a claim on contract asserted by the plaintiff, the court held that the matter of pleading a set-off was optional with the defendant, and the plaintiff could not, without his consent, enforce its allowance, saying: "Set-off is only a defense, and may be made or not at the option of the defendant. If he choose, he can withhold it as a defense, and bring an independent action for its recovery. And the plaintiff in a suit, against whom this cross demand exists, has no power or option in the premises. He must submit to whatever course the defendant elects to pursue." *Wharton v. King* (1881) 69 Ala. 365.

In *Robbins v. Harrison* (1857) 31 8 A.L.R.—45.

Ala. 160, it was held that failure to plead a claim on contract as a set-off in a former action on contract constituted no bar to an independent and subsequent suit thereon, the court saying: "A defendant, having a right of set-off, or cross action, may, at his election, bring it forward in the suit against him, or bring an independent suit upon it. The rule that a judgment is conclusive, not only as to every matter determined, but as to every matter which might have been set up as a defense to the cause, does not include rights of set-off. A defendant is not bound to plead his set-off; though, if he pleads it, a decision against him is conclusive."

See also *Bartlett v. Pearson* (1848) 29 Me. 9, wherein there was dictum to the effect that the defendant in a prior action on contract might have set off a claim against the plaintiff arising out of their mutual dealings, but that he was not bound to do so, by law or equity, and could lawfully elect to commence an independent action on his claim.

And see *Hendrickson v. Hinckley* (1854) 17 How. (U. S.) 443, 15 L. ed. 123, wherein there was dictum to the effect that "there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action." In that case, it appeared that the plaintiff purposely omitted to set off his claims arising out of a contract which was the basis of an action at law against him, and sought relief from the judgment granted therein, petitioning the court to try the claims as an offset to the judgment.

See also *Collyer v. Collins* (1864) 17 Abb. Pr. (N. Y.) 467, an action to recover an amount for extra work performed under a contract by the plaintiff to build a schooner for the defendants. It appeared that the defendants had previously brought action against the plaintiff in a foreign court on a breach of the contract, wherein the plaintiff did not plead his claim as a set-off or counterclaim, but in a later action on the judgment obtained in the foreign suit set up the same identical claim made in the case

at bar as a counterclaim. The court held that the action on the judgment barred the plaintiff herein from recovering. But in a concurring opinion it was said: "But in a case where the defendant might set up his counterclaim or set-off in answer to the plaintiff's demand, he has his election whether he will do so or bring his cross action."

*(b) Prior action on contract; claim for breach of warranty.*

In *Thoreson v. Minneapolis Harvester Works* (1882) 29 Minn. 341, 13 N. W. 156, an action to recover damages for a breach of warranty under a contract to sell a chattel, it appeared that the plaintiff had been sued by the defendant in a previous action to recover the purchase price of the chattel, and in that action the claim for damages on the ground of breach of warranty had not been set up by way of defense, set-off, or counterclaim. The court held that the judgment recovered by the defendant in the former action constituted no bar to a recovery for breach of the contract of warranty.

Where, in an action by a vendee against the vendor under a contract of sale to recover damages for a breach of warranty, it appeared that the vendor had secured a judgment against the vendee as defendant, in a former action, and that the latter had not asserted his claim for a breach of warranty as a counterclaim, the court held that the prior judgment was no bar to the second suit, as the plaintiff therein, as defendant before, was not obliged to plead his cause of action in counterclaim but could elect to proceed in an independent action to recover on his claim. *Barth v. Burt* (1865) 43 Barb. (N. Y.) 628.

And in *Bloom v. Arthur Walker & Co.* (1919) 175 N. Y. Supp. 150, an action by the buyer of goods against his vendor for a breach of contract in failing to deliver the specified quantity of goods, it appeared that the defendant had sued the plaintiff in a prior action for the purchase price of goods delivered, and in that suit the alleged breach of contract was not pleaded as a counterclaim. The de-

fendant, therefore, pleaded the prior judgment in abatement of this action. It was held that the plaintiff was not required to plead in counterclaim in the former action, but could elect to recover on his claim in an independent suit.

In *Parker v. Roberts* (1885) 63 N. H. 431, an action by the purchaser of goods to recover damages suffered by reason of a breach of warranty of the quality of the goods, it appeared that the plaintiff had suffered judgment by default in a prior suit brought against him by the defendant to recover the purchase price. The court held that the former judgment was no bar to the action, for if the plaintiff had appeared therein he would not have been obliged to set up the present cause of action as a counterclaim, but could have elected to reserve the claim for a subsequent action thereon.

So, in *Bascom v. Manning* (1872) 52 N. H. 132, wherein the circumstances were analogous to those stated in *Parker v. Roberts* (N. H.) supra, the court held that a judgment by default in a prior action to recover the purchase price of goods sold did not preclude a recovery by the purchaser in a subsequent independent action on a breach of warranty under the sale.

In *Stillwell v. Hill* (1918) 87 Or. 112, 169 Pac. 1174, an action to recover damages occasioned by the failure to deliver a specified quantity of hay to the plaintiff as vendee under a contract of sale, it appeared that the defendant vendor had brought a prior action against the vendee to recover upon the hay actually delivered, and in that action the present plaintiff, as defendant, defended on the ground that the vendor had not performed the contract in that he had not delivered the quantity of hay specified. The defendant pleaded the record and judgment in the former suit as a bar. The court held that the plaintiff's plea in the former action constituted an affirmative denial only, and was not in the nature of a counterclaim; and that, while he might have obtained damages in the previous action by pleading his cause of action as a

counterclaim, yet he had an option to plead it as a counterclaim or maintain a separate action on it. See to the same effect: *Crabtree v. Kile* (1859) 21 Ill. 180; *Morgan v. Powers* (1867) 66 Barb. (N. Y.) 35; *Perley v. Balch* (1839) 23 Pick. (Mass.) 283, 34 Am. Dec. 56; *Stevenson v. Klepinger* (1836) 5 Watts (Pa.) 420; *Standefer v. Aultman & T. Mach. Co.* (1904) 34 Tex. Civ. App. 160, 78 S. W. 552.

In *McKnight v. Devlin* (1873) 52 N. Y. 399, 11 Am. Rep. 715, the court held that it was optional with the purchaser of a chattel to recoup his damages occasioned by a failure of title, in an action for the purchase price, or reserve his claim for a future independent proceeding thereon, saying: "It is optional with a defendant whether he will recoup his claim growing out of the same contract upon which the action is brought, or resort to an independent action; and this option is not defeated by a transfer of the claim, and the bringing of a suit in the name of the transferee, except in cases where an indorsee or transferee of negotiable paper acquires a title discharged of all equities, and valid against all defenses."

Where it appeared that the defendant had set up a cause of action for a breach of contract by way of counterclaim, but that in a former action in contract between the same parties, in the same capacities, the defendant had neglected to plead his claim, and judgment had been rendered against him and the plaintiff pleaded the former judgment as a bar to the counterclaim, the court held that while the general rule as to defenses was well settled that a judgment was conclusive as to all matters which might have been presented therein, counterclaims and set-offs were expressly excepted from the rule by the statute (Ky. Code 1902, § 17), and a defendant could elect to set up a claim in his favor either by way of set-off, counterclaim, or cross petition, or, at his option, waive the statutory privilege and subsequently assert the claim in another action, or maintain an independent and original proceed-

ing to recover thereon. *Truesdale v. Brady* (1907) 31 Ky. L. Rep. 1336, 105 S. W. 122.

In *Mason v. Summers* (1887) 24 Mo. App. 174, wherein it appeared that the plaintiff had interposed his claim for a breach of contract as a counterclaim in a prior action on the contract, but withdrew the same before judgment was rendered therein, the court held that the matter was not adjudicated in the former suit, and although the plaintiff, as defendant therein, might have pleaded by way of counterclaim, he was not bound so to plead, but could recover in a separate action.

In *Anderson v. Rogge* (1894) — Tex. Civ. App. —, 28 S. W. 106, it appeared that the defendant had interposed the same counterclaim for breach of contract in a prior action on the contract brought against him by the plaintiffs, but in that proceeding he failed to appear at trial and prove the same. The court held that the judgment in the former action did not estop the defendant from asserting the counterclaim, saying: "As to this counterclaim, appellant was the plaintiff; and inasmuch as the record shows affirmatively that he was not present, prosecuting his suit, the only effect that should be given to that judgment, in reference thereto, is a dismissal for want of prosecution."

In *Ogden v. Pioneer Iron Works* (1904) 91 App. Div. 394, 86 N. Y. Supp. 955, the defendant asked for a stay of proceedings pending the determination of a prior action brought by him against the plaintiff in another court, to recover the unpaid purchase price due under a contract, wherein it was contended that plaintiff could have interposed the claim on contract here sued upon, as a counterclaim. The court refused the granting of the motion, holding that the plaintiff, as defendant before, could elect to enforce a claim by an action in the forum of his choice, rather than submit it by way of counterclaim in the suit of his opponent.

In *Davidson Chemical Co. v. Andrew Miller Co.* (1913) 122 Md. 134, 89 Atl. 401, it was held that a defend-

ant in an action on contract, who had pleaded a claim for a breach of contract by way of set-off, could properly withdraw the plea before evidence was given thereon, and maintain a separate independent action to recover on the claim.

In *Jones v. Charles Warner Co.* (1912) 2 *Boyce* (Del.) 566, 83 *Atl.* 131, the court held that in actions on contract for goods sold and delivered, or for work, labor, and services performed under a contract, the defendant could, at his election, either avail himself of a breach of the contract by way of counterclaim, or sue in an independent action to recover the damages sustained; but an election to avail himself of one might preclude the subsequent use of the other.

See to the same effect: *Barker v. Cleveland* (1869) 19 *Mich.* 230; *Kauffman v. Raeder* (1901) 54 *L.R.A.* 257, 47 *C. C. A.* 278, 108 *Fed.* 171; *McKinney v. Springer* (1851) 3 *Ind.* 59, 54 *Am. Dec.* 470; *Epperly v. Bailey* (1851) 3 *Ind.* 72.

In *Ives v. Van Epps* (1839) 22 *Wend.* (N. Y.) 155, wherein it appeared that the defendant had a claim for a breach of contract in his favor against the plaintiff, the court held that he could elect to maintain an action on his claim, or set it up by way of recoupment in the present action on contract, saying: "Where a man brings an action for breach of a contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated, the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff, whether they be liquidated or not. The law will cut off so much of the plaintiff's claim as the cross damages may come to."

So, in *Jones v. Witousek* (1901) 114 *Iowa*, 14, 86 *N. W.* 59, wherein the plaintiff sued for a breach of guaranty which he had failed to assert by way of counterclaim in a prior action on contract brought against him, the court held that as the former action was in a justice's court, and the coun-

terclaim exceeded the jurisdiction, the plaintiff could not have pleaded his cause therein (*Iowa Code*, § 4477); and in any event he was not obliged to do so under § 3440 of the Code, since a set-off or counterclaim may or may not be pleaded, as the defendant may elect, and unless pleaded the right to sue on it in a future action, or rely upon it as a defense, is not impaired by a prior judgment against the former defendant.

In *Foster v. Milliner* (1868) 50 *Barb.* (N. Y.) 385, the court held that where it appeared that, in a former action on a contract to repair brought against the plaintiff, his claim for a breach of the contract was set up by way of counterclaim, but was withdrawn before judgment under a stipulation between the parties, the judgment in the prior action constituted no bar to his suit brought to recover for the breach of contract.

In *Mimnaugh v. Partlin* (1887) 67 *Mich.* 391, 34 *N. W.* 717, an action to recover damages for imperfect work, it appeared that the plaintiff, when sued in a prior action to recover the value of the services, failed to plead his claim as a set-off. The court held that the contention of the defendant herein that the plaintiff was estopped from maintaining his action because of failure to assert the same as a set-off in the prior suit was erroneous, saying: "The defendant might have recouped the damages he recovered in his suit against Mimnaugh, but he was not obliged to do so or lose his claim. In case a party neglects to set off a claim when he has an opportunity to do so, he does not thereby preclude himself from recovering his demand, but he will not be allowed any costs in a suit to enforce such claim."

In *Davenport v. Hubbard* (1873) 46 *Vt.* 200, 14 *Am. Rep.* 620, an action to recover damages occasioned by the defendant's breach of contract to dig a cellar for the plaintiff within a specified time, the defendant pleaded a former judgment in his favor, in an action to recover the value of his services, as a bar to the plaintiff's suit. The court held that the judgment constituted no bar to the plaintiff's recov-

ery, for, as defendant before, he could use his claim as a set-off, or forbear and use it as the basis for recovery in a separate action.

See to the same effect: *Ornauer v. Penn Mut. L. Ins. Co.* (1912) 52 Colo. 632, 123 Pac. 650; *Davis v. Hedges* (1871) L. R. 6 Q. B. (Eng.) 687, 40 L. J. Q. B. N. S. 276, 25 L. T. N. S. 155, 20 Week. Rep. 60; *Walkup v. Mesick* (1905) 110 App. Div. 326, 97 N. Y. Supp. 142.

(c) *Prior action for breach of contract; claim for purchase price.*

In *Jennison Hardware Co. v. Godkin* (1897) 112 Mich. 57, 70 N. W. 428, an action to recover for the value of goods sold and delivered, the court held that the omission of the plaintiff to assert his claim as a set-off in a prior action, brought by the defendant for damages on account of defects in the goods sold, constituted no bar to his maintaining an independent action on his claim.

In *Kerr v. Blair* (1909) 55 Tex. Civ. App. 349, 118 S. W. 791, an action for goods sold and delivered and services rendered, it appeared that, in a former action by the defendant against the plaintiff to recover for a breach of contract, plaintiff did not assert his claim as a set-off. The court held that he was not thereby precluded from recovering on the claim, since there was no obligation on him to plead it as a set-off in the former suit.

In *Miller v. Baillard* (1908) 124 App. Div. 555, 108 N. Y. Supp. 973, an action to recover money paid for the construction of a certain machine for the plaintiff by the defendant which it was alleged the defendant refused to deliver, the defendant merely interposed a defense, and subsequently instituted a separate action against the plaintiff for services rendered and materials furnished. The court refused to consolidate the actions, holding that, while the defendant might have interposed a counterclaim for his demands, he was not required to do so, but had a right to maintain a cross action thereon in a proper court of his own choosing.

(d) *Prior action for rent; claim for breach of covenant in lease.*

In *Riley v. Hale* (1893) 158 Mass. 240, 33 N. E. 491, wherein it appeared that in a former action by a lessor against his lessee for rents under the lease, the lessee did not assert by way of recoupment a claim in his favor for a breach of the lessor's covenant of quiet enjoyment, the court held that his failure to assert his claim in the prior action did not bar him from maintaining a subsequent independent action to recover the damages arising under the claim, since the right to set up a claim in recoupment was a privilege which the defendant was not bound to avail himself of.

And see *Reiner v. Jones* (1899) 38 App. Div. 441, 56 N. Y. Supp. 423, wherein it was held that, in an action to recover rents due, the defendant tenant could elect to counterclaim for damages occasioned by the breach of a covenant to repair, resulting in a loss of rental value, or he could reserve his cause of action for an independent suit thereon. But in that case it appeared that the defendant counterclaimed for damages to stock caused by a leaky roof, which the court held was not a proper subject of counterclaim in a suit by a landlord to recover rents due.

So in *New York v. Mabie* (1855) 13 N. Y. 151, 64 Am. Dec. 538, the court held that in an action by a lessor for rent, the tenant under the lease could elect to recoup his damages occasioned by a breach of covenant in the demise, or bring a separate action thereon.

In *Morgan v. Smith* (1876) 7 Hun (N. Y.) 244, it was said that it was a privilege of a tenant, when sued for rents due under a lease, to counterclaim damages by reason of the plaintiff's failure to place the tenant in the possession of the light he was entitled to enjoy under the lease. But as the action was brought against the sureties on the lease, the court held that they could not set up the counterclaim unless it was shown that the tenant was insolvent.



(e) *Prior action for breach of covenant in lease; claim for rent.*

In *Parsons v. Crawford* (1885) 64 N. H. 23, 3 Atl. 632, a former suit by the defendants as plaintiffs against the present plaintiffs, to recover damages for a breach of covenant under a contract to rent property, was held to be no bar to an action brought by the prior defendants in their capacity as lessors to recover the unpaid rental of the premises, the court holding, inferentially, that the claim sued on was not required to be pleaded in the prior action, and therefore the judgment rendered therein was not a bar.

Where it appeared that the lessor of property failed to counterclaim for rent due in an action brought against him by the lessee, the court held that the omission did not bar his right to subsequently recover the rent in an independent action, holding that the provision of the Code which bars a counterclaim, unless set up in an action brought against the party in whose favor it exists, refers only to a cause of action arising out of, or connected with, the same transaction set forth as the basis of the plaintiff's claim. Cal. Code Civ. Proc. § 488, subd. 1, § 439. *Brosnan v. Kramer* (1901) 135 Cal. 36, 66 Pac. 979.

(f) *Prior action on promissory note; claim for breach of contract.*

In *Fiske v. Steele* (1890) 152 Mass. 260, 25 N. E. 291, an action on a judgment founded on a promissory note, the defendant filed a set-off consisting of items of account which had accrued before the judgment in the original action was rendered, but which the defendant had not asserted therein. The court held that the defendant's omission to plead his claim before judgment did not preclude him from asserting it in the action on the prior judgment.

In *Dilley v. Ratcliff* (1902) 29 Tex. Civ. App. 545, 69 S. W. 237, the plaintiff sued to recover damages occasioned by the failure of the defendants to deliver promptly certain machinery to be used in connection with the operation of a cotton gin. It appeared that the defendants had successfully maintained a prior action

against plaintiff on a note given to secure the purchase price of the machinery, and in that action the present claim was not pleaded in set-off. The court held that while the plaintiff could have pleaded the damages for the breach of contract in set-off to the defendants' action on the note, he did not do so, and therefore his cause of action was not drawn into that suit; nor did his failure so to plead his claim estop him from recovering on the same in an independent action.

In *Gillespie v. Torrance* (1862) 25 N. Y. 306, 82 Am. Dec. 355, a much-quoted case in New York, the court reiterated and restated the rule, as laid down in former decisions, that where a defendant had a claim for a breach of warranty, which could have been asserted by way of set-off, recoupment, or counterclaim in a pending action against him on a promissory note, he was not obliged to interpose his claim as such, but had an election so to use it, or bring an independent action to recover thereon. The court said: "It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross action."

In *Gilmore v. Williams* (1894) 162 Mass. 351, 38 N. E. 976, wherein it appeared that the plaintiff had not availed himself of the privilege of setting up his claim of breach of warranty in a prior action brought against him on a promissory note, the court held that the judgment therein was no bar to his action, as the present plaintiff, as defendant in the former action, could elect to set up his claim as a recoupment or reserve the same for an independent suit for damages.

See to the same effect: *De Sylva v. Henry* (1836) 3 Port. (Ala.) 132; *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587; *McDonald v. Christie* (1863) 42 Barb. (N. Y.) 36; *J. S. May-*

field Lumber Co. v. Carver (1901) 27 Tex. Civ. App. 467, 66 S. W. 216; Dudley v. Stiles (1873) 32 Wis. 371; La Fleche v. Bernardin (1911) 21 Manitoba L. R. 315, 17 West. L. R. 394.

In North Baltimore Bottle Glass Co. v. Altpeter (1907) 133 Wis. 112, 113 N. W. 435, wherein the defendant interposed a counterclaim in a suit for damages occasioned by a breach of contract, which it appeared he had also used as a counterclaim in a prior suit on certain promissory notes, wherein judgment by default was granted to the plaintiff, the court held that the defendant's failure to appear in the former action amounted to a waiver of the counterclaim, which was not adjudicated therein, and as the counterclaim constituted an independent cause of action, which he was not compelled to present as a counterclaim, the failure so to plead it in the prior proceedings did not estop the defendant from interposing it in a separate suit.

Where a defendant interposed a cross demand for certain sums due and owing in an action in equity, which, although available as a set-off, he had omitted so to plead in a prior action on purchase-money notes at law, the court held that the omission did not preclude the setting off of the demand in the subsequent proceeding in equity, saying: "It is not compulsory on him to make it, and the judgment does not preclude its future introduction." Weaver v. Brown (1888) 87 Ala. 533, 6 So. 354.

In Wright v. Anderson (1889) 117 Ind. 349, 20 N. E. 247, it appeared that the plaintiff, as defendant in a prior action to recover on a promissory note, filed a counterclaim based on an equitable right, but failed to include therein a claim for money had and received. Subsequently he brought the suit at bar against the plaintiff in the prior proceeding, to enforce the legal right omitted in the former counterclaim. The court held that as all distinctions between law and equity were abolished by the Code of Practice, the plaintiff could have made his counterclaim in the prior action sufficiently broad to have included his

legal remedy, but he was not required to do so, and, having failed to include that right, was not estopped from maintaining an original action thereon.

In Fairfield v. McNany (1873) 37 Iowa, 75, the court applied a statute (Iowa Rev. Stat. § 2621) which reads as follows: "Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of set-off, counterclaim, or cross demand in the action in which the judgment was recovered." It was held that the defendant was not barred by a judgment in default against him, on a note given in part payment for land, from bringing action upon a bond for title for a breach thereof, and therefore he was not obliged to pay a judgment obtained in that action, to the plaintiff, as a creditor of the judgment debtor.

See also Trautwein v. Twin City Iron Works (1893) 55 Minn. 264, 56 N. W. 750, wherein it was held that a judgment in a prior action on a breach of warranty under a contract was no bar to a subsequent suit by the judgment defendant to recover on a promissory note, given pursuant to the contract. In that case, however, it appeared that the defendant in the case at bar had brought suit in a former action to recover on a promissory note, in which suit the plaintiff in the case at bar had counterclaimed for breach of warranty; and, further, that before trial in the former action the plaintiff, by leave of the court, withdrew his cause of action, and judgment was given for the defendant on his counterclaim. This action being brought to recover on the judgment, the defendant interposed his claim on the promissory note as a counterclaim.

See also Fabbricotti v. Launitz (1851) 3 Sandf. (N. Y.) 743, an action by a payee to recover on a note for the price of goods sold, wherein it appeared that the defendant set up

by way of recoupment a claim for damages occasioned by the nondelivery of the goods, and it appeared further that the defendant had instituted a separate action to recover on his claim. The court held that the defendant must elect between his recoupment and the separate and independent action.

*2. Prior action on contract; claim in tort.*

In *Secor v. Siver* (1914) 165 Iowa, 673, 146 N. W. 845, it was held that the recovery of the purchase price by the seller did not bar the buyer from thereafter bringing an action for damages for fraud in making the sale, unless, in a former action, he actually put the fraud in issue.

And in *Linderman Mach. Co. v. Hiltenbrand Co.* (1919) — Ind. App. —, 125 N. E. 81, it was held that a failure to assert a counterclaim for fraud and deceit in inducing one to purchase a machine, in an action for the purchase price, did not preclude the assertion of the claim for fraud and deceit in a subsequent action.

In *Kirven v. Virginia-Carolina Chemical Co.* (1907) 77 S. C. 493, 58 S. E. 424, an action for damages sustained by the plaintiff from the use of fertilizer manufactured and sold by the defendant, it appeared that the defendant had successfully maintained a prior action in a Federal court to recover on certain notes given by the plaintiff to secure the purchase price of the fertilizer, and in that action the plaintiff, as defendant therein, withdrew his defense based on the claim for damages. The court held that the cause of action for damages was not adjudicated in the former proceedings, nor was the plaintiff, as defendant therein, obliged to assert it.

In *Sykes v. Bonner* (1871) 1 Cin. Sup. Ct. Rep. (Ohio) 464, an action to recover damages for the alleged malpractice of a physician, wherein it appeared that the latter had recovered a judgment by default against the plaintiff for the value of his services, the court held that the question of malpractice was not in issue, and the prior judgment constituted no bar to the present action, for, although the

plaintiff, as defendant in the former proceeding, could have pleaded her damages by way of counterclaim therein, she was not obliged to do so, since her damages exceeded the jurisdiction of the court, and the only penalty she could suffer for failing to appear therein would be the loss of costs in her subsequent action, as provided by the statute. Code, § 95, 2 Swan & C. 979, 1 Swan & C. 804, § 202.

So, in *Hall v. Clark* (1855) 21 Mo. 415, it appeared that the plaintiff, who was a vendee under a contract of sale, had suffered damages by reason of the fraudulent representations of the defendant, the vendor, but had failed to plead his damages in a former action brought against him to recover the purchase money under the contract. The court held that the prior judgment was no bar to the prosecution of the action based on the fraud, saying: "In cases in which the defendant is sued for the purchase money of property, and he has sustained injury by the fraudulent misrepresentations or misconduct of the plaintiff respecting the subject of the sale, pending its negotiation, he may, at his option, recoup his damages in an action against him to recover the purchase money, or he may bring a separate action for the deceit. Such a defense is of the nature of a set-off, which a party may use or not, at his election; and a failure to use it as a set-off will not debar him from his action for the fraud."

And see *Sinclair v. Neill* (1874) 1 Hun (N. Y.) 83, 3 Thomp. & C. 77, wherein it was said that a party, induced by fraudulent representations to purchase a store with its stock of goods and fixtures, could maintain an independent action for damages occasioned by the fraud, or he could make use of his right for the recovery of damages by way of recoupment, or counterclaim, in reduction of the seller's claim for the purchase price.

In *Price v. Macomber* (1914) 163 Iowa, 406, 144 N. W. 1020, it appeared that the defendant had suffered judgment in a foreign jurisdiction in an action on a contract. In an action on the judgment the defendant offered, by way of set-off, a claim for fraud,

inducing him to enter into the contract. The plaintiff replied, pleading the defendant's failure to assert the set-off in the first action as a bar to its assertion in the second. The Iowa Code (§ 3440) provided as follows: "Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered; but such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counterclaim in the action on which the judgment was recovered." It was held that the cause of action in fraud was not lost by a failure to set it up as a defense, set-off, or counterclaim in the plaintiff's original action.

In *McLane v. Miller* (1847) 12 Ala. 643, wherein it appeared that the plaintiff had not pleaded a claim in a former action on contract in which he was a defendant, for the wrongful taking of a slave, the court held that he was not barred from bringing an independent action to recover damages for injury caused by the trespass.

Also in *Ward v. Fellers* (1854) 3 Mich. 281, it was held that the defendant, in an action on contract, could elect to pursue his remedy for damages sustained by the plaintiff's negligence by way of recoupment in the original action, or institute a separate and independent suit to recover on his claim.

In *Watson v. Cowdrey* (1880) 23 Hun (N. Y.) 169, it appeared that in a former action to recover for services rendered, in which the plaintiff was defendant, and the defendant was the complainant, the present cause of action for conversion was set up as a counterclaim, but on motion of the former plaintiff was stricken out. The court held that the prior action constituted no bar to the later proceeding, as the matter herein claimed upon was not litigated or pleaded, and the party in whose favor it existed had the right to recover thereon in a separate action.

In *DeGraaf v. Wyckoff* (1889) 118

N. Y. 1, 22 N. E. 1118, the court held that a judgment in a prior suit on contract in which a claim in tort might have been, but was not, set up as a counterclaim, constituted no estoppel to a proceeding on the claim, as the defendant in the former action was not obliged to counterclaim on his cause of action, but could sue thereon independently.

In *McCord-Collins Commerce Co. v. Levi* (1899) 21 Tex. Civ. App. 109, 50 S. W. 606, wherein it appeared that the plaintiff did not plead his claim for damages occasioned by the defendant's fraudulent misrepresentations, as a counterclaim in a prior action on contract brought by the latter, the court held that the judgment rendered in that action was not a bar to a recovery by the former defendant, suing independently on his claim.

See also *Schwinger v. Raymond* (1880) 83 N. Y. 192, 38 Am. Rep. 415, to the effect that, in an action by a carrier against the shipper of goods for freight charges, the shipper could pay the freight and sue for damages occasioned by the negligence of the carrier, or, refusing to pay, submit to suit and set up his damages as a counterclaim, or bring an independent action thereon.

*B. Prior action on contract; claim in equity.*

In *Fitzhugh v. McKinney* (1890) 43 Fed. 461, the proceeding was in equity to enjoin a judgment recovered against the plaintiff by the defendant in a former action, and allow a set-off and payment which the plaintiff had failed to assert therein. The court held that, while the statute (Tex. Rev. Stat. 1879 ed. title 21, arts. 649, 650) allowed the pleading of a set-off or counterclaim "founded on a cause of action arising out of, or incident to, the plaintiff's cause of action," the defendant in the prior suit was not required to do so, and his failure so to assert his claim would not preclude him from the relief sought in the case at bar; adding that the most that could be claimed on account of such a failure would be to charge him with costs of the subsequent action.

In *Mutual L. Ins. Co. v. Hargus*

(1907) — Tex. Civ. App. —, 99 S. W. 580, an action to cancel a policy of life insurance on the ground of fraudulent misrepresentations of the defendant's general agent, the court held that the pendency of an action by the agent against the insured to recover on a note given by the latter to secure a premium under the policy constituted no bar to the plaintiff's right to the relief sought, since he was not obliged to demand the cancelation of the policy in the former action.

In *Jordan v. Underhill* (1904) 91 App. Div. 124, 86 N. Y. Supp. 620, an action to compel an accounting by the defendant of his dealings and transactions as an agent of the plaintiffs, it appeared that the defendant had instituted a prior action to determine the amount of wages due him for services, and in that action the present plaintiffs had not interposed a counterclaim as they might have done. The court held that the first action constituted no bar, since it did not necessarily involve the matters made the basis of the second action; and that, while the present plaintiffs could have entered a counterclaim in the prior action, for the relief herein demanded, they were not obliged to do so.

So, in *Wright v. Salisbury* (1870) 46 Mo. 26, wherein it appeared that the plaintiff, as defendant in a prior action on a promissory note, had interposed a claim in equity by way of set-off, but, on the former action coming to trial, had abandoned it, the court held that the prior judgment did not conclude the enforcement of the plaintiff's equitable claim in an independent action, for, having been abandoned as a set-off in the former suit, it must be treated as though never having been raised therein, and, as the defendant had a right to elect to pursue his claim by set-off or in an independent action, his abandonment of the set-off showed an election to reserve the claim for a subsequent original action thereon.

In *Judah v. Brandon* (1841) 5 Blackf. (Ind.) 506, wherein the defendant contended that equitable claims set forth in the complainant's

bill should have been pleaded as a set-off in a former action brought by the defendant to recover on a bond, and that the plaintiff, having failed to do so, was therefore concluded by the judgment in the former suit, the court held that the Statute of Set-off was passed for the benefit of defendants, and was not compulsory; that the right to set off a claim could be waived, and an independent action maintained thereon.

In *Campbell's Gas Burner Co. v. Hammer* (1915) 78 Or. 612, 153 Pac. 475, wherein it appeared that it was possible for the plaintiff corporation to have secured the equitable relief sought, by filing a cross bill in a former action on contract brought against it in a court of law, the court held that it was not essential that such a course should have been pursued, for, as defendant before, the corporation could safely rely on a legal defense without being precluded from asserting its equitable rights in an independent suit.

*4. Prior action on contract; claim for foreclosure.*

In *Smith v. Fleischman* (1897) 23 App. Div. 355, 48 N. Y. Supp. 234, an action to foreclose a mechanic's lien, the defendant contended that the action was barred by the pendency of a prior suit brought by him against the plaintiff to recover on a breach of the contract, wherein the plaintiff, as defendant, could have counterclaimed. The court held that while the plaintiff could have interposed his claim in the former action as a counterclaim, he was not obliged to do so, especially since it appeared that, the former action being in law, he would have been restricted to a judgment for money damages, and could not have foreclosed his lien.

*5. Prior action in tort; claim on contract.*

In *Betts v. Connecticut L. Ins. Co.* (1905) 78 Conn. 442, 62 Atl. 345, wherein it appeared that the receiver of an insolvent corporation had recovered a judgment against an officer of the corporation for a neglect of duty, and in that proceeding the officer had

neglected to claim a set-off for salary due him, the court held that he was entitled to the relief sought, viz., to have his claim set off against the judgment rendered in the prior proceeding.

So, in *Perkins v. Oliver* (1896) 110 Mich. 402, 68 N. W. 245, it was held that the judgment in a former action in tort, in which the present plaintiff was defendant, was not conclusive as to a subsequent action brought by the plaintiff on a claim on contract which he might have, but did not, put in litigation by setting up the same as a matter in set-off or recoupment.

In *Smeaton v. Cole* (1903) 120 Iowa, 368, 94 N. W. 909, it was held that, where the defendant in an action in tort had a claim for a debt due and owing from the plaintiff, he was not obliged to plead it as a set-off or counterclaim, but could elect to make it the subject of a separate and distinct action; and, therefore, the petitioner was not obliged, nor did he have a right, to assume that the defendant would interpose his claim by way of a set-off or counterclaim, rather than by a separate action, so as to oblige the petitioner to plead in anticipation of the defendant's claim.

In *Sowden v. Murray* (1909) 114 N. Y. Supp. 164, an action for work, labor, and services performed on a garment, the defendant pleaded in abatement a prior suit in tort brought by the defendant against the plaintiff to recover for damages to the garment while in the plaintiff's possession, on the ground that the plaintiff should have pleaded its claim as a cross demand in the former action. The court held that while the plaintiff might have so pleaded its cause of action in the defendant's suit, it was not required to do so, and could elect to reserve the claim for an independent action thereon.

So, in *DIAMOND ICE & STORAGE CO. v. KLOCK PRODUCE CO.* (reported herewith) ante, 685, an action to recover storage charges, it appeared that a prior action had been maintained by the defendant against the plaintiff to recover for the conversion of certain produce which it had stored with the latter, and in that action the present

claim was not asserted as a set-off or counterclaim. The defendant having raised the question of the prior judgment as a bar to this action, the court held that it did not estop the plaintiff from recovering.

In an early case, *Sintzenick v. Lucas* (1793) 1 Esp. (Eng.) 44, an action to recover damages suffered by the unskilful performance of services by the defendant, the court held that the plaintiff was not precluded from recovering because of the fact that he had not pleaded his cause of action in a prior suit brought against him by the defendant to recover for the services rendered. See to the same effect, *Rigge v. Burbidge* (1846) 15 Mees. & W. 598, 153 Eng. Reprint, 988, 15 L. J. Exch. N. S. 309, 4 Dowl. & L. 1.

In *Johnson v. Reeves* (1901) 112 Ga. 690, 37 S. E. 980, the court held that a defendant having a claim on contract was not obliged to set it up by way of set-off in an action against him in tort, and held, further, that though both causes of action were on contract, or in tort, the court did not, by its decision, wish to be understood as intimating that the defendant would be obliged to set off his cause of action.

See also *Powell v. Davis* (1857) 19 Tex. 380, wherein the court said: "It would seem as matter of practice, if not of principle, that, to entitle the defendant to go behind the judgment to assert a claim for improvements, he ought to show some sufficient excuse for his failure to claim them in his answer to the prior action in trespass. If such excuse be shown, it is not perceived that there is anything in principle which would deny his right afterwards to assert the claim, as the right to pay for improvements is not dependent wholly upon the statute."

#### 6. *Prior action in tort; claim in tort.*

In *SEAGER v. FOSTER* (reported herewith) ante, 690, an action to recover damages sustained in an automobile collision, it appeared that another action was pending in which the present plaintiff was being sued for damages sustained by the defendant by reason of the same accident. The defendant

pleaded the pending action in abatement of the plaintiff's suit, contending that the plaintiff could have alleged his damages therein by way of set-off, counterclaim, or cross petition. The court held that although the plaintiff might so have set up his cause of action, he was not obliged to do so.

**7. Prior action in equity; claim on contract.**

In *Rabb v. Patterson* (1894) 42 S. C. 528, 46 Am. St. Rep. 473, 20 S. E. 540, it appeared that the plaintiff, when sued by the defendant to establish a title to land, did not assert in that action a claim for rents and profits received by the defendant while in possession of the land. The court held that the failure to assert the claim constituted no bar to a recovery thereon in an independent action, saying: "When A. sues B. to recover a specific tract of land or a specific sum of money, B. may content himself with defending himself against the claim of A. as set up in his complaint; he need go no further, although he may go further if he chooses. Not so, however, with A.; he must exhaust himself in regard to the specific tract of land or specific sum of money sued for; afterwards, he cannot make as a cause of action against B. any claim he had as to the land or to the money."

In *Jacobs v. Jacobs* (1919) — Or. —, 180 Pac. 515, an action to recover the rents and profits of real estate, it appeared that in a former partition action the plaintiff, as defendant therein, did not set up her claims for rents and profits. The court held that she was not obliged to do so, and, as the complaint in the former proceeding did not bring in issue the question of rents and profits, the judgment rendered therein was not conclusive, nor did it constitute a bar to the plaintiff's right to recover.

In *Stewart v. Turner* (1917) 67 Pa. Super. Ct. 255, an action by an employer against his agent for a breach of contract to sell goods, it appeared that the agent had instituted prior proceedings in equity to restrain the employer from selling goods to others in his territory, and in that action the plaintiff had not set up the claim for

damages based on the agent's breach. The court held that, notwithstanding the decree in the former proceedings, the plaintiff could maintain this action, as there was no legal obligation to assert the claim in the prior action.

Compare *Rogers v. Wiggs* (1851) 12 B. Mon. (Ky.) 504, wherein the court held that a defendant in an action in equity to rescind a contract for the sale of land ought to have set up any claim which he had for rents in order that a complete equitable adjustment could have been made. The court said: "The rents and improvements were an equitable incident to the suit for rescission, peculiarly appropriate to the suit in chancery, and not having been adjusted in that suit, we are of opinion that a court of law does not afford a remedy to recover either." That case, however, seems to have been decided on the theory that the plaintiff sought relief in a forum that could not afford him a remedy, and not on the ground that the failure to assert the set-off constituted a bar. But if the latter was the controlling rationale for the decision, it must be held that this case has been overruled by the great weight of authority in the state.

In *Ocean Shore Development Co. v. Hammond* (1918) — Cal. App. —, 175 Pac. 706, it was claimed that, as instalments under a contract were due at a time when an action for the rescission of the contract was instituted by the defendant herein, the plaintiff, who was defendant in the former action, was obliged to set up his cause of action as a counterclaim, or lose the right to sue thereon. The court held that § 422 of the California Code of Civil Procedure is permissive only, and the plaintiff was not obliged to avail himself of the right to counterclaim, but could reserve his action for a future independent suit.

In *Stauffer v. State Bank* (1916) 201 Ill. App. 306, the court held that no statute in the state of Illinois required parties to an action for an accounting, begun in a circuit court, to plead a set-off or counterclaim on contract, and that an independent action could be brought thereon.

Following and quoting *Roach v. Privett* (1890) 90 Ala. 391, 24 Am. St. Rep. 819, 7 So. 808, set out *supra*, II. b, 1 (a), it was held in *New England Mortg. Secur. Co. v. Fry* (1904) 143 Ala. 637, 111 Am. St. Rep. 62, 42 So. 57, that the plaintiff was not required to plead an indebtedness as a set-off in a prior suit to partition real property, but could reserve her rights and sue in an independent action.

In *Kennedy v. Davisson* (1899) 46 W. Va. 433, 33 S. E. 291, wherein it appeared that the plaintiff omitted to plead his claim on a contractual agreement as a set-off in a prior action in equity, brought by the defendant, the court held that he was not thereby precluded from recovering upon the same in this action, as a set-off could be pleaded as such, or, at the defendant's election, the claim could be reserved for a separate suit.

So, in *Weston v. Turner* (1887) 8 N. Y. S. R. 296, the court held that a judgment in a prior action to settle partnership affairs, in which the defendant's claim on contract was not directly involved, was no bar to the present proceeding to have the claim allowed as a set-off against the judgment; that if the claim could have been interposed in the prior action as an equitable counterclaim, it was not incumbent on the defendant therein to do so.

In *Harris v. Schrimper* (1918) — Iowa, —, 169 N. W. 750, an action for damages for breach of covenants of warranty, the existence of a right of way by easement over the granted premises constituting the breach, it was held that a former action against the defendants to quiet title in real estate as against their claim of an easement by right of way in which they failed to appear, did not bar them from pleading a counterclaim in the case at bar, alleging that in the real agreement the easement was excepted from the covenants of warranty, but that by the mistake of the scrivener the exception was not written in the deed, and praying for a reformation of the instrument.

In *Simmang v. Braunagel* (1894) — Tex. Civ. App. —, 27 S. W. 1032, an

action by the plaintiff as indorsee on a note, the defendant contended that the plaintiff was barred from recovering by reason of the pendency of an action against him by the defendant, to cancel the note on the ground of lack of consideration. The court held that the pending action was no bar, since the plaintiff had no interest therein except to defend, and it was not incumbent or obligatory on him to ask for a judgment on the note, but he could elect to bring an independent suit for that purpose.

*8. Prior action in equity; claim for dower.*

In *Grady v. McCorkle* (1874) 57 Mo. 172, 17 Am. Rep. 676, wherein it appeared that in a suit against a widow to compel the specific performance of a contract to convey land, the defendant did not assert her right of dower, the court held that the decree rendered in that action did not abate the widow's right, and that she was not precluded from maintaining an action to recover her dower, that question not having been raised, nor required to be put in issue by the defendant, in the former proceedings.

In *Huntzicker v. Crocker* (1908) 135 Wis. 38, 115 N. W. 340, 15 Ann. Cas. 444, wherein it appeared that in a prior action to set aside a fraudulent conveyance of real estate, the plaintiff's right of dower was not raised by her, or litigated in any way, the court held that the prior decree was not res judicata as to the dower, and did not preclude the plaintiff from establishing that right.

So, in *Malloney v. Horan* (1872) 49 N. Y. 111, 10 Am. Rep. 335, an action by a widow to establish her dower right in lands belonging to her deceased husband, it appeared that in a former action brought by the creditors of the husband for a sale of the property, the wife was made a party defendant, but did not plead her right of dower. The court held that while she might have obtained relief in the creditor's action by way of a cross petition, she was not obliged to do so.

*9. Prior action in equity; claim in tort.*

In an action to recover damages for



fraudulent representations inducing the plaintiffs to enter into a partnership with the defendant, it appeared that a prior action was maintained for a dissolution of the partnership and an accounting. The court held that, conceding the plaintiffs might have interposed a counterclaim for the relief sought herein in the prior proceedings, they were not under any obligation to do so, but were entitled to reserve it to be sued on as a separate cause of action. *Newgent v. Alsberg* (1916) 173 App. Div. 878, 160 N. Y. Supp. 71.

*10. Prior action in equity; claim in equity.*

In *Barber Asphalt Paving Co. v. Field* (1906) 132 Mo. App. 628, 97 S. W. 179, wherein it appeared that the plaintiff, as defendant in a similar prior action, could have secured the relief sought herein, viz., the enforcement of a tax lien, by filing a cross bill, the court held that the failure to plead and set up the claim in a cross bill did not deprive the plaintiff of his right to maintain an independent action to enforce his claim, especially as the matter was not involved in the former action in which the plaintiff, as defendant therein, had an election to plead his claim or reserve his rights for a future action.

And in *Washburn & M. Mfg. Co. v. Scutt* (1884) 22 Fed. 710, the court held that the plaintiff was not bound to set up its cause of action for the enforcement of certain license contracts by a cross bill in a pending action for the rescission of the contracts, brought against it by the defendant, and the pendency of another action and failure to assert the claim therein constituted no bar to an independent proceeding to recover on the claim.

In *Long v. Lackawanna Coal & I. Co.* (1911) 233 Mo. 713, 136 S. W. 673, it was held that the plaintiff, as defendant in a prior suit in equity, was not obliged to set up in his answer in that action matters entitling him to affirmative equitable relief, but could reserve his claims for a separate action. The court said: "The defense

of a prior suit pending applies only when the plaintiff in both suits is the same person, and both are commenced by himself, and not to cases where there are cross suits by a plaintiff in one suit, who is a defendant in the other, because it cannot be said that either is prosecuting two actions against the other within the rule in question."

In *Consolidated Fruit Jar Co. v. Wisner* (1899) 38 App. Div. 369, 56 N. Y. Supp. 723, an action to compel an accounting by the defendant for his acts as president of the plaintiff corporation, it appeared that the defendant had instituted a prior action against the corporation for an accounting for money due and owing to him. The court held that the prior action was no bar to the proceeding, since the corporation, as a defendant therein, could not have recovered affirmative relief except by joining issue and interposing a counterclaim, and this it was not obliged to do.

In *Hobbs v. Duff* (1863) 23 Cal. 596, wherein it appeared that the plaintiffs claimed in part on a claim for a balance due on a judgment for foreclosure, which, in a former action for specific performance, could have been asserted as a set-off, the court held that the failure so to use the same was no bar to a subsequent action thereon, saying: "It is clear that a party does not lose his right to bring a separate action for a demand which he might have pleaded as a set-off, but neglected to do."

And in *Kaplan v. Coleman* (1912) 180 Ala. 267, 60 So. 885, the general rule was succinctly stated and applied in the following terms: "It is the settled rule that an independent cross claim or right, not directly involved in the issues to be determined by the original suit, need not be there asserted, but its assertion and enforcement may be postponed for independent subsequent action." The court held that while a party might have filed a cross bill to an executor's suit, contesting the validity of a will, he was not required to do so, as the prior suit, which was maintained for a construction of the will, did not nec-

essarily involve the issue of its validity.

In *Blackwell Durham Tobacco Co. v. McElwee* (1886) 94 N. C. 425, wherein it appeared and was contended that the equitable relief sought by the plaintiff could be obtained in a similar equitable action pending, in which the parties were reversed, the court held that there was no obligation imposed upon the plaintiff, as defendant in the pending action, to assert a claim by way of set-off, and, if he so elected, he could make it the subject of an independent action of his own. See to the same effect: *Osborn v. Cloud* (1867) 23 Iowa, 104, 92 Am. Dec. 413; *Lloyd v. Reynolds* (1868) 29 Ind. 299; *Rapier v. Gulf City Paper Co.* (1879) 64 Ala. 330.

*11. Prior action in equity; claim for foreclosure.*

In *Axtel v. Chase* (1882) 83 Ind. 546, it was contended that the plaintiff could have secured the relief sought by foreclosure in the case at bar, by interposing a cross complaint in a former action in equity, in which she was the defendant and the defendants herein the plaintiffs; and that, by failing to do so, her right of action was abated. The court held that a former suit concludes the parties only as to matters in issue in that suit, and that a defendant, in whose favor a claim exists against the plaintiff, can elect to reserve the cause of action for a future and independent proceeding thereon.

*12. Prior action for possession; claim in equity.*

In *Uppfalt v. Woermann* (1890) 80 Neb. 189, 46 N. W. 419, an action to enforce specific performance of a contract, it appeared that in a former proceeding brought by the defendant to eject the plaintiff from the premises in question, the plaintiff did not plead the equities which were the basis of the suit at bar. The court held that he was not obliged to do so, but could elect to pursue his remedy in an independent action, saying: "Where he seeks affirmative relief by setting up a contract which will give him the right to demand specific per-

formance, this must be done by answer in the nature of a counterclaim. In such case he becomes an actor in fact, and plaintiff in the matter therein set forth, and such counterclaim does not come under the term defense. In effect, it is a cross action in which the defendant seeks affirmative relief. He is not compelled to seek this relief in an action of ejectment, any more than he is required to set up a set-off or counterclaim in other cases."

In *Olschewske v. King* (1906) 43 Tex. Civ. App. 474, 96 S. W. 665, the court held that a party defendant in an action to determine the title to real property was not obliged to assert therein his right to rescind a sale of the property on the ground of fraud, and that his failure to do so did not estop him from maintaining an independent action to rescind, although the former suit was still pending.

In *Witte v. Lockwood* (1883) 39 Ohio St. 141, wherein it appeared that the matters set up as a basis of the plaintiff's equitable claim constituted a proper subject for a counterclaim, which he had omitted to assert in a prior action to obtain possession of property, brought against him by the defendant, the court held that the plaintiff was not precluded thereby from obtaining the relief sought, as the statute (Ohio Civ. Code, § 95; Rev. Stat. § 5073) only provides that a defendant who omits to set up a counterclaim or set-off cannot recover costs against the plaintiff in a subsequent action thereon.

So, in *Hill v. Cooper* (1876) 6 Or. 181, an action in equity to enforce the terms of an imperfect deed, it was contended by the defendant that the plaintiff had waived his right to equitable relief by failing to claim the same by way of a cross bill in a former action at law to recover the possession of the land, brought by the defendant against the plaintiff. The statute (Code 630, § 377) provided as follows: "Where the defendant is entitled to relief arising out of the facts, requiring the interposition of a court of equity and material for his defense, he may, upon filing his an-

swer therein, also, as plaintiff, file a complaint in equity in the nature of a cross bill, which shall stay the proceedings at law." The court held that the statute did not make it incumbent on the plaintiff, as defendant before, to file his claim by way of a cross bill, or, failing to do so, be forever barred from obtaining relief in a subsequent action in equity, but was permissive in its nature, giving to him an election either to file a cross bill or to maintain an independent action.

*13. Prior action for possession; claim for possession.*

In *Levy v. Hohweisner* (1905) 101 App. Div. 82, 91 N. Y. Supp. 552, an action for the replevin of a chattel, the court held that the omission of the defendants to pray judgment for a return did not preclude them from any subsequent action to regain possession of the chattel.

*14. Prior action for possession; claim on contract.*

In *Dedman v. Nally* (1892) 14 Ky. L. Rep. 229, wherein it appeared that the plaintiff was evicted from certain real estate under a judgment rendered in a prior action, in which he had omitted to claim for the value of certain improvements made by him on the premises, the court held that, while in the former proceedings the plaintiff could have counterclaimed for the value of the improvements, he was not obliged to do so, and that the judgment rendered therein was no bar to an independent action to recover on the claim.

In *Stone v. Darnell* (1860) 25 Tex. Supp. 430, 78 Am. Dec. 582, an action by the plaintiff to recover back money paid by him as the purchaser of premises at a sheriff's sale, it appeared that the defendant had previously maintained an action in ejectment against the plaintiff. The court held that while the plaintiff could have pleaded his demand in reconvention in the former action, he was not obliged to do so, and that he was not deprived of his right of action by his failure so to plead.

In *Gay v. Riehmant Mantel Co.* (1900) 53 App. Div. 507, 31 N. Y. Civ.

Proc. Rep. 81, 65 N. Y. Supp. 964, the court held that the failure to plead a counterclaim in an action by a landlord against his tenant for summary dispossession, did not preclude the tenant from asserting his cause by way of counterclaim in a subsequent action against him to recover rents due and unpaid, holding specifically that § 2244 of the Code of Civil Procedure could not be so construed as to require a defendant to plead and litigate in summary proceedings any counterclaim which he might have, arising out of the relation of landlord and tenant.

In *Wright v. Broome* (1896) 67 Mo. App. 32, wherein it appeared that the plaintiff had rendered services in the training and feeding of certain race horses belonging to the defendant, the court held that he was entitled to a recovery on a quantum meruit, although in a former action against him to recover the possession of the horses he did not set up his claim for services rendered.

So, in *Barclay v. Blackburn* (1831) 6 J. J. Marsh. (Ky.) 115, it was held that a judgment in detinue, in an action wherein the defendant did not assert his claim for services in the keeping of a horse, the property distrained, was no bar to an independent action on that claim.

*15. Prior action for possession; claim in tort.*

In *Sheetz v. Baker* (1890) 38 Ill. App. 349, wherein it appeared that in a distress proceeding brought by a landlord against his tenant certain property of the tenant was wrongfully converted, but that in the distress suit the tenant did not assert the conversion as a set-off, the court held that his failure to do so did not forfeit his right subsequently to maintain an independent action against the landlord for the conversion.

In *Woody v. Jordan* (1873) 69 N. C. 189, wherein the defendants pleaded that the plaintiff had a complete remedy available in a pending action brought by them against him to secure the possession of property, and in which he should plead his claim in tort by way of counterclaim, the court

held that the pending action was no bar to the plaintiff's independent suit, saying: "It is not a general rule that a defendant is obliged to assert a set-off or counterclaim in an action against him whenever he may do so. If he does plead a counterclaim, he cannot, during the pendency of that action, have a separate action upon it, and he is bound by any adjudication on it. But he is not bound by the plaintiff's recovery as to any set-off or counterclaim which he did not plead."

In *Morgan v. Tims* (1906) 44 Tex. Civ. App. 308, 97 S. W. 882, the court held that it was optional with the defendant in distress proceedings to reconvene his damages occasioned by the unjust and illegal issuance of the distress warrant in those proceedings, or to bring a separate suit to recover therefor; and where it appeared that the defendant adopted the latter course, the judgment in the prior proceedings was held to constitute no bar to his right to recover.

In *Collier v. Cunningham* (1891) 2 Ind. App. 254, 28 N. E. 341, it appeared that the plaintiff, who was suing for the value of a certain crop of wheat alleged to have been converted by the defendant, was the assignee of a lease of land by the terms of which the former lessee was precluded from assigning the lease, but which the plaintiff took without knowledge of the prohibitory clause. The defendant, as the lessor of the premises, on learning of the assignment, immediately brought an action in ejectment against the plaintiff, and a judgment was rendered in his favor for the possession of the land, but in that action the question as to the right of ownership of a crop of wheat, raised and cut by the plaintiff before the action was brought, was not litigated. The court held that the plaintiff assignee was not required to raise the issue of ownership of the wheat in the ejectment suit, but could reserve that claim for an original action to recover for its conversion.

**16. Prior action for foreclosure; claim on contract.**

In *Savery v. Sypher* (1874) 39 Iowa, 8 A.L.R.—46.

675, wherein it appeared that a mortgage debtor, relying on an agreement made with the mortgage creditor, omitted to assert certain claims for moneys advanced by way of set-off in an action on certain promissory notes and to foreclose a mortgage, brought by the creditor, the court held that the judgment rendered therein constituted no bar to an independent action brought by the debtor to recover on his claims, where it appeared that the creditor, after judgment rendered in the prior action in his favor, refused to carry out the terms of the agreement.

In *Gregory v. Clabrough* (1900) 129 Cal. 475, 62 Pac. 72, it appeared that the plaintiff, as the assignee of a claim for a sum of money paid by a mortgagor under a mistake of law to the defendant, a mortgagee, brought this action to recover thereon. The defendant claimed that the matter was a proper subject for a counterclaim in a prior foreclosure action, and therefore was barred under the provisions of § 439 of the Code of Civil Procedure. The court held that the action to recover the sum paid by mistake was not connected with the subject of the foreclosure action, and that, therefore, the plaintiff was not barred by failure to assert his claim therein as a counterclaim.

**17. Prior action for foreclosure; claim in equity.**

In *Shakespeare v. Caldwell Land & Lumber Co.* (1907) 144 N. C. 516, 57 S. E. 213, wherein it appeared that the facts set up by the plaintiff might have been made the basis of an equitable counterclaim in a former action to foreclose a mortgage, in which the plaintiff, as defendant, did not plead, the court held that the judgment rendered in the prior action was not res judicata, as the defendant therein was not required to assert his counterclaim.

**18. Prior action for divorce; claim for divorce.**

In *Cook v. Cook* (1912) 159 N. C. 46, 40 L.R.A.(N.S.) 83, 74 S. E. 639, Ann. Cas. 1914A, 1137, an action for divorce from bed and board brought

by the plaintiff wife, the husband pleaded in abatement of the action a prior and pending suit for absolute divorce brought by him against his wife. The court denied the plea, holding that while the wife could have asserted her cause in a cross petition, which is in the nature of a counterclaim, she was not required to do so, but had a legal right to elect to maintain a separate and independent action.

*10. Miscellaneous.*

In *Virginia-Carolina Chemical Co. v. Kirven* (1909) 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78, affirming (1907) 77 S. C. 493, 53 S. E. 424, it was held that a statute (Code of Procedure of South Carolina, §§ 170, 171), while giving to a defendant the right to assert or set up a counterclaim in an action brought against him, was not so construed by the state courts as to require the defendant so to assert his claim, but if the matter was not pleaded as a defense a subsequent and independent action could be maintained thereon.

In *Shankle v. Whitley* (1902) 131 N. C. 168, 42 S. E. 574, the court held that the pleading of a counterclaim was optional, saying: "The defendant was not estopped to set up his counterclaim in this action, because he might, if he had chosen, have pleaded it in a former action against him by the plaintiff, brought for a different cause of action."

And in *Livermore v. Bainbridge* (1873) 44 How. Pr. (N. Y.) 361, it was held that the defendant was not obliged to set up by way of counterclaim a demand in his favor against the plaintiff, but was at liberty to institute a cross action for the same. But it appearing that the defendant elected to maintain a separate action, which action was still pending, the court held that he could not interpose the same claim as a counterclaim, as the law does not favor double vexation for the same cause of action.

In *M'Credy v. Fey* (1838) 7 Watts (Pa.) 496, wherein the court said, in construing the Act of Defalcation relative to the right of a plaintiff to a nonsuit, that there was nothing in

the act requiring a defendant to plead a claim in his favor as a set-off; he could do so, or, at his option, bring an action against the plaintiff for it.

In *Douglas v. First Nat. Bank* (1871) 17 Minn. 35, Gil. 18, the court held that the provisions of a statute (Pub. Stat. § 72, chap. 60) which required the interposition of a claim, or, failing so to interpose, the cause of action would be abated, were no longer in force, and a judgment in an action in which a claim might have been, but was not, asserted by way of set-off or counterclaim, was no bar to a subsequent independent action to recover on the claim.

In *Clement v. Clement* (1904) 113 Tenn. 40, 81 S. W. 1249, an action by an executrix on a certificate of benefit issued by a benefit association, wherein it appeared that the plaintiff made certain beneficiaries parties defendant to her suit, the court held that, at their option, the defendants could assert claims in their favor by way of cross bill, or file an original bill to secure the amount of their claims.

In *Connery v. Brooke* (1873) 73 Pa. 80, an action to establish an easement over the defendant's premises, the court held that the judgment in a former action, brought by the defendant against the plaintiff to recover damages occasioned by the plaintiff's tearing down a gate erected by the owner of the premises across the alleged right of way, constituted no bar to the later action, as the two proceedings were different causes of action and the plaintiff, as defendant before, was not required to set up his claim in the prior action.

In *Bishop v. Bishop* (1915) 162 Ky. 769, 173 S. W. 180, wherein it appeared that the defendant, having a claim available as a set-off, had neglected to assert it in an action against him in a foreign jurisdiction, in which judgment was rendered for the plaintiff, the court held that under a statute (Kentucky Civil Code of Practice, § 17) the former judgment did not prevent the defendant from asserting any claim which was not, though it might have been, used as a defense or set-off in the former action.

And in *Minor v. Walter* (1821) 17 Mass. 237, it was held that the statute (Mass. Stat. 1817, chap. 185), permitting a defendant in an action to assert a claim by way of set-off, was not intended to compel anyone to plead a set-off, and the privilege could be waived at the defendant's election, and a separate action maintained by him to recover on the claim.

So, in *Jefferson v. Western Nat. Bank* (1911) 144 Ky. 62, 138 S. W. 308, the court construed § 17 of the Kentucky Code, which reads as follows: "A judgment obtained in an ordinary action shall not be annulled or modified by any order in an equitable action, except for a defense which arises, or is discovered, after the rendition of the judgment. But such judgment does not prevent the recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counterclaim in the action." It was held that a party having a claim which could be set up by way of counterclaim or set-off could elect so to use it, or maintain a separate action thereon, and a failure to assert the claim as a set-off or counterclaim in a former action was no bar to a subsequent independent suit on the claim.

And in *Tompkins v. Gerry* (1892) 43 Ill. App. 255, it was held that the pendency of an action in which the claim of the plaintiff could have been asserted as a set-off did not bar an independent proceeding to recover on the same, since the statute (Practice Act, § 30) was permissive only, giving to a defendant the right to interpose a claim by way of set-off, but not compulsory so as to bar recovery in a subsequent action because of failure to assert the claim as a set-off.

In *Gutchess v. Daniels* (1872) 49 N. Y. 605, it appeared that the defendants had expressly agreed to waive their rights to a set-off, but subsequently, in an action brought against them, they attempted to assert a claim by way of set-off. The court held that they were bound by their agreement, as, having the right by law to elect to set off a claim or maintain an independent action thereon, they were

not required to plead the claim in set-off, and were bound by an agreement not to do so.

In *Green v. Law* (1805) 2 Smith (Eng.) 668, it was held that there was no compulsion on a defendant to plead a set-off, and, at his option, he could institute and maintain an independent action on his claim, although such a procedure, unless warranted, was not countenanced by the courts, and parties so acting would incur the odium of being obstinate and litigious characters.

In *Kezar v. Elkins* (1879) 52 Vt. 119, wherein it appeared that a judgment was rendered against the plaintiff in a prior action wherein he was a defendant, but did not appear or set off his claim, the court held that the judgment did not conclude the plaintiff's claim, as he was not required to offset the same in the prior action.

In *City Nat. Bank v. Gardner* (1884) 5 Ky. L. Rep. 682, the decision is abstracted as follows: "A judgment at law does not affect the right of the defendant to recover on a claim which was not, although it might have been, pleaded as a set-off or counterclaim in the action."

In *Rankin v. Harper* (1853) 4 Ind. 585, the court held that a defendant could elect to assert a claim in his favor as a set-off in an action brought against him, or could maintain an action thereon independent of the plaintiff's suit.

In *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.* (1911) 208 Mass. 593, 95 N. E. 103, it appeared that the plaintiff's cause of action was pleaded by him as a set-off in a pending suit brought by the defendant. The court postponed a determination of the defendant's plea of abatement pending the hearing of a demurrer to the set-off, in the pending action, and, upon learning that the demurrer was sustained and the set-off dismissed, the court overruled the plea of abatement. However, the court said: "We are of opinion that it is more equitable, where a second action is brought for a cause that was made the foundation of a former suit which is de-

fective in some essential particular, to allow the plaintiff to discontinue the former suit upon proper terms, and proceed with the later one, rather than to order an abatement of the last action, and compel him to begin anew after the termination of the first suit. In the present case it appears that the claim could not be maintained under the declaration in set-off, because it was unliquidated. Perhaps it would have been better to have compelled the plaintiff to elect between the two actions when the answer in abatement first came up for a hearing, . . . by an order for an abatement, unless the declaration in set-off was abandoned."

See also *Carpenter v. Butterfield* (1802) 3 Johns. Cas. (N. Y.) 146, wherein there is dictum as follows: "It is not compulsory on a party to set off his demand. He has a right, if he chooses, to waive a set-off and resort to his action." The matter involved in that action, however, was held not to constitute a proper subject of set-off, as the claim had not matured at the time the prior action was brought.

In *Covington & C. Bridge Co. v. Sargent* (1875) 27 Ohio St. 233, the court held that a party defendant must present all his matters in defense, and, if he fails to do so, will not afterward be permitted to relitigate the matter. But the court expressly excepted from the effect of this ruling rights secured to parties by law, naming counterclaim, offset, or cross actions.

In *Lawrence v. Bank of Republic* (1865) 3 Robt. (N. Y.) 142, the court said by way of dictum: "And although counterclaims, which are not merely defenses, but admit of affirmative relief beyond dismissing the plaintiffs' complaint, are not lost by not being set up, nothing prevents their being set up if connected with the subject of action." And also: "Of course, where affirmative relief as a counterclaim is sought, although the Code does not expressly require that it should be asked for, it would seem more proper that it should be so in some way."

In *Summet v. City Realty & Brokerage Co.* (1907) 208 Mo. 501, 106 S. W. 614, the court said: "A party must try his entire cause of action or make his entire defense in the same action, and will not be permitted to split up the cause of action or defense into several parts and litigate each separately, when all the matters properly and naturally relate to the subject-matter in litigation and could properly and logically have been tried in the same cause; but this rule does not extend to matters which are wholly independent of and have no relation or connection with the subject of the litigation, such as set-off or counterclaim, without they are actually set up and adjudicated."

See also *Ruppert v. Haug* (1881) 87 N. Y. 141, wherein the court said, by way of dictum, that the defendant in an action in which a warrant for attachment was granted was not obliged to set up a claim in his favor as a counterclaim, and although judgment went against him it would be no bar to a future independent action to recover on the claim. The case, however, involved only the sufficiency of an affidavit for a warrant of attachment.

In *Blodgett v. Berlin Mills Co.* (1872) 52 N. H. 215, the court said, speaking of a claim for damages by way of recoupment: "The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross action; and, whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part, of the plaintiff's demand. He cannot, as in case of set-off, go beyond that, and have a balance certified in his favor." But the case did not involve a failure or omission to assert a claim in a prior action by way of set-off, recoupment, or counterclaim.

In *Dunham v. Bower* (1879) 77 N. Y. 76, 33 Am. Rep. 570, it was said: "Whenever recoupment is sought, the party entitled to it may interpose it as a defense or bring a cross action, and in general it is optional with him which course he will adopt. . . .

This proceeds upon the ground that recoupment is, in effect, the setting off of distinct causes of action." But the court held that the matter on which the plaintiff sought to recover should have been asserted as a defense in a prior action, and the rules relating to recoupment, therefore, did not govern.

In *Franke v. Franke* (1896) 15 Ind. App. 529, 43 N. E. 468, wherein the court said: "The defendant, in making his defense, cannot plead a part only of his defenses, and then, after judgment has been rendered, plead and have the benefit of those not interposed originally. He must interpose all of the defenses which he has, and as to them, whether pleaded or not, the judgment is conclusive; but it is not conclusive as to an affirmative right or cause of action which he may have against the plaintiff, and of which he could have taken advantage not by way of defense, but by way of cross action. His affirmative right is the subject of an independent action, and he may or not take advantage of it by way of cross action, as may to him seem best. He is not compelled to do so; neither will his rights with reference thereto be adjudged. But his failure to take advantage of the opportunity to set up such affirmative right by way of cross action is often detrimental to his interests."

And see *Zinn v. Dawson* (1899) 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784, wherein there was dictum as follows: "The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor, or, in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon, or set off against, a judgment against him. The court, in a proper case, will grant the motion. Its power to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors." In that case, however, it appeared that the

plaintiffs sought relief by way of an injunction to restrain the defendants from collecting their judgment, obtained by default in a prior action, on the ground of the insolvency of the defendants, in order to allow the plea of a set-off existing in favor of the plaintiffs. The court held that this was not the proper remedy, stating the proper procedure to be as set forth in the foregoing dictum.

In *Huntton v. Russell* (1879) 41 Mich. 316, 2 N. W. 38, there was dictum to the following effect: "If the claim made had not consisted of payments, but had arisen in some other way, so as to have constituted a proper matter of set-off, then the only effect of defendant's not appearing, pleading, and proving the same would be that in an action thereafter brought to recover the same he could not recover costs under the statute."

See also *Kafka v. Simon* (1869) 3 Or. 555, wherein there is dictum to the following effect: "It is true, no doubt, that when there are mutual independent claims between two parties, that neither can sue the other and compel him to bring in his claim as a set-off or counterclaim."

In *Baltimore & O. R. Co. v. Bitner* (1879) 15 W. Va. 455, 36 Am. Rep. 820, it was said that a party defendant should be left to his election to set up a claim in his favor as a recoupment to the plaintiff's action, or maintain a separate suit upon it. But in that case it did not appear that the claim was the proper subject of set-off or recoupment in a prior action. To the same effect, see: *Cary v. Bancroft* (1833) 14 Pick. (Mass.) 315, 25 Am. Dec. 393; *Berry v. Henslee* (1866) 38 Mo. 392; *Emery v. St. Louis, K. & N. W. R. Co.* (1888) 77 Mo. 339; *Francis v. Edwards* (1877) 77 N. C. 271.

### III. Limitation of rule.

#### a. Claim arising out of subject of former action.

It is now provided by statute in some states that a party defendant, having a claim or demand arising out of the transaction embodied in the complaint as the plaintiff's cause of action, or directly connected with the



same, must interpose his claim as a set-off or counterclaim, and a failure so to plead it forever bars recovery in a separate action.

**California.**—Gregory v. Clabrough (1900) 129 Cal. 475, 62 Pac. 72; Brosnan v. Kramer (1901) 135 Cal. 36, 66 Pac. 979.

**Idaho.**—Stevens v. Home Sav. & L. Asso. (1898) 5 Idaho, 741, 51 Pac. 779, 986.

**Michigan.**—Paccalona v. Peninsula Bark & Lumber Co. (1912) 171 Mich. 605, 137 N. W. 518.

**Montana.**—See also Scott v. Waggoner (1913) 48 Mont. 536, L.R.A. 1916C, 491, 139 Pac. 454.

**New York.**—Ward v. Gore (1868) 37 How. Pr. 119; Calrow v. Watson (1887) 6 N. Y. S. R. 610; Bartholomay Brewing Co. v. Haley (1897) 16 App. Div. 485, 44 N. Y. Supp. 915.

**Oregon.**—Paulson v. Oregon Surety Co. (1914) 70 Or. 175, 138 Pac. 838.

**Utah.**—Jeremy Fuel & Grain Co. v. Mellen (1917) 50 Utah, 49, 165 Pac. 791.

Thus, in Jeremy Fuel & Grain Co. v. Mellen (Utah) *supra*, wherein the counterclaim interposed by the defendant arose out of the transaction made the basis of a prior action by the plaintiff, in which the defendant failed to assert it, the court held that the omission to plead the counterclaim in the former suit barred the defendant from raising it under the provisions of a statute (Comp. Laws 1907, § 2970) which required the assertion as a counterclaim of a claim arising out of the transaction set forth in the plaintiff's complaint.

In Paulson v. Oregon Surety & Casualty Co. (1914) 70 Or. 175, 138 Pac. 838, wherein the plaintiff sought to charge the defendants with a trust in certain real property, it appeared that the defendants had successfully maintained a prior action against the plaintiff to foreclose the deeds to the property, which deeds were made the basis of this action. The court held that, as the plaintiff's claim arose out of the subject-matter which was made the cause of action in the prior proceedings, he was required to assert his claim therein, and could not relitigate

the question in a subsequent action.

In Bartholomay Brewing Co. v. Haley (1897) 16 App. Div. 485, 44 N. Y. Supp. 915, an action by the plaintiff brewing company to recover the purchase price of a quantity of beer sold and delivered, the defendant pleaded in abatement a pending action for breach of contract brought by him against the plaintiff. The court held that the plea in abatement was good; that, the present cause of action being on the same contract and transaction as that involved in the prior and pending suit, the plaintiff should have asserted his cause of action as a counterclaim therein, and, failing to do this, the pending proceedings were a bar to his action.

Where, in an action on a judgment, the defendant asserted a counterclaim which arose out of the agreement which was part of the subject-matter of the action in which the judgment was rendered, and which he had failed to plead therein, the court held that the judgment was a bar to the subsequent assertion of the counterclaim in an action thereon. Calwon v. Watson (1887) 6 N. Y. S. R. 610.

In Ward v. Gore (1868) 37 How. Pr. (N. Y.) 119, an action to compel a partnership accounting, it appeared that the defendant had instituted a prior action which was still pending, for the same purpose. The court held that the second action could not be maintained, as it was based on the same transaction and asked for the same relief as in the pending action, and therefore any claim for relief set up by the plaintiff in the second action should have been asserted by counterclaim.

In Paccalona v. Peninsula Bark & Lumber Co. (1912) 171 Mich. 605, 137 N. W. 158, an action to recover credit for an amount of bark furnished under a contract, it appeared that the plaintiff had been sued in a prior action by the defendant, to recover an excess of payment under the contract. It appeared further that in that action the plaintiff's claim was not set up as a counterclaim or set-off, and on this ground the defendant pleaded the

judgment in the prior suit in abatement of the suit at bar. The court held that the plaintiff was barred from recovery on his claim, as its substance was essential to the judgment in the prior action, having arisen from the same transaction, and therefore was adjudicated by the former decision.

In *Stevens v. Home Sav. & L. Asso.* (1898) 5 Idaho, 741, 51 Pac. 779, 986, the court held that where a defendant had a cause of action arising out of the same transaction set forth as the foundation of the plaintiff's claim, or connected with the subject of the action, he was required to set up his claim by way of cross complaint, and a failure to do so abated the right to recover thereon in a subsequent action.

See also *Scott v. Waggoner* (1913) 48 Mont. 536, L.R.A.1916C, 491, 139 Pac. 454, wherein the court said that by statute (Mont. Rev. Codes, §§ 6540, 6541) a defendant is required to plead by way of counterclaim any cause of action arising out of the contract or transaction set forth in the plaintiff's complaint, and if the defendant fails so to do, neither he nor his assignee can afterward maintain an action against the plaintiff thereon. But in that case it did not appear that the defendant omitted or failed to set up his cause by counterclaim.

*b. Matter necessarily adjudicated in prior proceeding.*

As a general rule, a party cannot recover in an independent action on a claim which he failed to plead in a prior action by way of set-off or counterclaim, but which was necessarily adjudicated by the former judgment or decree.

**United States.**—*Thayer v. Kansas Loan & T. Co.* (1900) 41 C. C. A. 106, 100 Fed. 901; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (1901) 48 C. C. A. 455, 109 Fed. 411; *Brown v. First Nat. Bank* (1904) 66 C. C. A. 293, 132 Fed. 450, writ of certiorari denied (1904) 196 U. S. 641, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; *Watkins v. American Nat. Bank* (1905) 67 C. C. A. 110, 134 Fed. 36, writ of error dismissed for want of jurisdiction in (1905) 199 U. S. 599, 50 L. ed. 327, 26

Sup. Ct. Rep. 746; *Blodgett & O. Co. v. George S. Lings & Co.* (1912) 194 Fed. 569.

**Alabama.**—*State v. McBride* (1884) 76 Ala. 51.

**Georgia.**—*Bryan v. Jones* (1912) 138 Ga. 719, 75 S. E. 1117.

**Illinois.**—*Hess v. Miller* (1901) 99 Ill. App. 225; *Springer v. Darlington* (1902) 198 Ill. 121, 64 N. E. 709; *Barnes v. Huffman* (1904) 113 Ill. App. 226.

**Kentucky.**—*Douglas v. Troxell* (1918) 181 Ky. 623, 205 S. W. 683.

**Massachusetts.**—*Merriam v. Woodcock* (1870) 104 Mass. 326.

**New York.**—*Davis v. Tallcot* (1854) 12 N. Y. 184; *Nemetty v. Naylor* (1882) 63 How. Pr. 387, affirmed in (1885) 100 N. Y. 562, 3 N. E. 497; *American Grocery Co. v. Pirkel* (1899) 25 Misc. 727, 55 N. Y. Supp. 606.

**North Carolina.**—*Bell v. Mutual Mach. Co.* (1909) 150 N. C. 111, 68 S. E. 680.

**Texas.**—*Murphy v. Wallace* (1888) 3 Tex. App. Civ. Cas. (Willson) 509; *Cameron v. Hinton* (1899) 92 Tex. 492, 49 S. W. 1047, affirming (1898) — Tex. Civ. App. —, 48 S. W. 24; *Rankin v. Hooks* (1904) — Tex. Civ. App. —, 81 S. W. 1005.

Thus, in *Blodgett & O. Co. v. George S. Lings & Co.* (1912) 194 Fed. 569, the plaintiff attempted to recover on a cause of action which, in a prior suit brought by the defendant against the plaintiff, had been withdrawn or dismissed by consent. It appeared, however, that the substance of the present claim had been relied upon as a defense to the former action, and as such had not been withdrawn. The court held that, while the affirmative claim was dismissed in the previous suit, the substantial issue thereof, relied upon as a defense, was not withdrawn, and was necessarily adjudicated in the prior action, and that the judgment therein bound the plaintiff.

In *Douglas v. Troxell* (1918) 181 Ky. 623, 205 S. W. 683, wherein the plaintiff sought to recover on a cause of action which, it appeared, he had made the basis of a defense in a prior suit, the court held that the judgment in the prior action was *res judicata*

as to the plaintiff's claim, and that he could not recover on the same in this action; nor was it possible for him to maintain his action under the statute (Code, § 17), since that section only made clear the right to recover on a claim which was not, though it might have been, used as a defense by way of counterclaim or set-off in the former action, and did not provide for cases where the claim was interposed purely in defense.

Where it appeared that a defendant in a former action had availed himself of part of a claim against the plaintiff, and had used the same as a matter of defense, but did not assert it as a counterclaim, the court held that he was barred from recovering on the claim in an independent action, saying: "But counsel for the plaintiff persuasively argues that . . . this case is not violative of the rule against splitting causes of action, because his client did not plead the failure of the bank to perform its covenant as a counterclaim, and did not claim any recovery on account of it in the action on the note, but interposed that breach and the damages from it in support of his defense that the consideration of his note had failed, and for that purpose only. But the same facts which constituted this defense to the note also constituted a counterclaim against the bank, upon which the vendee might have recovered, in his action upon the note, the judgment for \$19,000 which he now seeks to obtain. If these facts had constituted matter purely defensive, it is conceded that he would have been barred from again presenting them if he had not interposed them in the action upon the note. But, as they established both a defense and an affirmative cause of action, he might have reserved them, and have permitted judgment against him upon the note, and that judgment would not have estopped him from subsequently maintaining his affirmative cause of action in an independent suit for the breach of the covenant of the bank." *Watkins v. American Nat. Bank* (1905) 67 C. C. A. 110, 134 Fed. 36.

So, in *Thayer v. Kansas Loan & T.*

*Co.* (1900) 41 C. C. A. 106, 100 Fed. 901, wherein it appeared that in a previous suit between the parties the plaintiff had availed himself of a claim on a contract of guaranty, and had set up the same as a matter of defense in reply to the defendant's cross complaint, the court held that, judgment having been rendered against him in the prior action, the plaintiff could not maintain this independent suit to recover on the same matter which he had previously used as a defense; that the judgment in the former suit in effect decided that the plaintiff could not recover from the defendants.

In *Bryan v. Jones* (1912) 133 Ga. 719, 75 S. E. 1117, the plaintiff, as defendant in a former action brought by the administrator of a deceased person to recover certain gold and currency held by the complainant, defended on the ground that the money was given to him in return for services rendered to the intestate, and judgment was rendered in his favor. In an action to recover the value of services rendered to the defendant's intestate, the court held that, while the plaintiff had not claimed affirmatively for the value of his services in the prior action, nevertheless the judgment rendered in his favor necessarily decided that he was paid therefor by the gift of currency and gold in full satisfaction of his claim.

In *State v. McBride* (1884) 76 Ala. 51, it appeared that a prior action was brought against a county tax collector and the sureties on his official bond to recover taxes collected, but not accounted for. In that proceeding judgment by default was rendered against the defendants, who sought in the case at bar to go behind the judgment and set off certain claims in favor of the collector. The court held that as the statute (Ala. Code 1876, §§ 414, 421) required the collector to make a final settlement with the auditor, in which he should state all claims existing in his favor, his failure to appear and make the proper defense precluded him and his codefendants from setting off the claims after judgment had been rendered, holding that the

judgment was *res judicata* as to all such claims because they would have been necessarily involved, if the case had been litigated, and a failure to assert them constituted an estoppel against any right to present them in a subsequent proceeding.

Where in a prior foreclosure proceeding judgment was rendered against the defendant, by the terms of which every interest and claim in and to the premises which he then had were forever barred, the court held that the decree was conclusive as to his claim as plaintiff in the case at bar, to a right of easement in the premises. *Springer v. Darlington* (1902) 198 Ill. 121, 64 N. E. 709.

In *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (1901) 48 C. C. A. 455, 109 Fed. 411, it appeared that in a former action brought by the defendant against the plaintiff, the latter had interposed by way of recoupment one of a number of claims arising by way of breach of warranty in the same transaction. In an action to recover on the causes of action which were not set up in the former suit by way of counterclaim, the court held that when the contract was ended the claims of each party for alleged breaches, and damages therefor, constituted an indivisible demand; and when the same, or any part of the same, was pleaded and judgment rendered thereon, the judgment constituted a bar to demands which might have been litigated therein.

In *Brown v. First Nat. Bank* (1904) 66 C. C. A. 293, 132 Fed. 450, writ of certiorari denied in (1904) 196 U. S. 641, 49 L. ed. 631, 25 Sup. Ct. Rep. 796, wherein it appeared that the plaintiff, who, as defendant in a prior action brought against him by the defendant, had used a portion of an indivisible cause of action as a defense, the court held that he thereby estopped himself from maintaining an independent action to recover on the claim, holding that a defendant has an election to use an affirmative claim as a defense in an instant action, or to reserve the same, and maintain an independent suit or cross action, and if he elects to reserve the same, the

judgment in the action against him does not bar his right to subsequently maintain it; that, on the other hand, if he uses his claim or any part of it as a defense, he is estopped from thereafter recovering on it in an independent action.

Where in a prior partition suit of certain real estate the rights of the various parties were fully determined, including the claim of the defendant for rent due from the plaintiff, the court held that by the decree in the partition suit the defendant's set-off for rent due was barred, having been determined and adjudicated in the prior action. *Barnes v. Huffman* (1904) 113 Ill. App. 226.

So, in *Hess v. Miller* (1901) 99 Ill. App. 225, wherein it appeared that the appellant brought suit in replevin against the appellee for the recovery of a mare, and obtained judgment therein, and afterwards the appellee brought this action to recover the value of the mare, and obtained a judgment in the court below, it was held on appeal that the judgment below must be reversed, since the decision in the replevin suit necessarily decided the appellant's right to the property in question, and therefore constituted a bar to this proceeding to recover the value of the replevined property.

In *Merriam v. Woodcock* (1870) 104 Mass. 326, an action to recover damages for the negligent performance of services by the defendants, it appeared that in a former action, brought by the defendants to recover for services rendered, the plaintiff in the case at bar pleaded the negligent performance and the consequential damages as a defense, but did not claim the same by way of recoupment. The court held that the judgment in the former action was a bar to the present proceeding, and that the plaintiff could not recover, since the claim relied on was necessarily adjudicated in the prior suit.

In *Nemetty v. Naylor* (1882) 63 How. Pr. (N. Y.) 387, affirmed in (1885) 100 N. Y. 562, 3 N. E. 497, an action by a tenant to recover damages for an alleged breach of an agreement

to make repair, it appeared that in a prior action summarily to dispossess the tenant, the latter did not claim in set-off or counterclaim for the breach of the agreement. The court held that while a defendant, under the general rule, has a right to elect to maintain a separate action on a claim existing in his favor, this right did not exist in the present case, as the judgment in the former action necessarily negated the facts alleged in the case at bar as the basis of a cause of action.

So, in *Davis v. Tallcot* (1854) 12 N. Y. 184, an action to recover for a breach of agreement by an improper performance under a contract to manufacture certain goods, it appeared that the defendants had successfully maintained a prior action on the same agreement, wherein the question of proper performance on their part became essential and controlling in the rendering of a decision. The court held that, irrespective of the question of the plaintiffs' failure to plead their claim by way of recoupment, they were barred from maintaining the present action by the prior judgment, for the subject-matter herein was necessarily involved and adjudicated in the former action.

In *American Grocery Co. v. Pirk* (1899) 25 Misc. 727, 55 N. Y. Supp. 606, an action to recover damages for a breach of specifications under a contract to perform work, labor, and service, and furnish materials, on the ground that the materials so supplied were defective, it appeared that the defendant had sued the plaintiff in a former action, to recover the value of services rendered and materials furnished under the contract, and in that action judgment was had against the plaintiff. The court held that plaintiff could not maintain the action, as the subject-matter thereof was necessarily involved and adjudicated in the prior suit.

In *Bell v. Mutual Mach. Co.* (1909) 150 N. C. 111, 63 S. E. 680, wherein it appeared that, in a prior action brought by the defendant against the plaintiffs to recover the value of services rendered under a contract to repair a boat owned by the plaintiffs,

the defendant had recovered judgment, the court held that that judgment was an adjudication of the matter set up as the basis of plaintiffs' present action; and although the plaintiffs' claim might have been the subject of a counterclaim in the former action, nevertheless the judgment rendered therein took away its foundation as a subject for an independent suit.

In *Rankin v. Hooks* (1904) — Tex. Civ. App. —, 81 S. W. 1005, the court held that a judgment against the plaintiff in a prior suit brought by the defendant for forcible detainer of certain premises was a bar to the recovery by the plaintiff of the value of the use of the premises for a term remaining after the former judgment, as a material issue in that suit was whether the plaintiff was entitled to the possession of the premises, and that matter was adjudicated against him.

So, in *Cameron v. Hinton* (1899) 92 Tex. 492, 49 S. W. 1047, affirming (1898) — Tex. Civ. App. —, 48 S. W. 24, an action by a mortgagor for the conversion of the mortgaged property by the mortgagee under replevin, it appeared that the mortgagee had maintained a prior suit for foreclosure, in which the property was replevied and sold. The court held that the judgment rendered in the mortgagee's foreclosure action was a bar to the mortgagor's right to recover upon the alleged conversion, for that matter was necessarily involved and adjudicated therein.

And in *Murphy v. Wallace* (1888) 3 Tex. App. Civ. Cas. (Willson) 509, the court held that the judgment rendered in a prior action brought against the plaintiff's assignor by the defendant necessarily involved the claim of the plaintiff, although it was not set up in the former action, and therefore the judgment in the prior action was an adjudication thereof. The court said: "The plea of *res judicata* applies not only to the points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, by exercising reasonable dil-

igence, might have brought forward at the time."

*c. Necessity of pleading adverse claim in particular action.*

*1. Action to determine title to real property.*

In several jurisdictions a judgment rendered in a prior action to determine the title to real property constitutes a bar to a subsequent action by a party to the former suit to recover on a claim which he neglected to interpose therein, since the nature of that action makes it imperative that all adverse claims should be presented therein in order to effect a complete settlement of the controversy.

**Indiana.**—*Green v. Glynn* (1880) 71 Ind. 336; *Morarity v. Calloway* (1893) 134 Ind. 503, 34 N. E. 226.

**Iowa.**—*Blair v. Hemphill* (1900) 111 Iowa, 226, 82 N. W. 501.

**Kansas.**—*Weedman v. Fowler* (1911) 84 Kan. 75, 113 Pac. 390; *Steele v. Stevenson* (1919) 104 Kan. 469, 179 Pac. 304.

**Kentucky.**—See also *Jackson v. Gartin* (1883) 4 Ky. L. Rep. 989.

**Maine.**—*Doak v. Wiswell* (1851) 33 Me. 355.

**Maryland.**—*Anderson v. Anderson* (1899) 89 Md. 1, 42 Atl. 207.

**Michigan.**—*Pierson v. Conley* (1893) 95 Mich. 619, 55 N. W. 387.

**Mississippi.**—*Gaines v. Kennedy* (1876) 53 Miss. 103.

**Missouri.**—*Bobb v. Graham* (1886) 89 Mo. 200, 1 S. W. 90; *Bobb v. Gilmore* (1888) — Mo. —, 7 S. W. 5.

**Nebraska.**—*Cowles v. Kyd* (1912) 91 Neb. 274, 135 N. W. 1010.

**New York.**—*Weinman v. Salit* (1914) 85 Misc. 456, 147 N. Y. Supp. 758; *Jasper v. Rozinski* (1918) 182 App. Div. 365, 169 N. Y. Supp. 769.

**Ohio.**—*Raymond v. Ross* (1883) 40 Ohio St. 343.

**Washington.**—*Spring Hill Irrig. Co. v. Lake Irrig. Co.* (1906) 42 Wash. 379, 85 Pac. 6.

Thus, in *Green v. Glynn* (1880) 71 Ind. 336, it was held that the statute relative to actions to recover possession of real estate, and the sections applicable to actions to quiet title in real estate (2 Ind. Rev. Stat. 1876, p.

254, §§ 612 et seq.), required a party against whom an action was brought to quiet title to, or recover possession of, real estate, to set forth all claims to the property which existed in his favor, and, failing to do this, he could not maintain a subsequent action on such claims. The court said: "If one brought into court, being not only allowed full opportunity to assert such claim as he may have, but directly challenged to do so, neglects to use this opportunity expressly afforded him, he has no right to again vex the courts or those claiming adversely to him by instituting a new and distinct action against the party who summoned him into court."

So, in *Morarity v. Calloway* (1893) 134 Ind. 503, 34 N. E. 226, it was held that a defendant in an action to quiet title in land was estopped from subsequently bringing an action to assert a lien in his favor on the land, where it appeared that in the prior action he had failed to set up the lien by way of cross complaint, and therefore was bound by the decree therein.

In *Weinman v. Salit* (1914) 85 Misc. 456, 147 N. Y. Supp. 758, it was said that if the plaintiff's claim was a counterclaim not inconsistent with the right of the defendant, as plaintiff in a prior action to foreclose a mortgage, to recover, there could be no legal objection to the plaintiff's maintaining an independent action thereon, although he had not pleaded it as a counterclaim in the foreclosure action; but since it appeared that the plaintiff's claim was inconsistent with the right of the defendant, as plaintiff before, to establish his mortgage in the prior suit, it was held that the claim should have been presented in that action, and that the judgment therein was *res judicata* as to all contrary claims, whether pleaded or not.

In *Jasper v. Rozinski* (1918) 182 App. Div. 365, 169 N. Y. Supp. 769, wherein it appeared that the plaintiff was made a defendant in a foreclosure action instituted by the defendant during the pendency of the case at bar, and it further appeared that the plaintiff, as defendant therein, failed to appear and assert his claim in the

property, which claim he made the basis of his subsequent action, the court held that the judgment in the foreclosure suit barred the plaintiff from recovering.

In *Blair v. Hemphill* (1900) 111 Iowa, 226, 82 N. W. 501, it was held that in a former action brought by the defendant under a statute (Code 1851, §§ 4223, 4224) to quiet title to real estate, the nature of the action required the plaintiff to set up in that suit all claims in the property existing in his favor against the defendant, and, having failed to assert the lien which was made the basis of his subsequent suit, he was barred by the decree rendered in the former action from recovering on his claim in a subsequent independent action.

So, in *Weedman v. Fowler* (1911) 84 Kan. 75, 113 Pac. 390, wherein it appeared that a former action to quiet title in real estate was brought against the plaintiff as the guardian of an insane person, the court held that, so long as the judgment rendered against the plaintiff in the prior action remained in full force and effect, it constituted a bar to any claim which he might attempt to assert in subsequent actions, as the nature of the former proceedings required him to claim therein all his interests and rights of action relative to the property.

In *Steele v. Stevenson* (1919) 104 Kan. 469, 179 Pac. 304, wherein it appeared that the defendants in a suit to quiet title in real estate had neglected to assert certain affirmative claims in their favor, the court held that because of their omission they were bound by the decree rendered in the prior proceeding, and could not press claims in this action which were available, and necessarily challenged, in the prior suit, saying: "In an action to quiet title to land, a general finding of title in the plaintiff, and consequently of no title in the defendants, is a conclusive and binding decision against the defendants on the question of title, from whatever source it may be derived, and forever estops them from asserting a claim of title which existed at the time of the finding and judgment."

In *Anderson v. Anderson* (1899) 89 Md. 1, 42 Atl. 207, it appeared that the plaintiff was a party to an original bill to sell the real property of his deceased father, and made no adverse claims of title to the property, but allowed the action to proceed to judgment. After many years, he brought an action setting up a claim in the premises. The court held that he could not maintain the action on the ground both of laches and of estoppel; that, having been a party to the original bill, he was required by the nature thereof to present all his claims and interests, and having failed to do so, and submitted to the decree of the court, he was barred from subsequently asserting his claim in the premises.

In *Pierson v. Conley* (1893) 95 Mich. 619, 55 N. W. 387, the defendant claimed that he was entitled to the value of certain improvements made on the premises in controversy, but, it appearing that he had neglected to assert this claim in a prior action to partition the property, the court held that he was precluded from recovering on the claim in this action.

Likewise, in *Gaines v. Kennedy* (1876) 53 Miss. 103, wherein it appeared that the plaintiff, as defendant in a prior suit in ejectment, had omitted to set up a claim for improvements made on the premises during his incumbency, the court held that he could not obtain relief by a bill to enjoin the execution of the judgment in ejectment, saying: "If he did not make his demand in the action at law coextensive with his right, he cannot be relieved in equity for what he omitted, for the opportunity was then offered to establish his full right, and that adjudication covers not only all that was proved in that issue, but all that might have been established."

In *Doak v. Wiswell* (1851) 33 Me. 355, it was held that, in an action against a party to recover the possession of land, judgment rendered therein was conclusive as to all claims the defendant might have asserted, and his subsequent action to recover for property in buildings erected on the land by him was barred by the

decree in the prior proceeding and the possession taken under it.

In *Bobb v. Graham* (1886) 89 Mo. 200, 1 S. W. 90 (see also *Bobb v. Gilmore* (1888) — Mo. —, 7 S. W. 5, decided on the same facts), it was held that the plaintiff was barred from maintaining an action on an adverse claim of title to real estate, which, as defendant in a prior action to partition the property, he had failed to set up. The court said: "A judgment in a partition suit establishes the title to the land partitioned, and is conclusive upon any adverse claim of title or possession existing at the time of its rendition. The law requires the court to ascertain and determine the rights of the parties, and makes it the duty of the parties to disclose their adverse claims."

In *Cowles v. Kyd* (1912) 91 Neb. 274, 135 N. W. 1010, wherein it appeared that the plaintiff, who was the purchaser of certain property under a delinquent tax sale, had failed to appear and file his claim in a prior action brought against him by another purchaser under a sale for taxes, to determine the title to the premises, the court held that the plaintiff, having failed to set up his claim and interest in the property in the former action, was forever barred from subsequently asserting his interest against the judgment rendered in that suit.

So, in *Raymond v. Ross* (1883) 40 Ohio St. 343, the court held that it was incumbent on a mortgagee of premises to assert all claims in his favor in an action to determine title to the realty, in which he was made a party defendant. And where it appeared that the mortgagee failed so to claim in the prior action, the court held that he could not successfully sustain his claims in an independent proceeding.

In *Spring Hill Irrig. Co. v. Lake Irrig. Co.* (1906) 42 Wash. 379, 85 Pac. 6, an action to assert the rights of the plaintiff to the use of a perennial stream, it appeared that a prior action had been instituted by the defendant to determine the rights of the parties to the use of the same stream. The

court held that the prior action partook of the nature of an action to quiet title to real estate, and was governed by the same rules, and therefore the plaintiff was estopped from obtaining the relief sought for, as defendant in the prior action, all claims in its favor should have been asserted.

See also *Jackman v. Gartin* (1883) 4 Ky. L. Rep. 989, wherein it was said: "A vendee can [could] not maintain an action upon an alleged fraudulent warranty, after having been compelled to accept the title in an action against him for the purchase money, in which the want of title was relied upon."

### *2. Action for accounting or to settle partnership affairs.*

Since an action for an accounting or to settle the affairs of a partnership is designed to adjust the respective demands of the parties, a claim which might have been asserted by the defendant in such an action cannot be made the subject of a subsequent action by him. *Free v. Beatley* (1893) 95 Mich. 426, 54 N. W. 910; *Weiser v. Weiser* (1899) 5 N. Y. Anno. Cas. 196, 53 N. Y. Supp. 578, affirmed in (1899) 38 App. Div. 266, 57 N. Y. Supp. 48; *Hunter v. Stewart* (1884) 23 W. Va. 549; *Smith v. Johnson* (1812) 15 East, 213, 104 Eng. Reprint, 824, 13 Revised Rep. 449, 3 Eng. Rul. Cas. 508.

Where it appeared that the widow of a deceased partner had omitted to claim her dower interest in a prior suit brought for an accounting of the partnership property, the court held that she could not thereafter successfully assert her claim as against an innocent purchaser of the property under the decree, for the purchaser had a right to assume that all claims were settled in the former proceeding, and the widow was made a party defendant therein for the sole purpose of ascertaining her rights. *Free v. Beatley* (1893) 95 Mich. 426, 54 N. W. 910.

In *Weiser v. Weiser* (1899) 5 N. Y. Anno. Cas. 196, 53 N. Y. Supp. 578, affirmed in (1899) 38 App. Div. 266, 57 N. Y. Supp. 48, the court held that in a judgment creditor's action against a fraudulent transferee for an accounting of the profits of certain real property while in his possession, the



defendant was bound to assert all his claims in the nature of expenses incurred and encumbrances and taxes paid, and, having failed to do so, he was precluded from recovering thereon in a future action.

In *Hunter v. Stewart* (1884) 23 W. Va. 549, an action to recover a sum held in trust for the plaintiff by the defendant, it appeared that the amount involved was the proceeds of a decree in a former action to settle partnership affairs wherein the parties were codefendants, and that in the second action the defendant collected and held the amount awarded to the plaintiff. In the second action the defendant attempted to assert in set-off a partnership claim held by him against the plaintiff. The court held that the set-off could not be allowed, since it appeared that it existed at the time of the former action to settle the partnership affairs, and the defendant, having omitted to assert it therein, was concluded by the decrees there rendered.

In *Smith v. Johnson* (1812) 15 East, 213, 104 Eng. Reprint, 824, 13 Revised Rep. 449, 3 Eng. Rul. Cas. 508, wherein the defendant attempted to claim in set-off the amount of a claim which he failed to assert in a former reference to settle all matters of account between the parties, the court held that as it appeared that the subject in respect of which the deduction was here claimed was a matter in difference at the time of the reference, the defendant should have asserted it therein, and therefore he was bound as to every matter included within the subject of the reference.

*d. Recovery of unclaimed balance of set-off or counterclaim.*

In some jurisdictions, the rule is that a party defendant who pleads only a part of a claim by way of set-off or counterclaim is precluded from recovering the balance in a subsequent action, except where it appears that the original action was brought before a justice of the peace. *Riddle v. McLester-Van Hoose Co.* (1906) 145 Ala. 307, 40 So. 101; *House v. Donnelly* (1913) 7 Ala. App. 267, 61 So. 18; *Huff v. Broyles* (1875) 26 Gratt. (Va.) 283.

Thus, in *House v. Donnelly* (1913) 7 Ala. App. 267, 61 So. 18, it appeared that the defendant had, in a former action, set up a part of a claim against the plaintiff as a set-off, and in the suit at bar attempted to avail himself of the balance of the claim, not previously pleaded, by way of counterclaim. The court held that under the Alabama Code (§ 2595) but one suit could be maintained when all the breaches claimed had occurred at the time of the original suit, and, although the defendant could elect to plead his claim as a set-off or reserve it for a future independent action, he could not split it so as to plead a part as a set-off and recover on the balance as a counterclaim in a subsequent action.

In *Riddle v. McLester-Van Hoose Co.* (1906) 145 Ala. 307, 40 So. 101, it was held that the plaintiff could not maintain an action to recover the balance over and above a set-off which he had interposed in a former action, the court saying: "He was, of course, not bound to plead set-off as a defense. It was entirely optional with him; but having done so, and offered evidence to support his defense, and having defeated the plaintiff's recovery against him, he must be held to a release or remittitur of the residue of his demand."

So, in *Huff v. Broyles* (1875) 26 Gratt. (Va.) 283, wherein it appeared that the plaintiff sought to recover the balance of a claim in his favor over and above an amount allowed to him therein as a set-off in a prior action, the court held that he could not recover, for, under the statute (Code 1873, chap. 168, §§ 5-9), one cause of action could not be split up into two or more.

*IV. Rule in Vermont as to proceeding in probate court.*

The statutes in Vermont require an administrator of the estate of a deceased person to interpose a claim existing in favor of the estate against a creditor as an offset to any claim presented by the creditor, and a failure so to plead the claim bars the right to recover thereon. *Spaulding v. Warner* (1887) 59 Vt. 646, 11 Atl. 186; *Kenney*

v. Howard (1895) 67 Vt. 375, 31 Atl. 850.

In the case last cited it was said: "Commissioners having been appointed upon an estate, if a creditor thereof exhibits his claim against it to them for allowance, the executor or administrator must present all claims at law against such creditor in favor of the estate to the commissioners for allowance in offset, or must commence and prosecute an action to recover the same against such creditor, as permitted by Rev. Laws, § 2131, before the commissioners have acted upon the claim of the creditor against the estate; otherwise such claims of the estate against him are forever barred."

*V. Rule where prior action is brought in court of justice of peace, or other inferior court.*

*a. General rule.*

It is provided by statute in most jurisdictions that a defendant who fails to interpose a set-off or counterclaim, when sued before a justice of the peace, or in an inferior court not of record, on a claim or contract, is precluded from maintaining a subsequent action thereon.

Delaware.—Jones v. Charles Warner Co. (1912) 2 Boyce, 566, 83 Atl. 131.

Illinois.—Lathrop v. Hayes (1870) 57 Ill. 279; Quick v. Lemon (1882) 105 Ill. 578.

Montana.—Walter v. Cox (1907) 36 Mont. 20, 91 Pac. 1068.

New Jersey.—Righter v. Van Riper (1810) 3 N. J. L. 715; Johnson v. Pennington (1835) 15 N. J. L. 188.

New York.—Douglas v. Hoag (1806) 1 Johns. 283; McKerrass v. Gardner (1808) 3 Johns. 137; Serjeant v. Holmes (1808) 3 Johns. 428; Baldwin v. Walsworth (1844) Hill & D. Supp. 340; Greenleaf v. Low (1847) 4 Denio, 168; Goldberg v. Ziegler (1905) 92 N. Y. Supp. 777.

Pennsylvania.—Walsh v. Greenwood (1810) 2 Pa. Dist. R. 64; Slyhoof v. Flitcraft. (1831) 1 Ashm. 171; White v. Johnson (1833) 2 Ashm. 146; Herring v. Adams (1843) 5 Watts & S. 459; Shoup v. Shoup (1850) 15 Pa.

361; Armstrong v. Johnson (1883) 2 Chester Co. Rep. 64; Light v. Ringler (1885) 1 Pa. Co. Ct. 156; Wills v. Little (1898) 8 Pa. Super. Ct. 100, 42 W. N. C. 404. See also Holden v. Wiggins (1832) 3 Penr. & W. 469; Nickle v. Baldwin (1842) 4 Watts & S. 290.

West Virginia.—Bowdish & D. Bros. v. Groscup (1912) 70 W. Va. 758, 74 S. E. 950.

Thus, in Righter v. Van Riper (1810) 3 N. J. L. 715, it was contended by the defendant that in a prior action brought by him in a justice's court, the plaintiff failed to plead in set-off the claim which was made the basis of the suit at bar, and therefore he was estopped from recovering upon his claim. The court upheld the defendant's contention, holding that the plaintiff was barred by §§ 16 and 17 of the Justice's Act from maintaining an independent action on a claim which he had failed to plead in set-off as required.

And in Johnson v. Pennington (1835) 15 N. J. L. 188, it was held that under a statute the plaintiff could not maintain an action on a claim which was the proper subject of a set-off, and which he failed to plead as such in a prior action before a justice. The court said: "Our statute is peremptory. When a party is sued, he is not at liberty to bring a cross action for a demand which, as in this case, is the subject-matter of a set-off. The set-off must be claimed as such, or the right to recover it is barred. Nor does it make any difference which process was first returnable; or which suit first progressed to judgment. A different rule would encourage a party defendant to evade the wholesome provision of the act to prevent the multiplication of actions, and excite a disgraceful scramble for jurisdiction."

So too, in Bowdish & D. Bros. v. Groscup (W. Va.) supra, wherein the plaintiffs sued as partners to recover on a claim arising out of a contract made with the defendant, it appeared that the defendant had instituted a prior suit in a justice's court to recover under the same contract, and that the plaintiffs as defendants therein,

did not assert their claim as a set-off or counterclaim, although the amount thereof was within the jurisdiction of the justice. The court held that, having failed to set up their claim in the suit before the justice as a counterclaim, the plaintiffs were precluded from recovering in this action by the terms of the statute (Code 1906, chap. 50, § 55), which provides as follows: "If the defendant, at the time the plaintiff's action is commenced, has any credit, or set-off, or counterclaim to allege in defense or reduction of the plaintiff's demand, and be personally served with process in the suit, or appear and answer the action, he shall produce the same, with his evidence in support thereof, in the cause, or be forever precluded from maintaining any action for the recovery thereof," etc. However, the court said by way of dictum that, if the defendant's former action had been in a higher court, the question as to estoppel could not have arisen, for under the general rule a defendant could elect to recoup his claim in an action against him, or maintain an independent action against the plaintiff.

In *Lathrop v. Hayes* (1870) 57 Ill. 279, wherein it appeared that the plaintiff, having a claim against the defendant which amounted to less than \$100, neglected to set up the same in a prior action brought against him by the defendant in a justice's court, the court held that, under the statute (Ill. Rev. Stat. 1845, chap. 59, § 35) requiring that each party shall bring forward all demands and claims not exceeding \$100 in a suit commenced before a justice of the peace, the plaintiff, by failing to assert his claim as a set-off, was barred from maintaining an independent action to recover thereon.

In *Walter v. Cox* (1907) 36 Mont. 20, 91 Pac. 1063, wherein it appeared that the plaintiff's cause of action was the proper subject of a counterclaim in a prior action against him in a court of a justice of the peace, the court held that under the statute (Code Civ. Proc. §§ 1524, 1525) which provides that in an action in a justice's court a defendant must set up

all matters in the nature of a defense, set-off, or counterclaim coming within the jurisdiction of the court, and upon failure so to do the defendant, or his assignee, is thereafter barred from maintaining an action thereon, the plaintiff, having failed to assert his claim as required, was effectively barred from recovering.

In *Jones v. Charles Warner Co.* (1912) 2 Boyce (Del.) 566, 83 Atl. 131, it was stated that the statute (Rev. Code 1852, amended 1893, p. 744 [14 Del. Laws, chap. 94, § 8]) required that all accounts, demands, and causes of action cognizable before a justice of the peace, in favor of a defendant, must be pleaded as a set-off, and provided that a failure to do so should be a bar to a subsequent action thereon.

Where it appeared that the plaintiff had been sued by the defendant in a prior action before a justice of the peace, and failed to set up his claim in that action as a set-off, although it had accrued at the time, it was held that the former suit was a bar, as the plaintiff, as defendant in the prior action, was required to assert his claim by way of set-off in an action in a justice's court. *M'Kerras v. Gardner* (1808) 3 Johns. (N. Y.) 137.

In *Serjeant v. Holmes* (1808) 3 Johns. (N. Y.) 428, wherein it appeared that two suits were brought by the same plaintiff against the same defendant in a court of a justice of the peace, and the defendant allowed the first to proceed to judgment without asserting a set-off which existed in his favor, the court held that the omission was fatal to the assertion of the set-off in the second action, as the defendant was required to set off his claim in an action in a justice's court, at the very first opportunity.

In *Greenleaf v. Low* (1847) 4 Denio (N. Y.) 168, wherein the defendant pleaded in bar of the plaintiff's action a judgment in a prior action brought by the defendant before a justice of the peace in which the present plaintiff was the defendant, the court held that the plea was good, for the plaintiff should have set off his claim in the action before the justice, and, having

failed to do so, was precluded from ever maintaining an action thereon.

And in *Goldberg v. Ziegler* (1905) 92 N. Y. Supp. 777, the court held that a plea of *res judicata* was established where it was shown that, in a prior action in a municipal court, brought against the present plaintiff by the defendant herein, the claim which was made the basis of the plaintiff's action was matter for a counter-claim and should have been there considered and determined.

So too, in *Douglas v. Hoag* (1806) 1 Johns. (N. Y.) 283, the court held that the defendant's plea of a former action brought by him in a justice's court, wherein plaintiff's claim might have been, but was not, asserted as a set-off, was good, and that the plaintiff could not maintain his action.

In *Baldwin v. Walsworth* (1844) Hill & D. Supp. (N. Y.) 340, wherein it appeared that, in a former action brought by the defendant before a justice of the peace, the plaintiff, as defendant therein, neglected to set up by way of set-off a claim which was made one of the counts in his subsequent action, the court held that the omission was fatal to a subsequent recovery on the claim, for, under the statute (2 Rev. Stat. p. 235, § 57), a neglect to assert a claim as a set-off in a proper case before a justice of the peace was a perpetual bar to subsequent recovery.

In *Wills v. Little* (1898) 8 Pa. Super. Ct. 100, 42 W. N. C. 404, wherein it appeared that in a prior action brought against the plaintiff by the defendant in a justice's court, the plaintiff did not assert as a set-off the claims asserted in the case at bar but agreed to produce the claims before the justice for allowance on the judgment, the court held that this was not an assertion of a set-off within the meaning of the statute (Act 1810, § 7), and that by the terms of that act the plaintiff was estopped from recovering on his claims.

In *White v. Johnson* (1833) 2 Ashm. (Pa.) 146, wherein, although it could not be decided from the facts which of two suits in justices' courts maintained against each other by the

plaintiff and defendant, respectively, was prior in point of time, the court, deeming it necessary that the question be determined, in order that difficulties respecting it could not arise thereafter, stated the rule as follows: "Where one party bona fide institutes proceedings against another for a debt or demand arising from contract, before a justice of the peace, the effect of the commencement of such proceedings is to give to the justice exclusive jurisdiction during their pendency, not only of the plaintiff's demand, but of any legal set-off, within the jurisdiction of the justice, the defendant may have. Such set-off it is the imperative duty of the defendant to exhibit, under the peril of the forfeiture of his claim for his contumacy in neglecting or refusing to present it on hearing."

Likewise in *Armstrong v. Johnson* (1833) 2 Chester Co. Rep. (Pa.) 64, the court held that it was admissible on the part of the defendant to show by parol that the court had no jurisdiction of the plaintiff's claim, by reason of the fact that he was barred from maintaining an action thereon by having omitted to assert the same as a set-off in a previous suit before a justice.

In *Slyhoof v. Flitcraft* (1831) 1 Ashm. (Pa.) 171, the plaintiff issued summons shortly after having been served with a summons in an action brought by the defendant against him in a justice's court, and it appeared that the plaintiff's claim was the proper subject of a set-off in the suit in justice's court. The court held that he was estopped from maintaining his action, as his claim should have been asserted as a set-off in the prior action.

So, in *Herring v. Adams* (1843) 5 Watts & S. (Pa.) 459, wherein it appeared that the plaintiff did not assert his claim as a set-off in a prior action against him in a justice's court, although the claim arose *ex contractu* and was within the jurisdiction of the justice, the court held that under the Act of Assembly of 1810 the plaintiff was barred from recovering on his claim.

Under the act mentioned in the preceding paragraph where it appeared that the subject of a plaintiff's claim was proper matter for a set-off, which he omitted to assert when sued by the defendant in a justice's court, the court held that the action was properly dismissed. *Light v. Ringler* (1885) 1 Pa. Co. Ct. 156.

And in *Shoup v. Shoup* (1859) 15 Pa. 361, an action by an employer to recover damages occasioned by a breach of contract of employment by the defendant, it appeared that the defendant had brought suit before a justice of the peace and obtained a judgment against the employer for salary due him. The court held, under the same act, that the judgment rendered by the justice was a bar to the action, as the plaintiff, being defendant therein, was required to plead his claim in set-off, and, not having done so, was barred from subsequently recovering on it.

Under the same act, in *Walsh v. Greenwood* (1810) 2 Pa. Dist. R. 64, wherein it appeared that the defendant attempted to set off, in an action in replevin, a claim which he had omitted to assert as a set-off in a prior action to recover rents, brought against him in a justice's court, the court held that he was precluded from doing so by the terms of the statute.

See also *Nickle v. Baldwin* (1842) 4 Watts & S. (Pa.) 290, wherein it was said that a case in damages not exceeding \$100, arising *ex contractu* and capable of liquidation by a legal standard, fell within the Defalcation Act, as well as within the express terms of § 7 of the Act of March 20, 1810, which provides, in part, that "the defendant is required in a suit before a justice of the peace, on pain of being forever barred, to set off his demand, whether founded on bond, note, penal or single bill, writing obligatory, book account, or damage on assumption."

See also *Holden v. Wiggins* (1832) 3 Penr. & W. (Pa.) 460, wherein it was said of the same statute: "Under the 7th section of this act, justices are also authorized and required to take cognizance of any demand of the de-

fendant, founded 'upon bond, note, penal or single bill, written obligation, book account or damages on assumption, against the plaintiff, which shall not exceed one hundred dollars,' and which shall be offered by the defendant as a set-off against the plaintiff's demand. And it is thereby also declared that if the defendant have such a demand, but refuse or neglect to set it off, he shall be forever barred from recovering it."

#### *b. Limitation of rule.*

##### *1. Claim for unliquidated damages.*

As the rule requiring a defendant to plead a claim by way of set-off or counterclaim in an action before a justice of the peace, or in an inferior court, is purely statutory, it must be strictly construed, and the courts have so limited it to actions on contract only, and where the defendant's claim is for unliquidated damages, the party, in whose favor the claim exists, is not precluded from recovering upon the same, or the balance over and above the jurisdiction of the lower court, in a subsequent independent action. *Bush v. Kindred* (1858) 20 Ill. 98; *Cooper v. Crane* (1827) 9 N. J. L. 178; *Babeock v. Peck* (1847) 4 Denio (N. Y.) 292; *Cook v. Moseley* (1835) 13 Wend. (N. Y.) 277; *Welch v. Hazelton* (1857) 14 How. Pr. (N. Y.) 97; *Davis v. Aikin* (1895) 85 Hun. 554, 33 N. Y. Supp. 103; *Clift v. Mercer* (1903) 79 App. Div. 369, 79 N. Y. Supp. 622; *White v. Curtis* (1905) 49 Misc. 50, 93 N. Y. Supp. 319, 18 N. Y. Anno. Cas. 117.

In *Cooper v. Crane* (1827) 9 N. J. L. 178, an action against the executors under the will of a deceased party, to recover damages for the cutting and removing of timber from the plaintiff's premises by the testator during his lifetime, and on a second count to recover for payments made for the testator by the plaintiff as surety on a note, it appeared that in a prior action in a justice's court, the claims which were made the basis of the action were not pleaded in set-off, and the defendants contended that this omission so to plead precluded a recovery. The court held that, as the damages

under the first count for the cutting of timber were unliquidated, the claim thereon was not the proper subject of a set-off, in an action before a justice of the peace; but that, as to the second count for money had and received, it was the proper subject of a set-off, and, it appearing that it did not exceed the jurisdictional limits of the justice, should have been asserted as a set-off, failing which the plaintiff was precluded from maintaining an action to recover upon it, under the terms of § 15 of the Revised Laws, page 683, to the following effect: "If any defendant neglect or refuse to deliver a copy of his or her account or state of demand against such plaintiff, he or she shall forever thereafter be precluded from having or maintaining any action for such account or demand, or from setting off the same in any future suit. Provided always, that where the balance found to be due to such defendant exceeds the sum of one hundred dollars, then the said defendant shall not be precluded from recovering his or her account or demand against such plaintiff in any other court of record having cognizance of the same."

In *Bush v. Kindred* (1858) 20 Ill. 93, it was held that a party sued in a court of a justice of the peace was not required to set off a claim for unliquidated damages, the court saying: "If such damages might be so set off, it would be to invest justices of the peace with jurisdiction over questions involving title to real estate, and compel parties to litigate all their rights, of every nature and kind, in one action, which would result in great injustice and endless confusion. . . . It is manifest that the legislature never intended to confer such jurisdiction upon justices of the peace, and thereby produce such results."

In *Welch v. Hazelton* (1857) 14 How. Pr. (N. Y.) 97, the defendant pleaded, in abatement of the plaintiff's right to recover, a prior action before a justice of the peace in which the plaintiff, as defendant therein, should have asserted his claim as a set-off. The court held that the plea was insufficient, as it did not show

whether the plaintiff's claim was for liquidated or unliquidated damages.

Where it appeared that the plaintiff in an action to recover damages caused by a breach of warranty under a contract for the sale of a horse had not pleaded his claim as a set-off in a prior action instituted by the defendant before a justice of the peace to recover the purchase price of the horse, the court held that the failure to assert the claim as a set-off was no bar to a recovery, since the claim was unliquidated, and therefore could not have been interposed as a set-off in an action in a justice's court. 2 Rev. Stat. 234, 236, §§ 50, 57. It was held further that, conceding the claim could have been set up in mitigation of damages, the party was not bound to do so, and was not prejudiced by the omission. *Cook v. Meseley* (1835) 18 Wend. (N. Y.) 277.

In *Davis v. Aikin* (1895) 85 Hun, 554, 33 N. Y. Supp. 103, an action to recover the value of professional services rendered by the plaintiff to the defendant as the latter's attorney, it appeared that the defendant had brought a prior action in a justice's court against the plaintiff to recover for an alleged conversion, and that the plaintiff had not pleaded his demand as a counterclaim therein. The court held that the statute (Code Civ. Proc. § 2947), providing that the failure of a defendant, in an action to recover upon, or for, a breach of contract in a justice's court, to interpose a counterclaim existing in his favor, forever precluded the maintenance of an action thereon, applied only to actions on contract.

In *Clift v. Mercer* (1903) 79 App. Div. 369, 79 N. Y. Supp. 622, an action by the plaintiff to recover for money expended by him in the purchase of a team for the defendant's testator, it appeared that in a prior action in a municipal court against the plaintiff to recover the possession of the team, he did not file his claim as a counterclaim. The court held that the statute (Code Civ. Proc. § 2947), requiring a defendant to plead his counterclaim in a justice's court, the procedure in which applied to the mu-

municipal court of Syracuse, was limited specifically to actions "to recover damages on or for a breach of contract."

In *White v. Curtis* (1905) 49 Misc. 50, 18 N. Y. Anno. Cas. 117, 98 N. Y. Supp. 319, wherein it appeared that the plaintiff failed to file a counterclaim in a prior action brought against him in a justice's court for a certain demand, the court held that he was not thereby estopped from maintaining this proceeding to recover thereon.

*2. Claim dismissed or abandoned before justice.*

In New York, it has been held that where, in an action before a justice of the peace, a claim available as a set-off or counterclaim is interposed as such, but before judgment is rendered, the claim is withdrawn or dismissed, the judgment is no bar to a subsequent suit to recover on the claim. *Phinney v. Earl* (1812) 9 Johns. (N. Y.) 352; *Ives v. Goddard* (1857) 1 Hilt. (N. Y.) 434; *Lord v. Ostrander* (1864) 43 Barb. (N. Y.) 337. Compare *Lawrence v. Houghton* (1809) 5 Johns. (N. Y.) 129.

In *Phinney v. Earl* (N. Y.) *supra*, wherein the defendant pleaded a former action in a justice's court, in which the claim sued on by the plaintiff should have been set up by way of set-off, it appeared that in that action the plaintiff attempted to assert his claim as a set-off, but that it was dismissed on the defendant's motion. The court held that the former action constituted no bar to this suit, since the defendant could not plead the necessity of the claim being asserted as a set-off in the prior action when he had objected to its admissibility.

In *Lord v. Ostrander* (1864) 43 Barb. (N. Y.) 337, wherein it appeared that the plaintiff was defendant in a prior suit before a justice of the peace and did not set up his demands as a set-off, but that the justice dismissed the former proceeding against the remonstrance of the defendant, the court held that while the statute (2 Rev. Stat. 233, 236, § 57) required the defendant to interpose and avail himself of his claim in an action before the justice, or suffer a forfeiture of the same for omission so to plead it,

nevertheless the effect of the prior action as a bar was obviated by its dismissal before issue was joined.

Where it appeared that in a prior action in a justice's court the claim of the plaintiff, as defendant therein, was offered as a set-off, but was properly excluded by the justice, the court held that the former action constituted no bar. *Ives v. Goddard* (1857) 1 Hilt. (N. Y.) 434.

But compare *Lawrence v. Houghton* (N. Y.) *supra*, wherein the court held that a prior judgment rendered in an action in a justice's court, against the plaintiff as defendant therein, where he offered to set off the claim which was made the basis of the suit at bar, but the same was ruled out by the justice, nevertheless constituted a bar to the maintenance of this suit on the claim.

*3. Claim against party not litigant in prior action.*

The rule requiring a defendant to plead a claim by way of set-off or counterclaim in an action before a justice of the peace has been held not to apply where the claim exists against a party not a litigant in the action. *Culver v. Barney* (1835) 14 Wend. (N. Y.) 161; *Compton v. Green* (1853) 9 How. Pr. (N. Y.) 228.

Thus, in *Compton v. Green* (N. Y.) *supra*, it was held that a defendant in a justice's court action was not required by the statute (2 Rev. Stat. 234, 235, § 52) to plead a claim in set-off, where it appeared that the claim consisted of a demand against two parties, one only of whom was a plaintiff in the action before the justice; and therefore the pendency of the former suit constituted no bar to the independent action brought by the defendant against both parties liable on his claim.

So, in *Culver v. Barney* (N. Y.) *supra*, it appeared that the claim which was made the basis of the suit at bar, existed against two parties, and that in a former action in a justice's court brought by one of the parties, the plaintiff, as defendant therein, did not assert his claim as a set-off. The court held that he was not required to do so, since, under the statute requiring

the pleading of a set-off in an action in justice's court (2 Rev. Stat. 234, § 60, subd. 7), the demands which a defendant must set off are demands against the plaintiff in the action, and not against the plaintiff and another person, either jointly or severally.

**4. Recovery of balance of claim in excess of justice's jurisdiction.**

Where, in an action before a justice of the peace, a claim available as a set-off or counterclaim exceeds the jurisdiction of the court, the defendant, in whose favor the claim exists, may subsequently maintain an action to recover the balance of his claim over and above the sum of the court's jurisdiction.

**United States.**—*Canton-Hughes Pump Co. v. Llera* (1914) 131 C. C. A. 387, 215 Fed. 79, affirming (1913) 123 C. C. A. 397, 205 Fed. 209.

**Georgia.**—*Moon v. Starnes* (1916) 17 Ga. App. 679, 87 S. E. 1091.

**New Jersey.**—*Sipley v. Waas* (1885) 47 N. J. L. 187; *State, Clancy, Prosecutor, v. Neumeyer* (1889) 51 N. J. L. 299, 17 Atl. 154; *Harrison v. Dickerson* (1916) 89 N. J. L. 712, 99 Atl. 325.

**New York.**—*Babcock v. Peck* (1847) 4 Denio, 292; *Meyerhoffer v. Baker* (1907) 121 App. Div. 797, 106 N. Y. Supp. 718; *Rundlett & Reynolds v. Whitall* (1912) 76 Misc. 456, 185 N. Y. Supp. 697; *East Forty-sixth Street Realty Corp. v. Max Gutschneider* (1918) 108 Misc. 491, 170 N. Y. Supp. 374; *Silberstein v. Begun* (1919) 107 Misc. 395, 176 N. Y. Supp. 558.

**Ohio.**—*Deviany v. Jelly* (1817) *Tappan*, 127; *Lancaster Ohio Mfg. Co. v. Colgate* (1861) 12 Ohio St. 344.

**Pennsylvania.**—*Simpson v. Lapsley* (1846) 3 Pa. St. 459; *Gillum v. Kahnweiler* (1893) 2 Pa. Dist. R. 656.

**Texas.**—*Dixon v. Watson* (1909) 152 Tex. Civ. App. 412, 115 S. W. 100.

In *Canton-Hughes Pump Co. v. Llera* (1914) 131 C. C. A. 387, 215 Fed. 79, affirming (1913) 123 C. C. A. 397, 205 Fed. 209, the court construed § 157 of the Municipal Court Act of New York, which reads as follows: "Where defendant has a counterclaim which is in excess of the amount of the jurisdiction in this court, the counterclaim

may be interposed, and in the event of judgment being rendered in defendant's favor, sustaining said counterclaim, said judgment shall not be for any larger sum in any event than the sum of which the court has jurisdiction, exclusive of costs, but nothing in this section shall be construed to estop such a defendant from bringing an action against the plaintiff for the difference between the sum of the court's jurisdiction and the sum claimed by said defendant to be due, unless the judgment shall state that the sum awarded by the judgment is the whole amount found to be due." It was held that the act expressly allowed the maintenance of a subsequent suit to recover the balance of a counterclaim over and above the sum of which the municipal court had jurisdiction.

In *East Forty-Sixth Street Realty Corp. v. Max Gutschneider* (1918) 103 Misc. 491, 170 N. Y. Supp. 374, where in it appeared that, in a former action in a municipal court, the defendant had pleaded in counterclaim an amount due on a cause of action in excess of the jurisdiction of that court, it was held that he was not precluded from asserting the balance of his claim as a counterclaim in a second suit brought against him by the same plaintiff. The court said: "It is plain, however, that where a counterclaim is interposed to a cause of action in a court, the jurisdiction of which is limited in amount, or in a proceeding in which no affirmative judgment can be granted in respect of the counterclaim, . . . the defendant may avail of the excess or surplus of the counterclaim above the plaintiff's claim in the first action, and interpose the same as a defense or counterclaim in the second."

In *Rundlett & Reynolds v. Whitall* (1912) 76 Misc. 456, 185 N. Y. Supp. 697, in answer to the plaintiff's suit in a municipal court, the defendant pleaded a counterclaim for an amount within the jurisdiction of the court, and it appeared that another action was pending by the defendant against the plaintiff, to recover the balance of his claim. The court held that he



could recover the balance above his counterclaim.

So, in *Silberstein v. Begun* (1919) 107 Misc. 895, 176 N. Y. Supp. 558, wherein the plaintiff sought to recover damages for the defendants' breach of contract, it appeared that the defendants had instituted an action in a municipal court against the plaintiffs, to recover for goods sold and delivered, and that the plaintiffs had interposed a counterclaim based on their cause of action, for a sum in excess of \$1,000, the jurisdiction of the justice, but that the justice fixed their damage at \$1,000. The court held that while the plaintiffs were forced into the municipal court by the commencement of the action, they were not required to litigate their claim for damages, which exceeded the justice's jurisdiction, but might have set it up as an offset, and thus reserved the right to institute an action for their damages in a court of more ample jurisdiction; but having interposed the cause of action as a counterclaim they were bound by the result of the justice's judgment.

In *Babcock v. Peck* (1847) 4 Denio (N. Y.) 292, the court held that where it appeared that the plaintiff's cause of action for a liquidated sum exceeded the jurisdiction of a justice's court, he was not required to plead it in a former action in that court as a set-off. 2 Rev. Stat. 236, §§ 57, 58, subd. 1.

In *Sipley v. Wass* (1885) 47 N. J. L. 187, the court construed the 24th section of the Justice's Court Act, which reads as follows: "If any defendant neglect or refuse to deliver a copy of his or her account or state of demand against such plaintiff, he or she shall forever thereafter be precluded from having or maintaining any action for such account or demand, or from setting off the same in any future suit: Provided always, that where the balance found to be due to such defendant exceeds the sum of one hundred dollars, then the said defendant shall not be precluded from recovering his or her account or demand against such plaintiff in any other court of record having cognizance of the same." It was held that a plain-

tiff was not precluded from recovering on a claim which he omitted to interpose as a set-off when previously sued by the defendant in a justice's court, where he showed that the balance due him exceeded \$100.

In *State, Clancy, Prosecutor, v. Neumeyer* (1889) 51 N. J. L. 299, 17 Atl. 154, the court said: "If the defendant has a set-off, and when used in a justice's court shall neglect or refuse to deliver a copy of his or her account or state of demand against the plaintiff, he shall be precluded from suing for said account: Provided, that where the balance found to be due to the defendant exceeds \$100, then the defendant shall not be precluded from recovering his demand in any court. Rev. p. 544, § 24." The case, however, did not involve circumstances under which a prior defendant might have pleaded in set-off, for it appeared that the former action was brought in a justice's court, wherein the defendant attempted, unsuccessfully, to file a claim in set-off which far exceeded the jurisdiction of the justice.

In *Harrison v. Dickerson* (1916) 89 N. J. L. 712, 99 Atl. 325, the court held that § 25 of the Small Cause Act of 1903 (Revision) did not change the rule as laid down in *Sipley v. Wass* (N. J.) supra; and that failure to plead a set-off or counterclaim exceeding the jurisdiction of a justice's court constituted no bar to a subsequent independent action to recover on the claim.

In *Meyerhoffer v. Baker* (1907) 121 App. Div. 797, 106 N. Y. Supp. 718, an action to recover damages occasioned by the fraudulent misrepresentations of the defendant, made to induce the plaintiff to become a lessee of premises, it appeared that the defendant had successfully maintained a prior action for summary dispossession in a municipal court wherein the plaintiff did not plead her claim. The court held that, as it appeared that plaintiff's claim was for more than \$500, the limit of the jurisdiction of the municipal court (Laws 1902, chap. 580, § 1, subd. 13, § 157), she had sufficient reason for not setting up as a counterclaim therein the claim asserted in

the later action, and the prior proceedings, therefore, constituted no bar.

In *Devinny v. Jelly* (1817) Tappan (Ohio) 127, wherein it was contended that the plaintiff was barred from recovering on his claim for work, labor, and services, because of failure to plead the same as a set-off in a prior action brought in a justice's court by the present defendant against the plaintiff, the court held that, as it appeared that the plaintiff's claim exceeded in amount the jurisdictional limits of the justice, he was not required to plead the same as a set-off in the action in the inferior court, and his failure to do so did not preclude a recovery.

So, in *Lancaster, Ohio Mfg. Co. v. Colgate* (1861) 12 Ohio St. 344, wherein it appeared that the defendant in a former action in a justice's court attempted, without success, to plead as a counterclaim a demand in his favor for a sum far in excess of the jurisdiction of the justice, the court held that the amount being beyond the limit which he could recover in the prior action the failure to set up the claim as a counterclaim could constitute no bar to a recovery thereon in a subsequent action, in a court having jurisdiction to grant the relief sought.

In *Simpson v. Lapsley* (1846) 3 Pa. St. 459, the court held that the plaintiff was not estopped from recovering any part of his claim, because it was not offered as a set-off before a justice, when previously sued by the defendant, saying: "If the present plaintiff's demand against the plaintiff in the other suit was over \$100, he was not bound to submit any portion of it to the jurisdiction of the justice, or sever it into parts for the purpose of set-off. Besides, suppose he was bound to take some item of the account or demand, which he then claimed against the present defendant, and set it off against the claim of the plaintiff in that suit, can the defendant in this case, or the jury, or the court, select the one he was bound to set off? The act of assembly only requires a defendant to make his set-off,

when his demand, etc., shall not exceed \$100."

In *Giffen v. Kahnweiler* (1893; C. P.) 2 Pa. Dist. R. 656, wherein it appeared that the plaintiff's claim was in excess of the jurisdiction of a justice of the peace, the court held that his failure to set it off in a prior suit before a justice did not preclude him, under the statute (art. 1810, § 7), from maintaining a subsequent independent action to recover thereon.

In *Dixon v. Watson* (1909) 52 Tex. Civ. App. 412, 115 S. W. 100, an action by the plaintiff, as tenant, against the defendant, his landlord, for a breach of the lease, it appeared that the landlord had instituted a prior action against the tenant on the lease in a county court, and in that action the tenant did not assert his claim as a set-off for the reason that it exceeded the jurisdiction of the court. The court held that the plaintiff was not bound to plead his set-off in the county court action, but had the right to decline to do so and maintain an independent action thereon.

#### VI. Rule in Arkansas.

In Arkansas, an irreconcilable difference of opinion exists on the question whether a prior action in which a claim might have been interposed as a set-off or counterclaim is a bar to a separate or independent action thereon. But three cases have been found in this jurisdiction in which the question has been raised, two of which held that the prior action is a bar to a recovery on the claim, and the third holding directly to the contrary. *Beaty v. Johnston* (1899) 66 Ark. 529, 52 S. W. 129. Compare *Hughes v. Sebastian County Bank* (1917) 129 Ark. 218, 195 S. W. 364; *Turley v. Gorman* (1918) 133 Ark. 473, 202 S. W. 822.

In *Beaty v. Johnston*, supra, it was held that where a party has a claim which might properly have been the subject of a set-off in a prior action, the failure to use it as such does not bar a subsequent action to recover thereon.

But compare *Hughes v. Sebastian County Bank* (1917) 129 Ark. 218, 195 S. W. 364, wherein it appeared that

the plaintiff, who was the maker of a note held by the defendant bank, had neglected, in a prior action on the note, to set up by way of counterclaim or set-off the improper handling of his collateral by the bank, by reason of which he sustained a loss. In an action to recover the amount of the loss, the court held that the omission to plead the claim by way of set-off or counterclaim in the prior action precluded a subsequent recovery.

In *Turley v. Gorman* (1918) 133 Ark. 473, 202 S. W. 822, it was held that a party was concluded by the judgment rendered in a prior action, in which he failed to claim an amount by way of set-off, although it did not appear whether the set-off was available in the original suit.

#### *VII. Rule in New Jersey.*

Although there is an apparent conflict of opinion in New Jersey, the weight of authority in that state seems to hold that the failure to interpose an available claim by way of set-off, counterclaim, or cross petition in a prior action bars a recovery on the claim in a subsequent independent suit. *Schenck v. Schenck* (1828) 10 N. J. L. 276; *Henry v. Milham* (1832) 13 N. J. L. 266; *Dey v. Jackson* (1877) 39 N. J. L. 535; *Links v. Mariowe* (1912) 83 N. J. L. 389, 84 Atl. 1056. Compare *Longstreet v. Phile* (1876) 39 N. J. L. 63; *Baldwin v. Woodbridge & T. Engineering Co.* (1896) 59 N. J. L. 317, 36 Atl. 683. The procedure in justices' courts in that state is not in conflict with the general rule governing actions brought in inferior courts, and the cases from that jurisdiction relating to actions of that kind are in *V. supra*.

In *Henry v. Milham* (1832) 13 N. J. L. 266, the court held that, by the terms of the statute (Rev. Laws, 633, § 15), a party who had failed to assert a claim in his favor, which was the proper subject of a set-off in a former action against him, could not recover on the same in a subsequent independent action.

In *Links v. Mariowe* (1912) 83 N. J. L. 389, 84 Atl. 1056, the court held that the plaintiff's omission to file a liquidated claim for damages as a set-

off in a prior action against him in a district court precluded him from maintaining a subsequent action thereon, under the terms of the statute. Comp. Stat. p. 1971, § 61.

So, in *Dey v. Jackson* (1877) 39 N. J. L. 535, wherein it appeared that the plaintiff, as defendant in a former action, had omitted to plead his claim as a set-off therein, the court held that under the statute relating to set-off his claim became forever barred by reason of the failure to assert it in the original action as required.

Likewise in *Schenck v. Schenck* (1828) 10 N. J. L. 276, the court held that under the statute the plaintiff could not maintain an action on a claim which was the proper subject of a set-off in a former action, but which he failed to plead.

But compare *Longstreet v. Phile* (1876) 39 N. J. L. 63, wherein it appeared that the plaintiff, as a defendant in a prior suit to recover the value of property on which he had performed services, and which he had sold to satisfy his lien, did not assert, in that action, his claim for services, but suffered judgment, and subsequently brought an action to recover on his claim, the court held that he was not prevented from recovering by the judgment in the prior proceedings, as his right to set off his claim in the former action was optional with, and not imperative on, him, and, if he so elected, a subsequent independent action would lie to recover upon his claim. This decision, however, is not in accord with the weight of authority in the state, and should be limited strictly to those cases embracing a similar state of circumstances.

Compare also *Baldwin v. Woodbridge & T. Engineering Co.* (1896) 59 N. J. L. 317, 36 Atl. 683, wherein it appeared that the plaintiff was sued in a prior action brought against him in attachment as a foreign debtor. In that proceeding judgment was had by default, the plaintiff, as defendant therein, not appearing. The court held that the failure to plead the claim in set-off was no bar to the prosecution of an action thereon, despite the statute (Gen. Stat. March 27, 1874, p.

3109), since the former action, having been brought against a foreign debtor on whom personal service was not made, was an action in rem, and the

judgment therein had no further effect than to subject to a lien such property of the debtor as was subject to attachment. W. J. K.

A. TENENBAUM, Appt.,

v.

GERHARD B. LAMBERT COMPANY.

*Arkansas Supreme Court — October 20, 1919.*

(— Ark. —, 215 S. W. 596.)

**Evidence — of fraud in making written contract.**

1. The rule prohibiting the admission of parol evidence to vary a written contract does not preclude the admission of such evidence to establish fraud in making the contract.

[See note on this question beginning on page 747.]

**Contract — to deliver scrap iron — effect of estimate by buyer.**

2. The owner of a plantation who offers to sell the scrap iron which he has accumulated is not bound to de-

liver the quantity as estimated by the buyer's agent, which is much more than he possesses, although the estimated quantity is named in the written contract as that to be delivered.

APPEAL by plaintiff from a decree of the Phillips Chancery Court (Robertson, Ch.) in favor of defendant, cross complainant, in a suit brought to recover damages for alleged breach of a contract to sell scrap iron. *Affirmed.*

**Statement by Hart, J.:**

A. Tenenbaum brought this suit in the circuit court against Gerhard B. Lambert Company to recover \$540 damages, which he alleges he has sustained by reason of a breach of a contract with the defendant to sell it approximately 50 tons of scrap iron. The defendant answered, denying the allegations of the complaint, and by way of cross complaint asked judgment against plaintiff for the price of 13½ tons of scrap iron, which it shipped to the plaintiff, and for which it has not been paid. The defendant prayed for a reformation of the contract of sale, and asked that the case be transferred to the chancery court. Without objection the case was transferred to equity and tried there. The chancellor found for the defendant in the amount of its counterclaim. It was therefore de-

creed by the court that the complaint of the plaintiff be dismissed for want of equity, and that the defendant have and recover of the plaintiff the sum of \$149.37. The case is here on appeal.

Mr. B. F. Reinberger for appellant.  
Messrs. Moore & Vineyard, for appellee:

Plaintiff, by and through the superior knowledge and experience of M. M. Tenenbaum, his agent, perpetrated a fraud on the defendant.

Doniphan, K. & S. R. Co. v. Missouri & N. A. R. Co. 104 Ark. 483, 149 S. W. 60; 4 Pom. Eq. Jur. § 1376; Martin v. Hempstead County Levee Dist. 98 Ark. 23, 185 S. W. 458.

Plaintiff has wholly fallen down on the question of proving damages, if he had made a good and valid contract for the purchase from defendant.

Kirchman v. Tuffi Bros. Pig Iron & Coke Co. 92 Ark. 111, 122 S. W. 239; Allen v. Northern, 121 Ark. 150, 180 S. W. 465.

Hart, J., delivered the opinion of the court:

The only issue raised by the appeal is as to the correctness of the finding of the chancellor. According to the evidence adduced by the plaintiff, he has been engaged in the business of buying and selling scrap iron and hides at Little Rock, Arkansas, since the year 1890. His son traveled for him over the state of Arkansas, buying scrap iron for him. He went to Elaine, Phillips county, Arkansas, and entered into a contract with the Gerhard B. Lambert Company, a corporation engaged in business there, for the purpose of buying scrap iron from it, and the contract is evidenced by a letter signed by the Gerhard B. Lambert Company and written to A. Tenenbaum, Little Rock, Arkansas, and dated "May 5, 1917, Elaine, Ark." The letter is as follows:

Dear Sir:—We beg to confirm sale made to you through your representative, M. M. Tenenbaum, for approximately 50 gross tons of scrap iron, free of boilers, grates, and stove plates, at \$13.50 gross ton, f. o. b. cars, Elaine, Ark., railroad rates to govern, draft with bill of lading attached, delivery to be made within two weeks. We beg to acknowledge receipt of your draft for \$50 to apply on this shipment.

Yours truly.

The defendant shipped to the plaintiff one car of scrap iron within two weeks, and notified the plaintiff that this was all the scrap iron that it had. The plaintiff received the carload of scrap iron, but refused to pay for it, claiming that the contract called for approximately 50 tons of scrap iron and that the defendant had only shipped to the plaintiff 13½ tons. The plaintiff claimed that he had contracts out for the sale of the scrap iron, and that in order to fill them he had to buy scrap iron at an advanced price from other parties, and that he was damaged in the sum of \$540 by the defendant not complying with its contract. It is also shown by the

plaintiff that the defendant estimated that it had on hand at Elaine approximately 50 tons of scrap iron, and that the plaintiff bought that amount from it.

On the other hand, it was shown by the defendant that it was engaged in business at Elaine, Arkansas, and that on the 5th day of May, 1917, a son of the plaintiff called upon it to purchase the scrap iron which it had accumulated at its place of business. An agent of the defendant showed Tenenbaum the iron which it had accumulated at Elaine, and Tenenbaum estimated the amount to be between 40 and 50 tons. The plaintiff's agent was also told that the defendant had some more scrap iron at Lambrook, on its plantation, 8 miles away. The defendant was engaged in operating a cotton plantation of about 3,000 acres, and also operated a store and gin on the premises. The defendant knew nothing as to the amount of scrap iron on hand, and relied entirely upon the estimate made by Tenenbaum. The latter knew that the defendant was not engaged in the business of buying and selling scrap iron, and that it only intended to sell the plaintiff the amount of scrap iron which it had on hand at Elaine and Lambrook. The contract in question was written by an agent of the defendant, but was dictated by the agent of plaintiff. The above facts were testified to both by the bookkeeper and manager of the defendant.

It is first insisted by counsel for the plaintiff that this testimony on the part of the defendant was inadmissible, on the ground that it violated the well-known rule that parol evidence is inadmissible to modify or vary a written contract. The facts bring this case within an exception to the rule. The rule prohibiting the admission of oral evidence to vary a written contract does not preclude the admission of such evidence to establish fraud in making the contract. This is so because fraud in

Evidence of fraud in making written contract.

a contract could never be proved if the parties were bound by its terms as written. *Brown v. Le May*, 101 Ark. 95, 141 S. W. 759; *Carwell v. Dennis*, 101 Ark. 603, 143 S. W. 135.

In the case at bar two witnesses for the defendant testified in positive terms that it was engaged in running a plantation of 3,000 acres, and in operating a store, mill, and gin situated thereon; that it only intended to sell the scrap iron, which it had accumulated in the course of its business; that it was not engaged in the business of buying and selling scrap iron, and that the plaintiff knew these facts, and knew that the defendant relied upon his agent in estimating the quantity of scrap iron on hand. The iron was to be delivered within two weeks. The defendant did deliver all the

scrap iron it had on hand to the plaintiff within this time.

The chancellor correctly held that the action of the plaintiff in estimating the quantity of scrap iron in the contract at approximately 50 tons, when in fact there were only about 18½ tons, was a fraudulent misrepresentation which induced the defendant to sign

the contract, as dictated by the plaintiff's agent. This view is strengthened by the fact that the defendant wrote the plaintiff a letter, offering to sell him the scrap iron which it had on hand, and the agent of the plaintiff went down there to buy it in response to this letter.

Contract—to deliver scrap iron—effect of estimate by buyer.

It follows that the decree will be affirmed.

### ANNOTATION.

#### Admissibility of parol evidence as to amount of commodity specified in written contract of sale.

The parol evidence rule is not violated by the admission of evidence with respect to the amount of a commodity intended to be sold and transferred by a written contract of sale, where the amount is not specifically set out in the contract. *Smith v. Wilson Mercantile Co.* (1912) 6 Ala. App. 171, 60 So. 484; *Ruff v. Jarrett* (1880) 94 Ill. 475; *Farwell v. Tillson* (1884) 76 Me. 239; *Neal v. Flint* (1895) 88 Me. 72, 33 Atl. 669. Thus, in *Smith v. Wilson Mercantile Co.* (Ala.) supra, it was held that where a contract for the purchase of six bales of cotton did not specify the weight of the bales, it could be shown by parol evidence that the bales contemplated were of the usual and customary weight, and what that weight was. Likewise, in *Ruff v. Jarrett* (1880) 94 Ill. 475, it appeared that a bill of sale of ice did not state to whom the sale was made, the quantity sold, or the price per ton, but only stated by whom the ice was sold, its location, the total to be paid, and that it was to be removed before a certain time. It was held that this could not be regarded as a contract between the

parties without the aid of extrinsic evidence, and that if evidence could be introduced to prove who was the purchaser, and to give effect to the bill of sale, there was no reason for refusing to permit evidence of a warranty of quantity in order to show a failure of consideration, as a defense to an action on a note given for the ice. So, in *Neal v. Flint* (Me.) supra, the bill of sale involved contained no particular enumeration of the articles sold, the language being, "all the boats, canoes, sails, oars, paddles, fittings, and fixtures of every kind, more or less, as the same now lie at Winter Harbor."

It was held that parol evidence was admissible to show that there was an oral promise, warranty, or understanding, to the effect that all the boats, etc., put into the boathouse at Winter Harbor by one of the plaintiffs, were there at the time of the execution and delivery of the bill of sale. The court said: "The contract or promise relied on was a collateral agreement, incidentally connected with that which had been reduced to writing, and not inconsistent with it. The bill of sale

was silent as to quantity. The words, 'as they now lie,' refer to quality or condition rather than quantity and number. No part of the writing covered this collateral stipulation set up by the plaintiffs. Consequently evidence of it was admissible, and it was for the jury to determine whether it was proved or not. . . . The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of parol evidence of what was intended, or what took place previous to or at the time of making the contract. But there are exceptions to this general rule which permit parol evidence of engagements collateral to, or independent of, the provisions expressed in the written agreement, and not within its terms, although made at the same time and affecting the rights of the parties in relation to the subject-matter of the writing. In such it is deemed only partially reduced to writing, and the collateral undertaking or stipulation exists in parol."

In *Farwell v. Tillson* (1884) 76 Me. 239, the contract sued on was partly oral and partly written and provided, among other things, for the furnishing of stone for building purposes. The court held that an oral agreement between the parties with regard to the amount of stone to be furnished was properly admitted in evidence.

But evidence directly contradicting the amount of a commodity specifically stated in a written contract of sale will not be admitted.

**California.**—*Schroeder v. Schmidt* (1887) 74 Cal. 459, 16 Pac. 243; *Hodson v. Varney* (1898) 122 Cal. 619, 55 Pac. 413.

**Georgia.**—*Pennington v. Avera* (1905) 124 Ga. 147, 52 S. E. 324.

**Illinois.**—*McCloskey v. McCormick* (1865) 37 Ill. 66.

**Massachusetts.**—*Ridgway v. Bowman* (1851) 7 Cush. 268; *Parry v. Libbey* (1896) 166 Mass. 112, 44 N. E. 124.

**Mississippi.**—*Coats v. Bacon* (1900) 77 Miss. 320, 27 So. 621.

**Montana.**—*Hogan v. Kelly* (1904) 29 Mont. 485, 75 Pac. 81.

**New York.**—Compare *Van Gorden v.*

*Sackett* (1889) 53 Hun, 638, 6 N. Y. Supp. 860.

Thus, it has been said that parol evidence will not be admitted to show what was intended to be included in a bill of sale, where there is no doubt of the identity of the articles described therein. *Schroeder v. Schmidt* (Cal.) *supra*.

Nor will parol evidence be admitted to show that property included in a bill of sale was not intended to be included. *Hogan v. Kelly* (Mont.) *supra*. So, where the contract of sale of a photograph studio transferred "all the cameras . . . therein contained," the court refused to admit parol evidence to show that a certain named camera was reserved from the property sold. *Hodson v. Varney* (Cal.) *supra*.

In *Pennington v. Avera* (Ga.) *supra*, the court held that where a written contract of sale purported to cover "all timber for sawmill purposes" on a parcel of land, parol evidence would not be admitted to show that the limbs and tops of trees should be included in the contract, as well as all timber capable of being made into lumber.

In *Ridgway v. Bowman* (Mass.) *supra*, it appeared that a bill of sale was given of the stock of a livery stable, most of which was covered by a mortgage. In an action of trover by the vendor to recover part of the property as not conveyed by the bill of sale, he attempted to show by the attorney who prepared the bill of sale that he, the vendor, had stated to the purchaser that he was conveying only the mortgaged property. The evidence was rejected on the ground that it was an attempt to vary and control a written instrument by parol evidence.

In *Parry v. Libbey* (Mass.) *supra*, the bill of sale involved purported to convey to the plaintiffs "a certain lot of brick, being brick now left in a certain kiln situated in the southerly end of brick shed at South Clinton, Massachusetts, containing about two hundred thousand hard brick; also about one hundred thousand light hard brick, being piled partly in northern end of said shed and partly outside of

shed." It was held that the words, on their face, purported to convey all the brick in the two distinct piles mentioned, and that parol evidence was inadmissible to cut down their effect.

In *McCloskey v. McCormick* (Ill.) supra, there was involved a written memorandum in the form of a bill of sale, which contained a list of property, including the item, a "lot of empty boxes and empty barrels (not including 442 tierces and 100 barrels of salt now in the pork house), all other movable effects now in said pork house." It was held that it was not a mere receipt, but a bill of sale, and that parol evidence could not be admitted to prove that 150 barrels of salt should have been excepted instead of 100 barrels. The court said: "It is insisted that this bill of sale was executed in mistake, and included 50 barrels of salt not intended to be sold. That instead of there being but 100 barrels of salt, as received, there were 150. It is insisted that appellant had the right to explain the bill of sale, and to show that no portion of the salt was in fact sold. It will be observed that but 100 barrels of the salt and the tierces were reserved, and the other movable effects then in the house were included. The right to show the mistake is placed upon the ground that the bill of sale was in effect but a receipt, and, as such, it could be either contradicted or explained. In that respect it speaks its own language. If appellees were permitted to prove that this bill of sale contained articles not sold, it seems to us that it is not explaining a receipt, but contradicting an agreement or contract. It says that these 50 barrels of salt were sold to appellant, and it is proposed to prove that they were not sold."

In *Coats v. Bacon* (1900) 77 Miss. 320, 27 So. 621, it appeared that a written contract between the plaintiff and the defendants provided for the purchase of 6,000 cards of needles. After the delivery of the contract, a copy thereof was sent to the defendants with the request that they check it over carefully. They returned it with the statement that they had checked it, and found it correct in

every particular. It was held that parol evidence by the defendants to the effect that they had intended to order only 6,000 needles was improperly admitted, the court saying: "The letter from appellants to appellee of date August 9, 1898, taken with the indorsement thereon by appellee, 'We have checked this all over carefully, and find it correct in every particular,' completed the contract, which, being thus in writing, could not be changed in its terms by parol. Proof of fraud would set aside the contract, but there is no such proof in this record. Appellee should have read carefully the letters of appellants, and to indorse in the unqualified terms he did the proposed contract, without reading it carefully, is simply gross inattention. To permit the parol proof objected to in this case to be heard in evidence would be to make a contract for the parties, not to enforce the contract which they have themselves made. It was error to admit such parol proof."

By the terms of the contract involved in *Van Gorden v. Sackett* (1889) 53 Hun, 638, 6 N. Y. Supp. 860, the plaintiff agreed to deliver "about 200 bushels of buckwheat" to the defendant. He delivered in fact only about 50 bushels, and the defendant refused to pay therefor until the whole amount contracted for had been delivered. Parol evidence was admitted to the effect that, at the time the contract was made, the defendant's agent was told by the plaintiff that the buckwheat was partnership property, that his share was only about 100 bushels, and that he did not think the other owner would sell his share; and that the agent replied that it would be all right, and that the plaintiff would get pay for what he delivered. It was held that the evidence was properly admitted, the court saying: "It was competent to show by parol what the condition was, and what obligation was, by the bargain as in fact made, upon the defendant. *Chapin v. Dobson* (1879) 78 N. Y. 74, 34 Am. Rep. 512; *Eighmie v. Taylor* (1885) 98 N. Y. 294; *Juilliard v. Chaffee* (1883) 92 N. Y. 535; *Benjamin, Sales*, 2d ed. § 232.

In this view evidence was given



from which the justice had the right to find, as a part of the bargain, that the plaintiff might draw what buckwheat he had, and he would have his pay, without reference to whether the party who owned the rest drew his share. This would not necessarily be inconsistent with the writing, but would relate to the time and manner of payment. If such was the bargain, the defendant, after receiving and keeping the plaintiff's share, would not be in a position to assert the entirety of the contract, but would be bound to pay for what he received, and resort to his claim for damages, if the balance was not delivered."

However, when a contract of sale is tinged with fraud, parol evidence is admissible to explain the transaction, even though in effect it directly contradicts the amount of the commodity specifically stated to be sold and transferred thereby. Thus, in the reported Case (TENENBAUM v. GERHARD B. LAMBERT Co. ante, 745) it is held that parol evidence was admissible to show that the amount of scrap iron specified in a written contract of sale was fixed at 50 tons, through the fraudulent representations of the purchaser's agent, when in fact the vendor had on hand for sale only about 18½ tons. So, in Kirby v. Thurmond (1913) — Tex. Civ. App. —, 152 S. W. 1099, it appeared that there was a written contract be-

tween the plaintiff and the defendant for the sale of a stock of goods, specifying that the seller did not warrant as to quantity. It was held, however, that the parol evidence rule was not violated by admitting evidence to the effect that the defendant fraudulently misrepresented the amount of goods on hand at the time of sale. The court said: "Allegations of a petition are taken as true when considering a demurrer thereto. It was alleged that plaintiff was induced by fraudulent misrepresentations to enter into the contract of purchase, and but for such misrepresentations he would not have done so, stating what the misrepresentations were, and that they were made wilfully and with intent to deceive, etc., were sufficient to state a good cause of action, and, if proven, warranted a verdict by the jury. The provision in the bill of sale that 'it is understood that said stock is sold as it now stands, and the grantor does not warrant as to quantity,' does not preclude plaintiff from showing that he was induced to make the trade, and, in so doing, relied on the representations of the defendant. This does not violate the well-known rule that parol evidence is not admissible to contradict or vary the terms of a written contract, as the action in this case sounds in tort and not in contract."

M. J. Q.

## CORA L. KALLOCK

v.

## MARY ELWARD.

*Maine Supreme Judicial Court — November 25, 1919.*

(— Me. —, 109 Atl. 256.)

### Arrest — privilege of exemption — loss.

1. Exemption from arrest is a personal privilege which may be lost by waiver or estoppel.

[See note on this question beginning on page 754.]

### Estoppel — effect of statute.

2. A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right.

— to set up statutory exemption from arrest.

3. A married woman masquerading as a single one, who, when sued for tort by one ignorant of and with no

means of knowledge of the true state of facts, gives a bail bond to secure release from arrest, is estopped, after judgment goes against her, to set up her statutory exemption from arrest in exoneration of her bail.

**Arrest — right to discharge — when determined.**

4. The status of one petitioning for discharge from arrest at the time the application is made is the test of his right to relief.

EXCEPTIONS by plaintiff to an order of the Supreme Judicial Court for Knox County, at law, granting defendant's motion after verdict against her and before judgment, for exoneration and discharge of herself and sureties on her bail bond because she was a married woman exempt from arrest, in an action brought to recover damages for alienation by her of the affections of plaintiff's husband. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Frank H. Ingraham and A. S. Littlefield for plaintiff.

Mr. E. C. Payson for defendant.

Cornish, Ch. J., delivered the opinion of the court:

This case is before the law court on plaintiff's exceptions to the order of the presiding justice granting the defendant's motion and ordering an exoneration on a bail bond.

The facts are these: On July 19, 1918, an action was brought by the plaintiff under Rev. Stat. chap. 66, § 7, to recover damages of the defendant because of her alienation of the affections of the plaintiff's husband. A *capias* writ was issued returnable at the September term, 1918, of the supreme judicial court for Knox county, and, in accordance with its commands, the defendant was arrested and held to bail in the sum of \$8,000. The bail bond was signed by Mary L. Elword, as principal, and C. E. Bicknell and A. B. Crockett as sureties, was accepted by the sheriff, and the defendant was released from custody. The condition of the bail bond was as follows: "Now, therefore, if the above-bonded defendant shall appear and answer unto said suit and abide final judgment thereon and not avoid, then this obligation shall be void," etc.

The writ was duly entered at the September term, 1918, the bail bond was filed in court, an attorney appeared for the defendant, and the action was continued to the January term, and again to the April term, 1919, when the case was tried

and a verdict rendered in favor of the plaintiff. Early in the trial, it appeared, to the surprise of the plaintiff, that the defendant was a married woman, Mrs. Mary L. Davis, and that she had held herself out as a single woman on coming to Maine, in accordance with a pre-arranged plan with her husband, who in the meantime had gone to Pennsylvania. The defendant's attorney stated that he had received no information in regard to the marriage until about one month before the trial.

At the same term, after verdict against her and before judgment, the defendant filed a motion asking that she and her sureties on the bail bond be exonerated and discharged because she was a married woman, and under the statutes of this state was exempt from arrest. The presiding justice granted the motion "as a matter of legal right," and to this ruling exceptions were taken by the plaintiff.

The statute in this state granting a married woman exemption from arrest is as follows: "A husband married since April 26, 1852, is not liable for the debts of his wife contracted before marriage, nor for those contracted afterward in her own name, for any lawful purpose; nor is he liable for her torts committed after April 26, 1883, in which he takes no part; but she is liable in all such cases; a suit may be maintained against her therefor, and her property may be attached and taken on execution for such debts and for damages for such

torts, as if she were sole; but she cannot be arrested." Rev. Stat. chap. 66, § 4.

Exemption from arrest, however, is a personal privilege, and, as such, may be lost either by waiver or by estoppel.

Thus at common law a party or a witness duly summoned in a process then pending is immune from arrest while in attendance upon court, but the privilege may be waived. *Brown v. Getchell*, 11 Mass. 11; *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598.

So under the Constitution of Maine, senators and representatives, except in certain cases, are privileged from arrest "during their attendance at, going to, and returning from each session of the legislature." Art. 4, pt. 3, § 8. And yet it has been held that this privilege, though guaranteed by the organic law of the state, may be waived. The jury found such a waiver in *Chase v. Fish*, 16 Me. 132, and this court sustained the finding.

In the case at bar the exemption is created by statute, but there is no reason why the doctrines of waiver and estoppel should not apply and work their legitimate effects the same as if the exemption were created at common law or under the Constitution. A statute cannot

stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right. Thus it has been held in an elaborate opinion in which the doctrine is fully discussed that a statute, providing that "no waiver of demand or notice by an indorser of a promissory note is valid unless it is in writing, signed by him or his lawful agent," may be waived, or the conduct of the indorser may have been such that he is estopped to set up the statute. *Hallowell Nat. Bank v. Marston*, 85 Me. 488, 27 Atl. 529. "A statutory or even a constitutional provision, made for one's benefit, is not so sacred that he may not waive it, and having once waived it

he is estopped from thereafter claiming it," says the court in that case.

It remains, therefore, to ascertain whether the conduct of the defendant has been such in this case that she is estopped from now claiming the privilege of immunity from arrest. Has she so acted as to induce the plaintiff, relying upon her acts, to take steps which otherwise he would not have taken, and to change his course to his own disadvantage so that, having remained silent when she should have spoken, to allow her now to speak, even to allege and prove the truth, would be contrary to equity and good conscience?

That the defendant was in fact a married woman, Mrs. Mary L. Davis, at the time of her arrest, sufficiently appears from the bill of exceptions. She was masquerading as a single woman under the name of Mary L. Elword, or Mary L. Elward, or Mary Elwood. The reason for this subterfuge is best known to the defendant and her husband, but it is admitted that it was in accordance with a preconcerted plan between them, when she came to Maine and he went to Pennsylvania. The plaintiff was, therefore, justified in suing her as a feme sole and in making the arrest on mesne process. Had she then told the truth, the proceedings would immediately have been dropped, because the object of the service by arrest was undoubtedly to secure, if possible, a guaranty of the payment of judgment through the sureties on the bail bond, and if she were a married woman so that coverture would prevent the taking of such a bond, it is fair to presume that the unnecessary expense of costs and counsel fees would have been avoided by the plaintiff. The bail bond was supposed to take the place of attached property, and as security for the judgment if one were obtained.

But the defendant did not disclose the true situation, which she knew and which the plaintiff did not know and had not means of knowing, and

the defendant was aware of her ignorance.

Instead, she gave the bail bond. That, of itself, has been held not to constitute a waiver. *Baker v. Copeland*, 140 Mass. 842, 4 N. E. 606; *Dickinson v. Farwell*, 71 N. H. 218, 51 Atl. 624. But in the latter case the court said by way of dictum: "If the plaintiff does not know of the facts which create the privilege,—of the defendant's attendance upon a court as a witness, for example,—and the defendant is aware of the plaintiff's ignorance, he may possibly waive the privilege by omitting to disclose the facts. But it is not necessary to decide that question, for it is not claimed that the plaintiff was ignorant of the reason why the defendant happened to be within the jurisdiction at the time of his arrest."

We would not rest our decision, therefore, merely upon the defendant's failure to disclose the facts at the time of arrest, because it is undoubtedly true as a general principle that, if a person deprives another of his liberty, he does so at his peril. But that is one link in the chain. The action was entered in court and the bail bond was filed. At the April term, 1919, pleadings were filed. The general issue was pleaded with a brief statement that the affections of the plaintiff's husband for the plaintiff were destroyed before he met the defendant. Up to that point the plaintiff had been kept in utter darkness as to the true situation. The plaintiff's attorney opened the case to the jury, and after he had concluded he asked counsel for the defendant if he would admit the marriage and identity of the parties, referring, of course, to the plaintiff and her husband. The defendant's attorney replied: "If you mean that Miss Elward is Mrs. Mary L. Davis, yes." This was the first intimation that the plaintiff or her counsel had that the defendant was a married woman. The trial then proceeded, and after a verdict

against her this motion for an exoneretur was made by the defendant. We think this came too late to permit such a scheme to succeed is to put a premium on wilful deception, the practice of which had involved the plaintiff in useless cost and expense, and worked gross injustice.

—to set up statutory exemption from arrest.

It is true, as claimed by the defendant, that the status of the petitioner for discharge at the time when application is made is the test, and it might happen that, although the arrest had been valid when made,

Arrest—right to discharge—when determined.

through intervening circumstances a discharge should be granted, as, for instance, if the debtor had received his discharge in bankruptcy before judgment rendered. The reason is that, if the principal were surrendered by the bail, the court could not commit him, or, if committed, he would be entitled to immediate discharge. *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145; *White v. Blake*, 22 Wend. 612; *Washburn v. Phelps*, 24 Vt. 506; *Champion v. Noyes*, 2 Mass. 481, cited in *Almon H. Fogg Co. v. Bartlett*, 106 Me. 122, 124, 188 Am. St. Rep. 338, 75 Atl. 380.

That, however, is not this case. Here, if the bail should surrender the principal, she would not be entitled to a discharge because through her own conduct she has deprived herself of this privilege she had once possessed, and having once waived it, she is estopped from thereafter claiming it.

Authorities for the position taken are not lacking.

In *Moses v. Richardson*, 8 Barn. & C. 421, 108 Eng. Reprint, 1098, the court of King's bench declined to discharge a married woman from arrest on execution, where she had been sued as a feme sole and suffered judgment to go by default. "She must be left to her writ of error," said Lord Chief Justice Tenterden.

In *Poole v. Canning*, L. R. 2 C. P.

241, a married woman, sued as a feme sole, pleaded coverture, but offered no evidence in support of the plea. A verdict was found against her, and she was afterwards arrested upon the execution. She then applied for a discharge. The discharge was refused. Keating, J., said: "She comes to ask for her discharge on the ground that she is that which by the judgment of the court she is pronounced not to be."

Willes, J., said there was no authority for extending the power of discharge "to the case of one sued as a feme sole suffering judgment by default, or to the case of a married woman who has pleaded her coverture and has allowed the verdict to go against her on the trial of that issue, and so has created a sort of estoppel of the advantage to which it would be unjust to deprive a creditor without at least indemnifying him against the costs which he has been unnecessarily put to."

These two cases were cited and quoted in *Winchester v. Everett*, 80 Me. 535, 541, 1 L.R.A. 425, 6 Am. St. Rep. 228, 15 Atl. 596, where it was held that a judgment creditor is not liable in trespass for refusing, on notice that his judgment debtor is a married woman, to release her from arrest already made by an of-

ficer on an execution regularly issued on a judgment rendered against her on default.

In *Weston v. Palmer*, 51 Me. 73, the two defendants were in fact husband and wife, but there was nothing in the writ to indicate that relation, and the court held that the wife was sued as a feme sole. Coverture was not pleaded. Judgment was rendered on default, and the court refused a writ of error. The ground of the decision is stated as follows: "They now claim that, because they then had a legal defense, . . . which they chose not to avail themselves of, the judgment is erroneous and ought to be reversed. We think otherwise. They have had their day in court. They have once had a fair opportunity to try the same questions which are not presented. They chose not to avail themselves of it, and the law will not allow them another."

The same principle of equitable estoppel runs through all these cases. It obtains here. The defendant in this legal battle voluntarily laid down or designedly concealed a weapon which she might have successfully used. It is too late now for her to resume it and thereby unjustly deprive the plaintiff of the fruits of her victory.

Exceptions sustained.

## ANNOTATION.

### Waiver of privilege against or nonliability to arrest in civil action.

- I. Right to waive, 754.
- II. What constitutes waiver:
  - a. Failure to claim or plead privilege, 755.
  - b. Delay in claiming privilege, 757.

#### I. Right to waive.

An exemption from civil arrest granted to a freeholder, to a married woman, to a voter on election day, to a person who has taken the poor debtor's oath, to a person attending court as a witness or attorney or serving as a juror, or to a member of a state legislature, or other public officer, is generally regarded as a personal privilege

#### II.—continued.

- c. General appearance or pleading to merits, 757.
- d. Giving bail, 757.
- e. False representation as to status, 760.

which may be waived by the person on whom it is conferred.

United States.—See *Larned v. Griffin* (1882) 12 Fed. 590 (witness).

Connecticut.—See *Swift v. Chamberlain* (1820) 3 Conn. 537 (voter).

Illinois.—*Wilson v. Nettleton* (1850) 12 Ill. 61 (attorney).

Maine.—*Chase v. Fish* (1839) 16 Me. 132 (legislator); *Smith v. Jones*

(1884) 76 Me. 128, 49 Am. Rep. 593 (witness). And see the reported case (KALLOCK v. ELWARD, ante, 750) (married woman).

**Massachusetts.**—Brown v. Getchall (1814) 11 Mass. 11 (litigant).

**Michigan.**—Brower v. Tatro (1897) 115 Mich. 368, 73 N. W. 421 (juror).

**New Hampshire.**—Woods v. Davis (1857) 34 N. H. 328 (voter). See also Dickinson v. Farwell (1902) 71 N. H. 213, 51 Atl. 624 (witness).

**New Jersey.**—Faulkner v. Whitaker (1836) 15 N. J. L. 438 (freeholder); Barcklow v. Hutchinson (1867) 32 N. J. L. 195 (freeholder).

**New York.**—Hess v. Morgan (1802) 3 Johns. Cas. 84 (freeholder); Bours v. Tuckerman (1811) 7 Johns. 533 (litigant); Cable v. Cooper (1818) 15 Johns. 152 (poor debtor); Petrie v. Fitzgerald (1864) 1 Daly, 401 (witness); Randall v. Crandall (1844) 6 Hill, 842 (litigant); Stewart v. Howard (1853) 15 Barb. 26 (witness); Savage v. Sully (1911) 74 Misc. 98, 131 N. Y. Supp. 619 (witness). See also Farmer v. Robbins (1872) 47 How. Pr. 415 (litigant); Mackay v. Lewis (1876) 7 Hun, 83 (litigant).

**Ohio.**—White v. Marshall (1902) 23 Ohio C. C. 376 (extradited person).

**Pennsylvania.**—Geyer v. Irvin (1790) 4 Dall. 107, 1 L. ed. 762 (legislator); United States v. Edme (1822) 9 Serg. & R. 147 (witness); Green v. Bonaffon (1888) 2 Miles, 219 (litigant); Gottschall v. Reinhart (1890) 9 Pa. Co. Ct. 415 (freeholder). See also Dehson v. Fitzpatrick (1975) 2 W. N. C. 186 (freeholder); Desuian v. Zefcak (1899) 22 Pa. Co. Ct. 77 (freeholder).

**Tennessee.**—Lipton v. Harris (1824) Peck, 414 (witness).

**Vermont.**—Fletcher v. Baxter (1827) 2 Aik. 224 (witness); Wood v. Kinsman (1833) 5 Vt. 538 (poor debtor). See also Washburn v. Phelps (1852) 24 Vt. 506 (witness).

**Virginia.**—Johnson v. Johnson (1785) 4 Call, 88 (legislator).

**England.**—Partridge v. Clarke (1793) 5 T. R. 194, 101 Eng. Reprint, 109 (married woman). See also Bidgood v. Davis (1826) 6 Barn. & C. 84,

108 Eng. Reprint, 384, 9 Dowl. & R. 153, 5 L. J. K. B. 64 (public officer).

But it seems that the privilege accorded to a diplomatic or consular representative of a foreign nation is not personal, and cannot be waived. United States v. Benner (1890) Baldw. 234, Fed. Cas. No. 14,568; Valarino v. Thompson (1853) 7 N. Y. 576. Thus, in United States v. Benner (Fed.) supra, the defendant was indicted for the arrest and imprisonment of the secretary of the Danish legation. The court said: "The privileges of a foreign minister are not personal, nor is their violation punished as an injury to himself; the immunity from arrest is the privilege of the sovereign who sends him, the injury is done to him, in the person of his representative."

The general law of all nations, as well as the municipal laws of each, exempt ministers from all jurisdiction or control over their persons, so long as their representative character is recognized by the government which sends or receives them; if they exercise the functions of ministers, or retain that character, their exemptions attach to their office, whether they claim them or not. There is no principle of national law, or any word in an act of Congress, which justifies the arrest of a minister who waives the privileges of the diplomatic character." So, in Valarino v. Thompson (N. Y.) supra, the action was in assumpsit for money had and received. A verdict and judgment having been obtained in favor of the plaintiff, the defendant removed the cause to the superior court, assigning as error the fact that prior to and at the time of the commencement of the action against him, he was consul of the Republic of Ecuador, and so privileged from arrest and suit. The court held that the privilege was not a personal one, that the defendant did not waive it by answering to the merits, and that it was no objection that the plea was set up for the first time in an appellate court.

## II. What constitutes waiver.

### a. Failure to claim or plead privilege.

An exemption from civil arrest is

waived by submitting to the arrest and failing to assert the exemption. Thus, in *Hess v. Morgan* (1802) 3 Johns. Cas. (N. Y.) 84, an action for assault and battery and false imprisonment against a justice of the peace, for the issuance, in a former action, of an execution against the body of the plaintiff on which he was imprisoned, the evidence showed that the judgment in the former action was recovered before the justice, who asked the plaintiff if execution should issue; that the reply of the plaintiff was that he did not care how soon, and that he refused to state whether he was a freeholder or had a family. It was held that his refusal to claim exemption amounted to an acquiescence or submission to the process, and constituted a waiver of his exemption.

A like view was taken in *Gillespie v. Fogarty* (1840) 3 N. B. 162, wherein it appeared that the defendant was arrested while returning from court where he had attended as a witness. The court held that, since he was distinctly informed at the time of his seizure that he was privileged from arrest, his reply that it was just as well to arrest him, as it would save expense and he might as well meet the demand at once, constituted a waiver of his privilege.

So, in *Cable v. Cooper* (1818) 15 Johns. (N. Y.) 152, it was held that where a defendant taken in execution is discharged from imprisonment under the act for the relief of debtors with respect to the imprisonment of their persons, and is afterwards sued on the original judgment, he must plead his exemption if he intends to avail himself of it, and his omission to do so is a waiver.

Similarly, the privilege of a state senator from arrest while on his way to attend a session of the legislature was held in *Chase v. Fish* (1839) 16 Me. 132, to have been waived by submitting with but slight protest to arrest.

In like manner, in *Geyer v. Irwin* (1790) 4 Dall. (Pa.) 107, 1 L. ed. 762, it was held that while a member of the general assembly is privileged from

arrest during his attendance on the session, the privilege thus granted must be claimed at a proper time and manner, and is waived by a failure to urge it "as an objection to the trial of the cause."

In *Smith v. Jones* (1834) 76 Me. 138, 49 Am. Rep. 598, it appeared that the plaintiff, while returning home from another city where he had been attending court, was arrested and confined in prison until he was finally discharged on the ground that he was privileged from arrest. While the main issue involved was the propriety of bringing an action to recover damages for the plaintiff's detention, the court nevertheless said: "All the authorities affirm that the privilege may be waived. Therefore, the arrest cannot be void; is only voidable. The arrest remains valid until avoided. And the witness can avoid the arrest only by applying to the court for a discharge. He waives the privilege unless he applies for a discharge."

Likewise, in *Cooke v. Gibbs* (1807) 3 Mass. 193, it was held that the exemption of the defendant from arrest, in an action of debt on a judgment on which he had been previously committed to jail, and had been discharged on taking the poor prisoner's oath, was waived by neglecting to plead it.

The right of a voter to exemption from arrest on election day was, in *Woods v. Davis* (1857) 34 N. H. 328, held to be waived. It appeared that he was arrested and detained on election day by a tax collector for nonpayment of his taxes, and that he said nothing to the collector about his right to vote, made no objection on the ground of his privilege as a voter, and made no claim of exemption from arrest on that account. But in *Swift v. Chamberlain* (1820) 3 Conn. 537, the court held that an elector who, after election, retired to a house in the neighborhood while the proper officers were counting the votes, was still attending to the business of the election and was privileged from arrest, and that mere silence on his part at the time of his arrest was no waiver of his privilege.

*b. Delay in claiming privilege.*

A claim of exemption from civil arrest must be interposed in the proceeding at the first opportunity, or it is waived. Thus, it cannot be made for the first time after judgment. *Wood v. Kinsman* (1833) 5 Vt. 588. In that case it appeared that the plaintiff was exempt from arrest by reason of the fact that he had taken advantage of the Poor Debtors' Law. The court held that by negligently delaying and suffering judgment to be taken against him, and not appearing to object to the execution issuing against his body, and, in addition, returning from another state and surrendering himself to the officer in discharge of his bail, he waived his privilege so that he could not later set it up in an action of trespass by him to recover for his illegal arrest and imprisonment.

So, a plea of privilege made for the first time on appeal comes too late. *Wilson v. Nettleton* (1850) 12 Ill. 61, wherein the court held that a plea of privilege, by an attorney, that he was arrested on a civil writ issued in justice's court, while attending court as a suitor, was waived, where it was interposed for the first time in the circuit court on appeal.

While five days' delay has been held not to be a waiver (*Desuian v. Zefcak* (1899) 22 Pa. Co. Ct. 71), in the same jurisdiction, it has been held that an application to set aside the writ and process because the defendant, at the time of its issuance and service, was a suitor in another case pending, would not be allowed, where it appeared that the application was made after several days' delay, and after the defendant had obtained a rule to show cause why he should not be discharged on common bail (*Green v. Bonaffon* (1838) 2 Miles (Pa.) 219).

In *Farmer v. Robbins* (1872) 47 How. Pr. (N. Y.) 415, the defendant was arrested while on his way home from attending a cause in another county. The court held that, since the defendant failed to claim his personal privilege to the sheriff, and failed to demand his exemption from the county judge who issued the order, but, on the contrary, acquiesced in the arrest

by his silence in respect to his personal privilege, and, in addition to that, entered into the usual undertaking, and then waited some twenty-two days before serving the motion papers for an order discharging the arrest, he was guilty of laches and would be deemed to have waived his personal privilege.

In *Gottschall v. Reinhart* (1890) 9 Pa. Co. Ct. 415, it appeared that a freeholder, three years after he was arrested in an action for slander, made an application to quash the writ on the ground that he was a freeholder and, under the law, exempt from arrest. The court held that the writ would not be quashed, since he was too late in filing the application.

*c. General appearance or pleading to merits.*

In *Barcklow v. Hutchinson* (1867) 32 N. J. L. 195, it appeared that a resident freeholder, privileged as such from civil arrest, was arrested on suspicion of attempting to leave the jurisdiction and defraud his creditors. The court held that it was his privilege to claim the immunity, but that he waived all irregularities by filing a written plea which admitted that he was a freeholder and owed the debt, but which was defective because it failed to state that he was a resident of the county.

On the same principle, it was held in *Randall v. Crandall* (1844) 6 Hill (N. Y.) 342, that the filing of a plea in bar by a person exempt from arrest admitted for all purposes that the defendant was properly in court, and thereby waived his right to object that the warrant on which the action was commenced was served upon him while he was attending court as a suitor in another case.

*d. Giving bail.*

According to the view of the majority of the courts which have passed on the point, a person privileged from civil arrest does not waive his privilege by appearing in the action and giving bail. *Larned v. Griffin* (1882) 12 Fed. 590; *Dickinson v. Farwell* (1902) 71 N. H. 213, 51 Atl. 624; *Farmer v. Robbins* (1872) 47 How. Pr.



(N. Y.) 415; *Mackay v. Lewis* (1876) 7 Hun (N. Y.) 88; *United States v. Edme* (1822) 9 Serg. & R. (Pa.) 147; *Dobson v. Fitzpatrick* (1875) 2 W. N. C. (Pa.) 186; *Desuian v. Zefcak* (1899) 22 Pa. Co. Ct. 77; *Washburn v. Phelps* (1852) 24 Vt. 506.

Thus, in *Mackay v. Lewis* (1876) 7 Hun (N. Y.) 83, it was held that a witness attending the trial of an action to which he is a party is privileged from arrest and waives no rights by giving bail. See also *Farmer v. Robbins* (1872) 47 How. Pr. (N. Y.) 415.

Likewise, in *Dickinson v. Farwell* (1902) 71 N. H. 213, 51 Atl. 624, it appeared that the defendant, a resident of New York, while a witness before a referee in another action pending in the superior court of New Hampshire, was arrested a few minutes after he had left the witness stand, and before he had been discharged from testifying in that action. He furnished bond without objection, but on the day to which the writ was returnable he appeared specially and moved for a discharge from arrest on the ground that he was exempt from arrest and process. The court held that he was privileged and that the giving of the bail was not a waiver of his privilege, saying: "The giving of bail by a witness arrested in a civil action while entitled to the privilege is not, of itself, sufficient to constitute a waiver of the privilege. An arrest under such circumstances is illegal. The witness by giving bail acknowledges the fact of the arrest, but not its validity. He elects to be in the nominal custody of persons of his own selection, rather than in the actual custody of the sheriff or jailer, while the arrest continues in force. To protect the administration of justice, it is oftentimes necessary that he shall be released from actual custody as soon as possible. There was evidently such necessity in this case. The release can usually be effected more conveniently, expeditiously, and surely by giving bail than by either of the other methods provided by law."

So, in *Larned v. Griffin* (1882) 12 Fed. 590, it was held that where the

defendant was arrested while in attendance before a commissioner taking a deposition, the fact that he submitted to the arrest, made application for bail, and entered into bond for his release, did not constitute a waiver of his privilege against arrest.

Similarly, in *United States v. Edme* (1822) 9 Serg. & R. (Pa.) 147, it appeared that the defendant was arrested on a writ issuing from the United States district court, while he was returning from his attendance on a magistrate before whom he had made a deposition as a witness in a pending case. The court held that he was privileged from arrest, saying that the giving of a bail bond was so far from waiving the privilege that the court, in granting a discharge, would order it to be delivered up to be canceled.

So, in *Washburn v. Phelps* (1852) 24 Vt. 506, wherein a person was arrested while attending court as a witness, in violation of his privilege, and required to give bail to effect his release, the court said: "The courts have often shown themselves somewhat astute in devising grounds upon which to presume a waiver of the privilege from arrest, by giving bail, or in some other mode. But it is not esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest."

In *Dobson v. Fitzpatrick* (1875) 2 W. N. C. (Pa.) 186, it was held that the act of a freeholder in appearing and moving to reduce the bail constituted no waiver of his privilege from arrest.

So, in *Desuian v. Zefcak* (1899) 22 Pa. Co. Ct. 77, where the plaintiff sued out a writ of *habeas corpus* in slander, against a freeholder who was privileged from arrest, the court held that the giving of bail by the freeholder was no waiver of his right to abate the writ on the ground that he was privileged.

*Bidgood v. Davis* (1826) 6 Barn. & C. 84, 108 Eng. Reprint, 384, 9 Dowl. & R. 158, 5 L. J. K. B. 64, while not expressly so holding, seemingly implies that the execution of a bail bond is not a waiver of privilege. In that

case it appeared that the warden of the Tower, though insisting on his privilege from arrest, was arrested and confined in jail. He still claimed his privilege, but afterwards executed a bail bond to regain his liberty. While the court refused to order the bail bond to be delivered up and canceled, it nevertheless allowed him to sue out his writ of privilege.

There seem, however, to be a few cases of contrary tendency from the same jurisdictions. Thus, in *Petrie v. Fitzgerald* (1864) 1 Daly (N. Y.) 401, it appeared that the defendant was summoned to attend court to be informally examined by the opposing counsel on certain matters pending in another action; and after examination, but before he had a reasonable time to leave the city hall, he was arrested, and later released on bail. The court held that while he was privileged from arrest at the time of seizure, yet this privilege was personal, and was waived by his acts in giving bail and giving notice of justification of his sureties. So, in *Stewart v. Howard* (1858) 15 Barb. (N. Y.) 26, wherein the defendant was placed under arrest while attending court as a witness in another cause, it was held that giving bail without objection, giving notice by his attorney of a retainer in the cause, and demanding a copy of the complaint amounted to a waiver of his privilege from arrest. And in *Fletcher v. Baxter* (1827) 2 Aik. (Vt.) 224, wherein it appeared a person was arrested while attending court as a witness, the court held that where he not only gave bail, but suffered a judgment to pass against him in the original suit without claiming his privilege, the privilege was waived.

In some jurisdictions it has been held that one privileged from civil arrest waives his privilege by submitting to arrest and giving bail. *Brown v. Getchell* (1814) 11 Mass. 11; *White v. Marshall* (1902) 23 Ohio C. C. 376; *Lipton v. Harris* (1824) Peck (Tenn.) 414. Thus, in *White v. Marshall* (1902) 23 Ohio C. C. 376, *supra*, it appeared that the defendant was brought into the state of Ohio by extradition proceedings for the trial of a

crime which he had committed there. While awaiting hearing on this charge, a civil action was commenced against him, growing out of the same transaction for which he was arrested and indicted. The defendant claimed that the court had no jurisdiction to try the second action, and that he was privileged from arrest by reason of the fact that he was brought into the state under extradition proceedings for trial in another case. The court held that by filing motions for bail, which raised an issue of fact not only as to his rights to bail, but as to the existence of a complete defense to the action before he claimed exemption, he waived the privilege, saying: "It may be admitted that if extradition process should be used for the purpose of bringing the party into another state, with the intention of there serving him in a civil action, that the court might under such state of facts relieve the party from his appearance, not because the defendant himself could claim the same if he had voluntarily entered his appearance in the action, but because of the imposition upon the court and upon the state that brought the prisoner within its borders to answer for a crime therein committed. The good faith required in such cases is that the defendant shall be prosecuted for a crime he has committed, and not brought into the state for mere personal motives, and for the purpose of a civil action. . . . The defendant entered his appearance by his answer to the petition in the civil action, and by the motions he filed to quash the writ upon which he was arrested, and, having appeared by way of tendering issues to obtain his release from the arrest, he cannot thereafter avail himself of his privilege, but has waived it."

So, in *Brown v. Getchell* (Mass.) *supra*, it was held that while a party attending court is privileged from arrest, yet where he voluntarily submits to the custody of the arresting officer, and gives bail to effect his release, he thereby waives his privilege.

In *Tipton v. Harris* (Tenn.) *supra*, it was held that where a witness privileged from arrest is arrested, and does

not insist on his privilege, but gives a bond for the prison limits, this amounts to a sufficient waiver of his privilege.

*c. False representation as to status.*

In *Partridge v. Clarke* (1793) 5 T. R. 194, 101 Eng. Reprint, 109, it was held that the defendant would not be discharged from arrest on common bail on the ground that she was a married woman, where it appeared that at the

time she procured the credit she was masquerading as a single woman, and specifically denied that she was married. And see the reported case (*KALLOCK v. ELWARD*, ante, 750), wherein it is held that a married woman who holds herself out to the world as a single woman thereby waives the exemption from arrest granted to married women, and is estopped to set up her coverture as privilege against arrest.  
W. T. McC.

J. COLLISON, Appt.,

v.

DAVID CURTNER, in His Own Right and as Admr., etc., of Woodrow Curtner, Deceased.

*Arkansas Supreme Court — December 3, 1919.*

(— Ark. —, 216 S. W. 1059.)

**Landlord and tenant — construction of lease — duty to make repairs.**

1. A provision in a lease of a cotton gin that lessor shall furnish all fuel and supplies, "all repairs and new parts of machinery, and other similar things necessary for the successful operation of the plant" makes him responsible for the making of the repairs, not simply for furnishing the material, and therefore liable for injury through nonrepair, to one rightfully on the premises.

[See note on this question beginning on page 765.]

**Contract — construction — parties preparing.**

2. One preparing an instrument is responsible for the language employed, which will be given its plain and ordinary meaning.

[See 6 R. C. L. 854.]

**Appeal — evidence — failure to object.**

3. Testimony admitted without objection cannot be the subject of complaint on appeal.

[See 2 R. C. L. 77.]

**Evidence — permission to enter boiler room in cotton gin.**

4. Upon the question of liability for injury to one who had gone into the boiler room of a cotton gin to ascertain if his cotton was ready, evidence is admissible that persons going to the gin on business were permitted to enter that room.

**— condition of boiler.**

5. Upon the question of liability for injury to a customer in the boiler room of a cotton gin by the blowing of a plug out of the boiler, evidence is admissible of witness's examination of the condition of the boiler soon after the accident, and the conditions which were found.

[See 10 R. C. L. 943.]

**— lapse of time between accident and examination — effect.**

6. The lapse of fifteen days between an injury by the blowing of a plug out of a boiler and an examination of the boiler by witness does not render his testimony as to the condition of the boiler inadmissible in the absence of anything to show a change in the condition.

[See 10 R. C. L. 943.]

**APPEAL** by defendant from a judgment of the Circuit Court for White County (Jackson, J.) in favor of plaintiff in consolidated actions brought to recover damages for personal injuries to himself, and for injury to and death of his son, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Brundidge & Neelly and Cul. L. Pearce, for appellant:

Ledgerwood, to whom defendant had leased the property, was an independent contractor, for whose acts or whose failure to perform certain duties in the operation of the gin defendant was not responsible.

St. Louis, I. M. & S. R. Co. v. Gillihan, 77 Ark. 553, 92 S. W. 793; St. Louis, I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800; St. Louis, A. & T. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9; Martin v. St. Louis, I. M. & S. R. Co. 55 Ark. 510, 19 S. W. 814; Marion Shoe Co. v. Eppley, 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220; Weilbacher v. J. W. Putt Co. 123 Md. 249, 91 Atl. 343, Ann. Cas. 1916C, 115; Morning v. Cramp, 170 Fed. 365; Bodwell v. Weber, 98 Neb. 664, 154 N. W. 229, Ann. Cas. 1918C, 624.

It was error to permit the plaintiff to prove by witness Donohue the condition of the boiler some fifteen days after the accident.

Pekin Stave Co. v. Ramey, 108 Ark. 489, 168 S. W. 156; St. Louis, I. M. & S. R. Co. v. Steed, 105 Ark. 205, 151 S. W. 259; Prescott & N. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865; St. Louis Southwestern R. Co. v. Plumlee, 78 Ark. 148, 95 S. W. 442; Ft. Smith Light & Traction Co. v. Soard, 79 Ark. 393, 96 S. W. 121; St. Louis, I. M. & S. R. Co. v. Walker, 89 Ark. 556, 117 S. W. 534; Bodcaw Lumber Co. v. Ford, 82 Ark. 561, 102 S. W. 896; Little Rock & Ft. S. R. Co. v. Eubanks, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808, 13 Am. Neg. Cas. 200.

Testimony relative to the custom of customers of the gin going into the engine room to get a drink of water was incompetent.

St. Louis, I. M. & S. R. Co. v. Wirbel, 108 Ark. 440, 158 S. W. 118.

Messrs. Pace, Seawall, & Davis, for appellee:

Defendant was liable for the injuries to plaintiff and his son.

24 Cyc. 1128; 29 Cyc. 477; 18 Am. & Eng. Enc. Law, 2d ed. 241; Clay v. El Dorado Hotel Co. 121 Ark. 253, 180 S. W. 977; General Fire Extinguisher

Co. v. Beal-Doyle Dry Goods Co. 110 Ark. 49, 160 S. W. 889, Ann. Cas. 1915D, 791.

Mr. G. G. McKay also for appellee.

Wood, J., delivered the opinion of the court:

On the 3d of October, 1918, David Curtner, accompanied by his son, Woodrow Curtner, five years of age, drove a load of cotton to the gin of J. Collison, at Bald Knob, Arkansas. While waiting to have the cotton ginned, Curtner and his son went into the boiler room of the gin, and while there a plug at the bottom of the boiler was blown out, and Curtner and his son were scalded. The son died from the injuries received, and David Curtner instituted a separate action in his own right, and as administrator of the estate of his son instituted another action against the appellant, to recover damages for the injury and death of the son.

The grounds of negligence set forth in the complaints are that Collison negligently and carelessly permitted the boiler to become and remain insecure and unsafe, in that the plug used by him to stop the blowpipe at the bottom of the boiler was too large for the opening, and when screwed into the opening only a few threads would catch; that the threads in the opening of the boiler were worn, some of them being entirely gone, making the plug insecure in the opening; that the plug blew out, and permitted the steam and hot water to escape and burn the plaintiff below, appellee here, rendering him a cripple for life; that Collison, at the time of and before the happening of the accident, knew of, or in the exercise of ordinary care could have known, of the defective condition of the boiler, and that such condition was wholly unknown to the appellee. The appellee then set forth minutely the nature of the injuries received. The appel-

lee alleged that he had suffered, and that he will continue to suffer for the remainder of his life, great pain of body and anguish of mind as a result of the injuries; that on account of his own personal injuries he had been damaged in the sum of \$30,000, for which he asked judgment.

In the case of the appellee as administrator of the estate of his son, he alleged the same grounds of negligence, and set up that his son was injured by reason thereof, and suffered great agony, and finally died as the result of the negligence alleged. He averred that the services of his minor son were worth to him the sum of \$5,000, and that he should recover for the benefit of the estate in the sum of \$15,000. He therefore prayed for judgment in the sum of \$20,000.

In his answer the defendant, appellant here, denied all the material allegations of the complaint, and set up as an affirmative defense that the gin where the accident happened had been rented by the appellant to one N. B. Ledgerwood, who at the time was in the exclusive possession, control, management, and operation of the same; that, if the appellee and his son were injured, their injuries were caused by the appellee's going into the boiler room and taking his son, without the invitation or permission of the appellant; that appellee knew, or should have known, that it was a dangerous place, and was a trespasser, and was therefore guilty of contributory negligence. The allegations of the answer in the case of the appellee as administrator of the estate of his son were substantially the same. In that case the appellant charged that the appellee was guilty of contributory negligence in taking his son into a dangerous place and allowing him to remain there.

The causes were consolidated for the trial.

Appellant first contends that at the time of the accident the gin was being operated by one N. B. Ledgerwood, under a lease from appellant

which exempted him from liability in damages for the injuries of which the appellee complains. The lease was dated August 1, 1918, and was between J. Collison, the lessor, and N. B. Ledgerwood, the lessee, and recites in part as follows: "For and in consideration of the payment of rentals hereinafter reserved, and the covenants herein, the lessor hereby grants, lets, and leases unto the lessee, his executor, administrator, and assigns, for a period of one (1) year from the date hereof, the following property: All the property, personal and real, now used and known as the 'Collison gin plant,' including the realty upon which it is located, in the town of Bald Knob, Arkansas, and the use and the employment of all machinery, fixtures, implements, utensils, supplies on hand, and all other things which now constitute or are a part of the said gin plant, or located upon the premises and which are considered a part of the said gin plant. . . . It being agreed that the lessor shall furnish all wood, coal, and other fuel, oil, belting, and other supplies, all repairs and new parts of machinery and other similar things necessary for the successful operation of the said plant, and shall receive from the lessee the sum of \$4.25 for each and every bale of cotton ginned and turned out at the said plant, and shall also receive all profits and gain from the handling and sale of cottonseed coming from said gin. And the lessee shall pay said amount per bale, and concede all profits and gain from the handling and sale of cottonseed from said plant, and assumes and agrees to be responsible for, and assumes all liabilities for, wages, debts, damages, and otherwise, arising from or growing out of the operation of the said gin plant. And the lessor shall, during the period of said lease, be in no wise connected with the operation or management of the said gin plant, and assumes no liability therefor. But the lessor shall assist the lessee in keeping books, accounts, and do

other records of the business when requested so to do."

The contention of the appellant is that under the above lease Ledgerwood, at the time of the accident, was an independent contractor, and if the explosion was caused through any acts of negligence, such acts were those of Ledgerwood.

The court, at the instance of the appellee, over the objection of the appellant, gave instructions to the effect that under the terms of the lease appellant agreed to furnish all the repairs on the cotton gin; that if the jury found that at the time the alleged lease was executed the boiler plug near the back end was insecurely fastened, and that the threads of the boiler would not catch and hold the plug in position, and that by reason thereof the boiler at said place was unsafe and dangerous, and that appellant knew this or could have known it by the use of ordinary care and reasonable inspection; and that if they found that there was this unsafe and dangerous condition, and that it continued to exist from the date of the alleged lease until the injury, and that appellant negligently failed to repair it, the alleged lease would not constitute a defense, provided that the appellee and his child were lawfully upon the premises at the time and place of the alleged injury, and that the negligence, if any, of the appellant, was the direct and proximate result of the injury as defined in other instructions.

The specific grounds of objection to the above instructions were that they told the jury that the appellant agreed to furnish all the repairs on the cotton gin, when, under the undisputed evidence, the appellant was only to furnish the material for making such repairs as his lessee might find necessary and such as he might make demand for, and further because the undisputed evidence showed that appellant had nothing to do with putting the machinery in condition and repair prior to the operation of the same for the season of 1918.

The instructions and the objections raised to them call for a construction of the alleged lease. A majority of the court have reached the conclusion that the trial court was correct in construing the alleged lease as one which bound the appellant not only to furnish the material for making the repairs, but also to actually make all the repairs that were necessary for

Landlord and tenant—construction of lease—duty to make repairs.

the successful operation of the plant. It occurs to us that this is the correct construction of the contract, when the words, "furnish all repairs," are given their ordinary and obvious meaning. The word "repair," as used in the instrument, is a noun. It means: "Act of repairing; restoration; or state of being restored to a sound or good state after decay, waste, injury, etc., supply of loss, reparation; mending; also an instance or result of such restoration; often in pl., as the repairs to the house are extensive." Webster's New Int. Dict., Funk & Wagnall's New Standard Dict. "Repairs."

One of the definitions of the word "repairs" given by the latter author is: "Condition after use, specially good condition; condition after repairing."

The definition of the verb "furnish," as given by Funk & Wagnall's, is: "To equip or fit out; supply what is necessary or fitting."

As given by Webster is: "To accomplish; insure; to provide for; to provide what is necessary for."

If the appellant had intended that the words should have the meaning which he now insists they have, it would have been easy for the attorney who prepared the instrument under his direction to have so worded it as to convey that meaning, by simply using the exact words to express his meaning which he now contends the words used do express, to wit, "to furnish all materials for making repairs," instead of the words "furnish all repairs," the words actually used. The appellant,

having prepared the instrument, is responsible for the language employed, and, as he relies upon the instrument for his protection, he is not in a position to insist upon a different interpretation of the words than that of their plain and ordinary meaning.

Other portions of the instrument strengthen this construction, and show that the party named as the lessee in the instrument was to have nothing whatever to do, except to pay the rent and keep the gin running or in operation, after all machinery, wood, coal, supplies, repairs, etc., necessary for its successful operation, were furnished or made by the appellant. Such being the meaning of the alleged lease, the issue as to whether or not the negligence averred was that of an independent contractor, and the doctrine applicable thereto, have no place in this case. The court, therefore, ruled correctly in refusing prayers by the appellant for instructions seeking to have that issue submitted to the jury.

The issues of negligence and contributory negligence, under the evidence, were issues of fact for the jury. They were submitted under familiar and correct declarations of law.

Appellant complains here of the ruling of the court in admitting the testimony of certain witnesses, tending to show what the custom was with reference to parties being permitted to enter the boiler room, where the appellee and his son were injured. The abstract of the appellant does not show that any objection was made at the time to the

Appeal—evidence—failure to object.

testimony of these witnesses. Furthermore, if such testimony had been objected to, there was no error prejudicial to appellant in admitting it, for appellee testified without objection, and there was no testimony to the contrary, that he went into the engine or boiler room for the purpose of inquiring ~~whether~~ cotton would be ginned.

Those in charge knew that he and his son were in the boiler room, and no objections were made to their presence there. The testimony as abstracted was competent on the issue as to whether or not the appellee was a trespasser and guilty of contributory negligence, in going in and taking his son into a dangerous place. The testimony tends to prove that persons going to the gin on business were permitted to go into the boiler or engine room; that no steps were taken in any manner to prevent those having business at the gin from going into the engine or boiler room.

Evidence—permission to enter boiler room in cotton gin.

The appellant complains of the ruling of the court in permitting the witness Graham to testify that "he went down to the gin the next morning after the explosion, and that he found where the boiler had a plug in it, and that it had been blown out; that the threads were mighty bad on the boiler, where the plug is supposed to set in; it was eaten out considerable; that the threads on the boiler had an appearance of being freshly done, but were worn slick; that Mr. Collison spoke to him about the matter," etc.

The abstract of appellant does not show that any objection was made to the introduction of this testimony, and, even if it had been objected to, the testimony was competent, for the reason that it tended to show the real condition that the boiler was in at the time the accident occurred.

—condition of boiler.

The appellant also urges here that the court erred in permitting witness P. J. Donahue to testify as to the condition that the boiler was in some fifteen days after the accident; but the appellant, neither in his brief nor in his abstract, set out any testimony of the witness which shows that the boiler was in any different condition at the time witness saw the same than it was at the time the injury occurred. The testimony of this witness, as abstract-

ed, shows that he testified as an expert, and in answer to hypothetical questions propounded to him he gave his opinion concerning the causes that must have brought about the worn condition of the threads in the hole of the boiler from which the plug was blown, as assumed in the question propounded to the witness.

In the testimony, as abstracted, it does not appear that any objection was urged at the trial, either to the question or to the answer. But again we say that, even if objection had been offered to the testimony in the form in which it appears in appellant's abstract, we would have to hold that the testimony was com-

petent, and that it did not in any manner contravene the doctrine announced by us in Prescott & N. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865, St. Louis Southwestern R. Co. v. Plumlee, 78 Ark. 148, 95 S. W. 442, and other cases more recent of the same purport, to the effect that testimony is incompetent, after an accident has occurred, tending to show that the defect causing the accident and injury was removed, altered, or changed by the master, for the purpose of showing negligence.

There is no error in the record, and the judgment is therefore affirmed.

Petition for rehearing denied, January 12, 1920.

## ANNOTATION.

**Breach of lessor's covenant to repair as ground of liability for damages for personal injuries to tenant, or one in privity with latter.**

### I. In general, 765.

#### a. Majority rule:

1. In general, 766.
2. Application to wife, or other member of tenant's family, 767.
3. Application to guest, customer, etc., 769.
4. As affected by nature of the agreement to repair, 770.

#### b. Minority rule, 772.

### II. Rationale of majority and minority doctrines:

- a. Action ex delicto, 774.
- b. Action ex contractu; measure of recovery:
  1. In general, 779.

#### I. In general.

This note is not intended to cover the question of the liability of the landlord, whether he has covenanted to repair or not, for injuries to third persons while using that part of the leased premises intended for public use. In this connection, however, attention is called to *Lowell v. Spaulding* (1849) 4 Cash. (Mass.) 277, 50 Am. Dec. 775, holding that where there is an agreement by a landlord to keep the leased premises in repair, he is

### II. b—continued.

2. As to whether personal injuries are within the contemplation of the parties, 779.

- a. As affected by contributory negligence of the lessee or the injured person, 781.
- d. Duty of lessee to repair dangerous defects, 782.

### III. Where possession of the property is reserved by the lessor:

- a. In general, 783.
- b. Necessity of notice to lessor of defects, 785.

liable to a town for damages which it is compelled to pay by reason of an injury to a third person due to the bad condition of a cellarway, constructed in the sidewalk in front of the leased premises.

The question here raised is as to whether or not a contract by the landlord to repair the leased premises creates a relation between the parties out of which there arises the legal duty to repair, the failure to perform which will support an action ex delicto or



ex contractu to recover damages for personal injuries due to such negligence.

In considering the cases passing upon this specific question, they are to be interpreted with reference to certain distinguishing facts. As, for example: (1) Where the lease is of property for a private use or purpose, without any reservation of a right of possession in the landlord; (2) where the lease is of property to be put to some public use; (3) where there is a reservation by the lessor of the possession of the property for the purpose of making repairs and the grant to the lessee, in effect, is of the mere right or license to make a certain use of the property reserved. In treating the cases accordingly as they fall within one of the three divisions mentioned, at least some of the confusion existing among the authorities on the point will be obviated.

#### *a. Majority rule.*

##### *1. In general.*

Where the right of possession and enjoyment of the leased premises passes to the lessee, the cases are practically agreed that, in the absence of concealment or fraud by the landlord as to some defect in the premises, known to him and unknown to the tenant, the rule of caveat emptor applies, and the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein. This doctrine is in harmony with the common-law rule that a lease is a conveyance of an estate or an interest in real property, or a transfer of the right to the possession and enjoyment of real property for a specified period of time, or at will. In other words, it is a demise of real property for a limited period of time. So far as concerns the condition of the premises, the relation created by a lease is substantially similar to that created by a deed or a contract for the sale of real property with the right of possession. By the great weight of authority, the fact that the lessor covenants to repair the premises does not affect this rule, so far as concerns the lessor's liability

for personal injuries to the lessee or those in privity with him, due to defects in the premises leased for a private purpose, the possession of which has passed to the lessee, although the existence of the defect is attributable to the failure of the lessor to repair according to his covenant. Thus, in the following cases, the liability of a landlord who had covenanted to repair was denied:

**Alabama.** — *Anderson v. Robinson* (1918) 122 Ala. 615, 47 L.R.A. (N.S.) 330, 62 So. 512, Ann. Cas. 1915D, 820; *Hart v. Coleman* (1915) 192 Ala. 447, 68 So. 315. (But see this case *infra*, wherein a recovery is permitted in an action ex contractu.)

**California.** — *Grazer v. Flanagan* (1918) 35 Cal. App. 724, 170 Pac. 1046.

**Illinois.** — *Cromwell v. Allen* (1909) 151 Ill. App. 404.

**Indiana.** — *Hanson v. Cruse* (1900) 155 Ind. 176, 57 N. E. 904.

**Kansas.** — *Murrell v. Crawford* (1918) 102 Kan. 118, 169 Pac. 561.

**Kentucky.** — *Dice v. Zweigart* (1914) 161 Ky. 646, L.R.A. 1916F, 1155, 171 S. W. 195.

**Maine.** — *Shackford v. Coffin* (1901) 95 Me. 69, 49 Atl. 57.

**Maryland.** — *Thompson v. Clemens* (1903) 96 Md. 196, 60 L.R.A. 530, 53 Atl. 919; *Pinkerton v. Slocomb* (1916) 126 Md. 665, 95 Atl. 965.

**Massachusetts.** — *Tuttle v. George H. Gilbert Mfg. Co.* (1897) 145 Mass. 169, 13 N. E. 465; *Miles v. Janvrin* (1907) 106 Mass. 431, 13 L.R.A. (N.S.) 378, 124 Am. St. Rep. 575, 82 N. E. 708; *Rolfe v. Tufts* (1914) 216 Mass. 563, 104 N. E. 341, 5 N. C. C. A. 291; *Mills v. Swanton* (1916) 222 Mass. 557, 111 N. E. 384; *Lane v. Raynes* (1916) 223 Mass. 514, 112 N. E. 152; *Conahan v. Fisher* (1919) 233 Mass. 234, 124 N. E. 13.

**Missouri.** — *Korach v. Loeffel* (1912) 168 Mo. App. 414, 151 S. W. 790; *Dailey v. Vogl* (1915) 187 Mo. App. 261, 173 S. W. 707; *Murphy v. Dee* (1915) 190 Mo. App. 83, 175 S. W. 287; *McBride v. Gurney* (1916) — Mo. App. —, 185 S. W. 735; *Roman v. King* (1918) — Mo. App. —, 202 S. W. 590.

**New Hampshire.** — *Dustin v. Curtis* (1907) 74 N. H. 266, 11 L.R.A. (N.S.)

504, 67 Atl. 290, 13 Ann. Cas. 169; *Petroski v. Mulvanity* (1916) 78 N. H. 252, 99 Atl. 88.

**New Jersey.** — *Clyne v. Helmes* (1898) 61 N. J. L. 358, 39 Atl. 767, 4 Am. Neg. Rep. 180.

**New York.**—*Flynn v. Hatton* (1872) 43 How. Pr. 333; *Kabus v. Frost* (1884) 18 Jones & S. 72; *Spellman v. Bannigan* (1893) 86 Hun. 174; *Sanders v. Smith* (1899) 5 Misc. 1, 25 N. Y. Supp. 125; *Miller v. Rinaldo* (1897) 21 Misc. 470, 47 N. Y. Supp. 636; *Schiak v. Fleischhauer* (1898) 28 App. Div. 210, 49 N. Y. Supp. 992; *Wynne v. Haight* (1898) 27 App. Div. 7, 50 N. Y. Supp. 187; *Van Tassel v. Read* (1899) 86 App. Div. 529, 55 N. Y. Supp. 562, 5 Am. Neg. Rep. 428; *Folson v. Parker* (1900) 31 Misc. 848, 64 N. Y. Supp. 269; *Frank v. Mandel* (1902) 76 App. Div. 413, 78 N. Y. Supp. 855; *Stein v. Van Dusen* (1904) 98 App. Div. 358, 87 N. Y. Supp. 716; *Kushes v. Ginsberg* (1904) 99 App. Div. 417, 91 N. Y. Supp. 216, affirmed in (1907) 182 N. Y. 630, 81 N. E. 168; *Sherlock v. Rushmore* (1904) 99 App. Div. 598, 91 N. Y. Supp. 152; *Boden v. Scheltz* (1905) 101 App. Div. 1, 94 N. Y. Supp. 487; *Schiff v. Pottlitzer* (1906) 51 Misc. 611, 101 N. Y. Supp. 249; *Goetchius v. Gale* (1907) 57 Misc. 192, 108 N. Y. Supp. 1079; *Cuilhe v. Ackerman* (1908) 58 Misc. 538, 109 N. Y. Supp. 714; *De Negre v. Christman* (1912) 77 Misc. 147, 136 N. Y. Supp. 364; *Marston v. Frisbie* (1915) 168 App. Div. 646, 154 N. Y. Supp. 367; *Hopman v. Reinhardt* (1917) 164 N. Y. Supp. 676; *Silverman v. Isaac* (1918) 188 App. Div. 542, 170 N. Y. Supp. 290.

**Ohio.**—*Burdick v. Cheadle* (1875) 26 Ohio St. 393, 20 Am. Rep. 767; *Moulliet v. Anderson* (1908) 29 Ohio C. C. 128.

**Rhode Island.** — *Davis v. Smith* (1904) 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 38 Atl. 630, 3 Ann. Cas. 832.

**Utah.**—*Reams v. Taylor* (1906) 31 Utah, 288, 8 L.R.A.(N.S.) 436, 120 Am. St. Rep. 980, 87 Pac. 1089, 11 Ann. Cas. 51.

**Wisconsin.** — *McGinn v. French* (1900) 107 Wis. 54, 82 N. W. 724.

**England.** — *Tredway v. Machin* (1904) 91 L. T. N. S. 310, 20 Times L. R. 724, 53 Week Rep. 136; *Dobson v. Horeley* [1915] 1 K. B. 634, 84 L. J. K. B. N. S. 399, 112 L. T. N. S. 101, 31 Times L. R. 12; *M'Ilwaine v. Stewart* [1914] S. C. 984, 51 Scot L. R. 831.

**Canada.**—*Brown v. Toronto General Hospital* (1898) 22 Ont. Rep. 599.

On this point, in *Cromwell v. Allen* (1909) 151 Ill. App. 404, the court said: "In case a landlord fails to make repairs, in violation of his covenant, the tenant may (1) abandon the premises if they became untenable by reason of want of repair; (2) he may make the repairs himself and deduct the cost from the rent; (3) he may occupy the premises without repair, and recoup his damages in an action for rent; (4) he may sue for damages for breach of the covenant to repair, and the damage recoverable in this last instance is usually the difference between the value of the premises in repair and out of repair."

In *Lane v. Raynes* (1916) 223 Mass. 514, 112 N. E. 152, the court said that it is not enough to show that the landlord failed to comply with his agreement to make repairs, even after notice, but the tenant must also show that the landlord actually made the repairs, and was negligent in making them, thus causing the injury complained of.

In *Dailey v. Vogl* (1915) 187 Mo. App. 261, 178 S. W. 707, it is held that a landlord is not liable in an action, either *ex contractu* or *ex delicto*, for personal injuries to a tenant or a person in privity with the tenant, based upon a breach by him of his agreement to repair.

In *Murrell v. Crawford* (1918) 102 Kan. 118, 169 Pac. 561, it is held that the landlord is not liable for personal injury to his tenant, caused by her falling through the floor of a defective porch on the leased premises, although he had agreed to repair the porch and put it in good, safe and tenantable condition.

3. *Application to wife, or other member of tenant's family.*

The general rule that a landlord is not liable to compensate a tenant for

his damage for personal injuries, due to the defective condition of the leased premises the landlord was under covenant to repair, also applies to the wife of the tenant, and she cannot recover of the landlord for personal injuries which she suffers by reason of the defective condition of the premises. *Pinkerton v. Slocomb* (1916) 126 Md. 665, 95 Atl. 965; *Rolfe v. Tufts* (1914) 216 Mass. 563, 104 N. E. 341, 5 N. C. C. A. 291; *McBride v. Gurney* (1916) — Mo. App. —, 185 S. W. 735; *Wynne v. Haight* (1898) 27 App. Div. 7, 50 N. Y. Supp. 187; *Van Tassel v. Read* (1899) 36 App. Div. 529, 55 N. Y. Supp. 502, 5 Am. Neg. Rep. 428; *Stelz v. Van Dusen* (1904) 93 App. Div. 358, 87 N. Y. Supp. 716; *Kushes v. Ginsberg* (1904) 99 App. Div. 417, 91 N. Y. Supp. 216, affirmed in (1907) 188 N. Y. 630, 81 N. E. 1168.

In *McGinn v. French* (1900) 107 Wis. 54, 82 N. W. 724, it is held that the wife of a tenant cannot maintain an action *ex contractu* for personal injuries due to the defective condition of the leased premises, based upon a contract with the tenant to repair.

In *McBride v. Gurney* (1916) — Mo. App. —, 185 S. W. 735, it is held that the wife of a tenant cannot maintain against the landlord a tort action to recover for personal injuries due to the defective condition of the premises, where the action is based upon a violation of the landlord's agreement to repair.

In *Clyne v. Helmes*, (1898) 61 N. J. L. 358, 39 Atl. 767, 4 Am. Neg. Rep. 180, it was held that even if it be assumed that the tenant might hold the landlord for damages for personal injuries caused by the defective condition of the demised premises, which the landlord has failed to repair according to his agreement, nevertheless the wife of the tenant cannot maintain an action based upon such agreement, to recover compensation for injuries to her, due to the defective condition of the premises. The court said that there was no privity of contract between the landlord and the members of the tenant's family.

The rule also applies to other members of the tenant's family (*Silverman*

*v. Isaac* (1918) 183 App. Div. 542, 170 N. Y. Supp. 290; *Davis v. Smith* (1904) 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 8 Ann. Cas. 832; also, to a child of the lessee (*Folsom v. Parker* (1900) 81 Misc. 848, 64 N. Y. Supp. 263; *Miller v. Rinaldo* (1897) 21 Misc. 470, 47 N. Y. Supp. 686; *Flynn v. Hatton* (1872) 43 How. Pr. (N. Y.) 333; *Petroski v. Mulvanity* (1916) 78 N. H. 252, 99 Atl. 88).

In *Brady v. Klein* (1903) 133 Mich. 422, 62 L.R.A. 909, 108 Am. St. Rep. 455, 95 N. W. 557, 2 Ann. Cas. 464, 17 Am. Neg. Rep. 351, it is held that no one, aside from the tenant, at least, has any right to maintain an action against the landlord to recover damages for personal injuries received, where the action is based upon a covenant to repair. In this case the action was in behalf of a child of the tenant, and it was held not maintainable.

In *Dice v. Zweigart* (1914) 161 Ky. 646, L.R.A. 1916F, 1155, 171 S. W. 195, the landlord was held not liable for the death of a child of a tenant, caused by falling into an uncovered cistern upon the leased premises, which, however, was generally kept covered by a plank upon which a heavy stone was placed, the landlord, however, having agreed to make this covering safer by installing a pump. The court, in reaching its conclusion, said that the case presented was simply one of the landlord's promise to repair the cistern, and of his failure to do so. "The only question to be considered, therefore, is whether or not the landlord, under these circumstances, is liable in damages for personal injuries received by a member of his tenant's family. The child in this case was not on the premises by invitation of the landlord. He was there by virtue of the relation which he sustained as a member of the tenant's family. If there be any liability, therefore, it grows out of that relation, and if the landlord be not liable to the tenant under the same circumstances, he is not liable to a member of the tenant's family. Ordinarily, of course, the landlord is not under a duty to use ordinary care to furnish a tenant reasonably safe premises in which to live. The tenant

takes the premises as he finds them. As to him, the doctrine of caveat emptor applies. Here the dangerous condition was known to the tenant. The law imposed no duty on the landlord to repair the premises, and no liability for personal injury growing out of the defective condition of the premises. It is difficult to perceive upon what theory a mere agreement to repair could impose a liability not imposed by law. Of course, cases may arise where a legal duty arises from a contractual relation, and for a breach thereof an action of tort will lie. But such a case is altogether different from a duty entirely dependent upon a contract in which it is assumed."

Upon this point in *Mehr v. McNab* (1894) 24 Ont. Rep. 653, the court said, *arguendo*: "Even if the lessor was the one who had to do the repairs, and the accident had happened to the lessee himself, he could not sustain an action against the lessor for damages of the character of the damages claimed here. The plaintiff is a daughter of the lessee, who is her next friend, by whom she sues in this action; she was a member of his family and living with the lessee at the time of the accident, and I do not see how she can be considered a 'stranger,' as was contended."

*Ryall v. Kidwell* [1913] 3 K. B. (Eng.) 123, 29 Times L. R. 499, 82 L. J. K. B. N. S. 877, 108 L. T. N. S. 922, 77 J. P. 345, 57 Sol. Jo. 518, 11 L. G. R. 655, Ann. Cas. 1915B, 163, denies a recovery for injuries suffered by a daughter of the tenant. It is to be noted that the English cases are based upon a statute which in express terms imposes upon the landlord the duty of keeping the leased premises in repair, and reserves to him a sufficient possession of the leased premises for the purpose of making such repairs. This statutory liability of the landlord, however, only includes the tenant, and the court, regarding it as a change in the general rule, strictly applies it and holds that it does not apply even to the tenant's family. The cases are, therefore, no support to the rule asserted in *Merchants' Cotton Press &*  
8 A.L.R.—49.

*Storage Co. v. Miller* (1915) 135 Tenn. 187, L.R.A.1916F, 1137, 186 S. W. 87.

### 3. Application to guest, customer, etc.

The general rule also applies to guests of the tenant (*Frank v. Mandel* (1902) 76 App. Div. 413, 78 N. Y. Supp. 855), and to a member of a lodge although the lodge is the tenant (*Dustin v. Curtis* (1907) 74 N. H. 266, 11 L.R.A. (N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169); it also applies to a customer or patron of the tenant (*Burdick v. Cheadle* (1875) 26 Ohio St. 393, 20 Am. Rep. 767).

In *Frank v. Mandel* (N. Y.) *supra*, the court said: "The plaintiff, as a lodger, visitor, or member of the tenant's family, has no better claim than a tenant would have. The covenant of the landlord to repair does not inure to the benefit of a stranger, sustaining injuries because of its breach. . . . 'The fact that a landlord leases premises with a condition that he may re-enter for the purpose of making repairs does not enlarge his responsibility as to third persons, or burden him with the duty, as to them, of observing any greater degree of care than would be required were he in possession.'"

In *Dustin v. Curtis* (1907) 74 N. H. 266, 11 L.R.A. (N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169, it appeared that a member of a lodge was injured by falling plaster while attending a lodge meeting. The owner of the building had leased it to this lodge, and had agreed to repair the same. Under these circumstances he was held not liable to the injured person in an action for tort to recover for personal injuries.

In *Burdick v. Cheadle* (1875) 26 Ohio St. 393, 20 Am. Rep. 767, it is held that the landlord is not liable to a third person for injuries received through the defective condition of the fixtures attached to a store building which he had leased, and which he had agreed to keep in repair. The court said that "whatever may be the rights and duties respectively of landlord and tenant, as between themselves, the latter cannot, by the terms of the lease, be

discharged from the duty to his guests, and in a greater degree to his customers, of caring for their safety. And while such persons may reasonably expect the exercise of care for their safety from the person who invites them, they have no right to expect like care from his landlord, with whom they are not in privity."

In *Sherlock v. Rushmore* (1904) 99 App. Div. 598, 91 N. Y. Supp. 152, the servant of the lessee was injured through the defective condition of the leased premises. Although the landlord had contracted to keep the same in repair, he was held not liable to the servant for breach of the agreement.

In *Glidden v. Goodfellow* (1913) 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428, it is held that the rule in that state, holding the landlord liable for injuries to a third person caused by defects in the leased premises which the landlord has contracted to keep in repair, also applies to a contract by the landlord to properly heat the premises, and where he negligently fails to perform, the contract he is liable to a servant of the tenant, who suffers injury in consequence thereof.

*4. As affected by nature of the agreement to repair.*

Up to the present time the cases apparently have given but little consideration to the question as to the effect of the form or character of the agreement by the lessor, that is, as to whether or not it is merely a simple agreement to repair, or whether it is of such a character as to amount to a reservation by the lessor of the possession of the leased premises for the purpose of making repairs.

In *Miles v. Janvrin* (1907) 196 Mass. 431, 13 L.R.A.(N.S.) 378, 124 Am. St. Rep. 575, 82 N. E. 708, the court said that in respect to what is within the contemplation of the parties, there is no difference between a contract by the landlord to keep the premises of his tenant in repair, generally, during the term of the lease, and a contract by a landlord to make specific repairs on the premises of the tenant, although there is a difference between a landlord's agreeing to maintain premises in

a safe condition for the tenant's use, and a contract to keep his tenant's premises in repair.

If a part of a landlord's undertaking is an agreement in terms to make repairs, and the circumstances are such as to leave the meaning doubtful, it is to be determined from all the language used, and from all the circumstances, whether his meaning is to make repairs merely as a mechanic might contract to make them, only upon notice that they are needed, or whether his undertaking is intended to be broader, including a duty to observe for himself and provide for the safety of the premises. *Ibid*.

In the foregoing case, the court said that the landlord is liable where the arrangement with the tenant is that during the term of the lease the landlord is to be responsible for the safety of a flight of steps which leads from the highway to the demised house; hence, the direct way of carrying that arrangement into effect is to give the tenant nothing but the right to use the steps. Thus would the steps be in the control of the landlord, and, being in his control with an agreement to keep them in repair, the case would come within the rule applicable where a portion of the premises is reserved by the landlord.

In *Thompson v. Clemens* (1903) 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919, the rule is thus stated: "The mere failure of the landlord to make repairs which he had agreed to make cannot make him responsible to the tenant, or a member of his family, for damages for personal injuries sustained by reason of the defective condition of the premises, whether such suit be in assumpsit or in case; but in order to recover such damages there must be shown some clear act of negligence or misfeasance on the part of the landlord, beyond the mere breach of contract. . . . If the appellee knew of the defect in this porch that caused the injuries, and had reason to believe that it was likely to produce such result if not repaired, then it was negligence on his part, in view of his agreement to repair, not to do so promptly, or at least to take some steps

to protect the tenant and his family from injury."

In some jurisdictions, at least, the agreement to repair may be in such form, or the circumstances may be such, as to impose upon the lessor the duty of using ordinary care to inform himself as to the condition of the leased premises, at the time of the letting. And he may be held liable for personal injuries due to the defective condition of the premises when possession was given to the lessee, if the defect is attributable to his negligence in failing to repair and put in safe condition the premises, and the defect was known to him, or ought to have been known to him.

For example, in *Moore v. Steljes* (1895) 69 Fed. 518, it appeared that the lessor warranted the sufficiency and safety of the premises. This warranty was held to render him liable for injury to a child of the tenant due to a falling ceiling. It is pointed out that the action is not based upon the warranty, but this serves to fix the negligence of the lessor.

In *Robinson v. Heil* (1916) 128 Md. 645, 98 Atl. 195, it appeared that the injury complained of was due to defective stairs, and that these stairs were in a defective and dangerous condition at the time the property was leased, and that the landlord knew of this condition, his attention having been called to it by a prior tenant. The lessor agreed to repair the stairs, and told the tenant to use them until he could make the repairs. Under these circumstances it was held that the landlord was liable if he negligently failed to make the repairs, and that this was a question of fact for the jury.

In *Sontag v. O'Hare* (1897) 73 Ill. App. 432, the landlord was held liable for personal injuries resulting in the death of the wife of a tenant, due to the giving away of a railing to a stairway, where he had contracted to repair the premises. The lease was for the first-floor flat of a building, and the defective stairs led to this flat. The question was given considerable consideration by the court, which held that if the landlord agreed to make

these repairs at the time of leasing the premises, and neglected to do so, he would be liable for the death of the wife of the tenant due to the unrepai red condition of the stairs.

In *Jacobson v. Ramey* (1915) 200 Ill. App. 96, the landlord was held liable for personal injuries to the wife of the tenant under these circumstances: The landlord had leased to the tenant a certain building, the lower floor to be used as a store building and the upper floor for flats or apartments, the landlord agreeing so to remodel the building that the upper floor would be suitable for apartments. There was an outside stairway leading to these apartments, and it was alleged that the stairway was defective, rotten, and unsafe, and that it was because of this defective condition of the stairway that the plaintiff fell through it and was injured.

And see, upon this point, *Stillwell v. South Louisville Land Co.* (1900) 22 Ky. L. Rep. 785, 52 L.R.A. 325, 58 S. W. 696, holding that, where a landlord undertakes and promises to repair a cistern on the leased premises at the time and before he rented the same, he assumes the responsibility for injury to a child of the tenant, caused by such dangerous place.

*Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, L.R.A.1916F, 1101, 149 N. W. 489, it was held that a landlord having actual or constructive knowledge of a structural defect in a building, when he lets it to one without knowledge, actual or constructive, of the defect, is liable to an invitee of the tenant, also without such knowledge, for personal injuries due to such defect, the landlord having covenanted to keep the property in repair.

In *Mesher v. Osborne* (1913) 75 Wash. 439, 48 L.R.A.(N.S.) 917, 134 Pac. 1092, it is held that where the owner, upon leasing premises, covenants to repair the same, he is chargeable with knowledge of their condition and of any defect therein, rendering the premises unsafe, if a reasonable inspection by him would have disclosed the defect, and it was unknown to the tenant, and hence he is liable to the tenant for personal in-

juries received by reason of such defect. The court said that "where the landlord agrees to put the premises in repair, and keep them in repair during the tenancy, it would seem that there ought to arise a positive duty on his part, before relinquishing possession to the tenant, to make reasonable inspection of the premises for concealed defects, unknown to and undiscoverable by a reasonable inspection on the tenant's part, which might render the premises dangerous to the tenant, his family, servants, and guests. In such a case, as it seems to us, the landlord ought to be held to a more careful inspection than the tenant, because the duty to repair is upon the landlord, and his presumed knowledge of his own premises would make a discovery by him of concealed defects and dangers more probable. Such a rule would seem to be only a just application of the maxim to which we have adverted, that there is always a positive duty to exercise reasonable care to so use one's own property as not to injure another." This case is not necessarily a departure from the majority rule already stated, although it is, perhaps, a departure from the general rule that the doctrine of caveat emptor applies to leases of land, as to defects unknown to either of the parties.

In *Lowe v. O'Brien* (1914) 77 Wash. 677, 138 Pac. 295, it is held that the lessor of a building set upon piles driven in the water of an inlet is liable for personal injuries to a tenant due to the building falling into the water, the lessor having contracted to keep the premises in repair, and his attention having been called to these insecure pilings, and he having agreed to fix them soon, and having failed to do so. The court said that the question of contributory negligence by the plaintiff by remaining in the premises more than a reasonable time after the lessor made this promise was one of fact for the jury. This case may, perhaps, be regarded as a departure, in part at least, from the majority rule stated, although the peculiar facts and the nature of the defects are such as to present strong grounds for making

an exception to the majority rule. In this case the injury to the tenant was not due to an accident, but was directly due to the failure of the landlord to repair. It is more in line with the cases holding that the landlord is liable for injury to the property of the tenant where he breaches his contract to repair, where the injury to the property is the proximate result of the breach, as, for instance, the failure to repair a roof, permitting water to leak through onto the tenant's goods. In a majority of the cases considered, the injury was due to a combination of circumstances more or less accidental in their nature.

*b. Minority rule.*

In a few jurisdictions the majority rule referred to is denied, either in whole or in part. In Minnesota, it is apparently denied as a whole. The first Minnesota case denying the rule is *Barron v. Liedloff* (1905) 95 Minn. 474, 104 N. W. 289. In that case the sublessee of two rooms of the leased premises, who had been given the right to use a porch attached to another part of the premises and adjoining these rooms, was held to be entitled to recover from the original lessor for personal injuries received by reason of defective flooring in the porch, due to the lessor's failure to repair. The court said that where the landlord agreed to repair and keep in repair the premises, his right to enter and have possession of the premises for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of the owner and occupant. And if his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises, who are not guilty of contributory negligence on their part. It is clear that in this state the action in behalf of the injured person sounds in tort, and not in contract. This is emphasized in *Keegan v. G. Heileman Brewing Co.* (1915) 129 Minn. 496, L.R.A.1916F, 1149, 152 N. W. 877, where the court said: "If the lease did require the

defendant to keep the premises in repair, then the instruction was correct, for the rule is that, where the lessor by his lease contracts to keep the leased premises in repair, and he negligently fails to do so, he is liable to the lessee and the members of the lessee's family occupying the same, for personal injuries received from a defective condition of the premises. The action is for the wrong committed by the landlord by his negligence in failing to perform an act assumed by him, which he should know would protect them from injury if performed, or expose them to injury if not performed. The contract creates an implied legal duty on the part of the landlord toward those who are rightfully upon the premises, and a negligent violation thereof vests in them a right of action in tort against him for injuries sustained." This is also the doctrine of *Good v. Von Hemert* (1911) 114 Minn. 393, 131 N. W. 466; *Glidden v. Goodfellow* (1913) 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428; *Glidden v. Second Ave. Invest. Co.* (1914) 125 Minn. 471, L.R.A.1915C, 190, 147 N. W. 658, 6 N. C. C. A. 743; *Keiper v. Anderson* (1917) 138 Minn. 392, L.R.A.1918C, 299, 165 N. W. 237.

In *Keegan v. G. Heileman Brewing Co.* (Minn.) supra, this rule was applied in holding a landlord liable for injuries to an employee, due to his failure to heat the leased premises according to his contract. And in *Keiper v. Anderson* (Minn.) supra, the rule also was applied to a contract by the lessor to keep the premises heated, and, where the tenant's death resulted from a breach of this contract, it was held that an action could be maintained under the Death Statute to recover damages for the death. The court said that the right to maintain the action was not affected by the fact that it was based upon a breach of the contract; that as a matter of law the liability of the landlord was based upon his negligence, growing out of his failure to perform the contract. Compare, upon this point, with *Davis v. Smith* (1904) 26 R. L. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832, which denies the

right to recover for the death of a tenant, based upon the landlord's breach of covenant to repair, where the right of action depends upon the Death Statute.

In *Kurtz v. Pauly* (1914) 158 Wis. 534, 149 N. W. 143, the statement is made that the landlord is not liable for personal injuries to a tenant, due to defects in the premises, in the absence of an agreement upon his part to repair. And in *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, L.R.A.1916F, 1101, 149 N. W. 489, the court, while recognizing a conflict of authority upon the point, says that it thinks the weight of authority and the better reason support the doctrine that a landlord who agrees to keep leased premises in repair is liable to an invitee of the tenant in an action of tort for breach of his duty to repair. "Where a landlord agrees to keep leased premises in repair, his right to enter and have possession of the premises for such purpose is necessarily implied, and his duties and liabilities in that regard are in some respects similar to those of an owner and occupant. His negligent failure to repair, therefore, is a breach of duty, and anyone lawfully upon the premises by invitation of the tenant, who suffers injury in consequence of the landlord's breach of duty, has an action for negligence against the landlord.

. . . While the decisions of this court are not directly in point, they inferentially, if not directly, support the doctrine that, where a landlord agrees to keep premises leased in repair, he is liable to an invitee of a tenant for breach of duty in that regard."

In many cases like *Park v. Penn* (1916) 203 Ill. App. 188, where there was in fact no covenant to repair, the general rule of the landlord's immunity from liability is so stated as to suggest that it would not apply had the lease contained a covenant to repair. But this is pure obiter.

In *Collins v. Fillingham* (1908) 129 Mo. App. 340, 108 S. W. 616, a landlord, who had contracted to repair the premises, was held liable for injury to the child of a tenant, due to a rotten balustrade of the porch, which the



tenant had frequently requested the landlord to repair. This is also the holding in *Graff v. Lemp Brewing Co.* (1908) 130 Mo. App. 625, 109 S. W. 1044. These cases are apparently in conflict with *McBride v. Gurney* (1916) — Mo. App. —, 185 S. W. 735, which denies the liability of the landlord for personal injuries to the lessee or his family, due to the defective condition of the leased premises, although the lessor was under contract to repair the premises. The question, however, is apparently settled in Missouri by the decision of the supreme court of that state in *Kohnle v. Paxton* (1916) 268 Mo. 463; 188 S. W. 155, wherein the question is given very able consideration. It is held that the landlord cannot be held liable for damages for personal injuries to the tenant, due to defects in the premises, although he had contracted to keep the premises in repair.

There are, in addition to the cases previously cited in this subdivision, the following cases in which a recovery was sustained against the lessor for personal injuries due to the defective condition of the leased premises, which he was under covenant to repair:

**United States.** — *Moore v. Steljes* (1895) 69 Fed. 518 (supra, I. a, 4).

**Arkansas.** — *COLLISON v. CURTNER* (reported herewith) ante, 760.

**Illinois.** — *Sontag v. O'Hare* (1897) 73 Ill. App. 432; *Jacobson v. Ramey* (1915) 200 Ill. App. 96 (supra, I. a, 4).

**Maryland.** — *Robinson v. Heil* (1916) 128 Md. 645, 98 Atl. 195 (supra, I. a, 4).

**Oregon.** — *Ashmun v. Nichols* (1919) — Or. —, 180 Pac. 510 (infra, II. a).

**Tennessee.** — *Merchants' Cotton Press & Storage Co. v. Miller* (1915) 135 Tenn. 187, L.R.A.1916F, 1187, 186 S. W. 87 (infra, II. a).

**Washington.** — *Mesher v. Osborne* (1913) 75 Wash. 439, 48 L.R.A.(N.S.) 917, 134 Pac. 1092 (supra, I. a, 4); *Lowe v. O'Brien* (1914) 77 Wash. 677, 138 Pac. 295 (supra, I. a, 4).

**Wisconsin.** — *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, L.R.A.1916F, 1101, 149 N. W. 489 (supra, I. a, 4).

## II. Rationale of majority and minority doctrines.

### a. Action ex delicto.

The important question is, To what extent, if at all, is the relation of landlord and tenant enlarged by the inclusion in the lease of an agreement by the lessor to repair the leased premises? Does the lessor stand toward the lessee, in regard to an agreement of this character, in any different relation than would a third person, as, for example, a carpenter, contractor, plumber, etc.?

Where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done; and the mere violation of a contract, where there is no general duty, is not the basis of such an action. *Dustin v. Curtis* (1907) 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169, supra.

It has been said that actionable negligence is the neglect of a legal duty. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. *Ibid.*

In this connection, the general rule applies to a breach by the lessor of his covenant to repair, that if the act constituting the breach is one of misfeasance, either on the ground that it is prohibited by statute or is violative of some duty imposed by law because of the relation between the parties created by the contract, independent of the duties expressly imposed by the contract itself, the lessee may maintain an action either in tort or for breach of a contract; but where the act complained of is merely one of nonfeasance, or merely negligence, his

only remedy is for breach of contract. See cases cited in following section.

A comparatively late English appeal case holds that the power of control necessary to cast a duty to repair on the landlord, for breach of which damages may be recovered for personal injuries caused thereby, requires something more than a right or liability to repair the premises. It implies the power and right to admit people upon and exclude them from the premises. Ordinarily, this right and power belong to the tenant, and not to the landlord, and the latter's contract to repair cannot alone transfer such right to him. *Cavalier v. Pope* [1906] A. C. (Eng.) 428, 75 L. J. K. B. N. S. 609, 95 L. T. N. S. 65, 22 Times L. R. 648, 5 Ann. Cas. 713.

Generally speaking, a tort is based upon the breach of a legal duty, or the negligent performance of the same. Properly, it cannot be based upon the mere breach of a contract, although the contract may create some relation between the parties out of which there may arise some legal duty, and a failure to perform, or the negligent performance of this duty, may constitute a tort. For example, the relation of master and servant is created by contract. Regardless of the terms of the contract, the law imposes upon the master certain legal duties with regard to the safety of the servant, such as furnishing the servant a safe place in which to work. The negligent breach of this duty constitutes a tort. This duty arises out of the relation between the parties, and is not created by the contract itself.

On this point in *Schick v. Fleishhauer* (1898) 26 App. Div. 210, 49 N. Y. Supp. 962, *supra*, the court said: "The tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition, and to stay there at the risk of receiving injury on account of the defects in the premises, and then recover as for negligence for any injury that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for

negligence. In such a case the liability of one of the parties to the other because of negligence is based either on the breach of some duty which is implied as the result of entering into contractual relation, or from the improper manner of doing some act which the contract provided for. But the mere violation of a contract, where there is no general duty, is not the subject of an action of tort."

In *Thompson v. Clemens* (1903) 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919, the wife of a tenant was denied the right to recover damages for personal injuries received by falling through a defective porch which the landlord had agreed to repair, it not appearing, however, that either the tenant or the landlord knew of the particular defect which was the cause of the injury complained of. The court said: "We have no doubt, however, that no action, either in contract or in tort, by a tenant or one of his family, against a landlord, to recover damages for personal injuries, should be sustained merely because the latter has been guilty of a breach of contract to make necessary repairs in the premises demised. It is not denied by counsel for the appellant that such damages are too remote, and not in contemplation of the parties, to be recovered in an action *ex contractu*, and to permit a recovery for such damages, based on the contract, simply because it is in form an action of tort, would be making a distinction that could not be justified by reason or authority. There must be something more than a mere failure on the part of the landlord to make the repairs he has agreed to make."

Upon the same point in *Tuttle v. George H. Gilbert Mfg. Co.* (1887) 145 Mass. 169, 13 N. E. 465, the court said: "The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure. As a general rule,

there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract. We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor, and had unreasonably delayed in performing its contract. We are not aware of any authority for maintaining such an action."

Upon this point, in *Kohnle v. Paxton* (1916) 268 Mo. 463, 188 S. W. 155, the court says: "This doctrine necessitates the holding that the landlord, in failing to repair, has been guilty of something more than a breach of the contract, viz., negligence. Upon no other theory can a basis be established for an action sounding in tort. To sustain the rule as thus announced it is necessary to determine when the contractual obligation ends and the liability for negligence begins. They cannot be coexistent as to matters within the purview of the contract, which, if not forfeited, continues during the time prescribed and loses none of its force or effectiveness by reason of any act of the landlord. The contract not only defines the time and terms of the rental, but it measures as well the obligations of the parties. Thus complete within itself, it cannot be reasonably said that upon failure to comply with its conditions a right of action authorized by its terms, and within the contemplation of the law, can be supplanted by another not based upon or growing out of the contract, but having its origin purely in a process of reasoning. A breach of the contract to repair, resulting in injuries to the tenant, may arise from the negligence of the landlord, but this is not such technical negligence as will authorize a right of action in tort; this can only exist independently.

of the contract, for injuries not proximately resulting from the breach, and, therefore, not within the contemplation of the parties. Put more plainly, an agreement to repair does not contemplate a destruction of life or an injury to the person which may result accidentally from an omission to fulfil the terms of the agreement."

The distinction between the responsibility of the lessor for a tort based upon negligence, and for a breach of his contract, is pointed out in *Cronwell v. Allen* (1909) 151 Ill. App. 404. Upon this point the court says: "The wrongdoer is answerable for all the injurious consequences of his tortious act, which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contracts the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences, he is not generally held, for that reason, to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts, and were within the contemplation of the parties when the contract was entered into, as likely to result from its nonperformance."

In *Anderson v. Robinson* (1913) 182 Ala. 615, 47 L.R.A.(N.S.) 330, 62 So. 512, Ann. Cas. 1915D, 829, it is held that a landlord is not liable in a tort action for personal injuries due to a breach of his covenant to repair. It has, however, been held in this jurisdiction that a landlord may be held liable in an action *ex contractu* for breach of covenant to repair. See *Hart v. Coleman* (1917) — Ala. —, L.R.A.1918E, 213, 78 So. 201. On a prior appeal of the Hart Case, reported in (1915) 192 Ala. 477, 68 So. 315, it is also held that the landlord is not liable in an action in tort, for personal injuries resulting from defective premises, which the landlord had covenanted to repair.

In some jurisdictions a different

rule obtains. For example, in *Merchants' Cotton Press & Storage Co. v. Miller* (1915) 135 Tenn. 187, L.R.A. 1916F, 1137, 186 S. W. 87, the servant of a compress company was held entitled to recover against the lessor of the building in which the lessee carried on his business, for personal injuries due to a defective door in a passageway. The lessor was under contract to keep the property in repair, and two months prior to the injury had been notified by the lessee of the defective condition of this door, and requested to repair the same. The court concedes that the apparent weight of authority is contrary to its holding, but it erroneously assumes that this is due to the doctrine of a lack of privity between the third person and the lessor. The theory adopted by the court in holding the landlord responsible for injury to a servant of the tenant is thus stated: "The action of the injured employee, for example, in such cases, is not deemed to be on the contract, for the employee is, of course, a stranger to the lessor's obligation to repair or keep repaired. The remedy is considered to be one for the wrong committed by the lessor in his negligent failure to perform a duty voluntarily assumed by him, which he must be held to know would protect the employee of the tenant, as such user of the demised premises, from injury, if his engagement be kept, or expose the servant to injury otherwise. Instead of the duty being law-imposed, it is self-imposed. The fact that the duty is voluntarily taken on should not detract from its scope and effect, or lessen the implication which the law will make. Such a duty, on nonobservance, may constitute the culpable negligence that is the basis for an action sounding in tort. The implication of legal duty and the delictum arise in this way out of the obligation incorporated in the contract, not on the contract. . . . There is no undue hardship on the lessor in such case. He has seen fit to interpose his own agreement to repair, and thereby tended, at least, to cause the lessee to hold back and wait for its execution on his part. He has elected to retain for his own, as pri-

marily resting on him, the duty of care in the particular regard, and should not complain if the law leaves the burden where he placed it, and holds him not exempt."

A case imposing a very similar duty upon the lessor is *COLLISON v. CURTNER* (reported herewith) ante, 760. In this case the lessor of a cotton gin agreed to furnish all repairs, and new parts of machinery, and other similar things necessary for the successful operation of the plant. This agreement was construed to bind the lessor actually to make all repairs that were necessary for the successful operation of this plant. As thus construed, the agreement was held to impose upon him the duty to use ordinary care and inspection at the time of entering into the lease, to determine the condition of the machinery. It was held that if at this time a plug near the back end of the boiler was insecurely fastened, and the threads of the boiler were so worn that they would not hold the plug in position, by reason whereof the boiler was unsafe and dangerous, and these facts the lessor knew, or might have known by the exercise of ordinary care and reasonable inspection, then he would be liable for personal injuries to third persons who entered the boiler room to get a drink of water while they were delivering cotton to the gin, such personal injuries being caused by the boiler exploding, due to this defective plug.

In *Ashmun v. Nichols* (1919) — Or. —, 180 Pac. 510, holding a landlord who had contracted to keep the premises in repair liable to a tenant for personal injuries due to defective steps in the basement of the demised premises, the court said: "In a case like this we think that when a landlord agrees to keep his premises in repair, the law fastens upon him a duty to keep that contract, and if he violates that duty, after notice of the dangerous condition, he ought in principle to be liable for whatever injuries the tenant naturally and necessarily receives from such breach of duty. If the only injury is one directly contemplated in the contract, as the increased value of the use of the premises, the

action of the tenant would be purely upon the contract. But if the negligence of the landlord resulted, necessarily and naturally, in some further injury to his person or property, he may bring an action like the one at bar, and it is of little importance whether it is called technically an action on contract or an action upon the tort, or whether it partakes of a double nature, depending upon both tort and contract."

In *Barron v. Liedloff* (1905) 95 Minn. 474, 104 N. W. 289, the lessor of a two-story brick store and living rooms agreed with the lessee to put the premises in first-class condition, and to care for ordinary repairs; the lessee sublet a part of the second story for living rooms, with the right to use an adjoining porch, which was a part of the building. The sublessee was held entitled to recover from the owner of the property for a personal injury sustained by reason of the breaking of a board in the floor of the porch. In so holding, the court said that the rule that the measure of damages for breach of a covenant by the lessor to keep the leased premises in repair is the difference between the agreed rent and the rental value of the premises without the repairs has no application to an action in tort to recover damages for personal injuries sustained by the negligence of the lessor in making, or in failing to make, repairs that he agreed to make by his lease.

In *Keiper v. Anderson* (1917) 138 Minn. 392, L.R.A.1918C, 299, 165 N. W. 237, it is pointed out that all the cases theretofore presented to the court, in which the lessor was held liable for personal injuries received by another, due to the defective condition of the leased premises which the lessor had contracted to repair, the injury was not to the tenant, but was to some third party not in privity with the lessor, and the action was in tort and not in contract. It is, however, held in this case that where the complaint by the personal representative of the tenant, in an action seeking to recover damages for the wrongful death of the tenant, due to a breach by the lessor of his agreement to heat the leased

premises, alleges negligence on the part of the landlord, a cause of action is stated under the Death Statute.

It matters not the form of words used in reasoning of this character, the fact remains that the actual holding is that, for breach of contract to make the repairs, damages may be recovered for personal injuries received by anyone injured through the unrepaired condition of the premises. This holding ingrafts an exception upon the rule that it is the duty of one party to a contract to mitigate damages due to the breach. It ingrafts an exception upon the generally accepted rule that it is the duty of a tenant, if the landlord has contracted to repair, to make the repairs himself, at least where they are not serious in character, and charge the expense thereof to the landlord. It ingrafts an exception upon the generally accepted rule that for breach of contract the damages recoverable are such as are the proximate result of the breach, and fairly within the contemplation of the parties at the time of making the contract. When this rule is considered with reference to the facts of a particular case,—as, for example, *Merchants' Cotton Press & Storage Co. v. Miller* (1915) 135 Tenn. 187, L.R.A.1916F, 1137, 186 S. W. 87, *supra*,—the difficulties of the position in which courts may be placed by departing from the majority rule are well illustrated. In this case, the door which caused the injury weighed from 800 to 1,000 pounds, was metal lined, and operated by raising after the manner of an ordinary window, weights having been suspended to facilitate its being raised and lowered; these ropes, to which the weights had been attached, had become worn and broken, and the weights detached, so that in order to keep the door up and open a prop or stick was used as a support; by long use the strip that held either side of the door in place in grooves had worn away and become thin; on the day of the accident, at the close of the work hours, in the darkness, the plaintiff and two other laborers went to lower the door; one of these two knocked the prop out before the plaintiff reached the point where he or the

third laborer could take hold and ease the door's descent, its great weight requiring two or three men to lower it in safety; the door fell suddenly to the floor, and its bound carried it out of the insecure grooves, causing it to fall on the plaintiff, resulting in the injuries complained of. It is clear that the defective condition was trivial in character, and might have been repaired at small expense and in a comparatively short time. It is a perversion of the rule of damages for breach of contract to hold that under these circumstances, when the parties entered into the lease, it was contemplated that the landlord would become liable for personal injuries received under such a combination of circumstances. Certainly as to defects of this character it is but just to hold that the duty rests upon the tenant to make the repair, if the landlord fails to do so upon notice.

*b. Action ex contractu; measure of recovery.*

*1. In general.*

The measure of damages for breach of contract to repair the leased premises is the expense of doing the work which the landlord agreed to do, but did not. *Schiff v. Pottlitzer* (1906) 51 Misc. 611, 101 N. Y. Supp. 249.

Upon the question of the measure of recovery in *Dice v. Zweigart* (1914) 161 Ky. 646, L.R.A.1916F, 1155, 171 S. W. 195, the court said: "Where an ordinary contract is violated, the damages are limited to such as are within the reasonable contemplation of the parties. Manifestly, if a third party agreed to repair the cistern, there would be no liability for personal injuries growing out of the failure to repair. Since the duty of the landlord to repair does not grow out of the legal relations existing between him and the tenant, his agreement and failure to repair should subject him to no greater liability than a third party, who has violated his agreement to repair; for such consequences are no more within the contemplation of the parties in the one case than in the other."

In *O'Neil v. Brown* (1914) 158 Ky.

118, 164 S. W. 315, the rule is stated, but not applied, that if the landlord covenants to make repairs he undertakes to perform that which is not a duty imposed by law. The obligation assumed is, therefore, purely contractual, and any action of this character is based not upon negligence, but upon breach of contract. The rule governing such action is that originally announced in the leading case of *Hadley v. Baxendale* (1850) 26 Eng. L. & Eq. Rep. 398, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered arising naturally, i. e., according to the usual course of things, from said breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as the probable result of a breach of it."

*2. As to whether personal injuries are within the contemplation of the parties.*

It is the general rule that in covenanting to repair the leased premises the parties are not presumed to contemplate or intend that, if the premises become defective through the landlord's failure to comply with his covenant, an accidental injury to the tenant, or someone in privity with him, or a third person, shall be considered as the proximate result of the breach, and hence damages due to such an injury are not to be included in assessing the damages for the breach. *Murrell v. Crawford* (1918) 102 Kan. 118, 169 Pac. 561; *Korach v. Loeffel* (1912) 168 Mo. App. 414, 151 S. W. 790; *Dailey v. Vogl* (1915) 187 Mo. App. 261, 173 S. W. 707; *Sanders v. Smith* (1893) 5 Misc. 1, 25 N. Y. Supp. 125; *Schiff v. Pottlitzer* (1906) 51 Misc. 611, 101 N. Y. Supp. 249; *Spellman v. Bannigan* (1885) 36 Hun (N. Y.) 174; *Kabus v. Frost* (1884) 18 Jones & S. (N. Y.) 72; *Flynn v. Hatton* (1872) 43 How. Pr. (N. Y.) 333.

The mere agreement to repair in no way contemplates any destruction of life or injury to the person or prop-

erty of anyone which might accidentally result from an omission to fulfil the agreement, and no warrant exists in principle or authority for the proposition that a landlord, under such a contract, is liable to his tenant as in tort, for wilful refusal or neglect to perform his obligation. *Brown v. Toronto General Hospital* (1893) 23 Ont. Rep. 599.

Personal injuries due to the defective condition of the leased premises, brought about by the failure of the landlord to keep his covenant to repair, are too remote to have been within the contemplation of the parties. *Korach v. Loeffel* (1913) 168 Mo. App. 414, 151 S. W. 790.

In *Hanson v. Cruse* (1900) 155 Ind. 176, 57 N. E. 904, it is held that the landlord is not liable to the tenant for an injury due to exposure to the elements caused by a breach of the agreement to repair the leased premises. In so holding the court said: "But the tenant may contract with the landlord, as well as with another. . . . Under the contract, appellant was entitled to the repairs or to damages for the breach of the contract. Appellees broke their contract, and are liable in damages. But what is the measure? On principle, the landlord who is paid by the tenant to make repairs that he is not otherwise under obligation to make should be held to exactly the same liability that a stranger-contractor would incur. Damages for personal injuries resulting from the mere continuance of obvious defects, such as existed here, and which the tenant has contracted to have repaired, are not recoverable from the contractor. They are deemed to be too remote, and not within the contemplation of the parties at the time the contract was made. The injury is attributable to the tenant's want of care in the use of the property rather than to the contractor's breach."

And in *Schiff v. Pottlitzer* (1906) 51 Misc. 611, 101 N. Y. Supp. 249, it is said that a contract to repair does not contemplate as damages for failure to keep it that any liability for personal injuries shall grow out of the defective condition of the premises, because the

duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the costs in an action for that purpose, or as a counterclaim in an action against him for the rent.

In *Murrell v. Crawford* (1918) 102 Kan. 118, 169 Pac. 561, on this point, the court said: "The landlord's liability is only for the breach of his covenant to repair, and this liability is measured by the difference in the rental value of the leased property unrepaired, from its agreed rental value if the promised repairs had been made. If the repairs would cost but little, the tenant may make them himself, and offset the expense against the rent. In this instance, it cost about \$7 to make the repairs. The rent was \$10 per month, and it was then two months past due and unpaid at the time of the accident. The landlord's failure to comply with his covenant to repair is likewise ground for rescission and termination of the tenancy. But personal injuries are almost uniformly considered by the courts to be too remote to be included in an action for breach of covenant to repair. Loss of life or limb is not a natural and probable consequence which ordinarily and reasonably could be anticipated from a breach of covenant to make repairs on a dwelling house."

However, in *Hart v. Coleman* (1917) — Ala. —, L.R.A.1918E, 218, 78 So. 201, it was held that in an action *ex contractu* for breach of covenant to repair, the tenants might recover damages, including the personal injuries resulting from falling through a defective flooring, to which the tenant had called the landlord's attention, and which the latter had agreed to repair. The court said that it confined the rule to the case in hand, and to the facts presented, which are stated as follows: "The porch of the house occupied by plaintiff was badly in need of repairs and in an unsafe condition, at a place necessary to be traversed by plaintiff in the use of the premises. The landlord, the defendant, was notified of its condition, and saw it himself, and agreed to repair the same. We have

previously herein treated the question of consideration in support of such agreement, which need not be repeated. Reasonable time elapsed, and he failed to comply with his promise, and as a proximate result plaintiff fell through the porch and sustained the injuries. We are aware that it is held in some of the cases that, upon failure of the landlord to repair, the tenant should have done so, and could only recover what it would have cost to have made the necessary repairs." It is to be noted that when this case was before the court on a prior appeal (1915) 192 Ala. 447, 68 So. 315, it was held that the plaintiff could not recover damages on the theory of a tort.

*c. As affected by contributory negligence of the lessee or the injured person.*

The rule has been asserted that if the landlord is under contract to keep the premises in repair, and, after being notified of the need of repairs, he fails to make them, if the property cannot be safely occupied, the tenant can ordinarily abandon it. If with knowledge of such condition he still remains in the property, he, and others having such knowledge, as a general rule will be denied the right to recover on the ground of contributory negligence, even if the landlord is negligent. *Thompson v. Clemens* (1903) 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919.

In *Shackford v. Coffin* (1901) 95 Me. 69, 49 Atl. 57, it appeared that before a tenant moved upon the leased premises the landlord agreed to repair the stairs to the building thereon; knowing that the stairs had not been repaired, the tenant moved upon and accepted the premises; he also placed props under the stairs to strengthen them. In denying the right to recover for personal injuries due to falling through a platform at the top of the stairway, the court said that the tenant had as much knowledge in regard to the defective condition complained of as the landlord "All that was visible or known to the defendant or his agents was visible to the plaintiff. If the landlord had known of a secret defect not discoverable by the tenant, he was bound to disclose it. Notwithstanding plaintiff's agent agreed to repair the

stairs, nothing was done towards it. Plaintiff knew this; yet he moved in and accepted the premises. He placed props under the stairs because of that knowledge. In this state of facts as disclosed by the evidence, defendant is not liable to plaintiff."

A tenant, knowing of the open condition of an outside cellarway which the landlord had agreed to close or cover, by going near the same in the dark, is guilty of contributory negligence and assumes the risk of any injuries due to falling into the cellarway. *Reams v. Taylor* (1906) 31 Utah, 288, 8 L.R.A. (N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089.

But it has been held that where stairs did not look to be unsafe, although their appearance indicated the need of repair, it is not, as a matter of law, contributory negligence for the tenant to continue to use them, the landlord having told the tenant to do so until he could repair them. Under these circumstances, the court said that the question of contributory negligence was one for the jury. *Robinson v. Heil* (1916) 128 Md. 645, 98 Atl. 195.

In *Ashmun v. Nichols* (1919) — Or. —, 180 Pac. 510, *supra*, where the landlord, who had contracted to keep the premises in repair, was held liable to the tenant for personal injuries received by the giving way of stairs leading to the basement, it appeared that the tenant had given notice to the landlord of the dangerous condition of the leased premises, but it was nevertheless held that the use of the premises by the tenant did not constitute contributory negligence. The question as to the duty of the tenant to make the repairs, and thereby avoid any danger of personal injury, was apparently not considered by the court. Upon the question of contributory negligence the court said: "The question of contributory negligence was clearly one for the jury. When plaintiff found the steps were in a dangerous condition she was in the actual occupation of the premises with her family and household goods. She had the choice of remaining until the repairs were made, or attempting to remove to some other



place. To do the latter she would first have to find a place to which she could remove. She had the landlord's general promise to repair. She notified him at once about the dangerous condition of the steps, and he promised to repair them immediately. Under these circumstances, according to her testimony, she remained on the premises, using the steps carefully. We think it was clearly a question for the jury as to whether she was negligent in so doing, and as to whether the defendant was negligent in delaying to repair."

*d. Duty of lessee to repair dangerous defects.*

As an additional ground for denying the liability of the lessor for personal injuries due to the defective condition of the leased premises, it has been held that where the defect renders the premises unsafe, and its repair is not a difficult matter, it is the duty of the tenant to repair or cause it to be repaired at the expense of the landlord.

In *Schick v. Fleischhauer* (1898) 26 App. Div. 210, 49 N. Y. Supp. 962, it is held that the measure of damages for breach of an agreement by the landlord to repair the demised premises is the expense of doing the work which the landlord agreed to do, but did not. The court said that the contract to repair does not contemplate as damages for the failure to keep it that any liability for personal injuries shall grow out of the defective condition of the premises, because the duty of the tenant, if the landlord fails to keep in repair, is to perform the work himself and recover the costs in an action for that purpose.

In *Flynn v. Hatton* (1872) 43 How. Pr. (N. Y.) 343, the court said that a tenant had no right to omit making such repairs as were necessary to make the premises safe and secure for the use of himself and other persons he permitted to use the same, because he had an agreement with the landlord that the latter should make repairs. Such an agreement was characterized as an additional reason why the tenant himself should make the repairs, rather than an excuse for his neglect in not making them. Under this agree-

ment, he had an indemnity against any necessary outlay in making repairs, and his neglect in this regard was, therefore, inexcusable.

This point is also made in *Brown v. Toronto General Hospital* (1893) 23 Ont. Rep. 599. In the trial court, in directing a verdict for the defendant, Rose, J., said: "But the notice and knowledge which the landlord thus had, or the agent of the landlord thus had, could not be higher or greater than that conveyed by the notice, and could not be higher or greater than the knowledge of the persons giving the notice, and therefore could not be higher or greater than the knowledge of the tenant himself. The tenant, therefore, knew of the condition of the steps as well as the landlord, and if landlord knew the steps were dangerous, the tenant, a fortiori, must have known the steps were dangerous. The steps being dangerous, the danger of which the landlord had notice being that they might break down when the tenant should use them, the tenant chose, they being in that condition, to use them, running the risk of their breaking down." In affirming the action of the trial judge upon appeal, the court on the same point said: "In the present case the disrepair existed for over a year, and repeated notice was given to the agent of the hospital [the lessor], but nothing was done either by landlord or tenant. A small outlay would have remedied what was needed, probably not over \$8, which was the monthly rent. But nothing was done, and though the plaintiff had reason to believe the steps to be unsafe he continued to use them, till one day, he broke through, or the framework collapsed, and he was badly hurt. . . . The plaintiff did not believe he would be hurt when going on them, otherwise he would have used the back door; and if he used them, knowing the danger, he contributed to the result by his own incaution, and so should not recover. But if he did not suspect such danger, neither could the landlord; and the damages sustained were not the natural and expected consequences of the failure to repair."

In *Cromwell v. Allen* (1909) 151 Ill.

App. 404, the landlord was held not liable for injury to the tenant due to defects in the premises not shown to have been known to the landlord, although the latter had covenanted to keep the premises in repair. In so holding, the court said: "The ordinary covenant to keep the premises in repair is generally held to mean that the covenantor is to make such repairs on notice, and that he is not in default until so notified, unless the lease shows an intention that he shall take notice from his own observation. This intention will not be implied where the lease does not give him the right to enter and view the premises. The rule is that notice to perform is necessary whenever the fact, on the occurrence of which the right to claim performance depends, lies more peculiarly within the knowledge of the party claiming such right."

In *Hedekin v. Gillespie* (1904) 33 Ind. App. 650, 72 N. E. 143, it appeared that a tenant claimed that the landlord agreed that he would from time to time, as required, make all necessary repairs and keep the leased premises in good repair. The wife of the tenant was injured by falling through a defective walk upon the premises, and it was held that the measure of damages for the breach of the contract was the amount paid for making the repairs. The court said that it was incumbent upon the tenant to make the repairs, upon refusal of the landlord to do so, and look to the landlord for the cost of the same.

In *Reams v. Taylor* (1906) 31 Utah, 288, 8 L.R.A.(N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089, the lessor was held not liable for personal injuries to the tenant, due to his failure to repair an uncovered outside cellarway, the tenant subsequently, while near there in the dark, falling into the cellarway and injuring herself. In so holding, the court said that the plaintiff, as against her landlord, had no right to expose herself to the risk of injury from existing and visible defects in the premises leased by her. It was her duty to repair the defects, and deduct the expense therefor from the rent, or she might, under the lease in this case,

have surrendered the premises. She chose to do neither, and hence cannot recover.

The duty of a tenant in this regard is well stated in *McGinn v. French* (1900) 107 Wis. 54, 82 N. W. 724, wherein the court said: "It is perfectly evident that a few minutes' work with a hammer and nails would have made the steps absolutely safe. If these steps were as unsafe, defective, and dangerous as the plaintiff would have us believe, it was little less than foolhardy for anyone to attempt to use them. If they could be repaired, as they were, at so slight an expense and with so little effort, the continued use without such repair was an assumption of the risk of accident. Knowing these stairs were unsafe, the liability of danger great, and the expense of repairs trifling, it was the plain duty of the tenant to make them, and thus save his family from the threatened danger. . . . It was but a matter of common prudence, and the tenant, knowing the danger of loss or injury to be great, cannot continue the use of the dangerous premises and hide behind a promise to repair."

### III. *Where possession of the property is reserved by the lessor.*

#### a. *In general.*

Without reference to any agreement upon the part of the landlord to keep the leased premises in repair, it is the general rule that where he retains in his possession portions of the leased premises for the common use of himself and the tenant, or for the common use of different tenants, it is his duty to keep such portion of the premises in safe condition, and for the negligent failure to perform this duty he is liable in tort for any injury resulting therefrom to a tenant, or any person lawfully on the premises. This rule, of course, is not affected by the fact that the lease contained an agreement upon the part of the landlord to keep the premises in repair. The cases so holding, however, are sometimes referred to as supporting what may be termed the minority rule, that the landlord who has covenanted to repair is liable, even where the

juries received by reason of such defect. The court said that "where the landlord agrees to put the premises in repair, and keep them in repair during the tenancy, it would seem that there ought to arise a positive duty on his part, before relinquishing possession to the tenant, to make reasonable inspection of the premises for concealed defects, unknown to and undiscoverable by a reasonable inspection on the tenant's part, which might render the premises dangerous to the tenant, his family, servants, and guests. In such a case, as it seems to us, the landlord ought to be held to a more careful inspection than the tenant, because the duty to repair is upon the landlord, and his presumed knowledge of his own premises would make a discovery by him of concealed defects and dangers more probable. Such a rule would seem to be only a just application of the maxim to which we have adverted, that there is always a positive duty to exercise reasonable care to so use one's own property as not to injure another." This case is not necessarily a departure from the majority rule already stated, although it is, perhaps, a departure from the general rule that the doctrine of caveat emptor applies to leases of land, as to defects unknown to either of the parties.

In *Lowe v. O' Brien* (1914) 77 Wash. 677, 138 Pac. 295, it is held that the lessor of a building set upon piles driven in the water of an inlet is liable for personal injuries to a tenant due to the building falling into the water, the lessor having contracted to keep the premises in repair, and his attention having been called to these insecure pilings, and he having agreed to fix them soon, and having failed to do so. The court said that the question of contributory negligence by the plaintiff by remaining in the premises more than a reasonable time after the lessor made this promise was one of fact for the jury. This case may, perhaps, be regarded as a departure, in part at least, from the majority rule stated, although the peculiar facts and the nature of the defects are such as to present strong grounds for making

an exception to the majority rule. In this case the injury to the tenant was not due to an accident, but was directly due to the failure of the landlord to repair. It is more in line with the cases holding that the landlord is liable for injury to the property of the tenant where he breaches his contract to repair, where the injury to the property is the proximate result of the breach, as, for instance, the failure to repair a roof, permitting water to leak through onto the tenant's goods. In a majority of the cases considered, the injury was due to a combination of circumstances more or less accidental in their nature.

#### *b. Minority rule.*

In a few jurisdictions the majority rule referred to is denied, either in whole or in part. In Minnesota, it is apparently denied as a whole. The first Minnesota case denying the rule is *Barron v. Liedloff* (1905) 95 Minn. 474, 104 N. W. 289. In that case the sublessee of two rooms of the leased premises, who had been given the right to use a porch attached to another part of the premises and adjoining these rooms, was held to be entitled to recover from the original lessor for personal injuries received by reason of defective flooring in the porch, due to the lessor's failure to repair. The court said that where the landlord agreed to repair and keep in repair the premises, his right to enter and have possession of the premises for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of the owner and occupant. And if his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises, who are not guilty of contributory negligence on their part. It is clear that in this state the action in behalf of the injured person sounds in tort, and not in contract. This is emphasized in *Keegan v. G. Heileman Brewing Co.* (1915) 129 Minn. 496, L.R.A.1916F, 1149, 152 N. W. 877, where the court said: "If the lease did require the

defendant to keep the premises in repair, then the instruction was correct, for the rule is that, where the lessor by his lease contracts to keep the leased premises in repair, and he negligently fails to do so, he is liable to the lessee and the members of the lessee's family occupying the same, for personal injuries received from a defective condition of the premises. The action is for the wrong committed by the landlord by his negligence in failing to perform an act assumed by him, which he should know would protect them from injury if performed, or expose them to injury if not performed. The contract creates an implied legal duty on the part of the landlord toward those who are rightfully upon the premises, and a negligent violation thereof vests in them a right of action in tort against him for injuries sustained." This is also the doctrine of *Good v. Von Hemert* (1911) 114 Minn. 393, 131 N. W. 466; *Glidden v. Goodfellow* (1913) 124 Minn. 101, L.R.A.1916F, 1073, 144 N. W. 428; *Glidden v. Second Ave. Invest. Co.* (1914) 125 Minn. 471, L.R.A.1915C, 190, 147 N. W. 658, 6 N. C. C. A. 743; *Keiper v. Anderson* (1917) 138 Minn. 392, L.R.A.1918C, 299, 165 N. W. 237.

In *Keegan v. G. Heileman Brewing Co.* (Minn.) supra, this rule was applied in holding a landlord liable for injuries to an employee, due to his failure to heat the leased premises according to his contract. And in *Keiper v. Anderson* (Minn.) supra, the rule also was applied to a contract by the lessor to keep the premises heated, and, where the tenant's death resulted from a breach of this contract, it was held that an action could be maintained under the Death Statute to recover damages for the death. The court said that the right to maintain the action was not affected by the fact that it was based upon a breach of the contract; that as a matter of law the liability of the landlord was based upon his negligence, growing out of his failure to perform the contract. Compare, upon this point, with *Davis v. Smith* (1904) 26 R. L. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832, which denies the

right to recover for the death of a tenant, based upon the landlord's breach of covenant to repair, where the right of action depends upon the Death Statute.

In *Kurtz v. Pauly* (1914) 158 Wis. 534, 149 N. W. 143, the statement is made that the landlord is not liable for personal injuries to a tenant, due to defects in the premises, in the absence of an agreement upon his part to repair. And in *Flood v. Pabat Brewing Co.* (1914) 158 Wis. 626, L.R.A.1916F, 1101, 149 N. W. 489, the court, while recognizing a conflict of authority upon the point, says that it thinks the weight of authority and the better reason support the doctrine that a landlord who agrees to keep leased premises in repair is liable to an invitee of the tenant in an action of tort for breach of his duty to repair. "Where a landlord agrees to keep leased premises in repair, his right to enter and have possession of the premises for such purpose is necessarily implied, and his duties and liabilities in that regard are in some respects similar to those of an owner and occupant. His negligent failure to repair, therefore, is a breach of duty, and anyone lawfully upon the premises by invitation of the tenant, who suffers injury in consequence of the landlord's breach of duty, has an action for negligence against the landlord. . . . While the decisions of this court are not directly in point, they inferentially, if not directly, support the doctrine that, where a landlord agrees to keep premises leased in repair, he is liable to an invitee of a tenant for breach of duty in that regard."

In many cases like *Park v. Penn* (1916) 203 Ill. App. 188, where there was in fact no covenant to repair, the general rule of the landlord's immunity from liability is so stated as to suggest that it would not apply had the lease contained a covenant to repair. But this is pure obiter.

In *Collins v. Fillingham* (1908) 129 Mo. App. 340, 108 S. W. 616, a landlord, who had contracted to repair the premises, was held liable for injury to the child of a tenant, due to a rotten balustrade of the porch, which the

having prepared the instrument, is responsible for the language employed, and, as he relies upon the instrument for his protection, he is not in a position to insist upon a different interpretation of the words than that of their plain and ordinary meaning.

Other portions of the instrument strengthen this construction, and show that the party named as the lessee in the instrument was to have nothing whatever to do, except to pay the rent and keep the gin running or in operation, after all machinery, wood, coal, supplies, repairs, etc., necessary for its successful operation, were furnished or made by the appellant. Such being the meaning of the alleged lease, the issue as to whether or not the negligence averred was that of an independent contractor, and the doctrine applicable thereto, have no place in this case. The court, therefore, ruled correctly in refusing prayers by the appellant for instructions seeking to have that issue submitted to the jury.

The issues of negligence and contributory negligence, under the evidence, were issues of fact for the jury. They were submitted under familiar and correct declarations of law.

Appellant complains here of the ruling of the court in admitting the testimony of certain witnesses, tending to show what the custom was with reference to parties being permitted to enter the boiler room, where the appellee and his son were injured. The abstract of the appellant does not show that any objection was made at the time to the

testimony of these witnesses. Furthermore, if such testimony had been objected to, there was no error prejudicial to appellant in admitting it, for appellee testified without objection, and there was no testimony to the contrary, that he went into the engine or boiler room for the purpose of inquiring when his cotton would be ginned.

Those in charge knew that he and his son were in the boiler room, and no objections were made to their presence there. The testimony as abstracted was competent on the issue as to whether or not the appellee was a trespasser and guilty of contributory negligence, in going in and taking his son into a dangerous place. The testimony tends to prove that persons going to the gin on business were permitted to go into the boiler or engine room; that no steps were taken in any manner to prevent those having business at the gin from going into the engine or boiler room.

The appellant complains of the ruling of the court in permitting the witness Graham to testify that "he went down to the gin the next morning after the explosion, and that he found where the boiler had a plug in it, and that it had been blown out; that the threads were mighty bad on the boiler, where the plug is supposed to set in; it was eaten out considerable; that the threads on the boiler had an appearance of being freshly done, but were worn slick; that Mr. Collison spoke to him about the matter," etc.

The abstract of appellant does not show that any objection was made to the introduction of this testimony, and, even if it had been objected to, the testimony was competent, for the reason that it tended to show the real condition that the boiler was in at the time the accident occurred.

The appellant also urges here that the court erred in permitting witness P. J. Donahue to testify as to the condition that the boiler was in some fifteen days after the accident; but the appellant, neither in his brief nor in his abstract, set out any testimony of the witness which shows that the boiler was in any different condition at the time witness saw the same than it was at the time the injury occurred. The testimony of this witness, as abstract-

Contract—  
construction—  
parties  
preparing.

Evidence—  
permission to  
enter boiler  
room in  
cotton gin.

—condition  
of boiler.

Appeal—evidence—failure  
to object.

ed, shows that he testified as an expert, and in answer to hypothetical questions propounded to him he gave his opinion concerning the causes that must have brought about the worn condition of the threads in the hole of the boiler from which the plug was blown, as assumed in the question propounded to the witness.

In the testimony, as abstracted, it does not appear that any objection was urged at the trial, either to the question or to the answer. But again we say that, even if objection had been offered to the testimony in the form in which it appears in appellant's abstract, we would have to hold that the testimony was com-

petent, and that it did not in any manner contravene the doctrine announced by us in Prescott & N. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865, St. Louis Southwestern R. Co. v. Plumlee, 78 Ark. 148, 95 S. W. 442, and other cases more recent of the same purport, to the effect that testimony is incompetent, after an accident has occurred, tending to show that the defect causing the accident and injury was removed, altered, or changed by the master, for the purpose of showing negligence.

There is no error in the record, and the judgment is therefore affirmed.

Petition for rehearing denied, January 12, 1920.

### ANNOTATION.

**Breach of lessor's covenant to repair as ground of liability for damages for personal injuries to tenant, or one in privity with latter.**

#### I. In general, 765.

##### a. Majority rule:

1. In general, 766.
2. Application to wife, or other member of tenant's family, 767.
3. Application to guest, customer, etc., 769.
4. As affected by nature of the agreement to repair, 770.

##### b. Minority rule, 772.

#### II. Rationale of majority and minority doctrines:

- a. Action ex delicto, 774.
- b. Action ex contractu; measure of recovery:
  1. In general, 779.

##### I. In general.

This note is not intended to cover the question of the liability of the landlord, whether he has covenanted to repair or not, for injuries to third persons while using that part of the leased premises intended for public use. In this connection, however, attention is called to *Lowell v. Spaulding* (1849) 4 Cush. (Mass.) 277, 50 Am. Dec. 775, holding that where there is an agreement by a landlord to keep the leased premises in repair, he is

#### II. b—continued.

2. As to whether personal injuries are within the contemplation of the parties, 779.

- a. As affected by contributory negligence of the lessee or the injured person, 781.
- d. Duty of lessee to repair dangerous defects, 782.

#### III. Where possession of the property is reserved by the lessor:

- a. In general, 783.
- b. Necessity of notice to lessor of defects, 785.

liable to a town for damages which it is compelled to pay by reason of an injury to a third person due to the bad condition of a cellarway, constructed in the sidewalk in front of the leased premises.

The question here raised is as to whether or not a contract by the landlord to repair the leased premises creates a relation between the parties out of which there arises the legal duty to repair, the failure to perform which will support an action ex delicto or

by her when the accident occurred. When considered, however, with the other evidence in the case, it did not tend to prove that ~~—statement as to employment—conclusiveness.~~ fact or justify a finding to that effect. The alleged purpose for which the statement was obtained might fairly be said to relate to the employment by her husband and herself, and it is quite evident it was so understood by her.

Indeed it is not an uncommon thing for a husband and wife to use the plural when speaking of their individual possessions used in common by both, e. g., "our residence," "our servants," "our automobile." Under the circumstances it was a natural thing for her not to have distinguished between the time the chauffeur was employed by her husband and her personally. In any view such statement did not justify submitting the case to the jury, or it in finding that Fraser at the time the plaintiff was injured was her servant.

It has been settled by numerous authorities in this state at least that when it appears, in an action against the owner of an automobile for damages sustained, that the driver was not in his employ nor engaged in his business, a plaintiff cannot recover. *Automobile—liability for act of driver.* Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443, and cases cited; Reilly v. Connable, 214 N. Y. 586, L.R.A.1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444; Farthing v. Strouse, 172 App. Div. 523, 158 N. Y. Supp. 840; Heisenbittel v. Meagher, 162 App. Div. 752, 147 N. Y. Supp. 1087; Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708. The reason underlying this rule is the general one that a party injured by the negligence of another must seek his remedy against the person whose actual negligence caused the injury, and that

such person alone is liable. *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37. The case of master and servant is an exception to the general rule, and the negligence of the latter is imputable to the master where the servant is doing the act which occasions the injury and is at the time acting within the scope of his employment. This exception is based upon the fact that the servant is standing in the master's place and is acting for and representing him, since he must obey his orders. *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052.

But it is strenuously urged by the respondent that the defendant may be held liable, notwithstanding the rule established by the authorities cited, because she was the owner of the car, and in it at the time the accident occurred. This cannot be done unless the rule which makes one person responsible for the torts of another be entirely disregarded. If a change in this respect is to be made, it should be done by legislative enactment, and not by judicial decree.

A question somewhat similar to the one under consideration was recently considered in *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126. There the defendant loaned his automobile to a friend for a ride and was finally persuaded to accompany him. The plaintiff was injured through the negligent manner in which the automobile was driven by the defendant's friend, and brought action against the owner. The plaintiff's contention was essentially the same as that made by respondent in the present case. It was stated by the court as follows: "It is the contention of the plaintiff that, because defendant Miller was present and the machine was being used with his consent at the time of the injury complained of, he is liable; that, an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used."

The court, however, held that since at the time of the accident the automobile was not being driven by defendant, nor subject to his control, he was not liable for the negligent way it was driven, notwithstanding his presence in it.

In principle the present case cannot be distinguished from *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 38 L.R.A. (N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444. There the defendant owned an ambulance for which it hired a horse and driver from a livery stable. The plaintiff was injured through the negligence of the driver, but this court held that, notwithstanding the fact that the ambulance was owned by and at the time was being used for the defendant's purposes, the undisputed evidence that the defendant did not employ or pay the driver, and did not possess the right to discharge him, could not be disregarded, and consequently there was no evidence to sustain a verdict against defendant. In that case as in this the accident was caused by the negligent driving of the servant of another, whom the defendant did not select or control, and whom he could not discharge. Though at the time there was a representative of the defendant in the ambulance, and it

was then being used for its purposes, the court nevertheless held there was no evidence establishing the relation of master and servant between the defendant and driver, and in its absence the owner could not be held liable.

I am of the opinion the complaint should have been dismissed, and that the evidence did not justify a finding that the defendant was responsible for plaintiff's injuries.

The judgment, therefore, should be reversed, and a new trial granted, with costs to abide event.

Hiscock, Ch. J., and Hogan, Pound, and Andrews, JJ., concur. Chase and Crane, JJ., dissent on the ground that defendant was engaged in a joint undertaking with her husband at the time of the accident.

#### NOTE.

The general question whether uncontradicted testimony may be disregarded in civil actions is the subject of the annotation following *KELLY v. JONES*, post, 796. Other cases which like the reported case (*POTTS v. PARDEE*, ante, 785) have taken the view that uncontradicted testimony could not properly be disregarded, are cited in subdivisions IV. a, b.

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DALLAS BOUDEMAN, JR.,

v.

LESTER L. ARNOLD, Plff. in Err.

*Michigan Supreme Court — March 27, 1913.*

(200 Mich. 162, 166 N. W. 985.)

#### Evidence — right to disregard uncontradicted testimony.

1. The court may direct a verdict for either party where the evidence in his favor is uncontradicted either by cross-examination, other testimony, or facts and circumstances, is not in any way improbable or discredited, and but one legitimate inference may be drawn from it.

[See note on this question beginning on page 796.]



**Sale — conditional — effect of taking note as security.**

2. Title to personal property may be retained for security under a contract of sale to another, although a note is taken as evidence of the indebtedness, and the security is not lost by suit upon the note.

[See 24 R. C. L. 503 et seq.]

**Trial — taking case from jury — assertion that testimony is untrue.**

3. A claim by counsel that uncontradicted testimony in a case is not true does not require submission of the case to the jury.

**ERROR to the Circuit Court for Berrien County (Bridgman, J.) to review a judgment in favor of plaintiff in an action brought for the conversion of an engine. *Affirmed.***

The facts are stated in the opinion of the court.

Messrs. O'Hara & O'Hara, for plaintiff in error:

If there was not a reservation of title at the time of the sale of the engine, then, in the absence of any provision to the contrary in the mortgage, defendant became entitled to the engine upon its surrender to him by the mortgagor.

Blackwood Tire & Vulcanizing Co. v. Auto Storage Co. 133 Tenn. 515, L.R.A. 1916E, 254, 182 S. W. 576, Ann. Cas. 1917C, 1168.

Where the facts are not conceded, nor beyond dispute, it is exclusively the province of the jury to ascertain the fact.

Durant v. People, 13 Mich. 356; Molitor v. Robinson, 40 Mich. 200; Woodin v. Durfee, 46 Mich. 424, 9 N. W. 457; Yonkus v. McKay, 186 Mich. 203, 152 N. W. 1031, Ann. Cas. 1917E, 458; Nicholson v. Dyer, 45 Mich. 615, 8 N. W. 515; Wheeler v. Wallace, 53 Mich. 362, 19 N. W. 38; Schulz v. Schulz, 113 Mich. 502, 71 N. W. 854; Payne v. Union Life Guards, 136 Mich. 416, 112 Am. St. Rep. 368, 99 N. W. 376; Wilson v. Royal Neighbors, 139 Mich. 423, 102 N. W. 957; Brand v. Johnrowe, 60 Mich. 210, 26 N. W. 883; Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Kavanagh v. Wilson, 70 N. Y. 177; Koehler v. Adler, 78 N. Y. 291; Wohlfahrt v. Beckert, 92 N. Y. 497, 44 Am. Rep. 406.

Messrs. Gore & Harvey and Dallas Boudeman, for defendant in error:

The case was not one for submission to the jury.

Alexier v. Matzke, 151 Mich. 36, 123 Am. St. Rep. 255, 115 N. W. 251, 14 Ann. Cas. 52; Druse v. Wheeler, 26 Mich. 189; Lange v. Perley, 47 Mich. 352, 11 N. W. 198; Byles v. Golden Twp. 52 Mich. 612, 18 N. W. 383; Fourth Nat. Bank v. Olney, 63 Mich.

58, 29 N. W. 513; Corbett v. Spencer, 63 Mich. 731, 30 N. W. 385; Hunt v. Supreme Council, O. C. F. 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; Gillett v. Knowles, 97 Mich. 77, 56 N. W. 218; Jakoboski v. Grand Rapids & I. R. Co. 106 Mich. 440, 64 N. W. 461; Lange v. Perley, 47 Mich. 352, 11 N. W. 193; Dondero v. Frumveller, 61 Mich. 440, 28 N. W. 712; Horrigan v. Wyman, 90 Mich. 121, 51 N. W. 187; Cook v. Blake, 98 Mich. 389, 57 N. W. 249; Ferris v. Home Life Assur. Co. 118 Mich. 485, 76 N. W. 1041; Wisner v. Davenport, 5 Mich. 501; Grand Trunk R. Co. v. Nichol, 18 Mich. 170; Jenks v. Colwell, 66 Mich. 420, 11 Am. St. Rep. 502, 33 N. W. 528; Peninsular Stove Co. v. Osmun, 73 Mich. 570, 41 N. W. 693; Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121; Nester v. Baraga Twp. 133 Mich. 640, 95 N. W. 722.

There could be no merger of title to the engine owned by the three parties with the title of the boat owned by one of them.

Schellenberg v. Detroit Heating & Lighting Co. 130 Mich. 439, 57 L.R.A. 632, 97 Am. St. Rep. 489, 90 N. W. 47; Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775; Adams v. Lee, 31 Mich. 440; Robertson v. Corsett, 39 Mich. 777; Lansing Iron & Engine Works v. Walker, 91 Mich. 409, 30 Am. St. Rep. 488, 51 N. W. 1061; Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Gill v. DeArmant, 90 Mich. 425, 51 N. W. 527; First Commercial Sav. Bank v. Trenton Mill. Co. 144 Mich. 188, 107 N. W. 1107; Clark v. Wells, 45 Vt. 4, 12 Am. Rep. 187.

Fellows, J., delivered the opinion of the court:

Prior to February 21, 1914, defendant was the owner of four passenger boats on Paw Paw lake, in Berrien county. One of these boats

was named "Dixie." On this date he sold this line of boats to one Alpha Cross, taking as part payment certain real estate at an agreed price of \$685, and receiving for the balance four promissory notes, of \$528.75 each, secured by a chattel mortgage on the boats. This chattel mortgage did not cover after-acquired property. Cross, after the purchase of the boats, made an arrangement with Harry W. Shively and a Mr. Crosett for the joint operation by the three of this line of boats during the season of 1914. Shively and Corsett were to and did put in \$500 or \$600, which was used to repair the boats and put them in shape for operation. The engine in the Dixie proved unsatisfactory, and Shively saw plaintiff, a manufacturer of marine engines, with a view of purchasing one of his engines for use in the Dixie. Both Shively and plaintiff testify to the arrangement made, which was that the engine should be tried out to see if it proved satisfactory, that title thereto should remain in plaintiff until paid for, and that a note was to be and was given as evidence of the indebtedness in case any of them should die. There was no testimony given to the contrary. The engine was shipped to Paw Paw lake, put in the boat Dixie, and worked satisfactorily. Shortly before the first note given by Cross to defendant fell due, defendant took possession of the boat "Dixie" and proceeded to advertise the same for sale under the terms of the mortgage. Plaintiff demanded the engine, which the testimony shows could have been removed without damage to the boat; but the demand was refused, and the boat, with the engine installed, was sold, and bid in by defendant. This action was brought for the conversion of the engine. Upon the trial and here, defendant conceded that title might be retained in personal property by parol, but insisted that it was a question for the jury in the instant case whether it was so retained. The trial court was of the opinion that plaintiff's case was made

out by uncontroverted evidence, that there was no evidence to dispute it, and directed a verdict for the plaintiff for the value of the engine.

The defendant insists, and it is the only question in the case, that the court should have submitted the case to the jury. The functions of the judge and jury are too well understood to require extended discussion. The jury finds the facts; the judge decides the law. The jury weighs the evidence; the judge determines the legal questions. The credibility, sufficiency, and weight of the evidence on a given subject are for the jury; the question of whether there is any evidence on a given subject is for the court. Where the testimony is all one way, is uncontradicted by any testimony given in the case, either from a party's own witnesses or the other party's witnesses, either on direct or drawn out on cross-examination, or by any facts or circumstances in the case, is not in itself

in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff, or a defense made for the defendant, the duty rests upon the court to direct a verdict. *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Hunt v. Supreme Council, O. C. F.* 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555, 24 N. W. 854; *Peninsular Stove Co. v. Osmun*, 73 Mich. 570, 41 N. W. 693; *Brudin v. Inglis*, 121 Mich. 410, 80 N. W. 115; *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121; *Nester v. Baraga Twp.* 133 Mich. 640, 95 N. W. 722.

Evidence—right to disregard uncontradicted testimony.

That it is many times a difficult question to determine whether there is any testimony on a given subject does not relieve the court from the responsibility or the duty of solving it. In the instant case the testimony of plaintiff and Mr. Shively, a disinterested witness, agrees as to what the arrangement was with reference to the engine, that title was retained

in plaintiff until it was paid for, and that the note was given to evidence the indebtedness. We are unable to find anything in the cross-examination of either of them, any testimony by other witnesses, or any fact or circumstance in the case, which in any way tends to discredit or controvert the facts testified to by them. Under their undisputed testimony that title was retained in plaintiff, the circumstances surrounding their negotiations, their highly probable and in no way discredited testimony that the note was given solely to evidence the indebtedness, the fact that a note was given did not make a case for the jury. Title may

**Sale—conditional—effect of taking note as security.**

be retained for security, even though a note is given to evidence the indebtedness, and the vendor may sue upon the note without losing his security. *Holcomb & H. Mfg. Co. v. Cataldo*, 199 Mich. 265, 165 N. W. 941; *Atkinson v. Japink*, 186 Mich. 335, 152 N. W. 1079.

Nor was a case made for the jury by the unsupported, but often repeated, claim of defendant's counsel that the testimony of these witnesses was not truthful and their version of the transaction

was not true. If the unsupported claims of counsel would take a case to the jury, there would be few cases that juries would not be given an opportunity to speculate upon.

There was no error in refusing to submit this case to the jury, and the judgment is affirmed.

**Ostrander, Ch. J., and Bird, Moore, Steere, Brooke, Stone, and Kuhn, JJ., concur.**

#### NOTE.

The general subject as to the right to disregard uncontradicted testimony in civil actions is considered in the annotation following *KELLY v. JONES*, post, 796. For other cases in which the court, as in the reported case (*BOUDEMAN v. ARNOLD*, ante, 789), took the view that the uncontradicted testimony should control the result, see subdivision IV. b, of that note. In some of these cases, as in the *BOUDEMAN CASE*, the action of the trial court in directing a verdict was sustained on appeal; in others, a verdict by the jury contrary to the uncontradicted testimony was not permitted to stand.

JOSEPH A. KELLY, Appt.,

v.

BENJAMIN D. JONES, County Collector of Will County, etc.

*Illinois Supreme Court—December 17, 1919.*

(290 Ill. 375, 125 N. E. 334.)

#### Witness — right to disregard testimony.

1. There may be such inherent improbability in the testimony of a witness as to justify a court in disregarding his evidence, even in the absence of any direct contradiction.

[See note on this question beginning on page 796.]

#### Injunction — to prevent collection of tax on property not owned.

2. Injunction lies to prevent collection of a tax assessed against property which the taxpayer does not own.

#### Evidence — burden of proof — invalidity of tax.

3. One seeking an injunction against a tax alleged to have been assessed against property which he does not

own has the burden of showing the invalidity of the tax.

— sufficiency of evidence.

4. One seeking to enjoin the collection of a tax upon shares of corporate stock which he alleges that he did not own does not overcome the presumption of validity of the tax by clear and specific testimony by stating that he sold whatever stock he owned on some dates with respect to which he was not certain.

**Witness — facts demonstrating falsity of testimony.**

5. If facts stated by a witness demonstrate the falsity of the testimony, the court is not bound to believe him.  
[See 10 R. C. L. 1008, 1009.]

— right to reject uncontradicted testimony.

6. Where the testimony of a witness is uncontradicted either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected.

[See 10 R. C. L. 1006.]

**Tax — on intermingled property — validity.**

7. A tax on shares of corporate stock owned by the taxpayer cannot be sustained where they are assessed together with shares not owned by him, and there is no way of separating the assessment upon his stock from that not owned by him.

**APPEAL** by plaintiff from a decree of the Circuit Court for Will County (De Selm, J.) dismissing a bill filed to enjoin collection of certain personal taxes assessed against plaintiff. *Reversed with directions.*

The facts are stated in the opinion of the court.

Mr. George Warner Young, for appellant:

The board of review cannot assess or levy a tax against a person, based on property he does not own.

Weber v. Baird, 208 Ill. 209, 70 N. E. 231; Bates v. Parker, 227 Ill. 120, 81 N. E. 334.

If the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress.

Cooley, Taxn. p. 49; Cowles v. Britain, 9 N. C. (2 Hawks) 204; Hagar v. Yolo County, 47 Cal. 222; Union School Dist. v. New Union School Dist. 135 Ill. 478, 28 N. E. 49.

The record of the board of review is evidence of its act.

Duckett v. Gerig, 223 Ill. 284, 79 N. E. 94; Weber v. Baird, 208 Ill. 209, 70 N. E. 231; Bates v. Parker, 227 Ill. 120, 81 N. E. 334.

A bill for injunction is the proper remedy.

Union School Dist. v. New Union School Dist. 135 Ill. 478, 28 N. E. 49; Weber v. Baird, 208 Ill. 209, 70 N. E. 231; Duckett v. Gerig, 223 Ill. 284, 79 N. E. 94; Bates v. Parker, 227 Ill. 120, 81 N. E. 334.

Mr. Robert W. Martin, for appellee:

The presumption is that the tax is just, and that all officers who have had any official connection with it have properly discharged their duties in respect to it; which presumption can be

overcome only by clear and explicit testimony.

Peoria, D. & E. R. Co. v. People, 116 Ill. 401, 6 N. E. 497; Consolidated Coal Co. v. Baker, 135 Ill. 545, 12 L.R.A. 247, 26 N. E. 651; People ex rel. Funk v. Keener, 194 Ill. 16, 61 N. E. 1069; People ex rel. Thompson v. Hulin, 237 Ill. 122, 86 N. E. 666; People ex rel. Smith v. Hassler, 262 Ill. 133, 104 N. E. 177; People ex rel. James v. Martin, 283 Ill. 380, 119 N. E. 296.

The same rules and presumptions apply where one seeks to enjoin the collection of a tax.

Tolman v. Raymond, 202 Ill. 197, 66 N. E. 1086.

There may be such inherent improbability in the testimony of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct, conflicting testimony.

Podolski v. Stone, 186 Ill. 540, 58 N. E. 340; Kennard v. Curran, 239 Ill. 122, 87 N. E. 913; People v. Davis, 269 Ill. 256, 110 N. E. 9; Kuehne v. Malach, 286 Ill. 120, 121 N. E. 391.

The findings of the chancellor, who saw and heard the witnesses in open court, should not be disturbed unless the record on its face shows clear and palpable error.

Coari v. Olsen, 91 Ill. 278; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Biggerstaff v. Biggerstaff, 180 Ill. 407, 54 N. E. 333; Elmstedt v. Nicholson, 186 Ill. 580, 58 N. E. 381; Fabrice v. Von der Brelie, 190 Ill. 460, 60 N. E. 835;

*Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 800; *Hill v. Fowler*, 231 Ill. 206, 83 N. E. 151; *Kirby v. Judy*, 286 Ill. 200, 121 N. E. 611.

*Cartwright, J.*, delivered the opinion of the court:

The appellant, Joseph A. Kelly, a resident of Joliet, in Will county, in 1918 returned to the township assessor a schedule of personal property amounting to \$405, not including any shares of capital stock. He was notified by the board of review to appear and show cause why his assessment should not be increased. A hearing was had on September 5, 1918, and the board assessed him on 20 shares of Republic Iron & Steel Company preferred stock, 40 shares of United States Steel Company preferred stock, 93 shares of Corn Products Refining Company common stock, 50 shares of Sears, Roebuck, & Company, preferred stock, for the years 1914, 1915, 1916, 1917, and 1918, and also 50 shares of Columbia Gas & Electric Company stock for the year 1918. The various shares of stock were not valued separately, but a value was placed on all as a total for each year, making a final assessment of \$14,175 cash value for the whole. The assessment was returned by the board of review as an assessment of omitted property, and a tax having been extended on the assessment, the appellee, Benjamin D. Jones, as collector, demanded of the appellant payment of the taxes. Thereupon the appellant filed his bill in this case in the circuit court of Will county to enjoin the collection of the tax, alleging that he did not own the shares of stock on the 1st day of April of any year for which he was assessed, except the shares of the Columbia Gas & Electric Company, which he owned in 1918. He offered to pay taxes on the assessment of 1918 on the Columbia Gas & Electric Company stock if the court could determine the amount of such tax, but alleged that it was impossible to separate the tax levied upon property owned by him from the tax on property which he did not own, so as to deter-

mine the amount justly due. He prayed for an injunction restraining the collection of the tax, and a temporary injunction was issued. The bill was answered by the appellee, admitting the assessment as charged, but denying the ground of relief alleged, and upon a hearing the bill was dismissed for want of equity.

Taxing authorities cannot arbitrarily assess a person on property he does not own, and the proper remedy to prevent the collection of a tax levied on such an

*Injunction—to prevent collection of tax on property not owned.*

assessment is in equity by bill for injunction. *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231; *Duckett v. Gerig*, 223 Ill. 284, 79 N. E. 94; *Bates v. Parker*, 227 Ill. 120, 81 N. E. 384. Upon an issue of that kind the presumption is that the tax is just and lawful, and the objector assumes the burden of showing its invalidity.

*People ex rel. Funk*

*v. Keener*, 194 Ill.

16, 61 N. E. 1069;

*Tolman v. Raymond*,

202 Ill. 197, 66 N. E. 1086; *People*

*ex rel. Thompson v. Hulin*, 237 Ill.

122, 86 N. E. 666; *People ex rel.*

*James v. Martin*, 283 Ill. 380, 119

N. E. 296. The complainant was the

only witness at the hearing concern-

ing the ownership of the shares

of capital stock assessed to him. He

testified that at one time he owned

the 20 shares of Republic Iron &

Steel Company preferred stock, the

40 shares of United States Steel

Company preferred stock, and 50

shares of Sears, Roebuck, & Com-

pany preferred stock, but that he

sold all of them before April 1, 1914,

to raise money to go into the Joliet

Trust & Savings Bank, the Wood-

ruff Building, and the Joliet Pure Ice

Company, business enterprises at

Joliet; that he sold the United

States Steel Company preferred

stock some time in February, 1914,

and had a memorandum of that, as

it was sold on account of his daugh-

ters, and he gave them credit for

half of it, but as to the other shares

*Evidence—burden of proof—invalidity of tax.*

he had no memorandum when he bought or sold them. As to those stocks he testified generally that he had no data to go by; that he went into the Woodruff Building in 1910, and the last stock he bought in the Pure Ice Company was in 1912. He had alleged in his bill that the only stock he had owned since 1914 was the shares of Columbia Gas & Electric Company, but said that was a mistake, and admitted that he had owned 93 shares of Corn Products Refining Company at one time; that he had bought and sold shares of that stock several times, but he could not tell when he bought that stock and had no dates to guide him. He was uncertain about the dates, but said that he did not own that stock during the whole five-year period from 1914 to 1918. He could not give any dates or details of transactions concerning that stock, and his testimony was not so clear and explicit as to overcome the presumption of the validity of the tax on that stock.

—sufficiency of evidence.

The reason alleged for sustaining the decree is that the chancellor did not believe the complainant, and it is evident that such was the fact, because on no other ground could the decree be sustained. There

Witness—  
right to  
disregard  
testimony.

may be such inherent improbability in the testimony of a witness as to justify a court in disregarding his evidence, even in the absence of any direct contradiction. If his testimony is contradictory of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate

—facts  
demonstrating  
falsity of  
testimony.

the falsity of the testimony, the court is not bound to believe him. Podolski v. Stone, 186 Ill. 540, 58 N. E. 840; Kennard v. Curran, 239 Ill. 122, 87 N. E. 913; People v. Davis, 269 Ill. 256, 110 N. E. 9; Kuehne v. Malach, 286 Ill. 120, 121 N. E. 391. There was no inherent improbability in the

testimony of the complainant, and nothing incredible about his statement that he sold stock to go into certain business enterprises in Joliet. There was no reason arising out of the testimony of the complainant for disbelieving him. If there is a contradiction of testimony, either direct or by facts and circumstances proved, much weight is to be given to the findings of the chancellor, who saw and heard the witness, since his credibility may be seriously affected by his appearance, manner, and conduct while testifying. Coari v. Olsen, 91 Ill. 273; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Hill v. Fowler, 231 Ill. 205, 83 N. E. 151; Kirby v. Judy, 286 Ill. 200, 121 N. E. 611. But there was no question of weighing the testimony of the complainant against contradiction, since there was no contradiction whatever of the facts testified to. Where the testimony of a witness is contradicted, either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected. Larson v. Glos, 235 Ill. 584, 85 N. E. 926. While the complainant had no dates of the purchase or sale of stocks occurring several years before he testified, his testimony was that he sold the stocks before 1914 to go into certain specific Joliet enterprises, and he adhered to that statement throughout his testimony. No evidence was offered as to who appeared on the books of the various corporations to have owned the stock, or that the complainant ever exercised any right or privilege of a stockholder, and there was nothing whatever tending to demonstrate the falsity of his testimony.

—right to  
reject  
uncontradicted  
testimony.

It was admitted both by the bill and on the hearing that the complainant was lawfully assessed on the 50 shares of Columbia Gas & Electric Company stock for the year 1918, and the evidence did not show

that he was not liable on the 93 shares of Corn Products Refining Company's stock, and if it had been possible to separate the tax on those shares from the tax on shares not owned by the complainant, those taxes should and could have been sustained; but it was admitted, and is now conceded, that such separation was impossible. That being the case, granting the relief prayed for would not interfere with or in any manner prejudice the right to assess the complainant for the 50 shares of Columbia Gas & Electric Company stock and the 93 shares of Corn

Tax-on  
intermingled  
property—  
validity.

Products Refining Company stock hereafter as for omitted property.

Our conclusion is that the chancellor did not have sufficient ground to reject the uncontradicted testimony of the complainant, and that the decree was wrong in dismissing the bill.

The decree is therefore reversed, and the cause remanded to the Circuit Court, with directions to grant the relief prayed for in the bill, without prejudice to the right to assess the complainant with the stock of the Columbia Gas & Electric Company and the Corn Products Refining Company as omitted property.

### ANNOTATION.

#### Disregarding uncontradicted testimony in civil actions.

- I. Introductory, 796.
- II. Testimony contrary to physical facts, 798.
- III. Cases favoring the trier of facts:
  - a. In general, 801.
  - b. Judicial statements and explanations, 803.
  - c. Illustrations, 805.
  - d. Particular jurisdictions, 807.
- IV. Cases favoring uncontradicted testimony:
  - a. In general, 809.
  - b. Illustrations, 812.
- V. Uncontradicted testimony of interested witnesses:
  - a. Cases favoring the trier of facts:
    1. In general, 814.
    2. Court as trier of facts, 814.
    3. Jury, 815.

#### 1. Introductory.

This annotation is intended to be general and suggestive, rather than comprehensive.

Cases in the inferior courts have, as a rule, been excluded. The effort has been made to exclude cases where the testimony was "undisputed" as distinguished from those where it was merely not contradicted, but in many cases such a distinction cannot be exact. The large number of cases where a person injured at a railway crossing testified that he looked or listened, where he must have detected the train

#### V.—continued.

- b. Cases favoring uncontradicted testimony:
  1. In general, 818.
  2. Court as trier of facts, 819.
  3. Jury, 819.
- c. Testimony of defendant's implicated employees in negligence cases:
  1. Cases favoring the trier of facts, 820.
  2. Cases favoring uncontradicted testimony, 821.
- d. New York:
  1. In general, 824.
  2. Old rule, 824.
  3. Rule of Hull v. Littauer, 827.

#### VI. Miscellaneous, 830.

had he looked or listened, are excluded, as are also cases of testimony estimating values, and expert testimony. While by way of illustration some negligence cases are included in which the uncontradicted testimony is invoked as overcoming, as a matter of law, a presumption or a prima facie case in favor of the plaintiff, that class of cases is not in general included, since the question involves considerations peculiar to the function and effect of a rebuttable presumption which are foreign to the purpose of this note.

The credibility of witnesses is for

the jury; but they must not be permitted to run away with the case.

All agree that the jury must not believe impossibilities. Beyond this there is no rule generally applicable. As applied to uncontradicted testimony there are two broad rules: one, that the uncontradicted testimony of a witness is for the jury; the other, that the jury may not arbitrarily reject the uncontradicted testimony of a witness; and the courts apply one or the other as they mean to leave the matter to the jury, or to interfere. In the statement of these two rules the courts sometimes give preference to the power of the jury, and sometimes, on the other hand, require the jury to accept uncontradicted testimony unless there is some apparent reason against it. Cases in this annotation, as will be seen, are grouped generally according to the result, not according to the phrasing of the rule in the particular case. Sometimes the two rules are given in combined or double form. In a few jurisdictions an attempt has been made to enforce a rigid rule, at least so far as appellate courts are concerned, that the jury is not bound to believe uncontradicted testimony.

A similar rule as applied to the uncontradicted testimony of interested witnesses was formerly attempted in New York, but broke down as not of universal application.

By way of preface a few illustrations of the variety of points of view are here given.

"The credibility of a witness is for the jury; and where the issue depends upon facts the existence of which is not admitted, even though testified to by a credible witness who is unchallenged, the question is for the jury." *Second Nat. Bank v. Smith* (1917) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862.

"However improbable the testimony of a witness may appear, who testifies to a fact not in itself impossible in the ordinary course of events, the credibility, force, and effect of such testimony are for the jury." *O'Brien, J., in Hastings v. Brooklyn L. Ins. Co.* (1893) 138 N. Y. 478, 34 N. E. 289.

In affirming a judgment on a verdict

for the defendant, where the plaintiff had told an improbable story, including the statement that he obtained some of the money with which he made a purchase of property attached as the property of an alleged fraudulent vendee by finding buried treasure, the court said: "Bureaus and chests as depositories for money have this advantage over banks: they keep no records. And the story, as a whole, may be said to defy contradiction, save by its inherent improbability, its inconsistency with surrounding circumstances, and the contradictory statements. That lost treasures have been found in the past is doubtless true, but when the account is so improbable as that here given, and is inconsistent with statements made outside of court, it may well be rejected." *Jordan v. Crickett* (1904) 123 Iowa, 576, 99 N. W. 163.

"It is firmly established everywhere that, as a general rule, when a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within the knowledge of such witness, which is not in itself improbable, or in conflict with other evidence, the witness is to be believed, and the facts so given are to be taken as legally established." *Miller's Will* (1907) 49 Or. 452, 124 Am. St. Rep. 1051, 90 Pac. 1002, 14 Ann. Cas. 277.

While strictly beyond the scope of this note, reference may be here made to *Quock Ting v. United States* (1891) 140 U. S. 417, 35 L. ed. 501, 11 Sup. Ct. Rep. 733, in which case, affirming a judgment where the trial court, sitting without a jury, had disbelieved the petitioner and his father, who swore that the petitioner, a Chinese, was born in the United States, the court said: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testi-



mony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

"The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *Graham v. Chicago & N. W. R. Co.* (1909) 143 Iowa, 604, 119 N. W. 708.

In *Hughes v. Hughes* (1912) 109 Me. 564, 84 Atl. 647, the court affirmed the decision of the trial court in directing a nonsuit on the "overwhelming improbability of the plaintiff's own story." He was apparently a person of small means and poor character, who sued his mother and brother for having taken \$1,800 from his old coat, hanging in the cellar of his mother's house.

In affirming a nonsuit the court said: "For a young man in his nineteenth year to testify that he did not know that, if he got his fingers into the rolls of a straw cutter, they would be caught thereby, and did not know that, if they were caught, he would be injured, does not amount to even a scintilla of evidence tending to establish that such were the facts." *Roth v. S. E. Barrett Mfg. Co.* (1897) 96 Wis. 615, 71 N. W. 1034.

## II. Testimony contrary to physical facts.

The numerous cases are excluded which hold that the testimony of a person injured by a train at a railway crossing, that he looked and listened, but did not see or hear the train, does not justify the submission to the jury of his contributory negligence where the other evidence unmistakably shows that, if he had looked and listened, he would have seen or heard the train.

Uncontradicted testimony which is contrary to physical facts may be disregarded.

**United States.**—*Missouri, K. & T. R. Co. v. Collier* (1907) 88 C. C. A. 127, 157 Fed. 347, writ of certiorari denied in (1908) 209 U. S. 545, 52 L. ed. 920, 28 Sup. Ct. Rep. 571; *American Car & Foundry Co. v. Kindermann* (1914) 132 C. C. A. 577, 216 Fed. 499; *United States v. 60 Barrels of Wine* (1915) 225 Fed. 846 (trial by court).

**Arkansas.**—*Waters-Pierce Oil Co. v. Knisel* (1906) 79 Ark. 608, 96 S. W. 342.

**Colorado.**—*McLennon v. Whitney-Steen Co.* (1917) — Colo. —, 167 Pac. 771 (nonsuit).

**Indiana.**—*Lake Erie & W. R. Co. v. Stick* (1895) 143 Ind. 449, 41 N. E. 365; *Wabash R. Co. v. McDoniels* (1914) 183 Ind. 104, 107 N. E. 291; *Emrich Furniture Co. v. Byrnes* (1909) 44 Ind. App. 341, 87 N. E. 1042.

**Iowa.**—*McGlade v. Waterloo* (1916) 178 Iowa, 11, 156 N. W. 680.

**Kentucky.**—*Louisville & N. R. Co. v. Chambers* (1915) 165 Ky. 703, 178 S. W. 1041, Ann. Cas. 1917B, 471.

**Maine.**—*Tillson v. Maine C. R. Co.* (1907) 102 Me. 463, 67 Atl. 407; *L'Houx v. Union Constr. Co.* (1910) 107 Me. 101, 30 L.R.A. (N.S.) 800, 77 Atl. 636.

**Missouri.**—*Nugent v. Kauffman Mill. Co.* (1895) 131 Mo. 241, 33 S. W. 428; *Dyrcz v. Missouri P. R. Co.* (1911) 238 Mo. 33, 141 S. W. 861; *Sexton v. Metropolitan Street R. Co.* (1912) 245 Mo. 254, 149 S. W. 21; *Wray v. Southwestern Electric Light & Water Power Co.* (1896) 68 Mo. App. 380; *Zalotuchin v. Metropolitan Street R. Co.* (1907) 127 Mo. App. 577, 106 S. W. 548; *Scroggins v. Metropolitan Street R. Co.* (1907) 138 Mo. App. 215, 120 S. W. 781; *Giles v. Missouri P. R. Co.* (1913) 169 Mo. App. 24, 154 S. W. 852.

**Nevada.**—*McLeod v. Miller* (1915) 40 Nev. 447, 153 Pac. 566, 167 Pac. 27.

**New York.**—*Hudson v. Rome, W. & O. R. Co.* (1895) 145 N. Y. 408, 40 N. E. 8; *Schrager v. Foster* (1917) 180 App. Div. 923, 168 N. Y. Supp. 240; *Spitz v. United Electric Light & P. Co.* (1919) 175 N. Y. Supp. 737.

**Rhode Island.**—*Henry v. Providence Gas Burner Co.* (1914) — R. I. —, 90 Atl. 168.

Virginia.—Chesapeake & O. R. Co. v. Anderson (1896) 93 Va. 650, 25 S. E. 947, 8 Am. Neg. Cas. 651.

Wisconsin.—Chybowski v. Bucyrus Co. (1906) 127 Wis. 332, 7 L.R.A. (N.S.) 357, 106 N. W. 833.

The testimony of a witness which conflicts with natural law is not legitimate evidence, and cannot be considered. *Lake Erie & W. R. Co. v. Stick* (1895) 143 Ind. 449, 41 N. E. 365; *Emrich Furniture Co. v. Byrnes* (1909) 44 Ind. App. 341, 87 N. E. 1042. Testimony of witnesses which is contrary to physical law is of little or no value whatever. *McLeod v. Miller* (1915) 40 Nev. 447, 153 Pac. 566, 167 Pac. 27. "The testimony of a witness or finding of a jury, contrary to manifest physical situations, common knowledge, or conceded facts, is efficiently impeached thereby." *Samulski v. Menasha Paper Co.* (1911) 147 Wis. 285, 133 N. W. 142.

A verdict against physical facts cannot stand. *Schrager v. Foster* (1917) 181 App. Div. 923, 168 N. Y. Supp. 240; *Spitz v. United Electric Light & P. Co.* (1919) 175 N. Y. Supp. 727. "When the testimony of a witness is confronted by admitted facts and circumstances which are totally repugnant to and entirely inconsistent therewith, then such pretended testimony must give way and be counted for nothing." *Wray v. Southwestern Electric Light & Water Power Co.* (1896) 68 Mo. App. 380, reversing a judgment for the plaintiff.

The court is not bound to find in accordance with the defendant's testimony if he believes it to be contradicted by the circumstances. *Friemel v. Coker* (1920) — Tex. Civ. App. —, 218 S. W. 1105.

The court on appeal will test the testimony of witnesses by the physical possibilities (*Dyrez v. Missouri P. R. Co.* (1911) 238 Mo. 33, 141 S. W. 861); it will reverse a judgment founded on evidence of a physical impossibility (*Chesapeake & O. R. Co. v. Anderson* (1896) 93 Va. 650, 25 S. E. 947, 8 Am. Neg. Cas. 651), or contrary to scientific facts (*Chybowski v. Bucyrus Co.* (1906) 127 Wis. 332, 7 L.R.A. (N.S.) 357, 106 N. W. 833).

Evidence which is opposed to well-

known and recognized scientific facts about which there is no conflict, and which was a basis of a judgment in the lower courts, will be reviewed and the judgment reversed if justice requires. *Hudson v. Rome, W. & O. R. Co.* (1895) 145 N. Y. 408, 40 N. E. 8.

In *Sexton v. Metropolitan Street R. Co.* (1912) 245 Mo. 254, 149 S. W. 21, the court, in reversing a judgment for the plaintiff for personal injuries, said of the testimony of one of his witnesses: "No legal rule can stifle the conscience of a court when it comes to deal with testimony of this character. No court should be bound by testimony demonstrated to be false by all other facts in the case, and further demonstrated to be false by our own common knowledge of scientific facts."

The court is not required to send the case to the jury where the only evidence upon which the plaintiff "rests his right to succeed consists of a statement of alleged facts, inherently impossible and absolutely at variance with well-established and universally recognized physical laws. In such case, that which purports to be evidence is insufficient to constitute a compliance with the requirements of the scintilla rule, for it is the essence of that rule that there must be some evidence (however slight) upon which the jury might rationally find a verdict for the party producing it." *Louisville & N. R. Co. v. Chambers* (1915) 165 Ky. 703, 178 S. W. 1041, Ann. Cas. 1917B, 471.

"The statements by a witness [for the plaintiff] of the existence or the nonexistence, the occurrence or non-occurrence, of a given thing as a fact that contravenes all laws of mechanics and philosophy that are so generally recognized that courts cannot ignore them, cannot be said to be matters of fact that must go to the jury for their consideration as to their credibility, on the proposition that the jury are the triers of all facts in a suit at law." *Nugent v. Kauffman Mill. Co.* (1895) 131 Mo. 241, 38 S. W. 428.

In *Scroggins v. Metropolitan Street R. Co.* (1909) 138 Mo. App. 215, 120 S. W. 781, the court reversed a judgment for the plaintiff in a personal-

injury case, because it considered the plaintiff's account of the accident "too unreasonable to pass muster."

It was held, in reversing a judgment for the plaintiff in *Missouri, K. & T. R. Co. v. Collier* (1907) 88 C. C. A. 127, 157 Fed. 347, writ of certiorari denied in (1908) 209 U. S. 545, 52 L. ed. 920, 28 Sup. Ct. Rep. 571, that neither a court nor a jury will be permitted to credit testimony that the witness, who was near the track when the collision occurred, saw a certain signal given, where cars of a train on a sidetrack intervened between the place where the witness stood and the spot indicated by his testimony as that at which the signal was given.

The plaintiff's testimony that he looked for the elevator which struck him, but did not see it, cannot save him from nonsuit as against the physical fact that the elevator was only a few feet distant. *McLennon v. Whitney-Steen Co.* (1917) — Colo. —, 167 Pac. 771.

In *Wabash R. Co. v. McDoniels* (1914) 183 Ind. 104, 107 N. E. 291, the court said, in affirming a judgment in a case where a witness had testified to a statement as made by an injured person, that to believe that the person injured "could give an intelligent account of the accident would test human credulity to the limit. The jury has the right to disregard the testimony of a witness whose statement is contrary to the laws of nature."

The trial court properly directed a verdict for the defendant street railway company, though the plaintiff and his brother testified that they were thrown out of their buggy 50 or 60 feet in front of the car, when it appeared that the buggy struck the car, and that the plaintiff was thrown out rather under than in front of the car. *McGlade v. Waterloo* (1916) 178 Iowa, 11, 156 N. W. 680.

The court set aside a verdict given upon the uncontradicted testimony of the plaintiff, an experienced laborer, that he did not know that striking a hard blow with a heavy hammer upon a small chisel held against iron would cause splinters to fly, where ordinary observation and thought would have

revealed that fact to him. *L'Houx v. Union Constr. Co.* (1910) 107 Me. 101, 30 L.R.A.(N.S.) 800, 77 Atl. 636.

Testimony on the defendant's part that an electric car was moving so rapidly that, under ordinary conditions of wind and weather, it threw up a cloud of dust in advance of it, so as to obscure the headlight, was held, in *Zalotuchin v. Metropolitan Street R. Co.* (1907) 127 Mo. App. 577, 106 S. W. 548, to be so opposed to physical laws as to be unworthy of belief.

Testimony that a boy successfully boarded a freight train running at the speed of an express train, and that the train was brought to a dead stop within 10 feet, is so repugnant to the laws of physics of common knowledge that a reasonable mind must reject it as wholly impossible of belief. *Giles v. Missouri P. R. Co.* (1913) 169 Mo. App. 24, 154 S. W. 852.

In *Falkenstern v. Greenfield* (1911) 145 Wis. 232, 130 N. W. 61, the plaintiff's testimony as to the manner of the injuries to the buildings on his dam from water was disbelieved by the appellate court as incredible on the physical facts, and a verdict which had been directed for the defendant was approved.

While it is not intended to take up decisions holding the testimony in question to be not contrary to physical facts, the following cases may be here referred to:

It has been held that a trial court ought not to withdraw the testimony of a witness from the jury as contrary to physical facts unless it is so improbable as to warrant a declaration as matter of law that it is unworthy of belief. *Wolf v. City R. Co.* (1907) 50 Or. 64, 67, 85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181.

"To declare sworn testimony of a fact incredible, we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical facts that no reasonably intelligent man could give it credence." *Salchert v. Reinig* (1908) 135 Wis. 194, 115 N. W. 132.

In referring to the testimony of the plaintiff, and affirming a judgment for him, the court said: "The credibility

of a witness being for the jury, courts are not authorized to reject his testimony and refuse to submit the case to the jury on the ground that the facts stated are highly improbable. It is only where the facts testified to are utterly at variance with well-established and universally recognized physical laws, and, therefore, inherently impossible, that courts may refuse to submit the case to the jury." *Wasieto & B. M. R. Co. v. Hall* (1916) 167 Ky. 819, 181 S. W. 629.

And while reversing on other grounds a judgment for the plaintiff, entered on a verdict, the court, in *Louisville & N. R. Co. v. Quinn* (1920) — Ky. —, 219 S. W. 789, said: "It is only where the facts testified to are utterly at variance with well-established and universally recognized physical laws, and therefore inherently impossible, that courts may refuse to submit the case to the jury."

In affirming a judgment for the plaintiff, the court said: "While the facts testified to by the plaintiff and her witnesses may be untrue, they are in no sense a contradiction of the physical facts in the case. They are at most only improbable; but that the improbable and unlooked-for do sometimes occur is common experience." *Berger v. Chicago & A. R. Co.* (1902) 97 Mo. App. 127, 71 S. W. 102.

### III. Cases favoring the trier of facts.

#### a. In general.

There are many cases illustrating the principle that the testimony of a witness, though uncontradicted, is for the triers of facts, whether court or jury, who are not bound thereby.

**United States.** — *Tracy v. Phelps* (1885) 23 Blatchf. 71, 22 Fed. 634 (jury); *Waters v. Davis* (1906) 76 C. C. A. 444, 145 Fed. 912 (court).

**Arkansas.** — *Fidelity Mut. L. Ins. Co. v. Click* (1909) 93 Ark. 162, 124 S. W. 764 (jury).

**California.** — *Blankman v. Vallejo* (1860) 15 Cal. 639 (court); *Baker v. Fireman's Fund Ins. Co.* (1889) 79 Cal. 34, 21 Pac. 357 (court).

**Georgia.** — *Macon Consol. Street R. Co. v. Barnes* (1901) 113 Ga. 212, 38 S. E. 756 (jury).

8 A.L.R.—51.

**Illinois.** — *Chicago Union Traction Co. v. O'Brien* (1906) 219 Ill. 303, 76 N. E. 341 (jury); *Kennedy v. Modern Woodmen* (1909) 248 Ill. 560, 28 L.R.A. (N.S.) 181, 90 N. E. 1084 (jury).

**Iowa.** — *Oleson v. Hendrickson* (1861) 12 Iowa, 222 (jury).

**Kentucky.** — *Campbell v. Mobile & O. R. Co.* (1915) 162 Ky. 53, 171 S. W. 1002 (jury).

**Maryland.** — *Charleston Ins. & T. Co. v. Corner* (1844) 2 Gill, 410 (jury); *William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814 (jury, case reversed on other grounds).

**Massachusetts.** — *Harding v. Brooks* (1828) 5 Pick. 244 (jury); *Saures v. Stevens Mfg. Co.* (1907) 196 Mass. 543, 82 N. E. 694 (jury); *Lindenbaum v. New York, N. H. & H. R. Co.* (1908) 197 Mass. 314, 84 N. E. 129 (jury); *Ryan v. Fall River Iron Works Co.* (1908) 200 Mass. 188, 86 N. E. 310 (jury); *Whitten v. Haverhill* (1910) 204 Mass. 95, 90 N. E. 409 (jury); *Giles v. Giles* (1910) 204 Mass. 383, 90 N. E. 595 (jury).

**Michigan.** — *Woodin v. Durfee* (1881) 46 Mich. 424, 9 N. W. 457 (jury); *Zart v. Singer Sewing Mach. Co.* (1910) 162 Mich. 387, 127 N. W. 272 (jury); *Yonkers v. McKay* (1915) 186 Mich. 203, 152 N. W. 1031, Ann. Cas. 1917E, 458 (jury).

**Minnesota.** — *Schwartz v. Germania L. Ins. Co.* (1875) 21 Minn. 215 (jury).

**Missouri.** — *Bryan v. Wear* (1835) 4 Mo. 106 (jury); *Gannon v. Laclede Gaslight Co.* (1898) 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907 (jury); *Hunter v. Wethington* (1907) 205 Mo. 284, 103 S. W. 543, 12 Ann. Cas. 529 (court); *Holzemer v. Metropolitan Street R. Co.* (1914) 261 Mo. 379, 169 S. W. 102 (jury); *Staehlin v. Major* (1917) — Mo. App. —, 199 S. W. 427 (jury); *Quisenberry v. Stewart* (1920) — Mo. —, 219 S. W. 625 (jury); *Central Nat. Bank v. F. W. Drosten Jewelry Co.* (1920) — Mo. App. —, 220 S. W. 511 (jury).

**Montana.** — *Gervais v. Rolfe* (1920) — Mont. —, 187 Pac. 899 (court).

**New Jersey.** — *Second Nat. Bank v. Smith* (1917) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862 (jury); *Earle v. Nor-*

folk & N. B. Hosier Co. (1882) 36 N. J. Eq. 188 (court).

**New York.**—Donohue v. Henry (1855) 4 E. D. Smith, 162 (court).

**North Carolina.**—Rogers v. Briley (1795) 2 N. C. (1 Hayw.) 256 (jury); Noland v. McCracken (1836) 18 N. C. (1 Dev. & B. L. 594 (jury); American Nat. Bank v. Fountain (1908) 148 N. C. 590, 62 S. E. 738 (jury).

**Oregon.**—Wolf v. City R. Co. (1907) 50 Or. 67, 85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181 (jury).

**Pennsylvania.**—West Branch Bank v. Donaldson (1847) 6 Pa. 179 (jury); Reel v. Elder (1869) 62 Pa. 308, 1 Am. Rep. 414 (jury); Grambs v. Lynch (1884) 4 Pennyp. 243 (jury); Lehigh Coal & Nav. Co. v. Evans (1896) 176 Pa. 28, 34 Atl. 999 (jury); Lautner v. Kann (1898) 184 Pa. 334, 39 Atl. 55 (jury); Bartlett v. Rothschild (1906) 214 Pa. 421, 63 Atl. 1080 (jury); Carter v. Henderson (1909) 224 Pa. 319, 78 Atl. 554 (jury); Newman v. Romanelli (1914) 244 Pa. 147, 90 Atl. 556 (jury); Nydes v. Royal Neighbors (1917) 256 Pa. 381, 100 Atl. 944 (jury); McGlinn Distilling Co. v. Derwin (1918) 260 Pa. 414, 103 Atl. 872 (jury).

**Porto Rico.**—Le Brun v. Romero (1907) 3 Porto Rico Fed. Rep. 225 (court); Busigo v. Jordan (1914) 20 P. R. R. 274 (court).

**Rhode Island.**—Gorman v. Hand Brewing Co. (1907) 28 R. I. 180, 66 Atl. 209 (jury).

**Texas.**—Cheatham v. Riddle (1854) 12 Tex. 112 (jury); Sovereign Camp W. W. v. Jackson (1911) — Tex. Civ. App. —, 138 S. W. 1137 (jury).

**England.** — Lacey v. Forrester (1835) 3 Dowl. P. C. 668, 2 Crompt. M. & R. 59, 150 Eng. Reprint, 25 (jury).

This principle has illustration in cases holding that the presiding judge has no right to withdraw from the jury the testimony of a witness as unworthy of belief. *Waters v. Davis* (1906) 76 C. C. A. 444, 145 Fed. 912; *Campbell v. Mobile & O. R. Co.* (1915) 162 Ky. 58, 171 S. W. 1002; *Holzemer v. Metropolitan Street R. Co.* (1914) 261 Mo. 379, 169 S. W. 102.

So in cases holding it proper to send the case to the jury to determine the

truth of the uncontradicted testimony of the plaintiff's witnesses. *Tracey v. Phelps* (1885) 23 Blatchf. 71, 22 Fed. 634; *William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814; *Yonkus v. McKay* (1915) 186 Mich. 203, 152 N. W. 1031, Ann. Cas. 1917E, 458; *Lehigh Coal & Nav. Co. v. Evans* (1896) 176 Pa. 28, 34 Atl. 999; *Newman v. Romanelli* (1914) 244 Pa. 147, 90 Atl. 556.

So in cases holding it proper to send the case to the jury to determine the truth of the uncontradicted testimony of the defendant's witnesses.

**Arkansas.**—Fidelity Mut. L. Ins. Co. v. Click (1909) 93 Ark. 162, 124 S. W. 764.

**Illinois.**—Kennedy v. Modern Woodmen (1909) 243 Ill. 560, 28 L.R.A. (N.S.) 181, 90 N. E. 1084.

**Massachusetts.**—Harding v. Brooks (1827) 5 Pick. 244; *Lindenbaum v. New York, N. H. & H. R. Co.* (1908) 197 Mass. 314, 84 N. E. 129; *Ryan v. Fall River Iron Works Co.* (1908) 200 Mass. 188, 86 N. E. 310; *Whitten v. Haverhill* (1910) 204 Mass. 95, 90 N. E. 409.

**Minnesota.**—Schwartz v. Germania L. Ins. Co. (1895) 21 Minn. 215.

**Missouri.**—Gannon v. Laclede Gaslight Co. (1898) 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907; *Hunter v. Wethington* (1907) 205 Mo. 284, 103 S. W. 543, 12 Ann. Cas. 529; *Quisenberry v. Stewart* (1920) — Mo. —, 219 S. W. 625.

**New Jersey.**—Second Nat. Bank v. Smith (1918) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862.

**Pennsylvania.**—West Branch Bank v. Donaldson (1847) 6 Pa. 179; *Reel v. Elder* (1869) 62 Pa. 308, 1 Am. Rep. 414; *Lautner v. Kann* (1898) 184 Pa. 334, 39 Atl. 55; *Carter v. Henderson* (1909) 224 Pa. 319, 73 Atl. 554; *Nydes v. Royal Neighbors* (1917) 256 Pa. 381, 100 Atl. 944.

So in cases holding it error to direct a verdict on the uncontradicted testimony of the plaintiff's witnesses. *Oleson v. Hendrickson* (1861) 12 Iowa, 222; *Charleston Ins. & T. Co. v. Corner* (1844) 2 Gill. (Md.) 410; *Giles v. Giles* (1910) 204 Mass. 383, 90 N. E. 595; *Woodin v. Durfee* (1881) 46 Mich.

424, 9 N. W. 457 (claimant's witness); *Bryan v. Wear* (1835) 4 Mo. 106; *Staehlin v. Major* (1917) — Mo. App. —, 199 S. W. 427; *Central Nat. Bank v. F. W. Drosten Jewelry Co.* (1920) — Mo. App. —, 220 S. W. 511; *Bartlett v. Rothschild* (1906) 214 Pa. 421, 63 Atl. 1030; *McGlinn Distilling Co. v. Dervin* (1918) 260 Pa. 414, 108 Atl. 872.

Or in cases holding it error for the court to assume in his charge as true the uncontradicted testimony of a witness for the plaintiff. *American Nat. Bank v. Fountain* (1908) 148 N. C. 590, 62 S. E. 738.

So in cases holding it error to direct a verdict for the defendant on the uncontradicted testimony of his witnesses. *Grambs v. Lynch* (1884) 4 Pennyp. (Pa.) 243.

*b. Judicial statements and explanations.*

"A jury is not bound to accept as true the literal statements of witnesses, but may reject the same, when inconsistent with reason or with facts which have been duly established to their satisfaction." *Macon Consol. Street R. Co. v. Barnes* (1901) 113 Ga. 212, 38 S. E. 756.

In *Shultz v. Wall* (1890) 134 Pa. 262, 8 L.R.A. 97, 19 Am. St. Rep. 686, 19 Atl. 742, the court said that juries "cannot base verdicts on surmise or conjecture without evidence, but they are not bound to believe an incredible story because no witness contradicts it."

The jury are not compelled to believe uncontradicted testimony that is suspicious. *Sovereign Camp, W. W. v. Jackson* (1911) — Tex. Civ. App. —, 138 S. W. 1137.

"The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony." *Chicago Union Traction Co. v. O'Brien* (1906) 219 Ill. 303, 76 N. E. 341.

In *Noland v. M'Cracken* (1836) 18 N. C. (1 Dev. & B. L.) 594, it was held

to be error to instruct the jury "that when a witness was heard by a jury, who was neither impeached nor contradicted, whose story was credible, and in whose manner there was nothing to shake their confidence, they were bound to believe him."

"The credibility of a witness is for the jury; and where the issue depends upon the facts the existence of which is not admitted, even though testified to by a credible witness who is unchallenged, the question is for the jury." *Second Nat. Bank v. Smith* (1917) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862.

"If a statement is merely inconsistent with reasonable probabilities, and the circumstances are such that it might be believed by a jury, the court could not ignore it on a motion to direct a verdict." *Chicago City R. Co. v. Hagenback* (1907) 228 Ill. 290, 81 N. E. 1014.

The jury "are not bound to believe a witness whose testimony is inconsistent with the circumstances, although there is no other testimony bearing on the same question." *Zart v. Singer Sewing Mach. Co.* (1910) 162 Mich. 387, 127 N. W. 272.

In *Yeager v. Chicago, R. I. & P. R. Co.* (1909) 148 Iowa, 231, 123 N. W. 974, the court said: "Of course, the testimony of a witness is not to be rejected arbitrarily; but it may be rejected when the witness has been impeached in any of the recognized methods, or owing to the inherent improbability of his testimony and the manner and appearance of the witness while testifying, and when so rejected the jury is under no obligation to undertake to reconcile other testimony therewith in order to uphold the credibility of the impeached witness."

Where the witness's own statements create an impression of the improbability of the facts to which he testifies, his evidence may be disregarded. *Beatty v. Beatty* (1913) 151 Ky. 547, 162 S. W. 540.

"It does not follow, because a witness is not directly contradicted by another witness, that his testimony is undisputed. His manner on the stand, his lapses of memory, the improbabil-

ity of his story, its self-contradiction, the evidence afforded by circumstances, all these things, or some of them, may rightly lead the jury to reject his testimony." *Smucker v. Pennsylvania R. Co.* (1898) 6 Pa. Super. Ct. 529.

A jury is not bound by uncontradicted testimony as against the other facts in the case. *Logue v. Grand Trunk R. Co.* (1906) 102 Me. 34, 63 Atl. 522.

The jury is not absolutely bound by the testimony of a witness, although it is not contradicted by direct evidence, where the evidence itself indicates that it is unworthy of belief. *Kennedy v. Modern Woodmen* (1909) 243 Ill. 560, 28 L.R.A. (N.S.) 181, 90 N. E. 1084.

In reversing a judgment entered upon a directed verdict, the court, per Cooley, J., said: "The most of these facts the claimant insists are entirely undisputed on the evidence; and she claims that they establish beyond question the liability of Staley on the bond, and that the judge was at liberty to so instruct the jury. But the difficulty is that the facts were not conceded or beyond dispute: there was evidence of them which probably ought to have satisfied anyone to whom it was addressed; but evidence is for the jury, and the trial judge cannot draw conclusions for them. It is said that on some points there was no evidence of a conflicting nature; but that does not aid the claimant. A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment. If they return what he thinks is a perverse verdict, he may set it aside and order a new trial; but he cannot take upon himself their functions, as was done here." *Wordin v. Durfee* (1881) 46 Mich. 424, 9 N. W. 457.

In *Lacey v. Forrester* (1835) 3 Dowl. P. C. (Eng.) 668, the court refused to set aside a verdict for the plaintiff where the jury evidently declined to believe the defendant's uncontradicted witness. *Abinger, C. B.*, said that as "the secondary distinctly left it to the jury upon the credit of the witness, we cannot grant a new trial, unless we are

prepared to say that in every case where the jury disbelieve a witness we are bound to grant a new trial."

A typical illustration of the "double rule" may be found in *Gorman v. Hand Brewing Co.* (1907) 28 R. I. 180, 66 Atl. 209, when the court, in sustaining the jury, who evidently disbelieved one of the defendant's witnesses, said: "We have found no better statement of the principle under consideration than is made by Mitchell, J., in *Anderson v. Liljengren* (1892) 50 Minn. 3, 52 N. W. 219. He says: 'The rule undoubtedly is that, where the positive testimony of a witness is uncontradicted and unimpeached, either by other positive testimony or by circumstantial evidence, either intrinsic or extrinsic, it cannot be disregarded, but must control the decision of the court or jury. But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy them of its falsity.'"

In *Blankman v. Vallejo* (1860) 15 Cal. 639, the appellate court said, referring to the trial court as a trier of facts: "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief." Quoted and followed in *Baker v. Firemen's Fund Ins. Co.* (1889) 79 Cal. 34, 21 Pac. 357.

In *Earle v. Norfolk & N. B. Hosiery Co.* (1882) 36 N. J. Eq. 188, affirmed in (1883) 37 N. J. Eq. 315, the court, in dismissing a bill, said of a witness for the complainants: "His story is so inherently improbable, and the character he has written for himself in this case renders him an object of such extreme suspicion, that I am unwilling

by any judgment to deprive any person of his rights, especially rights evidenced by a solemn deed, on testimony so improbable and unsatisfactory."

In an equity case the Connecticut court said: "The trial court is at liberty to discredit any witness or multitude of witnesses, if it deems that it has cause to do so." *Allis v. Hall* (1903) 76 Conn. 322, 56 Atl. 637.

Where apparently the case was tried without a jury, it was held that the trial court had the right to disregard the testimony of a witness for the defendant on account of his manner and his statements. *Donohue v. Henry* (1855) 4 E. D. Smith (N. Y.) 162, affirming a judgment for the plaintiff.

The court is not bound to believe testimony so improbable on its face as to be unworthy of belief. *Le Brun v. Romero* (1907) 3 Porto Rico Fed. Rep. 225.

In *Busigo v. Jordan* (1914) 20 P. R. R. 274, the court said: "The statements of Emiliano Nazario are too vague and indefinite, and, as we have seen, the court gave no credence to these and other statements. It is not sufficient ground to reverse a judgment merely because a witness is uncontradicted, unless his testimony is strong and convincing."

#### *c. Illustrations.*

Whether or not the plaintiff has proved his case in forcible entry and detainer is a question for the jury, although all the defendant's evidence has been ruled out. *Oleson v. Hendrickson* (1861) 12 Iowa, 222.

In ejectment the uncontradicted testimony of adverse possession on the part of the defendant does not make a defense; it is for the trier of facts, which here was the court. *Hunter v. Withington* (1907) 205 Mo. 284, 108 S. W. 543, 12 Ann. Cas. 529, reversing judgment for plaintiff on other grounds.

Where the agent of the defendant insurance company and his brother testified to what would have been a good defense, that his instructions from the defendant were not to deliver policies unless the insured was in good health, it was held that the jury were justified in finding a verdict for the

plaintiff, although such testimony was not contradicted or controlled by counter evidence. *Schwartz v. Germania L. Ins. Co.* (1875) 21 Minn. 215.

The defense to an action on a life insurance policy was that the premium receipt three years old had been given by mistake, in the absence of payment. The jury found for the plaintiff, but, on appeal, the court reversed the judgment on the ground that a verdict should have been directed for the defendant. But, on rehearing, the court sustained the verdict, concluding "that the testimony given by the witnesses in contradiction of the receipt is not reasonable and consistent; or, at least, when we can see that the jury could have regarded it as unreasonable." *Fidelity Mut. L. Ins. Co. v. Click* (1909) 93 Ark. 162, 124 S. W. 764.

In *Rogers v. Briley* (1795) 2 N. C. (1 Hayw.) 256, on an issue of *devisavit vel non*, the court charged the jury, referring to the testimony of an attesting witness who was the son of the legatee: "Though a fact may be positively sworn to by one or two witnesses, and though these witnesses may concur in many of the circumstances, the jury are not absolutely bound to believe the fact they swear to, if they have reason, either from the character of the witness, or the circumstances with regard to that case, to disbelieve them."

Where the plaintiff claimed that the seller to him of the bonds in suit was a bona fide purchaser, the court said: "The court refused to rule, as matter of law, that Post was a bona fide purchaser of the bonds, and left the question as one of fact to the jury. This was not error, because the jury were at liberty utterly to reject his testimony as incredible, although he was not impeached or contradicted by direct evidence. It was enough to authorize the jury to do this, that there was some intrinsic improbability in Post's narrative, and he had shown himself unworthy of credit by his attempt to falsify the transaction respecting the sale of the bonds made by him to the plaintiff." *Tracy v. Phelps* (1885) 23 Blatchf. 71, 22 Fed. 634.



While beyond the scope of this note, reference may be here made to *Kuehne v. Malach* (1918) 286 Ill. 120, 121 N. E. 391, where the only surviving attesting witness to a will contradicted the attestation clause and the will was refused probate. On appeal the circuit court admitted the will. In affirming this decision the supreme court said: "The argument of counsel for appellants that, as there was no positive testimony contradicting that of Bettendorf as to the execution of the will except the attestation clause, the circuit court was necessarily bound to follow the testimony of Bettendorf and refuse probate, we consider unsound. While it is true the general rule is that positive testimony of a witness, uncontradicted and unimpeached either by positive or uncontradicted evidence, cannot be disregarded, it is also true that there may be such an inherent improbability in the testimony of the witness as to induce the court or jury to disregard it, even in the absence of conflicting testimony. He may be contradicted by the facts he states as well as by adverse testimony, and there may be so many omissions in the account of the particular transactions, or in his own conduct, as to discredit his whole story. *People v. Davis* (1915) 269 Ill. 256, 110 N. E. 9, and cases there cited. A review of the testimony of Bettendorf, as found in the record, shows it to be so unreasonable and on its face so contradictory, even without the contradiction over his own signature, found in the attestation clause, that we believe it does not present the true facts in many particulars."

In an action for wrongful death, where testimony tending to show contributory negligence was somewhat contradicted, the court said: "The rule seems to be, as stated in 38 Cyc. 1570; namely, that a verdict will not be directed where the only person who could have contradicted the witness is dead." *Clark v. Public Service Electric Co.* (1914) 86 N. J. L. 144, 91 Atl. 83.

The court, when a trier of the facts, is not bound to believe incredible testimony as to a transaction with a dece-

dent. *Todd v. Sykes* (1899) 97 Va. 143, 33 S. E. 517.

In *McCormick v. Kampmann* (1908) 102 Tex. 215, 115 S. W. 24, it was held that where the testimony of interested parties as to conversations with a deceased person has been received without objection, the jury is not bound to believe it.

In *Re Bailey* (1906) 98 N. Y. Supp. 725, also briefly reported in 111 App. Div. 909, where there was a trial by the court, it was said that where the only person who could directly dispute a witness is dead, close scrutiny should be given to the testimony and its probability.

In *Hughes v. Davenport* (1896) 1 App. Div. 182, 37 N. Y. Supp. 243, the court, in affirming a judgment on the report of a referee rejecting claims against the estate of a decedent, said: "The rule that a fact testified to by a disinterested witness who is not discredited, which is not in conflict with other evidence, is to be taken as legally established, and cannot be disregarded by the court or jury, is not applicable to this class of cases. The person who could contradict the witness, if his testimony is false, is not living, and the courts have uniformly enforced the rule that claims withheld during the life of an alleged debtor, and sought to be enforced after his death, must be established by satisfactory proof. . . . But the rule that the uncontradicted testimony of a disinterested witness is to be believed, is always subject to the limitation that the evidence is not improbable."

But in *Colorado & S. R. Co. v. Thomas* (1805) 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316, it was held that the jury had no right to disregard the uncontradicted testimony of the disinterested witnesses of the accident which killed the plaintiff's intestate. See also *Mackey v. New York C. R. Co.* (1858) 27 Barb. (N. Y.) 523, *infra*, IV.

And see, as holding that the jury have no right to disregard the evidence of defendant's employees in actions for killing the plaintiff's intestate, cases cited *infra*, V. d (2).

*d. Particular jurisdictions.*

In a few jurisdictions there has been an effort to make a definite rule that the credibility of uncontradicted witnesses, at least in the first instance, is for the jury. This effort seems to have been effectual in Massachusetts. *Lindenbaum v. New York, N. H. & H. R. Co.* (1908) 197 Mass. 314, 84 N. E. 129; *Ryan v. Fall River Iron Works Co.* (1908) 200 Mass. 188, 86 N. E. 310; *Whitten v. Haverhill* (1910) 204 Mass. 95, 90 N. E. 409; *Giles v. Giles* (1910) 204 Mass. 383, 90 N. E. 595; *Cain v. Southern Massachusetts Teleph. Co.* (1914) 219 Mass. 504, 107 N. E. 380; *Morrison v. Boston Ins. Co.* (1920) — Mass. —, 125 N. E. 698. So for the judge when there is no jury. *Bearse v. Mabie* (1908) 198 Mass. 451, 84 N. E. 1015.

In *Ryan v. Fall River Iron Works Co.* (1908) 200 Mass. 188, 86 N. E. 310, supra, it was held that the defendant's request to the effect that, there being uncontradicted testimony on the part of the defendant that the loom was started by the act of a fellow servant, the plaintiff could not recover, was properly refused, for the reason that the jury may have disbelieved this testimony, even though uncontradicted.

"In the absence of a presumption or of an admission by the other party as to facts or evidence, a verdict cannot be ordered in favor of a party who has the burden of proof, and relies on evidence introduced by himself." *Whitten v. Haverhill* (1910) 204 Mass. 95, 90 N. E. 409, supra.

"Where a proposition is only to be established by testimony of witnesses, the judge cannot properly direct a jury to decide that the fact is proved affirmatively by testimony. It is for the jury to say whether the witnesses are entitled to credit. . . . We know of no case in this commonwealth in which it has been determined that a jury can be directed to return a verdict, upon the oral testimony of witnesses, in favor of a party who has the burden of proving the facts to which they have testified. This direction [of a verdict] was erroneous and the exception must be sustained." *Giles v.*

*Giles* (1910) 204 Mass. 383, 90 N. E. 595, supra.

In this connection it is of interest to refer to an early Massachusetts case on this subject. In *Harding v. Brooks* (1827) 5 Pick. 244, where the defendant in slander proved by a witness a statement of the plaintiff which justified the words used by the defendant, the court, in nevertheless sustaining a verdict for the plaintiff, said: "The general rule is, that when a fact is sworn to by a witness of fair fame, and who is uncontradicted by other testimony, or any circumstances in which he may stand, the jury are not at liberty to disregard his testimony. The rule, and an exception to it, are laid down in the case of *Wait v. M'Neil* (1811) 7 Mass. 261. We think a qualification of the rule may grow out of the nature or subject-matter of the testimony. If it relate to declarations or conversations happening some time before the witness is called to testify, and the precise words are important to the point in issue, and the witness, though confident, is not positive in his testimony, the jury are at liberty to refuse such entire credit as may be necessary to satisfy them that the words in question are fully proved."

The same rule is laid down in *Maryland*. Thus: "The sufficiency of evidence to satisfy a jury, or the circumstance that it is all on one side, does not authorize the court to direct the jury that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right to weigh the credibility of evidence." *Charleston Ins. & T. Co. v. Corner* (1844) 2 Gill, 410.

In *William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814, the court, in reversing a judgment for the defendant on other grounds, said that with the burden "on the plaintiff, the claimant, the case at bar could not, at the instance of the plaintiff, have been withdrawn from the jury, for although the evidence adduced by the plaintiff was practically uncontradicted, the rule in this state is that the court cannot assume the existence of facts and take away from the jury the

finding of the same. In the case of *Calvert Bank v. Katz* (1905) 102 Md. 56, 61 Atl. 411, the court said: "Doubtless the jury would have found these facts according to the testimony, but the sufficiency of the evidence to satisfy the jury, or the circumstance that it was all on one side, does not authorize the court to direct the jury that it proves a fact."

The definite rule that the credibility of witnesses is for the jury is supported in Pennsylvania by the great weight of authority. *West Branch Bank v. Donaldson* (1847) 6 Pa. 179; *Reel v. Elder* (1869) 62 Pa. 308, 1 Am. Rep. 414; *Grambs v. Lynch* (1884) 4 Pennyp. 243; *Lehigh Coal & Nav. Co. v. Evans* (1896) 176 Pa. 28, 34 Atl. 999; *Lautner v. Kann* (1898) 184 Pa. 334, 39 Atl. 55; *Bartlett v. Rothschild* (1906) 214 Pa. 421, 63 Atl. 1080; *Carter v. Henderson & Co.* (1909) 224 Pa. 319, 73 Atl. 554; *Newman v. Romanelli* (1914) 244 Pa. 147, 90 Atl. 556; *Nydes v. Royal Neighbors* (1917) 256 Pa. 381, 100 Atl. 944; *McGlinn Distilling Co. v. Dervin* (1918) 260 Pa. 414, 103 Atl. 872.

In *West Branch Bank v. Donaldson* (1847) 6 Pa. 179, supra, the court said: "The principal exception to the charge is the submission to the jury of a question of fact, the evidence of which is said to be all on one side. But the jury were to judge of the credibility of the witnesses, and might possibly have disbelieved every word of their testimony; in which event it would have been their duty to find against the parties who were to maintain the affirmative of the issue."

"However clear and indisputable may be the proof when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence." *Reel v. Elder* (1869) 62 Pa. 308, 1 Am. Rep. 414, supra.

"The credibility of a witness is for the jury, and they are not bound to accept his statements because he is unimpeached and uncontradicted by

other witnesses. He may impeach and contradict himself on the witness stand, or the jury may believe that he is honestly mistaken. His manner, the motive or bias, the inherent improbability of his story, or the want of accurate recollection, may discredit his testimony and justify a jury in disregarding it altogether. The question is for the jury, and not for the court." *Lautner v. Kann* (1898) 184 Pa. 334, 39 Atl. 55, supra.

In reversing a judgment for the plaintiff upon a directed verdict the court said: "Where plaintiff's claim rests upon oral testimony, the credibility of the witnesses is always a matter to be passed on by the jury, and the court cannot relieve them of it." *Bartlett v. Rothschild* (1906) 214 Pa. 421, 63 Atl. 1080, supra.

"Where the proof in support of a plaintiff's claim is by oral testimony, it is the province of the jury to decide under instructions by the court." *Newman v. Romanelli* (1914) 244 Pa. 147, 90 Atl. 556, supra.

But in *Lonzer v. Lehigh Valley R. Co.* (1900) 196 Pa. 610, 46 Atl. 937, 8 Am. Neg. Rep. 335, the court set aside a verdict for the plaintiff where the jury had disregarded testimony of the defendant's employees to the effect that a killed employee knew of a certain notice, and that the same had been duly posted, and said: "When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief. If they do so, it is the duty of the court to set the verdict aside."

And it was held in another case, where there was suggestive if not corroborating written evidence, and the uncontradicted, unimpeached testimony of disinterested witnesses for the defendant's defense was that the negligence claimed was that of an independent contractor, that the jury would not be permitted capriciously to disbelieve their testimony. *Walters v. American Bridge Co.* (1902) 234 Pa. 7, 82 Atl. 1103, where judgment for

the defendant was ordered notwithstanding a verdict for the plaintiff.

In Missouri some of the cases lay down the rigid rule, but the result of the matter seems in doubt. It was held in *Bryan v. Wear* (1835) 4 Mo. 106, that it was error for the court to tell the jury they must believe witnesses' uncontradicted testimony. In *Gannon v. Laclede Gaslight Co.* (1898) 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907, it was held that where the plaintiff makes out a prima facie case in negligence, and the defendant puts in a defense of uncontradicted testimony, sufficient if true, the plaintiff is entitled to have the case sent to the jury.

In *Staehlin v. Major* (1917) — Mo. App. —, 199 S. W. 427, it was said where the "allegations of the petition were denied by the answer, and the burden of proof rested upon plaintiff, who, to make out his case, relied upon oral testimony not admitted to be true," that the trial court was without "power to peremptorily direct a verdict in favor of the party having the burden of proof is a rule of decision firmly established in this state. Such has been the law of this state since the decision of the supreme court in the early case of *Bryan v. Wear*, supra."

But in *Reichenbach v. Ellerbe* (1898) 115 Mo. 588, 22 S. W. 578, it was held that a jury had no right to disregard the uncontradicted evidence of the defendant's witness. And the existence of the double rule seems recognized in *Hammett v. Wabash R. Co.* (1908) 128 Mo. App. 1, 106 S. W. 1106, where the court said, in affirming a judgment for the plaintiff after trial by the court: "The question was one for the court, sitting as a jury, whose duty it was to weigh the testimony and to pass upon the credibility of the witnesses, but in doing so had no right to arbitrarily reject competent and credible evidence. We are justified in presuming that the court, in weighing the testimony, was not satisfied that the evidence of the [defendant's] witness Loomis, which was mainly a detail of what was contained in certain memorandums, was accurate and was of such a reliable character as ought to pre-

vail against plaintiff prima facie case. Besides, the court may not have given full credit to the said witness, as he was somewhat contradictory in his statements. It is held in *Adams County Bank v. Hainline* (1896) 67 Mo. App. 483: 'In a case where the evidence so far as appears by the record to be uncontradicted, and the trial court refuses the peremptory instructions, the appellate court will assume that the trial court saw something in the manner of the witnesses to impair their testimony, and will not interfere with the verdict.'"

In *Baird v. Wilks* (1920) — Mo. App. —, 218 S. W. 918, in affirming a judgment upon a verdict for the defendant, the court said: "Where plaintiff's right to recover is put in issue, and the evidence in his favor comes from interested witnesses, and leaves a well-grounded suspicion as to its truthfulness, or is such that the jury has a right to say that it is inherently weak or improbable, then the jury has a right to disbelieve and reject such evidence and find for defendant. In so holding we do not go as far in upholding the right of a jury to disbelieve and reject uncontradicted evidence as have the courts in some of the cases cited."

#### IV. Cases favoring uncontradicted testimony.

##### a. In general.

There are many cases illustrating the principle that the triers of facts, whether court or jury, have no right arbitrarily to reject the uncontradicted testimony of a witness. This has been held in cases where the court was the trier of facts. *United States v. 53 Boxes of Havana Sugar* (1870) 2 Bond, 346, Fed. Cas. No. 15,098; *Peter v. Wright* (1855) 6 Ind. 183; *Lussee v. Hays* (1870) 22 La. Ann. 307; *Second Nat. Bank v. Donald* (1894) 56 Minn. 491, 58 N. W. 269; *Newton v. Pope* (1823) 1 Cow. (N. Y.) 109; *Spring v. Millington* (1904) 44 Misc. 624, 90 N. Y. Supp. 152; *Miller's Will* (1907) 49 Or. 452, 124 Am. St. Rep. 1051, 90 Pac. 1002, 14 Ann. Cas. 277.

In *Dolhoude v. Lemoine* (1880) 32 La. Ann. 251, which is not clearly re-

ported, the court declined to disregard testimony of highly improbable or eccentric conduct.

In *Newton v. Pope* (1823) 1 Cow. (N. Y.) 109, *supra*, the court said, in reversing a judgment for the plaintiff in an action for injuring the plaintiff's horse in driving him: "The justice had no right, entirely and arbitrarily, to disregard the testimony of two unimpeached witnesses, on the ground 'that he was satisfied that they were biased in favor of the defendant.' There was no attempt to impeach their characters. The facts sworn to by them were not contradicted by any other witnesses, either directly or indirectly; nor was there any intrinsic improbability in the narration given by them. It is difficult to establish a rule which shall regulate and limit the discretion of a court or jury, in the degree of credit to be given to the testimony of different witnesses. Much must depend on the particular circumstances of the case. But there is no difficulty in saying that where (as in this case) the witness is unimpeached, the facts sworn to by him, uncontradicted, either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than of a jury to decide according to evidence. But it is mockery to talk of evidence if it is discretionary with the tribunal to which it is addressed to disregard it, upon the vague suggestion, unsupported by proof, of the bias of the witness."

In *Peter v. Wright* (1855) 6 Ind. 183, *supra*, the court said, in reversing a decree which dismissed a bill in chancery: "To justify the rejection of evidence, it must be either contradicted, or improbable in itself, or obnoxious according to some established legal mode of testing truth."

In *Lussee v. Hays* (1870) 22 Ia. Ann. 307, *supra*, the appellate court reversed a judgment for the defendant, as it declined to "ignore the positive sworn statements of five witnesses whose veracity has not been impeached."

In a garnishee case, where there was written corroborating evidence to the disregarded, uncontradicted testimony of the defendant and the claimant, the court, in reversing, said: "The plaintiff does not claim that, if the facts were as thus testified to, this money would be defendant's, and not Magraw's; but its contention is that the court was not bound to accept the testimony of defendant and Magraw as true, although there was no direct evidence contradicting it; that it contained such inherent improbabilities as to furnish a reasonable ground for concluding that it was not true. While recognizing the correctness of the general rule invoked, and the propriety of its liberal application, especially in cases of alleged frauds, yet it must be remembered that in all cases the positive testimony of an otherwise unimpeached witness can only be disregarded when its improbability or inconsistency furnishes a reasonable ground for doing so, and this improbability or inconsistency must appear from facts and circumstances disclosed by the evidence in the case. It cannot be arbitrarily disregarded by either court or jury, for reasons resting wholly in their own minds, and not based upon anything appearing on the trial." *Second Nat. Bank v. Donald* (1894) 56 Minn. 491, 58 N. W. 269, *supra*. See also the quotation from *Miller's Will* (1907) 49 Or. 452, 124 Am. St. Rep. 1051, 90 Pac. 1002, 14 Ann. Cas. 277, *supra*, I.

In *Spring v. Millington* (1904) 44 Misc. 624, 90 N. Y. Supp. 152, *supra*, the court reversed a justice's judgment for the plaintiff, suing for balance due on a contract for work done, for the reason that the justice absolutely overlooked the uncontradicted testimony of the defendant and his witness that the work was improperly done.

In *Moyle v. Hocking* (1897) 10 Colo. App. 446, 51 Pac. 533, the court, in a case tried without a jury, reversed a judgment for the defendant where the only evidence produced was that of a witness for the plaintiff, who testified to a contract and its performance.

So the jury has no right arbitrarily

to reject the uncontradicted testimony of a witness.

**Arkansas.**—*St. Louis, I. M. & S. R. Co. v. Ramsey* (1910) 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383; *St. Louis, I. M. & S. R. Co. v. Humbert* (1911) 101 Ark. 532, 141 S. W. 1122.

**California.**—*Hayward v. Rogers* (1882) 62 Cal. 348 (approving instruction).

**Colorado.**—*Colorado & S. R. Co. v. Thomas* (1905) 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

**Florida.**—*Levy v. Cox* (1886) 22 Fla. 546.

**Georgia.**—*Western & A. R. Co. v. Beason* (1900) 112 Ga. 553, 37 S. E. 863.

**Illinois.**—*Mitchell v. Brewster* (1862) 28 Ill. 163.

**Iowa.**—*Sleeper v. Des Moines* (1903) — *Iowa*, —, 93 N. W. 585; *White v. Hatton* (1907) — *Iowa*, —, 113 N. W. 830 (as stating the rule).

**Kentucky.**—*Barkley v. Bradford* (1896) 100 Ky. 304, 88 S. W. 432.

**Minnesota.**—*Daly v. Chicago, M. & St. P. R. Co.* (1890) 43 Minn. 319, 45 N. W. 611; *Campbell v. Canadian Northern R. Co.* (1914) 124 Minn. 245, 144 N. W. 772 (as stating the rule).

**Mississippi.**—*Mobile, J. & K. C. R. Co. v. Jackson* (1908) 92 Miss. 517, 46 So. 142.

**Missouri.**—*Reichenbach v. Ellerbe* (1893) 115 Mo. 588, 22 S. W. 573.

**Montana.**—*Boe v. Lynch* (1897) 20 Mont. 80, 49 Pac. 381 (possibly to be classed as "undisputed" testimony).

**Nebraska.**—*Dunbier v. Day* (1882) 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109.

**New York.**—*Algeo v. Duncan* (1868) 39 N. Y. 313; *POTTS v. PARDEE* (reported herewith) ante, 785; *Mackey v. New York C. R. Co.* (1858) 27 Barb. 528; *Cunningham v. Gans* (1894) 79 Hun, 434, 29 N. Y. Supp. 979; *Mahon v. Dime Sav. Bank* (1904) 92 App. Div. 506, 87 N. Y. Supp. 258; *Kelly v. Saugerties* (1906) 110 App. Div. 561, 97 N. Y. Supp. 177.

**Oregon.**—*Edwards v. Mt. Hood Constr. Co.* (1913) 64 Or. 308, 130 Pac. 49.

**South Carolina.**—*Wise v. Freshley* (1892) 14 S. C. L. (3 M'Cord) 547.

**Tennessee.**—*Sweany v. Bledsoe* (1848) 8 Humph. 612.

**Canada.**—*Victor Mfg. Co. v. Regina Trading Co.* (1913) 6 Sask. L. R. 302.

This rule has illustration where the jury disregarded the uncontradicted testimony of witnesses for the plaintiff. *Levy v. Cox* (1886) 22 Fla. 546; *Sleeper v. Des Moines* (1903) — *Iowa*, —, 93 N. W. 585; *Boe v. Lynch* (1897) 20 Mont. 80, 49 Pac. 381; *Dunbier v. Day* (1882) 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109; *Sweany v. Bledsoe* (1841) 8 Humph. (Tenn.) 612.

Also where the jury disregarded the uncontradicted testimony of witnesses for the defendant.

**Arkansas.**—*St. Louis, I. M. & S. R. Co. v. Ramsey* (1910) 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383; *St. Louis, I. M. & S. R. Co. v. Humbert* (1911) 101 Ark. 532, 142 S. W. 1122.

**Colorado.**—*Colorado & S. R. Co. v. Thomas* (1905) 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

**Georgia.**—*Western & A. R. Co. v. Beason* (1900) 112 Ga. 553, 37 S. E. 863.

**Illinois.**—*Mitchell v. Brewster* (1862) 28 Ill. 163.

**Minnesota.**—*Daly v. Chicago, M. & St. P. R. Co.* (1890) 43 Minn. 319, 45 N. W. 611.

**Mississippi.**—*Mobile, J. & K. C. R. Co. v. Jackson* (1908) 92 Miss. 517, 46 So. 142.

**Missouri.**—*Reichenbach v. Ellerbe* (1893) 115 Mo. 588, 22 S. W. 573.

**New York.**—*Algeo v. Duncan* (1868) 39 N. Y. 313; *POTTS v. PARDEE* (reported herewith) ante, 785; *Mackey v. New York C. R. Co.* (1858) 27 Barb. 528; *Cunningham v. Gans* (1894) 79 Hun, 434, 29 N. Y. Supp. 979; *Mahon v. Dime Sav. Bank* (1904) 92 App. Div. 506, 87 N. Y. Supp. 258; *Kelly v. Saugerties* (1906) 110 App. Div. 561, 97 N. Y. Supp. 177.

**Canada.**—*Victor Mfg. Co. v. Regina Trading Co.* (1913) 6 Sask. L. R. 302.

In *Levy v. Cox* (1886) 22 Fla. 546, supra, ejectment, the court reversed a judgment for the defendant, stating that "the jury, it is true, are the

judges of the evidence, but when a plaintiff makes out a plain and uncontradicted case, and his witnesses are unimpeached, they have no right to disregard the evidence."

In *Mitchell v. Brewster* (1862) 28 Ill. 163, the court, in reversing a judgment for the plaintiff, said of a witness for the defendant: "The only question would seem to be, was the jury justified in disregarding the testimony of this witness? He was not impeached in the least, in any way, so far as this record shows. Indeed, there is no intimation that he is not a truthful man. Can a jury, from mere caprice, entirely disregard the testimony of a witness unimpeached in any way? This they cannot lawfully do, although they are the judges of the credibility of witnesses. They must judge of that fact, as of any other in the case, from evidence. They cannot disregard the testimony of a witness without some cause. They must have some grounds for disbelieving him before they are authorized to do so. They must exercise their judgment, and not their will, when passing upon the credibility of a witness."

In *Card v. Fowler* (1899) 120 Mich. 646, 79 N. W. 925, the court thought the trial court ought to have given the following requested charge: "You are instructed that the uncontroverted testimony of a credible witness ought not to be lightly disregarded, and you have no right to substitute a fanciful hypothesis to account for facts which are explained by direct testimony. Your verdict should be based on the evidence, and that alone; and it is the duty of the jury to harmonize all proven facts, if possible, with the conditions found surrounding the case, and the circumstances proven to have existed at the time of the occurrence."

In *Campbell v. Canadian Northern R. Co.* (1914) 124 Minn. 245, 144 N. W. 772, the court said: "The discretion of the jury in the matter of credibility does not, however, warrant the disregard of the positive testimony of an unimpeached witness, unless its improbability furnishes a reasonable ground for so doing, which must ap-

pear from the facts and circumstances disclosed by the evidence."

#### *b. Illustrations.*

In *Sleeper v. Des Moines* (1903) — Iowa, —, 93 N. W. 585, the court affirmed an order granting a new trial after a verdict for the defendant where the jury had disregarded the uncontradicted testimony of the plaintiff and his witnesses as to the nature and extent of his injury.

Where the only evidence was the testimony of the plaintiff's daughter in favor of her father, and the jury found for the defendant, the court ordered a new trial. *Sweany v. Bledsoe* (1848) 8 Humph. (Tenn.) 612.

Similarly, in *Dunbier v. Day* (1882) 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109, the court reversed a judgment for the defendant when the jury disregarded the uncontradicted evidence of the plaintiff, his wife and daughter, that the money sued for was in his possession after he had entered the defendant's inn as a guest.

Where, in a suit on a benefit insurance certificate, the uncontradicted evidence shows an assessment notice to the insured and his failure to pay, thus forfeiting the insurance, a verdict for the plaintiff cannot stand. *Reichenbach v. Ellerbe* (1883) 115 Mo. 588, 22 S. W. 573, *supra*.

Where the defendant in an action on a promissory note proved by the uncontradicted testimony of himself and an uncle that he was not of age when the note was made, but the jury found for the plaintiff, a new trial was ordered. *Algeo v. Duncan* (1868) 39 N. Y. 313, *supra*.

Compare cases cited *infra*, V. a, 2.

In *Mackey v. New York C. R. Co.* (1858) 27 Barb. (N. Y.) 528, it was held that the jury had no right to disregard the uncontradicted testimony of a witness that he warned the plaintiff's intestate, killed at a railway crossing, of the approach of the train which killed him.

Where the defense to a check, that it was given for a gambling loss, was proved without contradiction by the defendant and a disinterested witness, it was held not necessary to send the

case to the jury, and their verdict for the plaintiff was set aside. *Cunningham v. Gans* (1894) 79 Hun, 434, 29 N. Y. Supp. 979.

The court set aside a verdict for the plaintiff where scales at first inaccurate were afterwards moved and tested and found to be correct, saying: "Even if the jury should have believed the testimony that the scales were untrue while they were located in front of the store of Gray, they are not authorized to reject the testimony of the weight after the scales were removed and placed where they were afterwards legally tested and found to be accurate." *Kelly v. Saugerties* (1906) 110 App. Div. 561, 97 N. Y. Supp. 177.

In *Victor Mfg. Co. v. Regina Trading Co.* (1913) 6 Sask. L. R. 302, it was held as to a counterclaim that the jury were not justified in disbelieving the uncontradicted evidence of the defendant's witness.

It is on the principle that the jury may not disregard uncontradicted testimony that the court in such cases has been sustained in ordering the result. *Kesterson v. Hays* (1919) — Ark. —, 209 S. W. 721; *Brown v. Petersen* (1905) 25 App. D. C. 359, 4 Ann. Cas. 980; *Johnson v. Buffalo Center State Bank* (1907) 134 Iowa, 731, 112 N. W. 165 (verdict directed for plaintiff); *BOUDEMAN v. ARNOLD* (reported herewith) 789; *McDermott v. Third Ave. R. Co.* (1887) 44 Hun (N. Y.) 107 (case dismissed on uncontradicted testimony for defendant); *Davis v. Hardy* (1827) 6 Barn. & C. 225, 108 Eng. Reprint, 436, 9 Dowl. & R. 380, 5 L. J. K. B. 91, 30 Revised Rep. 306.

The court was sustained in taking from the jury the question of the ownership of the property for the conversion of which the plaintiff claimed damages, on the testimony of the plaintiff and three other witnesses, where the defendant introduced no testimony on that issue, but attacked the plaintiff's credibility. *Kesterson v. Hays* (Ark.) *supra*.

In *Johnson v. Buffalo Center State Bank* (1907) 134 Iowa, 731, 112 N. W. 165, in affirming a judgment on a verdict directed for the plaintiff, the court said: "The rule in this state seems to

be that where the evidence in favor of the party having the burden of proof on an issue is in no way contradicted or its credibility affected by impeachment, the court may assume the fact relied upon to be proven, and need not submit the question to the jury, for a verdict against such evidence would be set aside."

In affirming a judgment entered upon a verdict directed by the court in favor of a claimant of property seized under an execution, the court said: "Undoubtedly the case was not above suspicion as to some understanding between Petersen and Hood; but that understanding may have been entirely proper and legitimate, and it has long since been well established in our law that suspicion is not proof and cannot be allowed to take the place of proof. The appellant's contention would require that every case of uncontradicted and unimpeached testimony should be submitted to a jury, when there is no countervailing testimony. But this is not the law. The law is that positive testimony uncontradicted, and not inherently improbable, is *prima facie* evidence of the fact which it seeks to establish, and the jury is not at liberty to disregard it." *Brown v. Petersen* (1905) 25 App. D. C. 359, 4 Ann. Cas. 980.

In *Davis v. Hardy* (1827) 6 Barn. & C. 225, 108 Eng. Reprint, 436, the court approved the decision of the trial court in ordering a nonsuit in a case of malicious prosecution, on the uncontradicted evidence of a witness for the defendant, showing probable cause. *Abbott, Ch. J.*, said: "Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." *Bayley, J.*, said: "If there is nothing in the demeanor of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If



the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial."

*V. Uncontradicted testimony of interested witnesses.*

*a. Cases favoring the trier of facts.*

*1. In general.*

There are many cases illustrating the principle that the testimony of an interested witness, though uncontradicted, is for the triers of facts, whether court or jury, who are not bound thereby.

*2. Court as trier of facts.*

This principle has had frequent illustration where the court was the trier of the facts.

**United States.**—*The Helen R. Cooper* (1870) 7 Blatchf. 378, Fed. Cas. No. 6,334; *Re Leslie* (1903) 119 Fed. 406; *The Dauntless* (1903) 121 Fed. 420, affirmed in (1904) 64 C. C. A. 243, 129 Fed. 715; *United States v. 60 Barrels of Wine* (1915) 225 Fed. 846 (interested witnesses contradicted by physical facts).

**Alabama.**—*Smyth v. Oliver* (1857) 31 Ala. 39.

**California.**—*Davis v. Judson* (1910) 159 Cal. 121, 113 Pac. 147; *California-Calaveras Min. Co. v. Walls* (1915) 170 Cal. 285, 149 Pac. 595.

**District of Columbia.**—*Alexander v. Blackman* (1906) 26 App. D. C. 541.

**Illinois.**—*Hester v. Frary* (1901) 99 Ill. App. 51.

**Iowa.**—*Bremer v. Haag* (1911) 151 Iowa, 449, 131 N. W. 667.

**Kentucky.**—*Mutual Mfg. Co. v. Charles Moore & Co.* (1910) 137 Ky. 130, 125 S. W. 267.

**Minnesota.**—*Anderson v. Liljengren* (1892) 50 Minn. 3, 52 N. W. 219; *Lang v. Ferrant* (1893) 55 Minn. 415, 57 N. W. 140.

**Missouri.**—*Lovell v. Davis* (1892) 52 Mo. App. 342.

**New Jersey.**—*Vreeland v. Vreeland* (1891) 48 N. J. Eq. 56, 21 Atl. 627; *Harris v. Barrett* (1909) 75 N. J. Eq. 386, 72 Atl. 956.

**New York.**—See *infra*, d.

**South Dakota.**—*Blount v. Medbery* (1903) 16 S. D. 562, 94 N. W. 428.

**Washington.**—*Keene v. Behan* (1905) 40 Wash. 505, 82 Pac. 884; *Gosline v. Dryfoos* (1907) 45 Wash. 396, 88 Pac. 634.

Examples may be given in the case of the pilot, or the master and pilot of a vessel in collision (*The Dauntless* (1903) 121 Fed. 420; *The Helen R. Cooper* (1870) 7 Blatchf. 378, Fed. Cas. No. 6,334); of a bankrupt in bankruptcy proceedings (*Re Leslie* (1903) 119 Fed. 406); of an interested witness in a patent case (*Alexander v. Blackman* (1906) 26 App. D. C. 541); and, in equity cases, *Smyth v. Oliver* (1857) 31 Ala. 39; *Vreeland v. Vreeland* (1891) 48 N. J. Eq. 56, 21 Atl. 627; *Harris v. Barrett* (1909) 75 N. J. Eq. 386, 72 Atl. 956; *Keene v. Behan* (1905) 40 Wash. 505, 82 Pac. 884.

The court is not bound to hold that a father contracted to give his son certain land when the only direct testimony in an action of the son against the father's estate is that of the son's wife. All the circumstances are to be considered. *Bremer v. Haag* (1911) 151 Iowa, 449, 131 N. W. 667.

The trial court is not required to believe the uncontradicted testimony of the defendant that he was an infant. *Levy v. Abramsohn* (1903) 39 Misc. 781, 81 N. Y. Supp. 344; *Waterman v. Waterman* (1903) 42 Misc. 195, 85 N. Y. Supp. 377; *Lovell v. Davis* (1892) 52 Mo. App. 342.

So, as to the uncontradicted testimony of the defendants and their mother to the same effect. *Garbarsky v. Simkin* (1901) 86 Misc. 195, 73 N. Y. Supp. 199. Compare *Algeo v. Duncan* (1868) 39 N. Y. 313, *supra*, IV. b; *Union Bank v. Mandel* (1910) 139 App. Div. 684, 124 N. Y. Supp. 459, *infra*, V. d, 2.

While without the scope of this annotation, it may be noted that in affirming the judgment, where the referee disregarded the plaintiff's evidence of value of hotel furniture, etc., the court said: "Appellant testified that the property, though it had been in use in a hotel from one to five years, was worth as much as when new, and his values were put upon

that basis. The evidence was clear, to be sure, but clearly outside the realms of all reasonable probabilities." *Bourda v. Jones* (1901) 110 Wis. 52, 85 N. W. 671.

"The court or jury has the right, in view of the interest of the witness, to disregard his evidence, as not entitled to credit. The credibility of the witness in such a case is to be determined by the court or jury." *Blount v. Medbery* (1908) 16 S. D. 562, 94 N. W. 423.

In reversing a judgment in an equitable action the court said: "Respondent is an interested party; hence, in weighing the testimony, we are not compelled to accept his statements, if they do not bear the stamp of credibility, even though uncontradicted." *Keene v. Behan* (1905) 40 Wash. 505, 82 Pac. 884.

In sustaining a judgment for the defendant after a trial by the court without a jury, the court said: "It is a well-established principle of law that neither courts nor jurors are bound by the uncontradicted testimony of an interested party when such testimony, upon being carefully weighed, does not commend itself as worthy of belief. If, by reason of improbable and inconsistent statements, the testimony of an interested party appears to be lacking in the element of truthfulness, courts and jurors may, in their discretion, reject the same." *Gosline v. Dryfoos* (1907) 45 Wash. 396, 88 Pac. 634. Quoted in *J. S. Brown & Bros. Mercantile Co. v. Sherrod* (1909) 53 Wash. 132, 101 Pac. 481.

In *Zimmerman v. Bannon* (1898) 101 Wis. 407, 77 N. W. 735, where the witness was a party, the court said: "A court is not bound to accept a statement as true because there is no direct testimony contradicting it. It may be inherently improbable, or it may be impeached by the attendant circumstances. Courts are never bound to accept the statement of a witness which is against all reasonable probability."

In *Alexander v. Blackman* (1906) 26 App. D. C. 541 (a patent case), the court said of interested witnesses: "We shall follow the rule laid down by this court in *Beals v. Finkenbinder*

(1897) 12 App. D. C. 23, 29: 'In weighing testimony we are not bound to believe a particular fact, testified to by one or more witnesses, simply because they may not have been directly contradicted therein, or impeached generally by evidence tending to show a want of reputation for veracity. The inherent probability or improbability of such a fact is to be tested by the unquestioned circumstances that surround the main transaction or occurrence, as well as "by the ordinary laws that govern human conduct." *Atlantic Works v. Brady* (1883) 107 U. S. 192, 203, 27 L. ed. 438, 442, 2 Sup. Ct. Rep. 225; *Telephone Cases* (1888) 126 U. S. 567, 21 L. ed. 1000, 8 Sup. Ct. Rep. 778.'

In *Harris v. Barrett* (1909) 75 N. J. Eq. 386, 72 Atl. 956, the court said: "The sole question that I paused to consider after the trial and upon which I have taken the briefs of counsel, is whether, in view of the fact that Harris and Barrett each swore to that which would lead to a contrary decision, I was bound to take their testimony upon points which the defendant was not able to contradict. I have reached the conclusion that I am not so bound. Without attempting to formulate a doctrine, I find that a trier of facts must be left free to believe or not to believe testimony which is subject to question."

### 3. Jury.

So the principle has been often applied in the case of trial by jury.

**United States.** — *Sonnentheil v. Christian Moerlein Brewing Co.* (1898), 172 U. S. 402, 43 L. ed. 493, 19 Sup. Ct. Rep. 233; *Grand Trunk R. Co. v. Cobleigh* (1879) 24 C. C. A. 342, 51 U. S. App. 15, 78 Fed. 784 (stating the rule).

**Alabama.**—*Nelson v. Warren* (1890) 93 Ala. 408, 8 So. 413.

**Arizona.**—*Lentz v. Landers* (1919) — *Ariz.* —, 185 Pac. 821.

**Arkansas.**—*Skillern v. Baker* (1907) 82 Ark. 86, 118 Am. St. Rep. 52, 100 S. W. 764, 12 Ann. Cas. 243.

**California.** — *Sonoma County v. Stofen* (1899) 125 Cal. 32, 57 Pac. 681.

**Iowa.**—*McKnight v. Parsons* (1907) 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15

Ann. Cas. 665; Meardon v. Iowa City (1910) 148 Iowa, 12, 126 N. W. 939.

Kentucky.—Howard v. Louisville R. Co. (1907) 32 Ky. L. Rep. 309, 105 S. W. 932; Wasioto & B. Mountain R. Co. v. Hall (1916) 167 Ky. 819, 181 S. W. 629.

Massachusetts.—Sullivan v. Old Colony Street R. Co. (1908) 200 Mass. 303, 86 N. E. 511; O'Connell v. Casey (1910) 206 Mass. 520, 92 N. E. 804.

Michigan.—Green v. Detroit United R. Co. (1920) — Mich. —, 177 N. W. 263.

Minnesota. — Hawkins v. Sauby (1892) 48 Minn. 69, 50 N. W. 1015.

New Jersey. — Schmidt v. Marconi Wireless Teleg. Co. (1914) 86 N. J. L. 183, 90 Atl. 1017, Ann. Cas. 1918B, 131.

New York.—See *infra*, d.

Pennsylvania.—Prowattain v. Tindall (1876) 80 Pa. 295; Second Nat. Bank v. Hoffman (1911) 229 Pa. 429, 78 Atl. 1002; Colonial Trust Co. v. Getz (1905) 23 Pa. Super. Ct. 619.

South Dakota.—Blount v. Medbery (1903) 16 S. D. 562, 94 N. W. 428 (as stating the rule).

Texas. — Heierman v. Robinson (1901) 26 Tex. Civ. App. 491, 63 S. W. 657; Franklin L. Ins. Co. v. Villeneuve (1902) 29 Tex. Civ. App. 128, 68 S. W. 203; Burleson v. Tinnin (1906) — Tex. Civ. App. —, 100 S. W. 350; Gulf, C. & S. F. R. Co. v. Batte (1908) — Tex. Civ. App. —, 107 S. W. 632 (as stating the rule); Dubinski Electric Works v. J. Lang Electric Co. (1908) — Tex. Civ. App. —, 111 S. W. 169; Sovereign Camp, W. W. v. Jackson (1911) — Tex. Civ. App. —, 138 S. W. 1137; First Nat. Bank v. McWhorter (1915) — Tex. Civ. App. —, 179 S. W. 1147.

Washington. — Keene v. Behan (1905) 40 Wash. 505, 82 Pac. 884; Gossline v. Dryfoos (1907) 45 Wash. 396, 88 Pac. 634 (as stating the rule); Citizens Sav. Bank v. Houtchens (1911) 64 Wash. 275, 116 Pac. 866.

It is upon the same principle that it is held to be error to direct a verdict for a party on his own testimony, though uncontradicted. Moore v. Robinson (1903) — Tex. Civ. App. —, 75 S. W. 890.

In Massachusetts it is the modern rule that the jury may disbelieve un-

contradicted testimony; a fortiori, the testimony of a party. Sullivan v. Old Colony Street R. Co. (1908) 200 Mass. 303, 86 N. E. 511; O'Connell v. Casey (1910) 206 Mass. 520, 92 N. E. 804.

It may be noted that in *Wait v. M'Neil* (1911) 7 Mass. 261, the jury were sustained in refusing to believe the son of the defendant, who was not impeached.

In *Sonnentheil v. Christian Moerlein Brewing Co.* (1898) 172 U. S. 402, 43 L. ed. 493, 19 Sup. Ct. Rep. 233, where the jury found against the uncontradicted testimony of the plaintiff's witness, the court, in holding it proper to submit the question to the jury, said: "While the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses . . . the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

In a negligence case the court said of the plaintiff: "The jury were not bound to accept his testimony, even though uncontradicted, as to any fact militating against his own prudence. A jury may properly reject any uncorroborated statement of a party to the action, even though there is no controverted testimony." *Grand Trunk R. Co. v. Cobleigh* (1897) 24 C. C. A. 342, 51 U. S. App. 15, 78 Fed. 784.

Where the trial court refused to charge that "it is the duty of the jury to believe the testimony of said Nelson [an interested party], in the absence of evidence or facts tending to show his testimony to be false," the appellate court, in affirming, said: "The law has fixed no such artificial standard for measuring the credibility of oral testimony. The mental processes by which we believe, or refuse to believe, what is related before us, are not reducible to rules, nor are they susceptible of exact definition." *Nelson v. Warren* (1890) 93 Ala. 408, 8 So. 413.

In *Schmidt v. Marconi Wireless Teleg. Co.* (1914) 86 N. J. L. 183, 90 Atl.

1017, Ann. Cas. 1918B, 181, the court, in reversing a judgment where the trial court had directed a verdict for the defendant upon the uncontradicted testimony of one of its witnesses who was its president and general counsel, an ex-governor of the state, of the highest character, said: "It will hardly do to say that the character of a witness is the determining factor upon the question whether the facts testified to by him shall be determined by the court or by the jury. It cannot be that where the character of the witness for truth and veracity is known by the court to be unimpeachable, the facts sought to be established by his testimony are to be determined by the court, but that where, in the judgment of the court, the witness is not entitled to full faith and credit, the facts sought to be proved by him must be determined by the jury. No such rule of evidence exists. In every case where the issue depends upon the determination of facts the existence of which is not admitted, the jury, and not the court, must determine them."

In *Greene v. Sigua Iron Co.* (1896) 31 C. C. A. 458, 88 Fed. 208, it was said: "The testimony of a party on a material issue should always be submitted to the jury, even though uncontradicted, if his adversary so request."

In reversing a case where a verdict was directed for the plaintiff, the court said: "The courts of this state have established the principle that a case wholly dependent upon the uncorroborated testimony of a party interested in the litigation, though unopposed by other witnesses, is for the jury, and they have the right to weigh the credibility of the witness." *First Nat. Bank v. McWhorter* (1915) — Tex. Civ. App. —, 179 S. W. 1147.

In *Franklin L. Ins. Co. v. Villeneuve* (1902) 29 Tex. Civ. App. 128, 68 S. W. 203, the court said: "The jury were not bound to believe the witness Roseberry, though not contradicted, as to the contestability of the incontestable clause. He was an interested witness, and the jury could consider that fact in passing upon his testimony, and

give it such credit as they deemed it deserved."

In *Leavitt v. Thurston* (1911) 38 Utah, 351, 118 Pac. 77, where the witness was a party, the court, thinking his testimony suspicious, said, while reversing a judgment against him on other grounds: "While a jury may not arbitrarily disbelieve a witness and reject his testimony, neither are they bound to accept a fact as established merely because he testifies to it, when the circumstances render its existence, or the testimony of the witness, improbable or doubtful."

#### Illustrations.

It is error for the court to instruct the jury that a party's (defendant's) evidence must be disregarded unless corroborated. *Prowattain v. Tindall* (1876) 80 Pa. 295.

The court on a second trial has no right to order a nonsuit because the plaintiff's testimony is different from what it was on the first trial. It is for the jury to say which testimony was correct. *Williams v. Delaware, L. & W. R. Co.* (1898) 155 N. Y. 158, 49 N. E. 672.

In a suit by a county against its ex-treasurer and his bondsmen the jury were held warranted in disbelieving the suspicious testimony of the defendant and his wife, that he had been robbed of the missing money. *Sonoma County v. Stofen* (1899) 125 Cal. 32, 57 Pac. 681.

In *Hawkins v. Sauby* (1892) 48 Minn. 69, 50 N. W. 1015, it was held that the denials of principal and agent that the agent took usury by the principal's consent might be disbelieved by the jury when the circumstances were not free from suspicion.

Where the indorser of a note claimed fraud, it was held that a bank which offered its cashier as a witness to show that it was a holder in due course was not entitled to a directed verdict on his uncontradicted testimony; the matter was for the jury. *Second Nat. Bank v. Hoffman* (1911) 229 Pa. 429, 78 Atl. 1002.

Where the plaintiff, her daughter and her daughter-in-law testified as to the manner of a street car accident, the car starting with a jerk, nothing

being said to the conductor or motorman at the time, and the jury found for the defendant, the conductor and motorman knowing nothing about the accident, and testifying that the car was not negligently or carelessly started at the point, the court said, *inter alia*: "As three witnesses testified to the fact that the car was suddenly started with a violent jerk, and there was no direct evidence to the contrary, counsel for appellant earnestly insist that the verdict was palpably against the evidence. In trials by jury it does not follow that because one or more witnesses testify positively concerning a fact, and there is no evidence to the contrary, that the verdict must be flagrantly against the evidence. The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth, neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any witness, and it is their province to give such weight to the evidence as, in their judgment and discretion, it is entitled to." *Howard v. Louisville R. Co.* (1907) 32 Ky. L. Rep. 309, 105 S. W. 982.

The jury is not bound to believe the testimony of interested parties, received without objection, as to conversations with a person since deceased. *McCormick v. Kampmann* (1908) 102 Tex. 215, 115 S. W. 24.

It may be noted that in *Klason v. Rieger* (1875) 22 Minn. 59, it was held that, the defendant having testified without contradiction that he was an infant, the jury might disregard this, inasmuch as he was contradicted on other matters.

It may also be noted that in *Barrett v. Connecticut Co.* (1911) 85 Conn. 705, 81 Atl. 963, where the plaintiff in a negligence case testified that she slipped on grease on a car rail, the court said: "Under our rule the jury were at liberty to credit the uncorroborated testimony of the plaintiff, even though it seems at variance with the probabilities." But the judgment for the plaintiff was reversed, as there

was not a preponderance of proof that the defendant placed the grease upon the rail.

*b. Cases favoring uncontradicted testimony.*

*1. In general.*

There are other cases in which it was held that the triers of facts, whether court or jury, were not justified in disregarding the uncontradicted testimony of an interested witness.

**United States.**—*United States v. 53 Boxes of Havana Sugar* (1870) 2 Bond, 346, Fed. Cas. No. 15,098.

**Idaho.**—*Southwest Nat. Bank v. Lindsley* (1916) 29 Idaho, 343, 158 Pac. 1032 (jury).

**Illinois.**—*Larson v. Glos* (1908) 235 Ill. 584, 85 N. E. 926 (court); *Kelly v. Jones* (reported herewith) ante, 792.

**Indiana.**—*Roe v. Cronkhite* (1876) 55 Ind. 183 (jury).

**Iowa.**—*Woodward v. Squires* (1874) 39 Iowa, 435 (jury); *Pumphrey v. Walker* (1887) 71 Iowa, 383, 32 N. W. 386 (jury).

**Minnesota.**—*Grover v. Bach* (1901) 82 Minn. 299, 84 N. W. 909 (jury).

**New Jersey.**—*Muirheid v. Smith* (1882) 35 N. J. Eq. 303 (court); *Cooley v. Barcroft* (1881) 43 N. J. L. 363 (court); *Tracy v. Tracy* (1901) 62 N. J. Eq. 807, 48 Atl. 533 (court).

**New York.**—See *infra*, d.

**Oregon.**—*Miller's Will* (1907) 49 Or. 452, 124 Am. St. Rep. 1051, 90 Pac. 1002, 14 Ann. Cas. 277.

**Texas.**—*McAfee v. Robertson* (1874) 41 Tex. 355 (jury); *Beene v. Rotan Grocery Co.* (1908) 50 Tex. Civ. App. 448, 110 S. W. 162 (court).

On the same principle are the cases holding that the trial judge had power to order the result.

In affirming a judgment for the plaintiff on a directed verdict, referring to testimony of the attorney for the plaintiff, taken by deposition, the court said: "The jury may discredit the testimony of an interested witness. But it is not an absolute rule, applicable in all cases, that the jury may discredit an uncontradicted witness because he is interested, or in the employ of an interested party. . . . The rule invoked, it seems to us, ought not to

be applied when the fact testified to is one which the opposing party is able . . . to introduce testimony to contradict, and fails to do so." *San Antonio v. E. H. Rollins & Sons* (1910) — *Tex. Civ. App.* —, 127 S. W. 1166.

## 2. Court as trier of facts.

In *Larson v. Glos* (1908) 235 Ill. 584, 85 N. E. 926, the court reversed a judgment based on a master's disregard of the testimony of an interested witness who "was not contradicted or impeached, and the facts testified to were not improbable in themselves or in connection with any circumstances in the case."

In *Cooley v. Barcroft* (1881) 43 N. J. L. 363, it was held that a justice trying a case could not arbitrarily reject the uncontradicted testimony of the defendant.

In *Tracy v. Tracy* (1901) 62 N. J. Eq. 807, 48 Atl. 583, it was held that the court in an equity case may not arbitrarily disregard the uncontradicted, unimpeached testimony of the plaintiff, not inconsistent nor improbable. And see also *KELLY v. JONES* (reported herewith) ante, 792.

In *Beene v. Rotan Grocery Co.* (1908) 50 *Tex. Civ. App.* 448, 110 S. W. 162, it was held that the court trying the case without a jury ought not to disregard the defendant's uncontradicted evidence of fraud, where his answer, charging the fraud, was filed months before trial, and the persons charged with fraud did not testify.

"Interested persons are by our law competent witnesses, and their testimony is binding on the court, unless overcome by counter testimony, or irreconcilable with the known facts of the case." *Marks v. New Orleans Cold Storage Co.* (1901) 107 La. 172, 57 L.R.A. 271, 90 Am. St. Rep. 285, 31 So. 671.

In *Harrigan v. Gilchrist* (1904) 121 Wis. 383, 99 N. W. 909, an equity case, the court said: "It seems that in setting aside Mr. Owen's evidence as false, the court overlooked the familiar rule that the undisputed reasonable evidence of one witness, though a party interested, should be given controlling weight in determining a question of fact."

## 3. Jury.

In *Southwest Nat. Bank v. Lindsley* (1915) 29 Idaho, 843, 158 Pac. 1082, the court reversed a judgment entered upon a verdict for the defendant on the ground that the jury, misled by passion or prejudice, had ignored the uncontradicted testimony of the plaintiff's president.

In *Grover v. Bach* (1901) 82 Minn. 299, 84 N. W. 909, the court, in setting aside, as without evidence to sustain it, a finding of the jury that the plaintiff was not the owner at a certain date of the note sued on, said as to his testimony: "There is nothing in his testimony to suggest that it was not entitled to full credence, or to justify its rejection as untrue, or to bring it within the rule that courts and juries are not bound to accept as true the testimony of a witness, although there is no direct contradiction, where it contains improbabilities and contradictions which, alone or in connection with other circumstances in evidence, furnish reasonable grounds for concluding that it is false."

In *Engmann v. Immel* (1884) 59 Wis. 249, 18 N. W. 182, it was held that the court properly charged the jury as to the testimony of the plaintiff's attorney: "You have heard the testimony of Mr. Frisby about the note, as to the genuineness of the signature. His testimony is uncontradicted, and unless there is something in the case which casts discredit on his testimony, you are bound to accept it as true."

Where a jury disregarded the defendant's account, proved by uncontradicted evidence, and gave judgment for the plaintiff, a new trial was ordered. *Roe v. Cronkhite* (1876) 55 Ind. 183.

Where the uncontradicted testimony of the defendant shows a good defense to a promissory note, the jury may not disbelieve him on account of their private knowledge of his bad reputation for truth. *Pumphrey v. Walker* (1887) 71 Iowa, 383, 32 N. W. 386.

The presumption of negligence in the setting of fire by a locomotive "may be met and overcome by satisfactory proof that the engine was properly constructed and managed, and in

suitable repair; and, if the uncontradicted evidence on the part of the railway company clearly shows that it has fully performed its duty in these respects, the presumption of negligence is rebutted." *Daly v. Chicago, M. & St. P. R. Co.* (1890) 43 Minn. 319, 45 N. W. 611, reversing a judgment for the plaintiff on a verdict. But where the evidence as to construction and repairs is not entirely satisfactory, the jury is not bound by it. *Cantlon v. Eastern R. Co.* (1891) 45 Minn. 481, 48 N. W. 22.

*c. Testimony of defendant's implicated employees in negligence cases.*

*1. Cases favoring the trier of facts.*

It has been often held in actions for negligence that the uncontradicted testimony of the defendant's implicated employees was for the triers of facts, who were not bound thereby.

**United States.** — *Robinson v. New York C. & H. R. R. Co.* (1882) 20 Blatchf. 338, 9 Fed. 877; *Craft v. Northern P. R. Co.* (1894) 62 Fed. 735.

**Arkansas.** — *Kansas City Southern R. Co. v. Whitley* (1919) — Ark. —, 213 S. W. 369.

**Indiana.** — *Princeton Coal & Min. Co. v. Roll* (1905) 162 Ind. 115, 66 N. E. 169, 13 Am. Neg. Rep. 271.

**Kentucky.** — *Chesapeake & O. R. Co. v. Booth* (1912) 149 Ky. 245, 148 S. W. 61.

**Maine.** — *Logue v. Grand Trunk R. Co.* (1906) 102 Me. 34, 65 Atl. 522.

**Massachusetts.** — *Hankinson v. Lynn Gas & E. Co.* (1900) 175 Mass. 271, 56 N. E. 604 (jury); *Soulier v. Fall River Gas Works Co.* (1915) 224 Mass. 53, 112 N. E. 627.

**New York.** — *Elwood v. Western U. Teleg. Co.* (1871) 45 N. Y. 549, 6 Am. Rep. 140 (action for negligence in sending a telegram); *Volkmar v. Manhattan R. Co.* (1892) 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870; *Hoes v. Third Ave. R. Co.* (1896) 5 App. Div. 151, 39 N. Y. Supp. 40, 5 Am. Neg. Cas. 674; *O'Flaherty v. Nassau Electric R. Co.* (1898) 34 App. Div. 74, 54 N. Y. Supp. 96, affirmed in (1900) 165 N. Y. 624, 59 N. E. 1128; *Fox v. Manhattan R. Co.* (1902) 67 App. Div. 460, 73 N. Y. Supp. 896; *Irish v. Union Bag &*

*Paper Co.* (1905) 103 App. Div. 45, 92 N. Y. Supp. 695, affirmed in (1906) 183 N. Y. 508, 76 N. E. 1097; *Courtney v. Niagara Falls Hydraulic Power & Mfg. Co.* (1910) 138 App. Div. 383, 122 N. Y. Supp. 721, affirmed in (1911) 201 N. Y. 584, 95 N. E. 1126.

**Porto Rico.** — *Diaz v. Fajardo Development Co.* (1906) 2 Porto Rico Fed. Rep. 152 (as stating the rule).

**Texas.** — *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772; *Galveston, H. & S. A. R. Co. v. Murray* (1906) — Tex. Civ. App. —, 99 S. W. 144; *Missouri, K. & T. R. Co. v. Harris* (1907) 45 Tex. Civ. App. 542, 101 S. W. 506; *El Paso Foundry & Mach. Co. v. De Guereque* (1907) 46 Tex. Civ. App. 86, 101 S. W. 814; *Ross v. St. Louis Southwestern R. Co.* (1907) 47 Tex. Civ. App. 24, 103 S. W. 708.

**Washington.** — *Gibson v. Chicago, M. & P. S. R. Co.* (1911) 61 Wash. 639, 112 Pac. 919.

In *Princeton Coal & Min. Co. v. Roll* (1903) 162 Ind. 115, 66 N. E. 169, 13 Am. Neg. Rep. 271, supra, it was held that the jury was not bound to believe the defendant's engineer as to the way the accident happened. It might believe that the engineer, on the contrary, carelessly started his engine.

In *Chesapeake & O. R. Co. v. Booth* (1912) 149 Ky. 245, 148 S. W. 61, supra, it was held that the jury were not bound by the statement of the defendant's fireman that he was maintaining a lookout and did not see the plaintiff, "as the circumstances were such as to show that there was nothing to prevent his seeing appellee as the train approached him if a lookout had been maintained by him."

The truth of the explanation of the defendant's employee as to the purpose with which he did the act complained of is for the consideration of the jury; they are not bound by it. *Hankinson v. Lynn Gas & E. Co.* (1900) 175 Mass. 271, 56 N. E. 604, supra.

In *Volkmar v. Metropolitan R. Co.* (1891) 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870, supra, it was held to be error to direct a verdict for the defendant in a negligence case upon

the uncontradicted evidence of its implicated employee.

In *Diaz v. Fajardo Development Co.* (1906) 2 Porto Rico Fed. Rep. 152, supra, the court said, referring to defendant's employee: "It is settled law that the court, even when sitting as a jury to decide questions of fact, need not find the fact in accordance with uncontradicted testimony, if that testimony is by an interested witness, or is improbable or unreasonable."

In *El Paso Foundry & Mach. Co. v. De Guereque* (1907) 46 Tex. Civ. App. 86, 101 S. W. 814, the court, in affirming a judgment for the plaintiff, said, referring to the testimony of the defendant's implicated employee: "The jury, under our system of laws, are the sole judges of the credibility of the witnesses and the weight to be given their testimony, and they have the authority to reject the testimony of a witness, although he is not contradicted by other witnesses, when the circumstances cast a suspicion upon his statements, or render them inconsistent with reason and common observation."

In considering the evidence of employees of the defendant in a negligence case the court said: "It seems to be well settled in this state that the jury are not required to believe a witness, although he made a plain statement of what is not impossible, and it is neither impeached nor contradicted; but may discredit him on account of the manner of giving the testimony and attendant circumstances." *Galveston, H. & S. A. R. Co. v. Murray* (1906) — Tex. Civ. App. —, 99 S. W. 144, supra.

In the matter of proving inspection by the defendant's foreman in a negligence case the court, in reversing a judgment for the defendant on a directed verdict, said: "When the burden of proving some disputed fact in a jury case rests upon a party, and such fact is sought to be proven by no other evidence than the testimony of a single interested witness, a trial court is not warranted in determining, as a matter of law, that such fact has been proven. This rule, we apprehend, is subject to few, if any, exceptions." *Gibson v.*

*Chicago, M. & P. S. R. Co.* (1911) 61 Wash. 639, 112 Pac. 919, supra.

Reference may be here made to the two following cases, although it does not appear that the witnesses in question were implicated:

In *Brush v. Long Island R. Co.* (1896) 10 App. Div. 535, 42 N. Y. Supp. 103, an action for damages for fire set by defendant's locomotives, it was held that the defendant was not entitled to an instruction that the facts testified to by its employees as to the construction of its locomotives were established by the proof although this was the only evidence on the subject.

In *Gombert v. New York C. & H. R. R. Co.* (1909) 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382, it was held that the court was not bound to instruct the jury that there was no indirect evidence to the contrary of that of the defendant's gateman and his wife, both of whom testified that he went suddenly deaf about a month after the accident to the plaintiff. The court said: "There was no error or impropriety in leaving it for the jury to decide whether the gateman's sudden and complete deafness within a month after the accident was consistent with his possession of an unimpaired sense of hearing at the time of the accident. Although he was not a party to the action, he had testified to a fact which, if material to the issue, was so unusual in the natural course of events as to invite inquiry. The jury had the undoubted right to weigh the testimony of the witnesses in this behalf for the purpose of testing the truthfulness of the rest of the gateman's story."

## 2. Cases favoring uncontradicted testimony.

In other actions for negligence it was held that the triers of facts were bound by the uncontradicted evidence of the defendant's implicated employees. *Haus v. Lake Erie & W. R. Co.* (1901) 46 C. C. A. 94, 105 Fed. 783; *St. Louis, I. M. & S. R. Co. v. Ramsey* (1910) 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383; *St. Louis, I. M. & S. R. Co. v. Humbert* (1911) 101 Ark. 532.



142 S. W. 1122; Brunswick & W. R. Co. v. Wiggins (1901) 113 Ga. 842, 61 L.R.A. 513, 39 S. E. 551; Alabama G. S. R. Co. v. Scruggs (1903) 119 Ga. 70, 45 S. E. 689; Central of Georgia R. Co. v. Mote (1904) 120 Ga. 593, 48 S. E. 136; St. Louis, A. & T. H. R. Co. v. Manly (1871) 58 Ill. 300; Bale v. Chicago Junction R. Co. (1913) 259 Ill. 476, 102 N. E. 808; Savage v. Rhode Island Co. (1907) 28 R. I. 391, 67 Atl. 633.

In Brunswick & W. R. Co. v. Wiggins (1901) 113 Ga. 842, 61 L.R.A. 513, 39 S. E. 551, the court, in reversing a judgment for the plaintiff, said: "One of the grounds of alleged error is, that the trial judge refused, on a proper request, to charge the jury that the evidence of persons in the employment of the railroad company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. Undoubtedly this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness, which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witnesses the weight to which, in their opinion as conscientious men, seeking after the truth, they believe it is entitled; but the employment or business of a witness affords no reason why his evidence should arbitrarily or without reason be disregarded."

In affirming a judgment in favor of the defendants in a case tried by the court without a jury, the court, referring to the testimony of the defendants, said as to their interest: "It is hardly necessary for us to remark that no court or jury would set aside or wholly ignore their testimony on this ground. If they are competent to testify at all to the facts, the very law authorizing it implies that under such circumstances some faith and credit are to be given to their statements. No court or jury are authorized to say: 'These parties are interested, and therefore, without considering any other fact or circumstance, we will

discredit them.'" Daniels v. Foster (1870) 26 Wis. 686.

In Hausse v. Lake Erie & W. R. Co. (1901) 46 C. C. A. 94, 105 Fed. 733, it was held that the court was not required to send a negligence case to the jury where it was claimed that the plaintiff's intestate was killed by the negligence of his employer, where the defendant's conductor had testified without contradiction that he had given notice and warning to the plaintiff's intestate, that being the only duty of the defendant in the premises. The court said, *inter alia*: "It is suggested here, for the first time in the progress of the case, that his credibility as a witness was put in issue by his relation to the parties and to the subject-matter of the controversy, and that the cause should have been submitted to the jury upon that issue. The suggestion is that the witness, as an employee of the defendant, whose duty it was to bring the bulletin concerning the work at Muncie to the knowledge of the trainmen, had an interest in showing that he had performed the duty, and strong motive to falsely represent that he had done so, if in fact he had not performed the duty, and that this interest and possible motive raised a question as to his credibility which should have been considered by the jury. The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony. . . . In the case at bar the question was neither made nor in any way suggested by the plaintiff or his counsel at the trial, nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth."

In St. Louis, I. M. & S. R. Co. v.

Ramsey (1910) 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383, the court reversed a judgment for the plaintiff in an action for the wrongful death of an employee of the defendant on the ground that the jury had arbitrarily disregarded the uncontradicted testimony of employees of the defendant. And on a further trial the court directed a verdict for the defendant, and this was affirmed on appeal. (1912) 105 Ark. 698, 151 S. W. 288.

In *St. Louis, I. M. & S. R. Co. v. Humbert* (1911) 101 Ark. 532, 142 S. W. 1122, the court said, in reversing a judgment for the plaintiff for the wrongful death of his intestate: "The burden of proof was on the plaintiff to show that the engineer discovered the helpless man on the track before he received the danger signal in time to stop before striking him. . . . This the plaintiff has not shown. The engineer's testimony is perfectly reasonable, and is uncontradicted. The jury had no right to arbitrarily reject it."

The presumption of negligence from the injury of an employee by the breaking of a lever or handle is repelled by the uncontradicted testimony of the foreman, showing testing. *Alabama G. S. R. Co. v. Scruggs* (1903) 119 Ga. 70, 45 S. E. 689, reversing judgment on verdict. Followed on principle in *Central of Georgia R. Co. v. Mote* (1904) 120 Ga. 593, 48 S. E. 136 (the testimony showing inspection).

Where decent, about to cross a railroad track, was warned by laborers in the employ of the defendant of the approach of a passenger train which killed him, it was held that the jury could not disregard the uncontradicted testimony of these laborers, although they were unable to speak English and testified through an interpreter. *Bale v. Chicago Junction R. Co.* (1918) 269 Ill. 476, 102 N. E. 808 (but three judges dissented on the ground that the testimony was contradicted).

In a case of the killing of a servant by negligence, where the defendant put in evidence of warning him of the danger, it was held that the jury were not entitled to disregard the uncontradicted testimony of the defendant's

employee that he warned the plaintiff's intestate. *Savage v. Rhode Island Co.* (1907) 28 R. L. 391, 67 Atl. 633.

It may be noted that it was held in *Mercier v. Yazoo & M. Valley R. Co.* (1916) 138 La. 1043, 71 So. 150, in reversing a judgment for the plaintiff in an action for damages for the death of a trespasser on a railroad track, killed by a fast passenger train, that the testimony of the engineer, fireman, and station agent, that the deceased was in such a position as not to be visible in time to avert the accident, cannot be disregarded on an hypothesis of visibility, based on the location of the wound on the head of the deceased.

Reference may also be made to *Wilson v. United Traction Co.* (1904) 94 App. Div. 539, 88 N. Y. Supp. 122, but it seems the point of the decision was that the plaintiff had not made out a prima facie case.

#### **Stock killed by railroads.**

Where the law raises a presumption or prima facie case against railroad companies killing stock, juries should not arbitrarily reject the uncontradicted, reasonable, exonerating testimony of the defendant's employees. *St. Louis, I. M. & S. R. Co. v. Landers* (1900) 67 Ark. 514, 55 S. W. 940; *Georgia R. & Bkg. Co. v. Wall* (1888) 80 Ga. 202, 7 S. E. 639; *South Carolina & G. R. Co. v. Powell* (1899) 108 Ga. 437, 33 S. E. 994; *Georgia S. & F. R. Co. v. Sanders* (1900) 111 Ga. 128, 36 S. E. 458; *Georgia S. & F. R. Co. v. Thompson* (1900) 111 Ga. 731, 36 S. E. 945; *Kentucky C. R. Co. v. Talbot* (1880) 78 Ky. 621; *Chicago, St. L. & N. O. R. Co. v. Packwood* (1881) 59 Miss. 281; *Miller v. Chicago & N. W. R. Co.* (1907) 21 S. D. 242, 111 N. W. 553.

In such case it was held to be error not to direct a verdict for the defendant. *Volkman v. Chicago, St. P. M. & O. R. Co.* (1888) 5 Dak. 69, 37 N. W. 731; *Huber v. Chicago, M. & St. P. R. Co.* (1889) 6 Dak. 392, 43 N. W. 819. (See the limitation in scope in regard to presumptions, made in the first paragraph of this annotation.)

But in *Kansas City Southern R. Co. v. Whitley* (1919) — Ark. —, 213 S. W. 369, it was held to be for the jury

to say whether the testimony of the engineer of the locomotive which killed an animal was reasonable, consistent, and uncontradicted. The same was held in substance in *St. Louis, I. M. & S. R. Co. v. Chambliss* (1891) 54 Ark. 214, 15 S. W. 469.

In the following cases it does not appear that there was a statutory presumption from the killing:

In *Ohio & M. R. Co. v. Atteberry* (1891) 43 Ill. App. 80, it was held that the jury may not, from whim or caprice, reject the uncontradicted exonerating testimony of the defendant's engineer and fireman in case of stock alleged to have been killed by the locomotive.

In *Blid v. Chicago & N. W. R. Co.* (1911) 89 Neb. 689, 131 N. W. 1027, the court reversed a judgment for the plaintiff for cattle killed by the defendant's locomotive and found from 60 feet to 150 feet from the crossing, it being the theory of the plaintiff that the cattle had passed from the highway over insufficient cattle guards. The defendant's fireman and engineer testified to striking the cattle at the crossing near a curve without time to prevent it, and that the cattle were carried on by the pilot, the engineer stating that he had known such bodies to be so carried for 100 yards. Another witness testified as an expert against bodies being carried so far. There were no cattle tracks on the railway, but there was hair on the cattle guards.

But, in affirming a judgment for damages for the loss of horses killed by the defendant's locomotive, the court said: "It is true the engineer and others upon the engine testified positively that they did not discover the horses until within 30 or 40 feet of them; but we are unwilling to say that even this unqualified statement might not be discredited by the jury, if they believed from the evidence that surrounding circumstances and conditions made its truthfulness improbable." *Lighthouse v. Chicago, M. & St. P. R. Co.* (1893) 3 S. D. 518, 54 N. W. 320.

#### *d. New York.*

##### *1. In general.*

In New York an effort was made to establish a rigid rule that the testimony of an uncontradicted interested witness involved a question of fact, to be determined by the jury or trier of the fact. This doctrine broke down with the decision in *Hull v. Littauer* (1900) 162 N. Y. 569, 57 N. E. 102, holding that the old rule was not inflexible. Since that time the decisions sometimes invoke the old rule and sometimes the new.

It may be said that two of the earlier cases sometimes cited as holding against the rigid rule may perhaps be considered as decided on the ground that the evidence in question was "undisputed," to wit: *Lomer v. Meeker* (1862) 25 N. Y. 361; *Kelly v. Burroughs* (1886) 102 N. Y. 93, 6 N. E. 109. But as much cannot be said of *Plyer v. German American Ins. Co.* (1890) 121 N. Y. 689, 24 N. E. 929 (decided ten years before the *Hull Case*), where the court reversed a judgment upon a verdict for the defendant on the ground that it was error not to have directed a verdict for the plaintiff upon the testimony of his uncontradicted witnesses, which was not undisputed, citing the *Lomer* and *Kelly Cases*, *supra*. For three or four cases in the appellate division, decided before the *Hull Case*, but taking a view similar to that case, see *infra*.

##### *2. Old rule.*

It was the apparent general theory of the old rule that the testimony of an uncontradicted interested witness involved a question of fact to be determined by the jury. *Elwood v. Western U. Teleg. Co.* (1871) 45 N. Y. 549, 6 Am. Rep. 140; *Kavanagh v. Wilson* (1877) 70 N. Y. 177; *Wohlfahrt v. Beckert* (1893) 92 N. Y. 490, 44 Am. Rep. 406; *Sipple v. State* (1885) 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; *Dean v. Van Nostrand* (1886) 4 N. E. 134 (partially reported in 101 N. Y. 621); *Dean v. Metropolitan Elev. R. Co.* (1890) 119 N. Y. 540, 23 N. E. 1054; *McQuigan v. Delaware, L. & W. R. Co.* (1890) 122 N. Y. 618, 26 N. E. 13; *Canajoharie Nat. Bank v. Diefendorf*

(1890) 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Page v. Krekey* (1893) 137 N. Y. 307, 21 L.R.A. 409, 33 Am. St. Rep. 731, 33 N. E. 311 (recognizing the rule); *Lesser v. Wunder* (1880) 9 Daly, 70; *Hodge v. Buffalo* (1874) 1 Abb. N. C. 356; *Michigan Carbon Works v. Schad* (1885) 38 Hun, 71; *Roseberry v. Nixon* (1890) 58 Hun, 121, 11 N. Y. Supp. 523; *Rumsey v. Boutwell* (1891) 61 Hun, 165, 15 N. Y. Supp. 765; *Meeteer v. Manhattan R. Co.* (1892) 63 Hun, 533, 18 N. Y. Supp. 561; *Bookheim v. Alexander* (1892) 64 Hun, 458, 19 N. Y. Supp. 776; *Stay v. Du Bois* (1893) 74 Hun, 134, 26 N. Y. Supp. 240; *Goldsmith v. Coverly* (1894) 75 Hun, 48, 27 N. Y. Supp. 116; *Miller v. Boyer* (1894) 79 Hun, 131, 29 N. Y. Supp. 479; *Halsey v. Hart* (1895) 85 Hun, 46, 32 N. Y. Supp. 665; *Kingsland Land Co. v. Newman* (1896) 1 App. Div. 1, 36 N. Y. Supp. 960; *Schmitt v. Metropolitan L. Ins. Co.* (1897) 13 App. Div. 120, 43 N. Y. Supp. 318; *Gulliver v. Blauvelt* (1897) 14 App. Div. 523, 43 N. Y. Supp. 935, 1 Am. Neg. Rep. 652; *Lamb v. Prudential Ins. Co.* (1897) 22 App. Div. 552, 48 N. Y. Supp. 123; *Moran v. Abbott* (1898) 26 App. Div. 570, 50 N. Y. Supp. 337; *Kennedy v. McAllaster* (1898) 31 App. Div. 453, 52 N. Y. Supp. 714.

Thus it was held that a verdict ought not to be directed for the plaintiff on the uncontradicted testimony of an interested witness. *Kavanagh v. Wilson* (1877) 70 N. Y. 177; *Hodge v. Buffalo* (1874) 1 Abb. N. C. 356; *Joy v. Diefendorf* (1891) 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; *Lesser v. Wunder* (1880) 9 Daly, 70; *Michigan Carbon Works v. Schad* (1885) 38 Hun, 71; *Rumsey v. Boutwell* (1891) 61 Hun, 165, 15 N. Y. Supp. 765; *Bookheim v. Alexander* (1892) 64 Hun, 458, 19 N. Y. Supp. 776; *Goldsmith v. Coverly* (1894) 75 Hun, 48, 27 N. Y. Supp. 116; *Miller v. Boyer* (1894) 79 Hun, 131, 29 N. Y. Supp. 479; *Kingsland Land Co. v. Newman* (1896) 1 App. Div. 1, 36 N. Y. Supp. 960.

So it was held that a verdict for the defendant ought not to be directed upon the uncontradicted testimony of

an interested witness. *Wohlfahrt v. Beckert* (1893) 92 N. Y. 490, 44 Am. Rep. 406; *Lamb v. Prudential Ins. Co.* (1897) 22 App. Div. 552, 48 N. Y. Supp. 123. And that there should not be a dismissal on the defendant's uncontradicted testimony. *Stay v. Du Bois* (1892) 74 Hun, 134, 26 N. Y. Supp. 240; *Kennedy v. McAllaster* (1898) 31 App. Div. 453, 52 N. Y. Supp. 714.

So it was held that the trier of fact was not bound by the uncontradicted testimony of an interested witness. *Elwood v. Western U. Teleg. Co.* (1871) 45 N. Y. 549, 6 Am. Rep. 140 (jury); *McNulty v. Hurd* (1881) 86 N. Y. 547 (court); *Sipple v. State* (1885) 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657 (court); *Dean v. Van Nostrand* (1886) 4 N. E. 134 (partially reported in 101 N. Y. 621) (jury); *Dean v. Metropolitan Elev. R. Co.* (1890) 119 N. Y. 540, 23 N. E. 1054 (jury); *McQuigan v. Delaware, L. & W. R. Co.* (1890) 122 N. Y. 618, 26 N. E. 18 (jury); *Canajoharie Nat. Bank v. Diefendorf* (1890) 123 N. Y. 191, 10 L.R.A. 636, 25 N. E. 402 (jury); *Roseberry v. Nixon* (1890) 58 Hun, 121, 11 N. Y. Supp. 523 (jury); *Gulliver v. Blauvelt* (1897) 14 App. Div. 523, 43 N. Y. Supp. 935, 1 Am. Neg. Rep. 652 (jury); *Halsey v. Hart* (1895) 85 Hun, 46, 32 N. Y. Supp. 665 (jury).

Where the plaintiff was the only witness to a fact, the court, in affirming a dismissal of the complaint, said: "The fact that the only witness called to testify to the loss was the plaintiff himself was enough to preclude this court from reviewing the decision of the trial judge and general term. For the court below was not bound, as matter of law, to credit the statements of a witness thus interested, given in his own behalf, though uncontradicted by any other witness." *Kearney v. New York* (1883) 92 N. Y. 617.

In an action for negligently sending a false and fraudulent telegram, where it was claimed by the defendant that, in finding against him, the jury had disregarded the positive, uncontradicted testimony of three of his employees, the court said: "It is undoubtedly the

general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. . . . But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at the time when interest absolutely disqualified a witness necessarily assumed that the witnesses were disinterested. The qualification must, in the present state of the law, be added. And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." The court stated further that each of the witnesses in question, "if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive." *Elwood v. Western U. Teleg. Co.* (1871) 45 N. Y. 549, 6 Am. Rep. 140.

"It cannot be said there is any peremptory rule of law which requires a tribunal to accept as true the testimony of an interested witness, delivered from unfaithful memory." *McNulty v. Hurd* (1881) 86 N. Y. 547.

In *Roseberry v. Nixon* (1890) 58 Hun, 121, 11 N. Y. Supp. 523, the court refused to disturb a judgment for the plaintiff where the defendant claimed that the court should have directed a verdict for her, the court saying: "It is undoubtedly true that the general

rule is that where a witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited; but this rule is subject to many qualifications. One is, that where a witness may be biased by his interest, the case is one for the jury. *Elwood v. Western U. Teleg. Co.* supra. The same principle has been held in numerous other cases. This interest need not necessarily be pecuniary; it may arise from the relationship of the witness to one of the parties. The only witness to prove the defendant's case was the husband and agent of the defendant, having an interest in the success of the defense; in fact, a party to it. The court was bound, under this condition of the evidence, to submit the question to the jury."

In *Kennedy v. McAllaster* (1898) 31 App. Div. 453, 52 N. Y. Supp. 714, the court said: "The rule is general, if not universal, that where the witness is interested in the matter in controversy, and although his testimony is uncontradicted, his credibility is a question for the jury, and the court is not warranted in directing a verdict upon his testimony alone when the testimony may be improbable in itself or inconsistent with other things or other circumstances of the case. . . . Facts testified to by a party, though uncontradicted, cannot be deemed established as matter of law, if his testimony alone supports them, where there are other things or circumstances in the case which might render his testimony inconsistent or improbable, but must be submitted to the jury in order that it may determine what effect, if any, such things and other circumstances, and his interest in the result of the controversy, should have upon his credibility and upon the final disposition and result of the action."

In *Kavanagh v. Wilson* (1877) 70 N. Y. 177, it was held to be error to direct a verdict for the plaintiff, suing a decedent's estate for commissions as a real estate broker whose claimed rate of pay depended upon the uncontradicted testimony of his son, who was somewhat interested in the result.

In *Wohlfahrt v. Beckert* (1893) 92

N. Y. 490, 44 Am. Rep. 406, it was held that a verdict for the defendant ought not to be directed upon the uncontradicted testimony of a witness who was in danger of criminal prosecution, the court quoting from the Elwood Case, *supra*, on the point.

In *Sipple v. State* (1885) 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657, it was held that the court trying the case was "under no legal obligation to give implicit credit" to the uncontradicted testimony of a witness in danger of civil and criminal prosecution.

There are some decisions after the Hull Case which seem to belong to the earlier rule.

Thus, in *Saranac & L. P. R. Co. v. Arnold* (1901) 167 N. Y. 368, 60 N. E. 647, in reversing a judgment for defendants, entered upon a dismissal of the complaint upon the uncontradicted testimony of the defendants, the court said, not referring to the Hull Case: "The general rule is that where a witness is interested in the question, although he is not impeached or contradicted, his credibility is a question for the jury, and the court is not warranted in directing a verdict upon his testimony alone."

*Gordon v. Ashley* (1908) 191 N. Y. 186, 83 N. E. 686, which does not refer to the Hull Case, seems distinctly to have been decided upon the old theory. In the Gordon Case, after the plaintiff had established a *prima facie* case, there was a nonsuit on the defendant's testimony, and the court, in sending the case back for a new trial, said: "While the testimony of a single witness, if believed, is sufficient to establish any fact in a civil action, still it need not be believed if the witness is interested, or his statements, even if uncontradicted, are inconsistent with his own conduct, or so improbable as to require explanation. If a fair argument can be made against the probability of his story, his credibility presents a question for the jury. Even if they do not think that he intended to speak falsely, still they may reject his testimony if they are satisfied that he was mistaken owing to interest, bias, a defective memory, or any other reason springing from the evidence." (Quoted

and followed in *MacReynolds v. Coney Island & B. R. Co.* (1915) 170 App. Div. 314, 155 N. Y. Supp. 655, where the Gordon decision is stated to be "quite in harmony with both the rule and limitation as declared and discussed in *Hull v. Littauer*.")

So, in *Burt v. Quackenbush* (1902) 72 App. Div. 547, 75 N. Y. Supp. 1081, affirmed in (1903) 175 N. Y. 490, 67 N. E. 1081, the court said, in affirming a judgment, where the case was tried without a jury, that "the court was not bound to credit the testimony of the parties."

And in *Becker v. Woarms* (1902) 72 App. Div. 196, 76 N. Y. Supp. 438, it was held that the defendant was entitled to an instruction to the effect that the jury were not bound to accept the testimony of the plaintiff as true, although uncontradicted or unimpeached (but it seems to have been contradicted).

It may be noted in this connection that it was held in *Fuller Buggy Co. v. Waldron* (1906) 112 App. Div. 814, 99 N. Y. Supp. 561, affirmed in (1907) 188 N. Y. 680, 81 N. E. 1165, that it was error to direct a verdict for the defendants on their uncontradicted testimony.

### 3. Rule of *Hull v. Littauer*.

It is the rule of *Hull v. Littauer* (1900) 162 N. Y. 569, 57 N. E. 102, that the uncontradicted testimony of an interested witness is not necessarily for the trier of fact. *Second Nat. Bank v. Wilson* (1902) 172 N. Y. 250, 64 N. E. 949; *Littlefield v. Lawrence* (1903) 83 App. Div. 327, 82 N. Y. Supp. 25; *Electric Fireproofing Co. v. Smith* (1906) 113 App. Div. 615, 99 N. Y. Supp. 37; *Block v. Galitzka* (1906) 114 App. Div. 799, 100 N. Y. Supp. 173; *Buckley v. Doig* (1906) 115 App. Div. 413, 100 N. Y. Supp. 869, affirmed in (1907) 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263; *Maher v. Benedict* (1908) 123 App. Div. 579, 108 N. Y. Supp. 228; *Eisenberg v. Lefkowitz* (1911) 142 App. Div. 569, 127 N. Y. Supp. 595; *Abramovitz v. Tenzer* (1911) 144 App. Div. 170, 128 N. Y. Supp. 951; *Wood v. Wise* (1912) 153 App. Div. 223, 137 N. Y. Supp. 1017, affirmed in (1913) 208 N. Y. 586, 102

N. E. 1117; *Pierson v. Mitsui & Co.* (1920) 181 N. Y. Supp. 273.

In *Hull v. Littauer* (1900) 162 N. Y. 569, 57 N. E. 102, the court, in affirming a judgment for the defendants, entered upon a directed verdict, said: "Generally, the credibility of a witness, who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances,—if its truthfulness or accuracy is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements,—it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness. Though a party to an action has been enabled, since the legislation of 1857 (Laws 1857, chap. 353), to testify as a witness, his evidence is not to be regarded as that of a disinterested person, and whether it should be accepted without question depends upon the situation as developed by the facts and circumstances and the attitude of his adversary." The court pointed out certain circumstances of the case, and said further: "The only evidence as to the contract was given by the defendant. There was nothing to contradict, or to discredit, his evidence. Those circumstances were sufficient to distinguish the case and to take it from without the operation of the general rule. If this position were not true, then the rule might be reduced to an obvious absurdity in its consequences, and verdicts might be rendered only to be set aside as against evidence."

In *Second Nat. Bank v. Weston* (1902) 172 N. Y. 250, 64 N. E. 949, it was held to be error not to direct a verdict for the plaintiff on the testimony of an interested witness, to some extent aided by written evidence.

The jury have no right to disregard the exonerating evidence of the employees of the defendant in an action for injuries caused by the alleged kicking of the plaintiff off defendant's train, when the plaintiff was stealing a ride, and did not identify his alleged assaulter. *Johnson v. New York C. & H. R. R. Co.* (1903) 173 N. Y. 79, 65 N. E. 946, 13 Am. Neg. Rep. 379, citing the *Hull Case*.

In *Mendoza v. Levy* (1906) 111 App. Div. 449, 97 N. Y. Supp. 753, where it was held that the court should not direct a verdict on uncontradicted testimony of the plaintiff which is suspicious, the court referred to what is described as "the general rule as stated" in *Saranac & L. P. R. Co. v. Arnold* (1901) 167 N. Y. 368, 60 N. E. 647 (see *supra*, b), or "that general rule as modified and expressed" in the *Hull Case*.

It may be noted that in *McConnell v. Hellwig* (1920) 190 App. Div. 244, 179 N. Y. Supp. 882, where the trial court had directed a verdict for the defendant against the plaintiff's uncontradicted testimony, the appellate court, in reversing the judgment, said that "the credibility of the plaintiff was not for the court, but for the jury, under the rule of *Hull v. Littauer* (N. Y.) *supra*."

Even before the decision in the *Hull Case* there are some cases taking the same view.

Thus, in sustaining a judgment of the county court for the plaintiff, reversing a decision of a justice, the court said: "The plaintiff's testimony was not contradicted or sought to be. She was not impeached, and there is no circumstance in the record which tends to impeach her credibility, and, under such circumstances, the justice was not at liberty to disbelieve her simply because she was interested in the event of the action." *Van Nosstrand v. Hubbard* (1898) 35 App. Div. 201, 54 N. Y. Supp. 739. And see, to a somewhat similar effect, *Berzevizy v. Delaware, L. & W. R. Co.* (1897) 19 App. Div. 309, 46 N. Y. Supp. 27. So, in *Denton v. Carroll* (1896) 4 App. Div. 532, 40 N. Y. Supp. 19, it was held that the jury had no right to find that fur-

niture seized for taxes as the property of a taxed boarder belonged to her when there was the positive, uncontradicted testimony of the landlady (the plaintiff) that she owned the furniture.

Where the testimony of the defendant is "not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious," the credibility thereof was not necessarily for the jury." *Maher v. Benedict* (1908) 123 App. Div. 579, 108 N. Y. Supp. 228.

In *Eisenberg v. Lefkowitz* (1911) 142 App. Div. 569, 127 N. Y. Supp. 595, the court affirmed a judgment for the plaintiff, entered upon a verdict directed on his uncontradicted testimony.

Where the facts as to time were testified to by one of the defendants, and he was not contradicted or discredited, it was held that the court erred in not disposing of the question of reasonable time as a matter of law. *Electric Fireproofing Co. v. Smith* (1906) 113 App. Div. 615, 99 N. Y. Supp. 37.

So, where one of the plaintiffs executed the contract sued on for himself and his brother, the coplaintiff, and the brothers both testified as to his authority and as to the ratification of it, it was held proper to take that question from the jury, although the witnesses were interested. *Wood v. Wise* (1912) 153 App. Div. 223, 137 N. Y. Supp. 1017, affirmed in (1913) 208 N. Y. 586, 102 N. E. 1117.

In *Buckley v. Doig* (1906) 115 App. Div. 413, 100 N. Y. Supp. 869, affirmed in (1907) 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, the trying referee whose decision was affirmed held that the plaintiff's uncontradicted testimony on a certain point must be accepted as conclusive.

The court may not disregard arbitrarily the uncontradicted testimony of the plaintiff's assignor, proving the plaintiff's case, and give judgment for the defendant. *Block v. Galitzka* (1906) 114 App. Div. 799, 100 N. Y. Supp. 173.

In *Abramovitz v. Tenzer* (1911) 144 App. Div. 170, 128 N. Y. Supp. 951, the court, following the *Hull Case*, reversed a judgment for the plaintiff in a case tried without a jury, holding that the trial justice was not justified in rejecting the uncontradicted testimony of the defendant's interested witnesses.

Where the defendant was held liable for the loss of the plaintiff's horse, the jury found a verdict for \$25. The plaintiff testified that the horse was worth \$175. The defendant claimed that the horse was balky, and "the only evidence offered on the part of the defendant, to contradict the value of the horse, as testified to by the plaintiff, was his own testimony, in which he stated, when asked as to the value: 'I do not see how he could be worth anything if he refused to work;' and the testimony of his witness Wagner, who said: 'I would not give anything for him; he would not work.' But, on cross-examination, when asked if the horse would work well in a team, if he would then say he was worthless, he answered: 'Not as a team horse. I would not. No.'" The court, in reversing the judgment on the plaintiff's appeal, said: "It is true that the credibility of the uncontradicted testimony of a party to an action is usually a question for the jury. So is the credibility of every witness, whether interested or not; but a jury is not at liberty to disregard the testimony of any witness, even though he be a party, who is in no wise impeached, and whose testimony is such that its truth is highly probable." *Littlefield v. Lawrence* (1903) 83 App. Div. 327, 82 N. Y. Supp. 25 (this case is, of course, not strictly within the scope of this annotation).

But the trial court should not give judgment for the plaintiff on his uncontradicted testimony when it passes credibility. *Punsky v. New York* (1908) 129 App. Div. 558, 114 N. Y. Supp. 66.

In *Strong v. Walton* (1908) 47 App. Div. 114, 62 N. Y. Supp. 353, in holding that the case was not one where the uncontradicted testimony of a party should be accepted by the jury, the



court said: "The plaintiff's testimony in its entirety might have suggested doubt of the truth of his main statement instead of dispelling it, and his manner may have confirmed the doubt. It was for the jury to decide, and we think their verdict should control."

In *Union Bank v. Mandel* (1910) 139 App. Div. 684, 124 N. Y. Supp. 459, the court considered that, under the circumstances, the jury were justified in disregarding the testimony of the defendant and his mother, to the effect that he was an infant at the time of the indorsement in question.

#### VI. Miscellaneous.

In *Graham v. Coos Bay R. & Nav. Co.* (1914) 71 Or. 393, 139 Pac. 337, the court said: "Under § 704, L. O. L., making the jury exclusive judges of the credibility of witnesses, the jury may disregard uncontradicted testimony where it is unsatisfactory to their minds. A jury is not bound to find a verdict in conformity with the declarations of any number of witnesses which do not produce a conviction in their minds as against a less number, or against a presumption or other evidence that does satisfy their minds. L. O. L. § 868, subd. 2."

"Jurors are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a presumption or other evidence satisfying their minds. Code Civ. Proc. § 2061, subd. 2." *Sterling v. Cole* (1909) 12 Cal. App. 93, 106 Pac. 602.

In *Anniston Nat. Bank v. Durham* (1897) 121 N. C. 107, 28 S. E. 134, the court said: "If the party upon whom the burden of proof rests has offered no evidence to prove the issue, or no such evidence as the jury ought to find a verdict upon (as in *Wittkowsky v.*

*Wasson* (1874) 71 N. C. 451), the court should say so, and direct a finding in the negative. *State v. Shule* (1849) 32 N. C. (10 Ired. L.) 153. But, no matter how strong and uncontradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury and direct an affirmative finding. To do this is to violate the Act of 1796 (§ 413 of the Code)."

It appears by the official headnote in *Frazier v. Georgia R. & Bkg. Co.* (1899) 108 Ga. 807, 33 S. E. 996, that it was there held that "when a plaintiff's right to recover depended upon the establishment of a particular fact, and the only proof offered for this purpose was circumstantial evidence from which the existence of such fact might be inferred, but which did not demand a finding to that effect, a recovery by the plaintiff was not lawful, when, by the positive and uncontradicted testimony of unimpeached witnesses, which was perfectly consistent with the circumstantial evidence relied on by the plaintiff, it was affirmatively shown that no such fact existed."

The appellate court will reverse a judgment on a referee's report sustaining a claim against decedent on doubtful and improbable testimony of the claimant. *Dougall v. Dougall* (1901) 61 App. Div. 282, 70 N. Y. Supp. 336.

It may be noted that on appeal from a judgment in a separation case granting the wife the custody and control of the children, the court said: "The judgment is supported by uncontradicted evidence, making absolute proof that the defendant defamed his wife and treated her so cruelly that her living with him became intolerable." *Schmalz v. Schmalz* (1920) 146 La. —, 84 So. 166.

EX PARTE WALTER MCGEE et al.

Kansas Supreme Court — November 8, 1919.

(105 Kan. 574, 185 Pac. 14.)

**Constitutional law — quarantine of communicable diseases — delegation of legislative power.**

1. Chapter 205 of the Laws of 1917 undertakes to protect public health by preventing dissemination of dangerous communicable diseases, through isolation and quarantine measures, nonobservance of which is declared to be a misdemeanor, and is not unconstitutional, on the ground that it delegates legislative power, because it confers on the state board of health authority to designate such diseases as are infectious, contagious, or communicable in their nature, and to prescribe proper control measures.

[See note on this question beginning on page 836.]

**Health — rules of board — reasonableness.**

2. Rules of the state board of health, adopted and published pursuant to the statute, and provisions of a city ordinance framed in accordance with the rules of the state board of health, considered and held, not to be unreasonable because they authorize isolation of men infected with venereal disease at an institution provided by the state for isolation and treatment of such diseases.

[See 12 R. C. L. 1272, 1290.]

**— findings of health officer — conclusiveness.**

3. The finding of a city health officer that a person has been examined and has been found to be infected with a dangerous, communicable venereal disease is conclusive as to the facts found, in the absence of a charge of

bad faith, or conduct equivalent to bad faith, on the part of the officer.

[See annotation in 2 A.L.R. 1542.]

**Habeas corpus — release from quarantine.**

4. A person regularly ordered to be isolated at the state institution is not entitled to a writ of habeas corpus for his discharge, because he is able to provide himself with proper treatment at an isolated place in the locality of his residence.

**Health — misnomer of place of isolation.**

5. The facts considered, and held, that certain misnomers of the state institution, the "State Quarantine Camp for Men, at Lansing," do not render the place of isolation indefinite, or otherwise invalidate the isolation orders under which the petitioners are held.

Headnotes by BURCH, J.

APPLICATION by petitioners for a writ of habeas corpus to secure their release from custody to which they had been committed, and to forestall execution of an isolation order contemplating their further detention. *Writ denied.*

The facts are stated in the opinion of the court.

Mr. Elisha Scott for petitioners.

Mr. D. H. Branaman for respondents.

Burch, J., delivered the opinion of the court:

The petitioners presented an application for a writ of habeas corpus to free them from present detention by the chief of police of the city of Topeka, and to forestall execution of an isolation order contemplating

further detention. The cause was heard on the application for the writ. The isolation order relating to one of the petitioners is in the following form:

November 10, 1919.

The Chief of Police,

Topeka, Kansas.

Sir:—

By authority of the rules and regulations for the control and suppression

sion of venereal diseases in the state of Kansas, enacted by the Kansas state board of health March 29, 1918, under authority of chapter 205, Session Laws of 1917 (and Ordinance No. 4,832, city of Topeka), I hereby notify you that George Buckner, now in custody at the city jail at Topeka, Kansas, has been examined and found to be infected with a dangerous, communicable disease, viz., chronic gonorrhœa.

In further pursuance of said rules and regulations, I hereby designate the state penitentiary at Lansing, Kansas, as the place and limit of the area in which the above-named person is to be isolated.

I request that you take the necessary action to transfer said person to the state penitentiary in accordance with the above-cited authority.

Respectfully,

[Signed] Earle G. Brown, M. D.,  
City Health Officer.

Constitutionality of the statute, validity of the rules of the state board of health, and validity of the city ordinance, referred to in the order, are questioned.

Section 1 of the statute, which became effective on February 28, 1917, reads as follows: "For the better protection of the public health and for the control of communicable diseases, the state board of health shall designate such diseases as are infectious, contagious or communicable in their nature and the state board of health is herewith authorized to make and prescribe rules, regulations and procedures for the isolation and quarantine of such diseases and persons afflicted with or exposed to such diseases as may be necessary to prevent the spread and dissemination of diseases dangerous to the public health. Such rules, regulations and procedures shall be published in the official state paper, and when so published shall be in full force and effect." Laws 1917, chap. 205.

Section 2 provides penalties for violating, or refusing or neglecting to obey, any of the rules, regula-

tions, or procedures prescribed by the state board of health.

It will be observed the statute is general, and contemplates protection of the public health by control of all dangerous diseases which are infectious, contagious, or communicable. It was not long until specific application of the statute to venereal diseases became urgent, on account of social conditions attending concentration of large bodies of troops at the three United States military establishments in the state, Fort Leavenworth, Fort Riley, and Camp Funston. The state board of health declared syphilis, gonococcus infection, and chancroid to be infectious, contagious, or communicable in their nature, and notifiable diseases dangerous to the public health, and made and published rules and regulations for the control and suppression of such diseases. The rules necessarily involved isolation of diseased persons, and facilities for isolation in the localities where such persons were found were totally inadequate. Desiring to co-operate with the state board of health and with the government of the United States in dealing with the venereal disease problem, the state board of administration, which is the central body having control of all correctional, charitable, and educational institutions of the state, placed at the disposal of all authorities concerned the facilities existing on the penitentiary reservation at Lansing. Provision was made for the quarantine and medical treatment of women at the industrial farm for women. Provision was made for the isolation of men in one of the penitentiary buildings, for their treatment at the penitentiary hospital, and for certain liberties outside the walls of the institution in connection with a few hours' work each day on the penitentiary farm. The portions of the state property thus set apart for the use of men were designated the "Kansas State Quarantine Camp for Men at Lansing," and the portion set apart for the use of women was designated the "Kansas State

Quarantine Hospital for Women at Lansing." Experience demonstrated that the men sent to the quarantine camp thus established were, generally speaking, a bad lot, and the board of administration provided that they should be subject to such rules for the discipline and control of the institution as the warden, with the approval of the board, might adopt.

The rules and regulations for the control of venereal diseases adopted by the state board of health cover the subject in detail. A portion of rule 36 reads as follows:

"Section 1. Local county and city health officers throughout the state and deputy state health officers appointed for that purpose are hereby authorized and directed to use every available means to ascertain the existence of and immediately investigate all suspected cases of syphilis in communicable form, gonococcus infection or chancroid within their respective jurisdictions, and to ascertain the source of such infections.

"Section 2. In such investigations said local health officers, deputy state health officers, or their duly authorized representatives, are hereby vested with full powers of inspection, examination, isolation and disinfection of all places, persons, and things, and as such inspectors said local health officers, deputy state health officers, or their duly authorized representatives, are hereby authorized:

"(a) To make examinations of all persons reasonably suspected of having syphilis in communicable form, gonococcus infection, or chancroid. Owing to the prevalence of such diseases among pimps and prostitutes, all such persons may be considered in the above class.

"(b) To isolate such persons whenever in the opinion of said local health officer, deputy state health officer, the state board of health or its secretary, isolation is necessary to protect the public health. In establishing isolation the health officer shall define the place and the

limits of the area in which the person reasonably suspected or known to have syphilis, gonococcus infection, or chancroid, and his or her attendant, are to be isolated, and no persons, other than the attending physicians, shall enter or leave the area of isolation without the permission of the health officer having jurisdiction. Provided: That women may be quarantined at the Kansas State Quarantine Hospital for Women at Lansing, and men may be quarantined in the Kansas State Quarantine Camp for Men at Lansing."

In September, 1918, the board of commissioners of the city of Topeka passed an ordinance, No. 4,832, dealing with the subject of venereal diseases which followed closely the rules and regulations of the state board of health. A part of § 8 and §§ 9 and 10 read as follows:

"Sec. 8. Powers and Duties of City Health Officer.—It is hereby made the duty of the city health officer and he is hereby directed and empowered: (a) To make examinations of persons reasonably suspected of having syphilis in the infectious stages, or gonococcus infection. Owing to the prevalence of such diseases among prostitutes, all prostitutes may be considered within the above class. (b) To isolate persons infected with any of said diseases whenever isolation is necessary to protect the public health. In establishing isolation, the city health officer shall define the limits of the area in which the persons reasonably suspected or known to have syphilis or gonococcus infection and his or her immediate attendant are to be isolated, and no person other than the attending physician shall enter or leave the area of isolation without the permission of the city health officer. . . .

"Sec. 9. Detention Hospital.—It shall be the duty of the city health officer to use only such building or buildings for quarantine purposes under this ordinance as shall first be provided or accepted by the board of commissioners, provided, however,

that the state industrial farm for women, at Leavenworth, may be used for such quarantine purposes.

"Sec. 10. Quarantine.—Whenever it is necessary for the protection of the public health that persons infected with venereal diseases be quarantined, the city health officer shall quarantine such diseased person[s] in said detention hospitals or at said industrial farm, and cause to be administered to such persons a proper course of treatment."

In May, 1919, the board of commissioners adopted a resolution reciting that the city had no suitable place to isolate and treat persons afflicted with venereal diseases, and designated and accepted as such places the "farm for interned men at Lansing," for men, and the "state industrial farm for women," for women.

The statute is assailed as delegating legislative power to the state board of health. The statute belongs to the well-known class in which the legislature enacts a law in general terms, confers on an officer or administrative body power to enforce the law, and to accomplish that end, to adopt necessary rules and regulations, and prescribe penalties for violations of the regulations so adopted. 12 C. J. 844, 848. The necessity for legislation of this character is demonstrated by very recent events. If, when the statute under consideration was before the legislature, it had designated all the infectious, contagious, and communicable diseases it knew, and had prescribed regulations for their suppression and control, it would have omitted the deadly influenza which soon afterwards made such appalling inroads on the lives and health of the people of the state. To meet emergencies of this character, it is indispensable to preservation of the public health that some administrative officer or board should be clothed with authority to make adequate rules which have the force of law, and generally the public welfare is best promoted by delegating power to make administrative regulations

to fulfil the expressed intention of the legislature. While in this instance the terms of the statute are somewhat meager, it undertakes to protect public health by preventing dissemination of dangerous communicable diseases, through isolation and quarantine measures, non-observance of which is declared to be a misdemeanor; and the authority given the state board of health to specify such diseases as measure up to the standard

of infectious, contagious, and communicable, and to prescribe appropriate control measures, is well sustained. The following cases, chosen from a constantly lengthening list, discuss and apply the principles involved:

Constitutional law—quarantine of communicable diseases—delegation of legislative power.

*Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40—authority to state board of health to adopt measures necessary to facilitate enforcement of pure food law, and to define specific adulterations (milk).

*Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152—authority of state board of agriculture to determine what oils are safe, pure, and afford sufficient light.

*Carstens v. De Sellem*, 82 Wash. 643, 144 Pac. 984—authority of commissioner of agriculture to specify diseases and pests injurious to nursery stock, trees, etc.

*Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349—authority of Secretary of Treasury, on recommendation of board of experts, to establish standards of tea.

*St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616—authority of Interstate Commerce Commission, in conjunction with American railway association, to designate and promulgate standard height and maximum variation of freight-car drawbars.

*Richards v. Fleming Coal Co.* 104 Kan. 330, 179 Pac. 380—rules and

regulations relating to use of dynamite and other detonating explosives in mines, agreed on between employer and employees and approved by state mine inspector.

In the case of *State v. Crawford*, 104 Kan. 141, 2 L.R.A. 880, 177 Pac. 360, it was held that the principles under discussion could not be extended to validate a code of rules relating to electric wiring, promulgated and revised from time to time by a body composed of private individuals and voluntary unofficial organizations, which meets occasionally somewhere in the United States.

The rules of the state board of health and the city ordinance are assailed as unreasonable. In this instance, only those provisions of the rules of the state board of health and of the city ordinance are involved, which relate to isolation of persons who have been examined and have been found to be diseased. Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable, and reasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is no greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed.

It is urged that the regulations in question are unreasonable, in that they authorize isolation in remote places beyond the limits of the city in which the petitioners reside. The court knows of no law or rule of public policy or private right which requires a person who, for the pro-

tection of the public, must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside. It would have been competent for the state board of health to designate a single hospital for the detention of all persons in the state found to be so diseased, and it is entirely reasonable for cities having inadequate facilities, or having no facilities of their own, to take advantage of those provided by state authority. In this instance the city health officer's power to isolate is restrained by ordinance, which requires the city commission to approve detention hospitals other than those provided by the city.

In the application for the writ it is stated that the petitioners are not diseased. The question is one of fact, determinable by practically infallible scientific methods. The city health officer was authorized to ascertain the fact. He has certified to the existence of disease, and, in the absence of a charge of bad faith, or conduct equivalent to bad faith, on his part, his finding is conclusive.

In the application for the writ it is stated that, if the petitioners be diseased, they are able to provide themselves with proper treatment in an isolated place in the city of Topeka. The answer is: The public health authorities are not obliged to take chances.

Finally, it is said that the isolation orders are bad because they direct quarantine in the state penitentiary, and the petitioners may not be confined in the penitentiary for disease. The orders ought not to have used the term "state penitentiary," and should be amended by employing the official designation, the "State Quarantine Camp for Men at Lansing." While it is true that physical facilities constituting part of the penitentiary equipment are utilized, interned persons are in no sense confined in the

Health—rules of board—reasonableness.

Findings of health officer—conclusiveness.

Habeas corpus—release from quarantine.

penitentiary, and are not subject to the peculiar obloquy which attends such confinement. Since, however, the isolation orders specify the authority under which they are issued, there is no doubt about the place. Neither is there any doubt that the place is the iden-

Health-mis-  
nomer of place  
of isolation.

tical place approved by the city commissioners under the name, "Farm for Interned Men at Lansing." Consequently, the confusion and misapplication of names, which should be avoided in the future, are not sufficient to entitle the petitioners to discharge.

The writ is denied.

## ANNOTATION.

### General delegation of power to guard against spread of contagious disease.

#### I. Introductory, 836.

#### II. Validity of general delegation, 836.

#### III. Scope of general delegation:

##### a. Measure other than vaccination:

1. Measures held authorized, 837.

2. Measures held not authorized, 839.

##### b. Vaccination, 841.

#### I. Introductory.

This note discusses the validity of a general legislative delegation to officers or bodies having locally the function of protecting the public health, of the power to make and enforce regulations to prevent the spread of communicable diseases, and the extent of the power which may be exercised under such a delegation. In treating the extent of the power conferred, not only have powers expressly granted been excluded from consideration, but the discussion has been confined to the existence of the power, excluding questions as to its abuse. The note is also confined to a consideration of powers looking specifically to the prevention of the spread of contagion, and does not consider the delegation of powers to protect the public health generally. Questions as to the validity of local health regulations, made under a general delegation of power, which conflict with those made by statute, are also excluded.

#### II. Validity of general delegation.

A general statutory delegation of power to make regulations for the protection of the public health from contagious or infectious diseases is not unconstitutional, as a delegation of legislative power.

Illinois.—*People v. Tait* (1913) 261 Ill. 197, 103 N. E. 750.

Indiana.—*Blue v. Beach* (1900) 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89.

Kansas.—See the reported case (*Ex PARTE MCGEE*, ante, 831).

Kentucky.—*Hengehold v. Covington* (1900) 108 Ky. 752, 57 S. W. 495.

Massachusetts.—*Train v. Boston Disinfecting Co.* (1887) 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

Michigan.—*Hurst v. Warner* (1894) 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440.

Missouri.—*Metcalf v. St. Louis* (1847) 11 Mo. 102; *St. Louis v. McCoy* (1853) 18 Mo. 238.

Washington.—*State ex rel. McBride v. Superior Ct.* (1918) 103 Wash. 409, 174 Pac. 973.

Thus, in *People v. Tait* (Ill.) supra, it was held that the provisions of a statute, giving the board of county commissioners in certain counties the general power to make rules and regulations to prevent the spread of communicable diseases, including the power to quarantine any house where an infected person might be, was not an unlawful delegation of legislative power.

So, in *Blue v. Beach* (Ind.) supra, the court held that an act providing that the state board of health should make rules and by-laws to prevent the spread of contagious and infectious diseases did not delegate legislative power in violation of the Constitution.

Similarly, in *Metcalf v. St. Louis* (Mo.) supra, it was held that a statute delegating to the city of St. Louis the power to adopt by ordinance regu-

lations to prevent the introduction of contagious diseases, and to make quarantine laws for that purpose, was not a delegation of legislative authority in violation of the constitutional prohibition. See to the same effect, *St. Louis v. McCoy* (Mo.) *supra*.

In like manner, the court held in *State ex rel. McBride v. Superior Ct.* (Wash.) *supra*, that the provisions of a statute creating a state board of health, and rendering its rulings final as to the existence of contagious diseases, were not violative of the Constitution, as a delegation of legislative power.

In the reported case *EX PARTE MCGEE*, ante, 831), the court sustains a statute delegating to the state board of health the power to define such diseases as it deems to be contagious or infectious, and to adopt such regulations as may be proper to control those diseases.

But in *State ex rel. Adams v. Burdge* (1879) 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347, the court held that an act which authorized the state board of health to make such regulations as it might deem necessary for the preservation of the public health from contagious diseases, and which further authorized the board to designate such diseases as were to be considered contagious and dangerous, was unconstitutional as an attempt to delegate legislative power.

### III. Scope of general delegation.

#### a. Measure other than vaccination.

##### 1. Measures held authorized.

#### Quarantine.

Under a general delegation of the power to take measures necessary to prevent the spread of contagious disease, health officers have the power to provide for the isolation of persons afflicted with such a disease. *Ex parte Johnston* (1919) — Cal. App. —, 180 Pac. 644.

Affirming that power, the court in *State v. Racskowski* (1913) 86 Conn. 677, 45 L.R.A. (N.S.) 530, 86 Atl. 606, Ann. Cas. 1914B, 410, said: "Our health officers are not only bound to make all necessary and proper regu-

lations to prevent the spread of disease, but they are bound to exercise the highest diligence in enforcing these regulations. Common knowledge tells us that contagious diseases may be communicated by those who have been exposed to the disease; and it is the common practice for the health authorities to detain all such persons from going abroad so long as the danger of contagion is imminent from those who have been exposed." It was, however, held in that case that this delegation of power to order a person into quarantine could be exercised only when the health officer had a reasonable belief that the person ordered into confinement was actually afflicted with a contagious or infectious disease.

Applying the rule just stated, it has been held that a general delegation of power to take measures against the spread of contagion authorizes a regulation requiring the removal of smallpox patients to a pesthouse. *Board of Health v. Ward* (1900) 107 Ky. 477, 54 S. W. 725; *Hengehold v. Covington* (1900) 108 Ky. 752, 57 S. W. 495.

So, under a general delegation of authority to make and enforce regulations for the prevention and spread of infectious or contagious diseases, it has been held that a board of health was authorized to direct the isolation of a person infected with anesthetic leprosy. *Kirk v. Board of Health* (1909) 83 S. C. 372, 23 L.R.A. (N.S.) 1188, 65 S. W. 387.

In the reported case (*EX PARTE MCGEE*, ante, 831), the court holds that a regulation of the state board of health, acting under its delegated power to prevent the dissemination of contagious or infectious diseases, and a city ordinance following the regulation of the state board, which direct the quarantine in a state hospital of men afflicted with venereal disease, are reasonable measures.

So, in *Ex parte Brown* (1919) — Neb. —, 172 N. W. 522, it was held that, under a similar delegation of power, the city of Omaha was authorized to provide by ordinance for the detention of persons "found to be in-



fects with communicable venereal virus." See also *Ex parte Johnston* (1919) — Cal. App. —, 180 Pac. 644.

In *Highland v. Schlute* (1900) 123 Mich. 360, 82 N. W. 62, it appeared that by a special statute the board of health of the city of Detroit was authorized, in case of epidemic disease, to make such provisions as it might deem necessary, though such provisions were not otherwise authorized by the general statute relative to all cities whose charter provisions were not inconsistent therewith. Under this special act the Detroit board of health adopted a regulation providing that, whenever smallpox broke out in one half of a double frame house, the entire house should be quarantined. The court held that this regulation was a proper exercise of the power delegated to the board of health.

Under an act providing that the health officer of the port of New York "shall, in the presence of immediate danger, take the responsibility of applying such additional measures as may be deemed indispensable for the protection of the public health," it has been held that the delegated powers justified the action of the health officer in landing and isolating passengers from cholera-infected ships, on Fire island, in the county of Suffolk, despite the order of the board of health of that county that such passengers should not be landed. *Young v. Flower* (1893) 3 Misc. 34, 22 N. Y. Supp. 332. So, in *Metcalf v. St. Louis* (1847) 11 Mo. 102, the court held that under the delegation of power to the city of St. Louis "to make regulations to prevent the introduction of contagious diseases into the city; to make quarantine laws for that purpose,"—an ordinance providing for the quarantine of vessels whose crew or passengers had been exposed to contagion, for a period not exceeding thirty days, was properly adopted.

#### Closing of store.

Under the provisions of a statute delegating to county boards of health the right to inaugurate and execute "such sanitary regulations as the local board may consider expedient, to prevent the outbreak of and spread of

cholera, smallpox, yellow fever, scarlet fever, diphtheria, and other epidemic and communicable diseases," it has been held that a county board of health might compel the closing of a store for disinfection, and quarantine the storekeeper, where such person had recently come from an infected locality. *Allison v. Cash* (1911) 143 Ky. 679, 187 S. W. 245.

#### Disinfection.

Where the board of health of a city has been authorized by statute to take such measures as it deems necessary to prevent the spread of dangerous communicable diseases, and to make quarantine regulations, it may properly adopt a regulation requiring the disinfection of all imported rags, at the expense of the owner. *Train v. Boston Disinfecting Co.* (1887) 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

So, the delegation of power to enact all laws or ordinances necessary to preserve the health of the city and to prevent the introduction of contagious diseases, contained in the charter of the city of Baltimore, has been held to authorize an ordinance imposing on the captain, owner, or consignee of any vessel coming to quarantine with persons on board afflicted with smallpox, the expenses incurred in disinfecting persons or property on board the vessel. *Harrison v. Baltimore* (1848) 1 Gill (Md.) 264.

#### Contract or expenditure.

In *Hazen v. Strong* (1830) 2 Vt. 427, wherein it appeared that the selectmen of a town had been delegated by statute the authority to take measures to prevent the spreading of smallpox when any person in the town should become infected therewith, the court held that the delegation of power carried with it the right to vote a tax to defray the expenses of inoculating the inhabitants with kinpox, as a measure to prevent the spreading of the disease.

So, under a statute delegating to cities and villages the power to make all regulations which may be necessary for the suppression of disease, a city may lease property for the pur-

pose of providing a smallpox hospital thereon. *Chicago v. Peck* (1900) 98 Ill. App. 434, affirmed in (1902) 196 Ill. 260, 63 N. E. 711. See to the same effect, *Anderson v. O'Conner* (1884) 98 Ind. 168, and *Turner v. Toledo* (1898) 8 Ohio C. D. 196.

Likewise, the power given to a local board to "make such regulations as are necessary for the protection of the public health respecting . . . causes of sickness . . . and quarantine; to proclaim and establish quarantine against all infectious or contagious diseases dangerous to the public, and maintain and remove the same," has been held to be sufficient to authorize the action of the board in refusing to permit a city to locate a pesthouse on land owned by it within the township. *Warner v. Stebbins* (1900) 111 Iowa, 86, 82 N. W. 457.

Where a statute required the common council to adopt measures for the preservation of the public health, the court held that the power of the council was commensurate with its duty, and it might properly engage the services of individuals to stay a contagion, for which services the city would be liable. *Rae v. Flint* (1883) 51 Mich. 526, 16 N. W. 887. See to the same effect, *Elliott v. Kalkaska* (1885) 58 Mich. 452, 55 Am. Rep. 706, 25 N. W. 461, and *Turner v. Toledo* (Ohio) *supra*.

### 2. Measures held not authorized.

#### Quarantine.

A general delegation of power to guard against the spread of contagion cannot validly be exercised by the adoption of arbitrary or oppressive quarantine regulations. See, generally, *State v. Kirby* (1903) 120 Iowa, 26, 94 N. W. 254, and *Hurst v. Warner* (1894) 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440.

In *People v. Tait* (1913) 261 Ill. 197, 103 N. E. 750, the court, in discussing the statutory delegation of power to county boards to make rules regulating quarantine, said: "Boards of health may not exercise the powers vested in them, arbitrarily, and without reference to existing conditions. It never was the intention of the legis-

lature to grant unlimited discretion to these boards, the exercise of which might deprive citizens of legal rights, when no public necessity existed for so doing. Such boards have neither legislative nor judicial powers. Their functions are purely ministerial, and must be exercised within reasonable limits, for the purpose of suppressing diseases and preserving the health of the people, which is the purpose for which they are created."

Thus, it has been held that a provision of a city charter, delegating to the health commissioner the duty of taking measures to preserve the public health from impending contagion, and a further statutory provision delegating to local boards of health the duty of guarding against the introduction of contagious and infectious diseases, are alike inadequate to authorize the act of a health commissioner in quarantining a person because of his refusal to submit to vaccination. *Re Smith* (1895) 146 N. Y. 68, 28 L.R.A. 820, 48 Am. St. Rep. 769, 40 N. E. 497.

The holding in *Re Smith* (N. Y.) *supra*, was followed in *Smith v. Emery* (1896) 11 App. Div. 10, 42 N. Y. Supp. 258, an action between the same parties to recover as for a false imprisonment, the court stating that the board delegation of power to the health authorities to quarantine persons exposed to contagion was to be exercised only where an individual had been exposed to the disease under circumstances which would have permitted the communication of it.

So, in *Sumner v. Philadelphia* (1873) 9 Phila. (Pa.) 408, the court, saying that a broad statutory delegation of power to a board of health to administer quarantine regulations does not give unlimited authority, and is not to be exercised arbitrarily, held that, where an infected vessel is detained after it has been completely cleansed, such further detention is unauthorized.

Likewise, in *Wragg v. Griffin* (1919) — Iowa, —, 2 A.L.R. 1327, 170 N. W. 400, it was held that statutes providing for state and local boards of health, which should make such rules

as might be found necessary, including quarantine, to preserve the public health, did not delegate the power to restrain a person suspected of having a contagious disease, for the purpose of extracting blood from his veins by way of determining his affliction.

So, in *Ex parte Dillon* (1919) — Cal. App. —, 186 Pac. 170, it was said that, while it is true, "where sufficient cause exists to believe that a person is afflicted with a quarantinable disease, there is no doubt of the right of the health authorities to examine into the case," the power depends on the existence of reasonable ground to believe that the person is so afflicted. It was accordingly held that a local board of health had no authority, under a general delegation of power to protect the public health, to detain and examine for venereal disease all persons arrested on charges of sexual crime.

And see *Taylor v. Adair County* (1905) 119 Ky. 374, 84 S. W. 299, wherein the court held that a county board of health, which was authorized by statute to establish quarantines and to determine the necessities of each situation from the facts then existing, must act as a board on each case or epidemic as it arose, and that such power could not be delegated to a single health officer. That holding was approved and followed in *Hickman County v. Scarborough* (1912) 150 Ky. 1, 149 S. W. 1116.

#### **Excluding other methods of treatment.**

In *Trabue v. Todd County* (1907) 125 Ky. 809, 102 S. W. 309, the court held that a county board of health, authorized by statute to inaugurate and execute such rules as it deemed necessary to prevent the spread of contagious diseases, did not have the right to adopt a resolution placing the health officer of the county in exclusive charge of all contagious diseases and the methods of attending thereto, since the power delegated by the statute was not intended to prevent persons from attending to such diseases by any reasonable means of their own.

#### **Seizure of property.**

The fact that a local board of health

had been given the power to prescribe such measures as it deemed necessary for the protection of the inhabitants from dangerous diseases has been held not to authorize a member of the board to take control of the premises of a person, merely because smallpox existed thereon, the court saying: "By the general authority to take such measures as are deemed necessary for the safety of the inhabitants, it is not intended to confer unlimited authority on the board to control persons and property at its discretion." *Brown v. Murdock* (1885) 140 Mass. 314, 3 N. E. 208.

So, it has been held that a statute, authorizing the selectmen to make regulations governing the quarantine of vessels arriving in port, did not authorize them to take a contaminated vessel into their own possession and control, to the exclusion of the owner. *Mitchell v. Rockland* (1856) 41 Me. 363, 66 Am. Dec. 252. On a further appeal in (1858) 45 Me. 496, a new trial was granted because of erroneous instructions, but the rule of law stated was affirmed, and later reaffirmed in (1860) 52 Me. 118.

Likewise, it has been held that a statute delegating to local boards of health the power to make provisions for the safety of the inhabitants where a person became infected with a disease dangerous to others, and to provide a hospital for the infected persons, and to take such other measures as they might judge to be necessary for the safety of the public, did not delegate the right to take possession of a dwelling house and the furniture therein, to the exclusion of the occupant or owner, and without his consent, and to use the dwelling as a hospital. *Spring v. Hyde Park* (1884) 137 Mass. 554, 50 Am. Rep. 334.

#### **Prohibiting sale or importation of property.**

In *Kosciusko v. Slomberg* (1891) 68 Miss. 469, 12 L.R.A. 528, 24 Am. St. Rep. 281, 9 So. 297, it appeared that a municipality, pursuant to the authority vested therein by its charter, to establish and enforce quarantine and regulations necessary to the health of its people, enacted an ordinance de-

declaring it unlawful to bring in or offer for sale secondhand clothing, without proof that it did not come from a locality in which contagion or infection was or had been prevailing. There was no epidemic or other circumstances rendering the ordinance necessary to preserve the public health, and the court held that such an exercise of power was not authorized, in the absence of a real necessity therefor.

*b. Vaccination.*

It seems to be the better rule that, during an epidemic of smallpox, a general delegation of power to take measures against the spread of contagion authorizes an order requiring vaccination as a prerequisite to attendance in the public schools. *Blue v. Beach* (1900) 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Highland Park Graded Common School Dist. v. McMurtry* (1916) 169 Ky. 457, 184 S. W. 390; *State ex rel. Cox v. Board of Education* (1900) 21 Utah, 401, 60 Pac. 1013.

In the leading case of *Blue v. Beach* (Ind.) *supra*, the court held that under the statutory power vested in the state board of health to adopt rules to prevent the spread of contagious and infectious diseases, and in view of a rule adopted by the state board, requiring local boards of health to compel the vaccination of all persons in their districts in case of threatened contagion, the promulgation of such an order by the local board was, under such circumstances, a proper exercise of its delegated power.

So, in *Highland Park Graded Common School Dist. v. McMurtry* (1916) 169 Ky. 457, 184 S. W. 390, the question arose whether a county board of health, by virtue of its general delegated power to inaugurate such rules as might be necessary to prevent the spread of contagious or infectious disease, might direct the vaccination of all school children as a condition precedent to attending school. The court held that when there existed a reasonable apprehension of a smallpox epidemic, such power might properly be exercised, saying: "Although we have no direct statutory direction

on this subject, a reasonable construction of the liberal powers conferred by the statute in the creation of these boards would imply a grant of authority to adopt, in reference to public schools, such measures as were here taken. Indeed, it would be extremely unfortunate if the legislature had limited the power of these boards in respect to dealing with situations such as this, or if the court should restrain them from taking such measures as might be by them deemed necessary to prevent an outbreak and epidemic of this disease in public schools, because there is scarcely any place where an outbreak of smallpox would spread with more rapidity, or over a wider territory, than if it found a starting place in one of the public schools, attended by hundreds of children. . . . Of course, these boards cannot adopt unreasonable or arbitrary rules or regulations or, without cause, harass the public, or needlessly subject individuals to expense or inconvenience, or act unless they have reasonable grounds to believe that the action taken is necessary to prevent or suppress the disease sought to be controlled. And we have no doubt of the jurisdiction of the courts to restrain these boards if they should undertake to exert authority not fairly within the powers conferred by the statute, or plainly not needed for the purpose of conserving or protecting the health of the people, or preventing the outbreak or spread of infectious or contagious diseases."

The statute under consideration in *State ex rel. Cox v. Board of Education* (Utah) *supra*, provided that local boards of health, with the assistance of the public officers of the district, should enforce the necessary rules and regulations concerning cholera, smallpox, and other contagious and infectious diseases, and should have jurisdiction in all matters pertaining to the preservation of the health of those attending public schools, and, in addition, might exclude from the schools any persons liable to convey such disease. During a time when smallpox was prevalent, the board of health and the board of education resolved that

no pupil should be admitted to the schools without having been vaccinated. The court held that the resolution was justified by a reasonable construction of the statute.

In *State ex rel. Freeman v. Zimmerman* (1902) 86 Minn. 353, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783, the court held that a general grant of power to make such rules and regulations as might be deemed necessary for the protection of the public health was sufficient to authorize the local authorities, under circumstances rendering such action reasonably necessary, to make and enforce a regulation prescribing vaccination as a condition precedent to the admission of children to the public schools. As to the construction of statutes granting such general powers, the court said: "In view of the importance of the interests confided to the care of health officers, the various statutes conferring such powers should, notwithstanding the individual liberty of the citizens is in a large measure involved, receive a broad and liberal construction in aid of the beneficial purposes of their enactment."

The action of a county board of health in enforcing a regulation adopted by the state board of health, which required the vaccination of all school children as a condition precedent to their admission to the public schools, was upheld in *Hill v. Bickers* (1916) 171 Ky. 703, 188 S. W. 766, though smallpox was not prevalent at the time, where the state board of health, in promulgating the rule, was acting under a broad delegation of power to make regulations for the prevention of disease. But the court said: "Unless such power is clearly conferred, local bodies may not require vaccination, in the absence of smallpox or the apprehension of an immediate outbreak thereof."

In other jurisdictions, it seems that a general delegation of the health power does not warrant a requirement of vaccination, except in the presence of a serious epidemic. Thus, under the provisions of an Illinois statute that the state board of health "shall have charge of all matters pertaining

to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations, as they may from time to time deem necessary for the preservation or improvement of public health," it has been held that an order of the state board of health that after a certain date no pupil should be admitted to any public school in the state without previous vaccination, when the pupil had not been exposed to smallpox and the disease was not prevailing in the locality, was unreasonable, and not within the delegated power of the board of health. *School Directors v. Breen* (1895) 60 Ill. App. 201, affirmed in (1897) 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81. On similar facts, the holding in *School Directors v. Breen* (Ill.) supra, was approved and followed in *Lawbaugh v. Board of Education* (1899) 177 Ill. 572, 52 N. E. 850.

In *People ex rel. Jenkins v. Board of Education* (1908) 234 Ill. 422, 17 L.R.A.(N.S.) 709, 84 N. E. 1046, 14 Ann. Cas. 943, it appeared that, under its statutory power to make all regulations necessary for the promotion of health and suppression of disease, a city passed an ordinance requiring vaccination as a condition precedent to the admission of pupils to the public schools, and further empowering the commissioner of health to make such rules as he deemed necessary for the public safety, in case of emergency from impending contagious diseases. The court held that the action of the commissioner in declaring smallpox to be epidemic in the district, and in giving instructions to exclude unvaccinated children from the public schools, was not a lawful exercise of any power conferred on the municipality, saying that the existence of a few cases of smallpox in a large city did not create an emergency.

Similarly, in *Waldschmidt v. New Braunfels* (1918) — Tex. —, 207 S. W. 303, reversing (1917) — Tex. Civ. App. —, 193 S. W. 1077, it was held that, under a general statutory grant of authority "to do all acts and make all regulations which may be necessary or expedient for the promotion

of health or the suppression of disease," a city might adopt an ordinance requiring vaccination as a condition precedent to the admission of pupils to the public schools, at a time when smallpox was more or less prevalent in the state, although there was but one case in the city, and that was "isolated, and practically convalescent."

The power to compel vaccination was also denied in *Osborn v. Russell* (1902) 64 Kan. 507, 68 Pac. 60, wherein it was held that the authority granted to the state board of health

by a statute providing that "the state board of health shall supervise the health interests of the people of the state, and that the state board of health shall adopt and publish such rules and order of business as may be necessary to make this act effective," was not sufficient to uphold a regulation of the board that every pupil who had not been successfully vaccinated should be excluded from the public schools. The existence of an epidemic was alleged in that case, but the alleged fact was not referred to by the court. R. E. B.

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CHARLES F. RUDDY, Plff. in Err.,

v.

HERMAN J. ROSSI.

*United States Supreme Court—December 9, 1913.*

(248 U. S. 104, 63 L. ed. 148, 39 Sup. Ct. Rep. 46.)

**Exemptions — homestead lands — debts incurred before patent.**

1. The exemption of homestead lands, under U. S. Rev. Stat. § 2296, from liability to the satisfaction of any debt contracted prior to the issuing of the patent, extends to debts incurred by a homesteader after obtaining the receiver's final receipt and certificate, but before the patent has actually been issued.

[See 22 R. C. L. 265, 266.]

— validity.

2. Congress has power to prevent the sale of lands on execution to satisfy a judgment obtained after final patent had issued upon debts incurred prior

to that time, but after the receiver's final receipt and certificate have been obtained.

[See 22 R. C. L. 265-267.]

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**ERROR** to the Supreme Court of the State of Idaho to review a judgment which, modifying a judgment of the District Court for Shoshone County, held that homestead lands could be sold on execution to satisfy a judgment upon debts incurred by a homesteader after obtaining the receiver's final receipt and certificate, but before the patent had actually issued. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Charles E. Miller and A. H. Featherstone, for plaintiff in error:

It is within the jurisdiction and power, and is the duty, of the Land Department, to inquire into and determine questions brought to its attention touching the legality or validity of claims asserted under the Public Land Laws, at any time prior to the issuance of patent.

Re Hyde, 33 Land Dec. 639.

The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office, and by the Secretary of the Interior, as the proper administration of the law or demands of justice may require.

Orchard v. Alexander, 157 U. S. 373,

39 L. ed. 738, 15 Sup. Ct. Rep. 635; *Knight v. United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Kern Oil Co. v. Clarke*, 31 Land Dec. 302; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 593, 42 L. ed. 591-593, 18 Sup. Ct. Rep. 208.

The doctrine of "relation," as applied to government patents for land, is never invoked except where necessary to give effect to the intent of the statute, or to cut off intervening claimants.

24 Am. & Eng. Enc. Law, 128, 275, 277; *Demarest v. Wyncoop*, 3 Johns. Ch. 146, 8 Am. Dec. 467; *Stahl v. Lynn*, 86 Wis. 75, 56 N. W. 188; *Johnston v. Jones*, 1 Black, 221, 17 L. ed. 120; *Jackson ex dem. Henderson v. Davenport*, 20 Johns. 537; *Wood v. Ferguson*, 7 Ohio St. 291; *Barncord v. Kuhn*, 36 Pa. 383; *Gibson v. Chouteau*, 13 Wall. 92-104, 20 L. ed. 534-538, 39 Mo. 588; *Lessieur v. Price*, 12 How. 74, 13 L. ed. 899; *Lynch v. Bernal*, 9 Wall. 315, 19 L. ed. 714; *Jackson ex dem. Griswold v. Bard*, 4 Johns. 230, 4 Am. Dec. 267; *Heath v. Ross*, 12 Johns. 140; *Lyttleton v. Cross*, 3 Barn. & C. 325, 107 Eng. Reprint, 754; *Redfield v. Parks*, 132 U. S. 249, 33 L. ed. 331, 10 Sup. Ct. Rep. 83; *Small v. Westchester F. Ins. Co.* 51 Fed. 795; *Shay v. McNamara*, 54 Cal. 175; *Hawkins v. Harlan*, 68 Cal. 236, 9 Pac. 108; *Reynolds v. Plymouth County*, 55 Iowa, 93, 7 N. W. 468; *Churchill v. Sowards*, 78 Iowa, 474, 43 N. W. 271; *Durham v. Hussman*, 88 Iowa, 36, 55 N. W. 11; *Kromer v. Friday*, 10 Wash. 642, 32 L.R.A. 671, 39 Pac. 229; *Whitney v. Morrow*, 34 Wis. 648.

Lands acquired under the Federal Homestead Laws cannot, in any event, be subjected to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

*Watson v. Voorhees*, 14 Kan. 328; *Empire Copper Co. v. Henderson*, 15 Idaho, 635, 99 Pac. 127; *Mackenzie v. Hare*, 239 U. S. 299, 60 L. ed. 297, 36 Sup. Ct. Rep. 106, Ann. Cas. 1916E, 645; *Doran v. Kennedy*, 237 U. S. 362, 59 L. ed. 996, 35 Sup. Ct. Rep. 615; *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Seymour v. Sanders*, 3 Dill. 437, Fed. Cas. No. 12,690; *Brun v. Mann*, 12 L.R.A. (N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; *Re Cohn*, 171 Fed. 570; *Re Par-meter*, 211 Fed. 757; *Grames v. Consolidated Timber Co.* 215 Fed. 785; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766.

The homestead statute means exactly what it says, and that the date of limitation is the date of the patent.

*Re Harris*, 16 Ariz. 1, 140 Pac. 825, Ann. Cas. 1916A, 1175; *Gilkerson-Sloss Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29, 15 S. W. 191; *Barnard v. Bol-ler*, 105 Cal. 214, 38 Pac. 728; *Klempp v. Northrop*, 137 Cal. 414, 70 Pac. 284; *Miller v. Little*, 47 Cal. 348; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Dickerson v. Bridges*, 147 Mo. 235, 43 S. W. 825; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Smith v. Schultz*, 10 Neb. 600, 7 N. W. 329; *Le-man v. Chipman*, 82 Neb. 392, 117 N. W. 885; *Clark v. Bayley*, 5 Or. 343; *Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766; *Schultz v. Levy*, 33 Or. 373, 54 Pac. 184; *Gould v. Tuck-er*, 20 S. D. 226, 105 N. W. 624; *Blair v. Mayer*, 24 S. D. 563, 140 Am. St. Rep. 797, 124 N. W. 721; *Van Doren v. Mil-ler*, 14 S. D. 264, 85 N. W. 187; *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Sprin-kle v. West*, 62 Wash. 587, 34 L.R.A. (N.S.) 404, 114 Pac. 430, Ann. Cas. 1912D, 281; *Gile v. Hallock*, 33 Wis. 523; *Sturby-Eastabrook Mercantile Co. v. Davis*, 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495; *Stark Bros. v. Glaser*, 19 Okla. 502, 91 Pac. 1040; *Leonard v. Ross*, 23 Kan. 296.

Mr. Carlton Fox also for plaintiff in error.

No appearance for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court:

By "An Act to Secure Homesteads to Actual Settlers on the Public Do-main," approved May 20, 1862, 12 Stat. at L. 392, chap. 75, Comp. Stat. § 4530, 8 Fed. Stat. Anno. 2d ed. p. 543, Congress prescribed the conditions under which citizens could acquire unappropriated public lands in tracts of not exceeding 160 acres. A manifest purpose was to induce settlement upon and cultivation of these lands by those who, five years after proper entry, would become owners in fee through issuance of patents. The great end in view was to convert waste places into per-manent homes. Such occupancy and use constituted a most important consideration and were rightly ex-pected to yield larger public benefits

than the small required payment of \$1.25 per acre.

Decision of this cause requires us to consider the meaning and validity of § 4 of the act [Rev. Stat. § 2296, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575], which provides: "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

Plaintiff in error made preliminary homestead entry of designated land within the state of Idaho August 6, 1913; submitted final proofs October 4, 1909; obtained final receipt and certificate November 12, 1909; final patent issued August 26, 1912. In 1914 two judgments were obtained against him: the first upon indebtedness incurred prior to November 12, 1909; the second upon debts contracted subsequent to that date and prior to patent. Executions were issued and levied upon the homestead; and thereupon the original proceeding was begun to declare asserted liens invalid and a cloud upon the title. The court below held the first judgment unenforceable against the land, since it represented indebtedness which accrued prior to final entry. It further held the second judgment could be so enforced, as it was based upon debts contracted after final entry, at which time the homesteader became legally entitled to his patent: 28 Idaho, 376, 154 Pac. 977.

The language of § 4 is clear, and we find no adequate reason for thinking that it fails precisely to express the lawmakers' intention.

Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? This question undoubtedly presents difficulties which we are not disposed to minimize. In *Wright v. Morgan*, 191 U. S. 55, 58, 48 L. ed. 89, 93, 24 Sup.

Ct. Rep. 6, a similar point was suggested, but not decided.

The Constitution declares: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" and it is settled that Congress has plenary power to dispose of public lands. *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. ed. 573, 578. They may be leased, sold, or given away upon such terms and conditions as the public interests require. Instead of granting fee-simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *M'Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

Acting within its discretion, Congress determined that, in order promptly to dispose of public lands and bring about their permanent occupation and development, it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded, or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the legislature owed to the public.

The judgment of the court below must be reversed and the cause re-

Exemptions—  
homestead lands  
—debts incurred  
before patent.

—validity.



manded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Holmes:

This case involves a question of theory that may be important, and I think it desirable to state the considerations that make me doubt.

The facts needing to be mentioned are few. On August 26, 1912, the United States conveyed land in Idaho to Ruddy in fee simple, in pursuance of a homestead entry by Ruddy on August 6, 1903, final proof on October 4, 1909, and final receipt of the purchase price on November 12, 1909. In September, 1912, after the conveyance, Rossi began suits against Ruddy, attaching this land, and in June, 1914, levied executions upon the same. The debts for which the suits were brought were incurred before the issue of the patent, and the present proceeding is to prevent Rossi from selling the land to satisfy the judgments. The question arises under Rev. Stat. § 2296, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575, providing that no lands acquired under that chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The supreme court of Idaho narrowed the issue to the case of debts contracted after final proof, but that distinction is not important to the difficulty in my mind.

My question is this: When land has left the ownership and control of the United States and is part of the territory of a state, not different from any other privately owned land within the jurisdiction, and no more subject to legislation on the part of the United States than any other land, on what ground is a previous law of Congress supposed any longer to affect it in a way that a subsequent one could not? This land was levied upon not on the assertion that any lien upon it was acquired before the title passed from the United States, but merely as any other land might be attached for a debt that Rossi had a right to collect, after

the United States had left the premises. I ask myself what the United States has to do with that. There is no condition, no reserved right of re-entry, no reversion in the United States, saved either under the Idaho law, as any private grantor might save it, or by virtue of antecedent title. All interest of the United States as owner is at an end. It is a stranger to the title. Even in case of an escheat the land would not go to it, but would go to the state. Therefore the statute must operate, if at all, purely by way of legislation, not as a qualification of the grant. If § 2296 is construed to apply to this case, there is simply the naked assumption of one sovereignty to impose its will after whatever jurisdiction or authority it had has ceased and the land has come fully under the jurisdiction of what for this purpose is a different power. It is a pure attempt to regulate the alienability of land in Idaho by law, without regard to the will of Idaho, which we must assume on this record to authorize the levy if it is not prevented by an act of Congress occupying a paramount place.

I believe that this court never has gone farther in the way of sustaining legislation concerning land within a state than to uphold a law forbidding the inclosure of public lands, which little, if at all, exceeded the rights of a private owner, although it was construed to prevent the erection of fences upon the defendants' own property, manifestly for the sole purpose of inclosing land of the United States. *Canfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. At most it was a protection of the present interests of the United States under a title paramount to the state. On the other hand, it is said in *Pollard v. Hagan*, 3 How. 212, 224, 11 L. ed. 565, 571, that no power in the nature of municipal sovereignty can be exercised by the United States within a state; that such a power is repugnant to the Constitution. This case was referred to in *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816,

and it was decided that the act of Congress authorizing the formation of the state of Mississippi, and providing that the Mississippi river should be forever free, "could have no effect to restrict the new state in any of its attributes as an independent sovereign government," and both these cases were cited upon this point with approval in *Ward v. Racehorse*, 163 U. S. 504, 511, 512, 41 L. ed. 244, 246, 247, 16 Sup. Ct. Rep. 1076. See also *Shively v. Bowlby*, 152 U. S. 1, 27, 38 L. ed. 331, 341, 14 Sup. Ct. Rep. 548. In *Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994, where it was held that the laws of a territory abolishing constructive trusts were ineffectual to protect the holder of a certificate from the United States against the establishment of such a trust, it was said that "when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it;" and later in the decision there is cited a passage from *Wilcox v. Jackson*, 13 Pet. 498, 517, 10 L. ed. 264, 273, to the same effect,—a passage also cited and relied upon by the four justices who dissented and held that the territorial laws governed even then. It has been repeated ever since. *McCune v. Essig*, 199 U. S. 382, 390, 50 L. ed. 237, 241, 26 Sup. Ct. Rep. 78; *Buchser v. Buchser*, 281 U. S. 157, 161, 58 L. ed. 166, 167, 34 Sup. Ct. Rep. 46.

Coming to the precise issue, the question of the power of the United States to restrict alienation of land within a state after it had conveyed the land in fee was left open in *Wright v. Morgan*, 191 U. S. 55, 58, 48 L. ed. 89, 93, 24 Sup. Ct. Rep. 6, but it was said that the clearest expression would be necessary before it would be admitted that such a restriction was imposed. In *Buchser v. Buchser*, 231 U. S. 157, 58 L. ed. 166, 34 Sup. Ct. Rep. 46, it was held that the laws of the United States did not prevent homestead land becoming community property

at the moment that title was acquired, and it was said that, the acquisition under the United States law being complete, that law had released its control. The statement in *Wilcox v. Jackson*, *supra*, that when the title has passed, the land, "like all other property in the state, is subject to state legislation," was repeated. In *Alabama v. Schmidt*, 232 U. S. 168, 58 L. ed. 555, 34 Sup. Ct. Rep. 301, following *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338, it was held that land conveyed to the state by the United States for the use of schools could be acquired by adverse possession under state law, and that the trust, although, as was said in the earlier case, "a sacred obligation imposed on its public faith," imposed only an honorary obligation on the state. *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, was distinguished as having been decided on the ground that in the grant to the railway there was an implied condition of reverter in case the company ceased to hold the land for the purpose for which it was granted,—a ground which, as I have said, is absent here.

It is said that where a statute is susceptible of two constructions, by one of which grave constitutional questions arise and by the other of which they are avoided, our duty is to adopt the latter. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527. I am aware that this principle, like some others, more often is invoked in aid of a conclusion reached on other grounds than made itself the basis of decision, but it seems to me that it properly should govern here. It might without violence. When the Act of 1862 [12 Stat. at L. 393, chap. 75], now Rev. Stat. § 2296, Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575, was passed, the United States owned territories to which it could be applied with full scope. *Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994. The greater part of the public land was in those terri-

tories. Without stopping to suggest other possibilities of construction, this fact is enough to explain and give validity to the act when passed. There is no need to import to it the intent to anticipate the future, and to reach the states that were still in the bosom of time.

Of course, the United States has power to choose appropriate means for exercising the authority given to it by the Constitution. But I see no sufficient ground for extending that authority to a case like this. It is not the business of the United States to determine the policy to be pursued concerning privately owned land within a state. According to all cases in this court, so far as I know, when the patent issued its authority was at an end.

I am aware that my doubts are contrary to manifest destiny and to a number of decisions in the state courts. I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic. But as I have a real difficulty

in understanding how the congressional restriction is held to govern this case,—a question which nothing that I have heard as yet appears to me to answer,—I think it worth while to mention my misgivings, if only to show that they have been considered and are not shared.

#### NOTE.

The decision of the United States Supreme Court in the reported case (*RUDDY v. ROSSI*, ante, 843), to the effect that the exemption of homestead lands under U. S. Rev. Stat. § 2296 (Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575) from liability for debts contracted prior to the issuance of the patent, extends to debts incurred after obtaining the receiver's final receipt or certificate, but before the patent has actually been issued, settles a question as to which some doubt was previously entertained, as is shown by the decision of the state court (28 Idaho, 376, 154 Pac. 977), which is reversed by the reported decision.

### STATE OF KANSAS

v.

MRS. L. O. HEITMAN, Appt.

*Kansas Supreme Court — June 7, 1919.*

(105 Kan. 139, 181 Pac. 630.)

#### **Constitutional law — different punishments for men and women.**

Chapter 298 of the Laws of 1917, establishing an institution known as the state industrial farm for women, for the detention and care of women convicted of criminal offenses, does not violate any of the provisions of the 14th Amendment to the Constitution of the United States, because a woman convicted of misdemeanor is sentenced to the farm for an undetermined period, with a maximum limit, while a man convicted of the same misdemeanor is sentenced, under the general law, to the county jail for a definite period, within the same maximum limit.

[See note on this question beginning on page 854.]

Headnote by BURCH, J.

APPEAL by defendant from a judgment of the District Court for Shawnee County (Garver, J.) assessing the penalty, after conviction, for keeping and maintaining a liquor nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Edward Rooney, for appellant:

Chapter 298 of the Session Laws of 1917 is unconstitutional and in contravention of the 14th Amendment to the Constitution of the United States, abridging the privileges of defendant and denying her the equal protection of the law.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Re Gardner, 84 Kan. 264, 33 L.R.A.(N.S.) 956, 113 Pac. 1054; State v. Barnett, 3 Kan. 255, 87 Am. Dec. 471; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Pace v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637; Sons & Daughters of Justice v. Swift, 73 Kan. 255, 84 Pac. 984.

Messrs. Richard J. Hopkins, Attorney General, and Hugh T. Fisher for the State.

Burch, J., delivered the opinion of the court:

The defendant was convicted of keeping a liquor nuisance. She was sentenced to pay a fine of \$100, and was committed to the state industrial farm for women until discharged according to law. She appeals from the portion of the judgment assessing penalty.

The statute under which the defendant was convicted is § 1 of chapter 232 of the Laws of 1901. After declaring what places are common nuisances, the statute provides as follows: "Every person who maintains or assists in maintaining such common nuisance shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$100 nor more than \$500, and by imprisonment in the county jail not less than thirty days nor more than six months, for each offense." Gen. Stat. 1915, § 5524.

The fine was assessed under this statute. The commitment was adjudged under the provisions of § 5 of chapter 298 of the Laws of 1917, reading as follows: "Every female person, above the age of eighteen

years, who shall be convicted of any offense against the criminal laws of this state, punishable by imprisonment, shall be sentenced to the state industrial farm for women, but the court imposing such sentence shall not fix the limit or duration of the sentence. The term of imprisonment of any person so convicted and sentenced shall be terminated by the state board of administration, as authorized by this act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the person was convicted; provided, that where the person, so convicted and sentenced to said industrial farm for women, is not more than twenty-five years of age and said conviction is for her first offense, the board of administration may parole or release such person under rules and regulations prescribed by said board before the expiration of the minimum term, but in all other cases, the person so committed to said institution shall not be eligible to parole by the board of administration until the expiration of the minimum term fixed by law for the punishment of the offense for which she has been convicted; provided further, that where any person has been committed to such institution on conviction for murder in the first or second degree, such person shall not be released from said institution until the expiration of the term for which such person is sentenced, except by action of the governor exercising his pardoning or parole power."

The detention portion of the defendant's sentence was therefore indeterminate, with a maximum limit of six months. If the defendant had been a man, the sentence would have been to the county jail for some definite period within the maximum and minimum limits fixed by the statute in 1901. Because the defendant was sentenced to detention for an undetermined period at the state industrial farm for women, she contends she has been denied the equal protection of the law, and that her privileges and immunities have been

abridged, contrary to the 14th Amendment to the Constitution of the United States. Some other objections to the industrial farm law are proposed, but they have already been disposed of in the cases of *State v. Dunkerton*, 103 Kan. 748, 175 Pac. 981, and *Re Dunkerton*, 104 Kan. 481, 3 A.L.R. 1611, 179 Pac. 347.

In support of the defendant's contention, the familiar decisions are cited which declare that, in the administration of criminal justice, no different or higher punishment shall be imposed on one than that which is prescribed for all, for the same offense. The reason for striving to base justice on equality is probably best stated in Rudolf von Ihering's "Law as a Means to an End," chapter VII. § 11, translated from the German and published as volume 5 of the *Modern Legal Philosophy Series*:

"What is there so great in equality that we measure the highest concept of right—for this is what justice is—by it? Why should law strive after equality, when all nature denies it? And what value has equality independently of any particular content? Equality may be as much as anything else equality of misery. Is it a consolation for the criminal to know that the punishment which has overtaken him will also strike all others in the same position? The desire for equality seems to have its ultimate ground in an ugly trait of the human heart; in ill will and envy. No one shall be better or less badly off than I; if I am miserable, everybody else, too, shall be so.

"But the reason we want equality in law is not because it is something worth striving after in itself, for it is not so at all. We see to it that, with all the equalizing powers of the law, inequality finds its way back again by a thousand paths. But, indeed, our reason for wanting it is because it is the condition of the *welfare* of society. When the burdens which society imposes upon its members are distributed un-

equally, not only does that part suffer which is too heavily laden, but the whole of society. The center of gravity is displaced, the equilibrium is disturbed, and the natural consequence is a social struggle for the purpose of re-establishing equilibrium; which under certain conditions becomes a highly dangerous menace, and is always a shock to the existing social order." Page 276.

Differences, however, cannot be denied or disregarded, and the very principle of equality not only approves, but necessitates, classification, without which fixation of the social center of gravity and stable equilibrium of the social order would be impossible. It would revolt justice if youthful first offenders were subjected to the same penal regimen as mature recidivists. Hence the decisions are numerous and familiar that equal protection of the law is secured if the law operate in the same way on all who belong in the same class. Classes may not be created arbitrarily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert. The defendant asserts that sex does not constitute a just and reasonable ground for substituting an indeterminate sentence, within a stated limit, to the industrial farm for women, in place of a definite sentence, within the same limit, to the county jail.

In the years between enactment of the Statutes of 1901 and 1917, application of the scientific method in dealing with the subjects of crime and punishment has produced noteworthy results. Crime is no longer treated abstractly, according to the *a priori* method, and punishment no longer consists of penalties sawed into stock lengths and corded up by

the judges' bench, for use in passing sentence.

Every act condemned by our Penal Code is proper, perhaps laudable, somewhere in the world. Each civil society governmentally organized has a conception, more or less definite, of its own best interest and welfare, and sets up standards of conduct to which the individual is supposed to conform. Failure to measure up to the prescribed standards may be of such public concern that the state must attach sanctions to its regulations. When the state shall do this is a practical question, to be determined with respect to circumstances and conditions. Departure from the standard thus sanctioned we call crime, and the nonconformist we call a criminal.

Investigation of the facts discloses that the nonconformist generally acts through the prompting of some perfectly natural instinct, such as the pugnacious instinct, the sex instinct, or the inquisitive instinct. The state itself, by the creation or toleration of untoward conditions, may contribute to delinquency. Statistics have been published showing that, in the year 1916, in the state of Massachusetts, 176,000 arrests were made. Of these, 104,000 were for drunkenness; and consequently the legally recognized sale of intoxicating liquor under government license was directly responsible for crime. Conditions resulting from social and economic pressure are contributing causes of crime; but the nonconformist fails to measure up to the normal standard, primarily and principally, on account of some personal subnormality or abnormality of body or mind or both. The result is that the study of crime, not neglecting the social factor, becomes largely the study of individuals.

Individuals cannot be studied en masse. They may be classified into groups, on the basis of common characteristics; but the individual cannot be assigned to his proper group until he has been segregated, and his peculiar physical and mental

endowments, or lack of endowments, have been considered in the light of his heredity and environment.

The method which has just been described must be employed in affixing punishment. Care must be taken that, in denouncing punishment, which is done in the interest of society, society itself does not suffer, for punishment is a two-edged sword. In ancient barbarous days it was discovered that it was to the advantage of the conqueror not to kill his captives; they were more profitable kept alive, fed well, well cared for, and put to work. In the same way, society now loses if it punish one of its members in a way that crushes him, when it might rehabilitate him and restore him to conformity and usefulness.

The old theory of vengeance and retribution, carried out in medieval times in torture chambers with implements of torture, and in modern times by means more degrading, if less severe, wholly failed to better social conditions. The theory of deterrence by horrible example did no better. In the reign of Henry VIII. 70,000 thieves were hung, and it was found more pockets were picked during the hangings than at any other time. For a remarkably long time our criminal and penal jurisprudence suffered from the paralysis of outgrown traditions, the application of antiquated methods, and the employment of archaic equipment. As the results of patient, careful, scientific study and experiment, sifted, compared, and corrected in conferences and congresses, national and international, became generally known, and the practical work of individual criminologists, penologists, and social reformers commenced to attract general attention, the public mind and conscience slowly awakened. State legislatures commenced to take notice. In very recent years progress has been rapid, and there are now few to deny that it is best for society—is simply common sense—to try to float from off the rocks of the penal law and save, if pos-

sible, for future profitable voyaging, human vessels stranded there, whether by fog, or ill wind, or defective steering gear, or bad seamanship.

Quite obviously it is of fundamental importance that the nature of the particular vessel be considered, in order that proper measures may be adopted to save it; and Mrs. Jessie D. Hodder, superintendent of the reformatory for women at Framingham, Massachusetts, made the following classification of women sentenced to reformatories for crime: With reference to intellect, they may be imbecile, moron, sub-normal, dull, fair, or good; with reference to nervous organization, they may be normal, neuropathic, psychopathic, epileptic, or hysterical. These are only some of the factors which determine whether or not a delinquent woman needs permanent custodial care, may safely be returned to society after training, or presents a special and peculiar disciplinary problem. Proceedings of International Conference of Social Work, 45th Annual Session (1918) page 117.

The one unqualifiedly reprobated and repudiated punitive institution is the county jail. It has no defenders, except local officials, jealous of centralized authority, and the sheriff, elected irrespective of qualifications to rehabilitate men and women, even if he had facilities and opportunity, and whose compensation depends in part on fees for keeping and boarding prisoners. There is no opportunity for segregation, differentiation, and proper classification. There is no opportunity for discipline at all, much less discipline appropriate to individual need. There is nothing but detention, and detention in caged and demoralizing idleness, injurious to body and mind, crushing to the spirit, and tending to moral contamination and induration, rather than to moral upbuilding. The consensus of enlightened opinion is that the county jail is impossible as a place of punishment, and has no justification for

its existence, except as a place of temporary keeping, in default of bail, pending final conviction.

Another relic of the stone age of penological theory and practice is the definite sentence for a fixed period for a specific crime. It has been well said that it is just as stupid, and infinitely more cruel, to sentence misdemeanants to jail for fixed periods as it would be to sentence sick people to a hospital for fixed periods. All penologists agree that the definite sentence should be abolished, because, if the primary object be to return to society as future assets those who are present liabilities, there must be classification, and there must be time, according to susceptibility and capability, for the remedial, reformatory, and educational processes to have their effect. In a given case, the period of detention may be quite short; but, according to need, the brain must be cooled, the nerves nourished and quieted, the clouded or deadened conscience cleared or quickened, the weakened will strengthened, the disordered mind, with its confused notions of right and morality, stabilized, and fresh impulses given outward, away from the old self, forward to new and hopeful things, and upward to self-respect and self-control.

Comprehension of the fact that punishment ought to fit, in some degree, not simply the crime, but the offender, led the legislature to adopt the system of maximum and minimum penalties found in the Crimes Act and related statutes. Clearer comprehension led it to adopt, in recent years, the indeterminate sentence for felonies, except murder and treason (1903), and the parole system (1907).

Experience teaches that the greatest evil of prison life is idleness, and that the greatest benefaction which can be conferred on a prisoner is work adapted to his abilities and performed under clever plan and guidance. Work is indispensable to order and discipline, to physical and mental health, and to growth in

moral strength and stature. Work should not be merely useless or formal, but should be at something capable of arousing interest and generating the feeling that what is done is worth while. There should even be some division of the profit from labor between the workman and his employer, the state. The best results are attained when work is performed in an environment as nearly as possible natural and normal, and the results of work done in the sunshine and wind and free air of the open outdoors, away from barred cells and frowning, guard-mounted walls, have been most gratifying. Some of the states are able to present records of success attending this method of treatment which, contrasted with old prison policies, are quite marvelous.

The circumstance that the new method of dealing with convicts happens to be more humanitarian than the old does not detract from its virtue. It has been adopted after trial, not from sentiment, but because of its demonstrated efficiency in protecting and promoting the true and ultimate welfare of society as a whole.

Long ago the legislature made the first and most obvious classification of delinquents, and provided for segregation of youthful offenders, and treatment of boys and girls in separate corrective institutions. By enactment of the industrial farm statute, the legislature made the next most obvious classification, based on the distinction between male and female, and abolished the county jail and the penitentiary as places for the reformatory treatment of women.

The industrial farm law puts into practice the most advanced tenets of the new penology. The farm is under supervision of the state board of administration, the central body having control of all correctional, charitable, and educational institutions of the state. The superintendent is a woman. The farm is in fact a farm, and the buildings are constructed on the cottage plan. Pro-

vision is made against overcrowding, and there are no cells or bars or restraining walls. Careful classifications are made, according to the results of searching physical, mental, and moral diagnosis, and complete records are kept of all facts throwing light on cause of detention, proper plan of treatment, and progress of the individual. Medical and surgical treatment is administered. The discipline is educative and reformatory, and the work includes agriculture, dairying, poultry raising, manufacturing, and practice of domestic arts and sciences. Small wages are allowed, and provision is made for parole and final discharge whenever compatible with the welfare of society, with full restoration of all civil rights.

It required no anatomist, or physiologist or psychologist, or psychiatrist to tell the legislature that women are different from men. In structure and function human beings are still as they were in the beginning, "male and female created He them." It is a patent and deeplying fact that these fundamental anatomical and physiological differences affect the whole psychic organization. They create the differences in personality between men and women, and personality is the predominating factor in delinquent careers. It was inevitable that, in the ages during which woman has been bearer of the race, her unique and absolutely personal experiences, from the time of conception to the time when developed offspring attains maturity, should react on personality, and produce what we understand to be embraced by the term "womanhood." Woman enters spheres of sensation, perception, emotion, desire, knowledge, and experience, of an intensity and of a kind which man cannot know. Her individualities and peculiarities are fostered by education and by social custom,—whether false and artificial or not is of no consequence here; and the result is a feminine type radically different from the masculine type, which demands special



consideration in the study and treatment of nonconformity to law.

It is not worth while discussing the necessity of preventing promiscuous association of the sexes in prison. There must be complete segregation. Female wards in men's prisons, and female annexes to men's prisons, merely separate the sexes. They do not differentiate the problem of the delinquent female from the problem of the delinquent male. In 1869 the legislature of the state of Indiana undertook to do this, by establishing a separate prison for women, to be officered and managed by women, and conducted according to the reformatory method as then apprehended. Since 1869 some thirteen other states have established separate institutions for the treatment of delinquent women, on the definite principle of reclamation as opposed to naked punishment. The industrial farm, with buildings constructed on the cottage plan, has become an accepted type, and the indeterminate sentence has been almost, though not quite, universally adopted. An extended analysis of the statutes in existence prior to January 1, 1917, which therefore

does not include the later statutes of Connecticut, Kansas, Michigan, and Rhode Island, may be found in volume 8 of the *Journal of Criminal Law & Criminology*, at page 518.

Many facts might be marshaled leading to the conclusion that the female offender not merely requires, but deserves, on account of matters touching the perpetuation and virility of the human species, correctional treatment different from the male offender, both in kind and in degree; but the general considerations, merely outlined above, are sufficient. Let it be conceded that the industrial farm for women may fail to accomplish the results hoped for; the statute represents a serious effort on the part of the legislature to deal justly with a subject of great public concern, the proposed regulations are justified by reasoning apparently sound, supported by experience apparently verifying, and this court is not authorized to declare that the classification which the statute establishes is either arbitrary or unreasonable.

The judgment of the District Court is affirmed.

*Constitutional law—different punishments for men and women.*

## ANNOTATION.

### **Constitutionality of statute as affected by discrimination in punishment for same offense based upon age, color, or sex.**

The present annotation supplements that to *Re Dunkerton*, 3 A.L.R. 1614. The only decisions in point since that annotation are: The reported case (*STATE v. HETTMAN*, ante, 848), which holds that a statute providing for detention of females convicted of criminal offenses on an industrial farm for an undetermined period is not violative of the 14th Amendment of the

Federal Constitution, in that other statutes provide different terms and places of imprisonment for men convicted of the same offenses; and *State v. Cagle* (1918) — S. C. —, 96 S. E. 291, which upholds the general rule that a statute is not unconstitutional as providing unequal penalties in that it makes a discrimination based upon age.  
G. J. C.

DONALD C. WALKER et al., Exrs., etc., of John U. Brookman, Deceased,  
Plffs. in Err.,

v.

PEOPLE OF THE STATE OF COLORADO.

*Colorado Supreme Court—January 7, 1918.*

(— Colo. —, 171 Pac. 747.)

**Tax — inheritance — foreign-held bonds.**

1. Unregistered corporate bonds held by a nonresident at his domicil are not subject to inheritance tax in the state where the corporation is located.

[See note on this question beginning on page 863.]

— what subject.

2. The succession, and not the thing

inherited, is the subject of a succession tax.

[See 26 R. C. L. 195, 196.]

(Hill, Ch. J., and Scott, J., dissent.)

**ERROR** to the District Court for the City and County of Denver to review a judgment affirming an order of the County Court, fixing the amount due the state as inheritance taxes on the estate of John U. Brookman, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Mr. William N. Vaile, for plaintiffs in error:

The assessment of these bonds is not authorized by the language of the Inheritance Tax Statute of Colorado.

People v. Griffith, 245 Ill. 532, 92 N. E. 314; Cooley, Taxn. 2d ed. 267; Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; Kennedy v. St. Louis, V. & T. H. R. Co. 62 Ill. 395; Heinssen v. State, 14 Colo. 282, 23 Pac. 995; 21 Am. & Eng. Enc. Law, 1012.

The proper subject of the tax is the inheritance; but even if the bonds be regarded as themselves the subject of the tax, they are not within the intent or language of the act, because they are not "property within the state."

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Scholey v. Rew, 23 Wall. 381, 23 L. ed. 99; People v. Griffith, 245 Ill. 532, 92 N. E. 313; Bruce v. Bruce, 2 Bos. & P. 231, note, 126 Eng. Reprint, 1252, note; Desesbats v. Berquier, 1 Binn. 336, 2 Am. Dec. 448; McKeen v. Northampton County, 49 Pa. 519, 80 Am. Dec. 515; Brown v. Elder, 32 Colo. 527, 77 Pac. 853; Thomson v. Advocate General, 12 Clark & F. 1, 8 Eng. Reprint, 1294, 13 Sim. 153, 60 Eng. Reprint, 59, 9 Jur. 217; State Tax on Foreign-held

Bonds, 15 Wall. 300, 21 L. ed. 179; Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88; Davenport v. Mississippi & M. R. Co. 12 Iowa, 539; State v. Earl, 1 Nev. 394; People v. Eastman, 25 Cal. 602; State, Potter, Prosecutor, v. Ross, 23 N. J. L. 517; Blackstone v. Miller, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Re Preston, 75 App. Div. 250, 78 N. Y. Supp. 91; Re Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Gilbertson v. Oliver, 129 Iowa, 568, 4 L.R.A.(N.S.) 953, 105 N. W. 1002; Re Fearing, 200 N. Y. 340, 93 N. E. 956; Re Whiting, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715.

Messrs. Leslie E. Hubbard, Attorney General, and John L. Schweigert, Assistant Attorney General, for the People:

The assessment of the bonds is authorized by the language of the Inheritance Tax Statute of Colorado.

Smith v. Farr, 46 Colo. 371, 104 Pac. 401; Denver v. Lunney, 46 Colo. 403, 104 Pac. 945; People v. Griffith, 245 Ill. 532, 92 N. E. 313; Warner v. Gunnison, 2 Colo. App. 430, 31 Pac. 238; Carlisle v. Pullman Palace Car Co. 8

Colo. 320, 54 Am. Rep. 553, 7 Pac. 164; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Bradley v. People*, 8 Colo. 599, 9 Pac. 783.

The bonds are property within the state for inheritance tax purposes.

*People v. Ames*, 24 Colo. 427, 51 Pac. 426; *Re State Lands*, 18 Colo. 367, 32 Pac. 986; *Patterson v. Gile*, 1 Colo. 200; *Vance v. Rockwell*, 3 Colo. 243; *Duggan v. Bliss*, 4 Colo. 227, 34 Am. Rep. 80; *Brown v. Elder*, 32 Colo. 527, 77 Pac. 853; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Backstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51; *People v. Griffith*, 245 Ill. 532, 92 N. E. 818; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Neilson v. Russell*, 76 N. J. L. 27, 69 Atl. 476; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *People v. Palmer*, 25 Colo. App. 450, 139 Pac. 554; *Re Macky*, 46 Colo. 79, 23 L.R.A.(N.S.) 1207, 102 Pac. 1075; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. ed. 616, 620; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Mann v. Carter*, 15 L.R.A.(N.S.) 150, note; *Blakemore & B. Inheritance Taxes*, pp. 146, 147; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Re Rogers*, 149 Mich. 305, 11 L.R.A.(N.S.) 1134, 119 Am. St. Rep. 677, 112 N. W. 932; *Kinney v. Treasurer (Kinney v. Stevens)*, 207 Mass. 370, 35 L.R.A.(N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902.

*Bailey, J.*, delivered the opinion of the court:

This is a proceeding to review a judgment of the district court affirming an order of the county court fixing the amount due the state as inheritance taxes in the estate of *John U. Brookman*, deceased. *Brookman* was a resident of the state of New York. Included in his estate were certain unregistered bonds of a Colorado corporation, the payment of which was secured by mortgage on certain real property situated in the states of Colorado, Wyoming, and New Mexico. The decedent held these bonds in the

state of his residence. Upon the theory that they were property within this state because of the situs of some of the real property mortgaged to secure their payment, the inheritance tax appraiser imposed a tax upon their transfer by inheritance. In substance the executors contend that the tax is not authorized by the statute, on the ground that the bonds are not property within the state, within the meaning of the statute, and that to give the law a construction necessary to include and cover the bonds would be a violation of both the state and Federal Constitutions.

The Inheritance Tax Law of 1913, Laws 1913, page 539, under which the appraiser assessed the tax, is, so far as applicable, as follows: "A tax shall be, and is hereby, imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom, in trust or otherwise, to any person or persons, institution or corporation, except as hereinafter exempted, in the following cases:

When the transfer is by will or intestate laws of property within the state, and the decedent was a nonresident of the state at the time of his death."

There is no dispute of the state's right to impose an excise on the bonds passing by inheritance, if they are to be considered as property within the state. As was stated in *Brown v. Elder*, 32 Colo. 527, at page 532, 77 Pac. 855: "First, an inheritance tax is not one on property, but one on the succession; second, the right to take property by devise or descent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the state may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of the respective state constitutions requiring uniformity of taxation."

Decedent was a resident and cit-

izen of the state of New York. The bonds, drawn to bearer, were payable in New York, and were kept by him at his domicile there. Prior to his death they manifestly were beyond the reach of the taxing power of this state, for any purpose. Upon his decease the right of succession was governed by, and subject to, the laws of New York, not of Colorado, and neither the bonds, as the measure of the tax, nor the right to take them by inheritance, which is the thing actually taxed, have any situs in this state. The rule is stated in 37 Cyc. 1562, as follows: "Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a nonresident, and this is without regard to the place where the certificate may be kept. But a different rule applies to bonds of a corporation. The bonds of a domestic corporation are not taxable at the domicile of the corporation if kept at the domicile of a nonresident owner, but are subject to the tax if physically present in the state, although belonging to a nonresident decedent."

**Tax—inheri-  
tance—foreign-held  
bonds.**

testate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." Laws 1896, chap. 908, § 220, as amended by Laws 1897, chap. 284, § 2.

The court held in substance that this class of indebtedness was taxable in the state where the debtor resides, when the property is actually physically there. It is urged by the state that this case is decisive of the one at bar, and that it in effect overrules the authority relied upon by plaintiffs in error, which is primarily State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179, in which case a tax was levied upon bonds of a corporation doing business in Pennsylvania, when the bonds were kept at the domicile of the owner in another state. At page 319 the court said: "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

"The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by nonresidents of the state,

It is contended by the state that the fact that the payment of the bonds is secured upon property within this state brings them, as evidences of this debt, within its power for the purpose of taxation, on the ground, among others, that creditors are compelled to invoke local laws to enforce the obligation. *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, is cited and relied upon in support of this contention. The question in that case was whether a debt due an Illinois decedent by a copartnership in New York, and money deposited by him in a New York Trust Company, were taxable under a clause in the New York Inheritance Tax Statute, imposing a tax: ". . . Upon the transfer of any property, real or personal. . . . When the transfer is by will or in-

they are property beyond the jurisdiction of the state."

This principle, unless overruled by *Blackstone v. Miller*, supra, clearly precludes the taxation of the Brookman bonds as property within this state. That the court, in *Blackstone v. Miller*, supra, had no intention to overturn its decision in *State Tax on Foreign-held Bonds*, supra, so far as it affected bonds, is clearly evident from the opinion therein, where (188 U. S. 206) the court says: "There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-held Bonds*, supra. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337, 83 Am. St. Rep. 279, 58 N. E. 1078. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases. *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 428, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 309, 319, 320, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110."

The cases cited by defendant in error are all distinguishable by some vital and controlling fact from the case at bar. Thus, in *Blackstone v. Miller*, supra, ancillary administration was in progress in the courts of the taxing state. This is also true in *Re Rogers*, 149 Mich. 305, 11 L.R.A. (N.S.) 1134, 119 Am. St. Rep. 677, 112 N. W. 931; *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82, and in the Massachusetts cases.

It is settled law that it is the succession which is the subject of

the tax, and not the thing inherited. In the case at bar there is no ancillary <sup>-what</sup> subject. administration here.

The decedent, the legatees, and the bonds themselves, now are, and have been at all times, beyond this jurisdiction. So far as the bonds in question are concerned, there is no property, or evidence of indebtedness belonging to the Brookman estate physically within this jurisdiction, nor is this state concerned in any manner with the process of succession. In substance it is urged by defendant in error that the state has authority under the statute to tax the right of nonresident legatees to inherit property outside of the state, under the foreign-probated will of a nonresident testator. The bonds, being unregistered, pass upon delivery, just like money. They are manifestly transitory and fugitive, and this state is powerless to place its hand upon them, for the purpose of taxation, in the absence of direct, specific legislation to that effect. For taxing purposes the debt which the bonds represent is the property of the bondholder, and not of the debtor. The situs of the bonds is the domicile of the owner, and they are taxable there. This is the rule except when such property is not in the custody of the nonresident owner, but is physically present in the state proposing to levy the tax.

Cases in state courts denying the right to tax evidences of indebtedness secured by local real estate, but held abroad, are the following: In *Re Preston*, 75 App. Div. 250, 78 N. Y. Supp. 91, the syllabus reads as follows: "Bonds of a private individual secured by a mortgage on real estate situated in New York, both bonds and mortgages being kept in good faith outside of the state, are not subject to the taxable transfer acts."

The court, citing *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, said it was unable to distinguish this case from that "where it was held that the

bonds of a domestic corporation, owned and held in a foreign state, could not be reached by the former taxable transfer act," citing, also, *State Tax on Foreign-held Bonds*, *supra*.

*Gilbertson v. Oliver*, 129 Iowa, 568, 4 L.R.A.(N.S.) 953, 105 N. W. 1002, was decided under a statute providing that "all property within the jurisdiction . . . and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale, or gift, . . . in possession or enjoyment after the death of the grantor or donor, to any person in trust or otherwise . . ." (Code, § 1467), is subject to a collateral inheritance tax. Part of the property involved was notes and mortgages owned by residents of Iowa and secured by property situated therein. The court admitting that "there is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicil of the owner, or whether the actual situs of such property . . . determines the liability to taxation," says: "The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicil of the owner, and not elsewhere, unless the owner has himself given it a different situs."

The court then quotes *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 539, to the following effect: "It is true that the situs of the property mortgaged is within the jurisdiction of the state, but the mortgage itself, being personal property, a chose in action, attaches to the person of the owner."

The court also quotes with approval from *Hunter v. Board of Supervisors*, 33 Iowa, 376, 11 Am. Rep. 132, to the following effect: "The debt due, of which the notes are the evidence, is property, vested

in the owner wherever he may reside. This property in the right—the chose in action—is as absolute a property therein, and he is as well entitled to it, as he is to tangible property in possession; and this species of property—debts due—must, in the nature of things, follow and be with the owner; except, perhaps, where he has conferred authority upon someone else as his agent to loan, manage, receive, and collect the same for him. . . . The right to the 'money due' being in the appellant, the property in the right must, of necessity, be in the place where he resides, irrespective of the situs of the evidence."

In *Re Fearing*, 200 N. Y. 340, 93 N. E. 956, it is stated in the syllabus: "Transfer Tax Law (Laws 1892, chap. 399), § 1, provides that a tax shall be imposed on the transfer by will or intestate law of property within the state, where the decedent was a nonresident at the time of his death. Held, that bonds passing under the will of a nonresident pursuant to a power of appointment were not property within the state within such act, and subject to taxation because the bonds were secured by mortgages on lands located in New York."

At page 344 of 200 N. Y., the court said: "Whether the bonds are secured . . . of corporate property, or . . . by mortgages of the property of individuals, they represent, equally, debts of their makers, which, as choses in action, under the general rule of law, are inseparable from the personality of the owner."

The contention of defendant in error can prevail only upon the theory laid down in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, to the effect that for inheritance tax purposes a debt may be taxed at the domicil of the debtor; but this was declared where the property was physically in the taxing state, and ancillary administration was in progress in its courts, and cannot be considered an authority for the imposition of

the tax under consideration. In any event, bonds, such as are here involved, are specifically excepted by that opinion from the operation of the special rule therein laid down.

It will be observed that in some of the cases the domicil of the owner has been held to furnish the test of jurisdiction for the purpose of taxation, while in others this test has yielded to the actual situs of the property within the territorial limits of the taxing authority; but in no case has the domicil of the debtor, or the location of the securities, been taken as the situs for the purpose of taxation in the absence of some special circumstance which the court considered gave it an actual situs. No such circumstance exists here. Moreover, whether the test to be applied is the domicil of the owner, or the place where the securities are actually located, since both are in the state of New York, the conclusion must be that the bonds are exempt from taxation in Colorado.

The judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Hill, Ch. J., dissenting:

In *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, decided October 6, 1896, it was held that bonds of domestic corporations owned by and in possession of a nonresident decedent at his domicil at the time of his death, and which then passed to nonresidents by will or the law of descent in the state where he lived, were not subject to taxation in New York under that portion of its transfer tax act which reads: "When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." Laws 1892, chap. 399, § 1.

In construing this language, the court considered with it and gave emphasis to § 22 of the New York act, which defines the word "property" as meaning all property or

interest therein over which the state had jurisdiction for the purposes of taxation. A very able dissenting opinion was rendered by Justice Vann, concurred in by Justice O'Brien; the majority opinion was written by Justice Gray.

In *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718, the same court held that individual deposits of a nonresident decedent in a trust company in that state were subject to this tax under the same act. The opinion was by Justice Vann, and per his reasoning, it was a debt owing by the trust company to the nonresident decedent; yet, regardless of this, he held it was property within the state so far as the transfer act or inheritance tax law, so-called, was concerned, it being agreed by all (and is conceded here) that it is not a tax upon property, but rather upon the right to receive it. Justice O'Brien concurred with Justice Vann; Chief Justice Andrews and Justices Bartlett and Martin concurred in the result upon the theory that a deposit of money in a bank, although technically a debt, is still money for all practical purposes, and as such was taxable under the transfer act. Justice Gray filed a dissenting opinion, in which Justice Haigh concurred, to the effect that the trust company was a mere creditor of the decedent, and for that reason that it did not constitute property within the state, so far as their transfer act was concerned. I am unable to harmonize the two opinions or to gather from them sufficient upon which to hazard a guess as to what the future position of that court will be on similar questions. The former of these cases is the only case cited in 37 Cyc. 1562, to sustain its statement set forth in the opinion of the court here to the effect that the right to inherit these bonds, when held by a nonresident in another state, is not subject to such a tax in the state where issued and where the lands covered by the mortgage to secure them is situate.

In *Blackstone v. Miller*, 188 U. S.

189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, it was held that a deposit by a citizen of Illinois in a trust company in New York was subject to the transfer tax in New York, notwithstanding that the whole succession had been taxed in Illinois, including this deposit. This opinion was not upon the theory of the three members concurring in the opinion in the New York case last referred to, but, to the contrary, takes the position of Justices Vann and Gray, that the relation was that of debtor and creditor, but disagreed with the latter as to the result which should follow. For instance, the court says: "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay."

And again: "Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death."

In commenting upon *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179, the court distinguished it from this class of cases, and, among other things, said: "The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337, 83 Am. St. Rep. 279, 58 N. E. 1078. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases."

For the reason last stated, and the fact that the case referred to was concerning a tax on property, and not a tax upon the right to in-

herit it, I do not think it applicable here. In *State ex rel. Graff v. Probate Court*, 128 Minn. 371, L.R.A. 1916A, 901, 150 N. W. 1094, it was held that a promissory note, as well as a book account, of a Minnesota corporation, held by a resident of Pennsylvania, and who died with the note in his possession in the latter state, was subject to a tax upon the right to succeed to the ownership of said property in Minnesota under the language of their act, which reads: "When a transfer is by will or intestate law, of property within the state or within its jurisdiction, and the decedent was a nonresident of the state at the time of his death." Gen. Stat. 1913, § 2271.

This case goes into the history of the question in detail, showing that the right to succeed to ownership is taxable by the state having jurisdiction of the debtor, for the law of that state furnishes the means to compel payment, etc. While the Minnesota act has these additional words not contained in our act, viz., "or within its jurisdiction," I cannot see that they add anything to its scope. The words "within this jurisdiction" are used alternately with the words "within the state," and to my mind mean "within the state." The reasoning of the Minnesota court gives no extra effect to them, but is just as applicable to the paragraph had they been omitted.

In *Re Rogers*, 149 Mich. 305, 11 L.R.A.(N.S.) 1134, 119 Am. St. Rep. 677, 112 N. W. 931, the court held that notes secured by mortgages on lands in Michigan, given by residents of that state, owned by a nonresident, and held by him at his home in New York at the time of his death, were subject to an inheritance tax in Michigan under the provisions of their act, which reads: "When the transfer is by will or intestate law of property within the state, and the decedent was a nonresident of the state at the time of his death." Pub. Acts 1903, No. 195, § 1.



This is the exact language of our act. Theirs was passed in 1903, ours in 1913. Their decision placing a construction thereon was announced July 15, 1907. Hence, long before our legislature adopted the exact language of the Michigan act, it had before it the construction of the Michigan court thereon, holding that it made subject to this tax a note held by a nonresident, given by a citizen of their state, when secured by a mortgage upon lands within the state.

The holding in *Kinney v. Treasurer* (*Kinney v. Stevens*) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902, is to the same effect as the Michigan court, under a somewhat similar statute. In commenting, the court said: "The question before us is whether these securities are property within the jurisdiction of the commonwealth, in reference to taxation upon the succession. . . . The debt belongs with the mortgage, and it must coexist to give the mortgage validity. For that purpose it has a situs within the jurisdiction of the state where the land lies."

The only distinction between the two cases last cited and this is that the bonds under consideration are payable to bearer; but, for the purposes of this tax, it appears to me that it is a distinction without a material difference. All the authorities that I have been able to find are to the effect that, under similar language, the right to succeed to ownership of stock of a domestic corporation held by a nonresident is subject to this tax. The Minnesota case applies it to an unsecured note as well as a book account; the Massachusetts and Michigan cases to notes secured by mortgages; the Supreme Court of the United States case to a bank deposit on the theory of simple debtor and creditor. The reasoning in all is to the effect that the situs of the property for the purpose of this tax is at the domicile of the debtor, or where the property

covered by the mortgage is situate. In such circumstances, when the language of our act is considered as a whole, I am of opinion, as said by Mr. Justice Holmes in *Blackstone v. Miller*, supra, concerning the New York act, that it was intended to reach the transfer of this property if it can be reached. The opinion, as I understand it, concedes that it can be reached by appropriate legislation. I am of opinion that it has already been reached by the language used. Whether ancillary administration is in progress or not, in my opinion, makes no difference. The question to be determined is whether our act has attempted to, or whether we can, tax the right or privilege to inherit or succeed to such property. This should be determined by conditions as they exist at the time of the death of the testator. Such being the case, I am unable to appreciate wherein the question of ancillary administration cuts any figure, pertaining to the construction which should be given to our act. It might aid the collection of this tax, but I cannot agree that there should be any difference in the rule to be applied to the same class of property simply because one estate has ancillary administration pending and the other has not. The fact that these bonds can be transferred by delivery in another state, in my opinion, makes no difference; they are not money. A note indorsed in blank can be thus transferred, and if secured by mortgage, per former rulings of this court, such a transfer carries with it the equitable right to have the mortgaged property disposed of in satisfaction of the debt. A bond of the kind under consideration is but a promise to pay, and is in a sense but a promissory note. It is common knowledge that stocks in domestic corporations are quite often indorsed in blank by the person to whom issued, and thereafter sold and transferred by delivery through the hands of numerous persons. I can think of no reason why a book

account may not be thus assigned to bearer and pass title accordingly. If it is for the reason that the bonds are payable to bearer that they are exempt from this tax, then, in my

opinion, it is a reason which sacrifices substance to form.

Scott, J., concurs.

Petition for rehearing denied April 1, 1918.

### ANNOTATION.

#### Succession tax on bonds of domestic corporation owned by estate of non-resident and held at his residence.

The situs of property for purposes of taxation has given rise to some conflicting rules. It is recognized, however, in all cases, that there must be some interest within the state in order to furnish a basis for taxation by the state. The present note is confined to an examination of the judicial decisions upon the question whether the fact that bonds owned by a nonresident, and held at his residence, are obligations of a domestic corporation, is sufficient to subject them to an inheritance or succession tax in the state where the corporation is situated.

Corporate bonds owned by a non-resident decedent, and held at the place of his residence, are not taxable merely because of the fact that the bonds are obligations of a domestic corporation, under statutes taxing transfers of "property within the state." *WALKER v. PEOPLE* (reported herewith) ante, 855; *Re Bronson* (1896) 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707. Bonds of a Pennsylvania corporation belonging to the estate of a nonresident were, it seems, held nontaxable in *Del Bus-to's Estate* (1888) 6 Pa. Co. Ct. 289. This has been held true in case of bonds of individuals, even if the bonds are secured by a mortgage of real estate within the state. *Re Fearing* (1911) 200 N. Y. 340, 93 N. E. 956; *Re Preston* (1902) 75 App. Div. 250, 78 N. Y. Supp. 91. The court in these cases declares that there is no distinction between corporate bonds and the bonds of individuals in this regard.

That bonds of a domestic corporation, secured by mortgage of real property within the state, owned by a non-resident and kept at the owner's residence, are not subject to a tax, was held

in *Re Richards* (1918) 182 App. Div. 572, 169 N. Y. Supp. 968, affirmed in (1919) 225 N. Y. 671, 122 N. E. 889, under chap. 664, § 220, Laws of 1915. This statute taxed a transfer "by will or intestate law of tangible property within the state or of any intangible property if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized, except a corporation . . . being or in the nature of a moneyed corporation, a railroad or transportation corporation or a public service or manufacturing corporation . . . and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located wholly or partly within the state of New York or of an interest in any partnership business conducted wholly or partly within the state of New York in such proportion as the value of the real property of such corporation, joint stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint stock company or association or partnership, and the decedent was a non-resident of the state at the time of his death; or when the transfer is by will or intestate law of capital invested in business in the state by a nonresident of the state doing business in the state either as principal or partner."

It has been held that bonds of a railroad company organized in the state of the forum, and having its general offices and principal place of business there, owned by a nonresident, and kept

by him at the place of his residence, are not subject to an inheritance tax where the railroad company's lines extend through a number of states, to whose jurisdiction it is thus subject. In *State v. Chadwick* (1916) 133 Minn. 117, L.R.A.1916E, 1288, 157 N. W. 1076, the court, in holding the bonds not subject to tax, states: "In the case before us there is no necessity of the owner coming to Minnesota to enforce the bonds. They can be enforced in New York [the bonds were payable at the office of the railway company in New York, where they were registered], or in any of the seven states through which the road passes. Under the Constitution, a judgment upon the bonds, rendered in any of these states, will be entitled to full faith and credit in Minnesota. . . . And the trust deed securing the bonds can be enforced in any of the seven states, and all the lines in the several states, constituting, as they do, one system, can be sold and title passed under the foreclosure decree. . . . We hold that the bonds are not subject to a succession tax in Minnesota because the debtor is incorporated there and has there its principal offices, it being subject to jurisdiction in other states having property sufficient to satisfy them. . . . Whether the doctrine that a mortgage of real property to secure an obligation gives a taxable situs for inheritance tax purposes in the state where the mortgaged property is located [is a sound one] we do not decide. In the case at bar 27 per cent of the mortgaged property is in Minnesota, and the value of this 27 per cent exceeds the total of the issued bonds. Seventy-three per cent of the value of the mortgaged property is in the seven states outside Minnesota, and this value is proportionally greater than the issued bonds. All of the mortgaged property can be subjected to the payment of the bonds and the entire property sold upon suit brought in the other states. . . . Under such circumstances the mortgage does not give a taxable situs in Minnesota." The provisions of the inheritance tax statute governing this case were as follows: "A tax shall be and is hereby

imposed upon any transfer of property, real, personal or mixed, or any interest therein or income therefrom in trust or otherwise, in any person, association or corporation . . . in the following cases. . . . (2) When a transfer is by will or intestate law of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death."

It has also been held that bonds of a domestic corporation, owned and held by a nonresident at the place of his residence, are not liable to a tax under a collateral inheritance tax statute imposing a tax "upon all estates, real, personal, and mixed, passing from any person who may die seised or possessed of such estate, being within this commonwealth," and making it the duty of executors and administrators to pay the tax. *Kintzing v. Hutchinson* (1877) 7 W. N. C. 226, Fed. Cas. No. 7,834. The legislature subsequently declared that the words in the statute, "being within this commonwealth," should be construed as relating to "all persons who had been, at the time of their decease, or then might be, domiciled within the commonwealth, as well as to estates."

In the reported case (*WALKER v. PEOPLE*, ante, 855) a point is made of the fact that the bonds involved were unregistered bonds.

On the contrary, mortgages securing promissory notes (whether of a corporation or individual does not appear) have been held to constitute an interest in real estate and to be subject to taxation under a statute taxing transfers of any interest in real estate. *Hawkrigde v. Treasurer* (1916) 223 Mass. 134, 111 N. E. 707.

While this note has been confined in general to a determination of the question whether the single fact on which the tax can be based is that the bonds were those of a domestic corporation, it should be noted that where the additional fact that the bonds were kept in the state was present, the bonds have generally been held taxable. Thus, bonds of a domestic corporation, owned by a nonresident, were held subject to an inheri-

tance tax in *People v. Griffith* (1910) 245 Ill. 532, 92 N. E. 313, where the nonresident spent a considerable portion of his time in the state of the forum, and kept the bonds in a safe deposit vault in that state. In *Re Romaine* (1891) 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759, where it did not appear whether the bonds were issued by a foreign or domestic corporation, bonds owned by a nonresident and habitually kept by him in the state of the forum were held subject to an inheritance tax under a statute taxing all property that shall pass by will or by the intestate laws of the state from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be within the state. That bonds of a domestic corporation, owned by a nonresident, but kept in a safe deposit vault in the state, are subject to a tax under a statute taxing property within the state, is held also in *Re Whiting* (1896) 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715.

Bonds and mortgages (whether of a domestic corporation does not appear) which had been in the state for a

long period prior to the owner's death, in the hands of an agent who was acting under a power of attorney to invest and reinvest, were held to be taxable in *Lewis's Estate* (1902) 208 Pa. 211, 52 Atl. 205. In this case the executor and legatees had requested and consented that a complete administration and distribution of the whole estate comprehended in the account should be had in Pennsylvania by a Pennsylvania court. In the subsequent case of *De Noaille's Estate (Re Helena)* (1912) 236 Pa. 213, 46 L.R.A.(N.S.) 1167, 84 Atl. 665, personal property placed by a nonresident with trustees within a state for investment under a trust which might have been terminated at any time, and which did not name ultimate beneficiaries, was held to retain its situs at his domicile, where he died without descendants, and was not subject to a collateral inheritance tax at the domicile of the trustees. The court in *Lewis's Estate* emphasizes the fact of the consent to an administration in Pennsylvania, and states that the benefit of such an administration could not be had without its burden.

W. A. E.

**SAN PEDRO, LOS ANGELES, & SALT LAKE RAILROAD COMPANY,**  
Plff. in Err.,

v.

**ROBERT L. BROWN.**

*United States Circuit Court of Appeals, Ninth Circuit—May 19, 1919.*

(258 Fed. 806.)

**Master and servant — car inspector — “blue flag rule” — duty to see that flag is placed.**

1. The court cannot say as matter of law that one of two car inspectors working in pairs and inspecting a train for defective brake equipment is negligent in going under a train without making sure that the other has actually placed the blue flag signal to protect the train against movement, where such other undertook to place the signal, and where the custom of the inspectors was to work on opposite sides of the train, and it was not customary for each to see personally that the flag was placed before going beneath a car.

[See note on this question beginning on page 870.]

— duty to obey rules.

2. A railroad company may issue rules for the safety, guidance, and protection of its employees which the employees must obey.

[See 18 R. C. L. 498, 520, 573, 659, 670.]

— customary interpretation of rule.

3. An employee is not necessarily negligent in following a custom with respect to the interpretation of a rule promulgated for his guidance if the rule does not clearly cover the particular situation which confronts him.

— effect of contributory negligence.

4. The negligence of a railroad employee engaged in interstate commerce does not bar his holding the railroad liable for injuries received in the em-

ployment, if negligence of a fellow servant contributes to the accident.

[See 18 R. C. L. 826, 828, 831.]

— delegation of duty to place blue flag — establishment of relations.

5. That a car inspector delegated to a fellow inspector the duty of placing the blue flag to protect the train while they were working about it does not make the latter his servant so as to absolve the railroad company from liability for his negligence.

— assumption of risk.

6. A car inspector engaged in interstate commerce does not assume the risk of the negligence of a fellow inspector in failing to place a blue flag to protect the train while they are working about it.

[See 18 R. C. L. 830, 831.]

**ERROR** to the District Court of the United States for the Southern Division of the Southern District of California (Trippet, District J.) in favor of plaintiff in an action brought under the Federal Employers' Liability Act to recover damages for personal injuries. *Affirmed.*

Statement by Hunt, J.:

The San Pedro, Los Angeles, & Salt Lake Railroad Company brought writ of error to review a judgment of the district court in favor of Brown, defendant in error, upon a verdict for damages for personal injuries. The railroad company denied negligence and pleaded contributory negligence. The action was brought under the Federal Employers' Liability Act April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. §§ 8657-8665, 8 Fed. Stat. Anno. 2d ed. p. 1208), which provides, in substance, that every common carrier by railroad, while engaged in interstate commerce, is liable in damages to any person suffering injury while he is employed by such carrier in such commerce, whether such injury results in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, and the fact that an employee may have been guilty of contributory negligence merely mitigates the damages and does not bar a recovery.

The evidence as produced by plaintiff below was as follows: Brown was an experienced car in-

spector employed by the railroad company at Otis, now Yermo, California. The inspectors worked in pairs; Brown's "partner" being one Ables, also an experienced inspector. On November 17, 1914, in daylight, they were about to inspect a train of fifteen or more cars which was standing upon a main track west of the depot. The inspectors went toward the head of the engine, and separated near the head of the engine, Ables going on the south or engineer's side, and Brown on the north or fireman's side, of the engine. Ables had the blue flag in his hand. When the men separated, they were about 50 feet from the front of the engine, and Ables said: "I will put the flag there, and we will hold them there until we are through." Brown testified that it was not customary to put the flag right in the cab of the engine, but to place it on the running board, where the engineer could see it; that when he went around the engine on the north side he could not see the engineer or the fireman; that he passed two cars, and observed that on the third car, a "Salt Lake box car," the air was set, but the piston

travel was too short; that he went to the west end of the car to adjust the brake, and crawled under the west end of the car behind the rear trucks, was facing forward, on the fireman's side, and pulled the release rod to release the brakes. The lever had a track spike in it, instead of a key bolt, and moved with difficulty, so he took his hammer from his pocket to strike, and was in the act of crawling up closer when he noticed the wheels starting. He made a "lunge," seized a grab iron under the rear of the car, and managed to get out by the time the train came to a stop, but was injured. Brown said that he relied upon his partner to put the blue flag on the engine; that the custom was for one inspector to go on one side and one on the other, although they were supposed generally to go together.

There was evidence as to the custom of the railroad company with respect to inspection of air and of cars, and that when a train was brought into the yard the car inspectors place a blue flag on the end, and one inspector would go down each side of the train and inspect for brake shoes and brake "riggins." There was no evidence of a practice of putting a flag signal at each end of the train.

The testimony of Brown and Ables varies in some respects, particularly as to the conversation they had just before they separated; but Ables admitted that he was going toward the engine and had the flag in his hand. There was evidence that it was neither customary nor necessary that each inspector should personally see the flag on the engine before going beneath the car.

Certain rules of the company were introduced in evidence. One, No. 517, under the heading "Car Inspectors," reads: "When making repairs under cars standing on main track or sidetrack, they must protect themselves by placing a blue signal on the drawhead or the platform or step of the car at each end of the train to prevent the cars from being coupled to or moved while

they are making repairs." Rule 26, under which Brown said they were working, provides: "A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Workmen will display the signals, and the same workmen alone are authorized to move them. Other cars must not be placed on the same tracks, so as to intercept the signal, without first notifying the workmen." Another rule, No. 842, provides, in substance, that if the brakes on the last car are properly set, inspectors or trainmen will signal to release the brakes, and the inspector will examine each car and see that the brake releases, and if any brakes will not release, or have leaks or broken rods, they must be cut out by closing the stop cock in branch pipe.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Messrs. Dana T. Smith, E. E. Bennett, and A. S. Halsted, for plaintiff in error:

The great preponderance, if not the overwhelming weight, of the evidence, shows that there was no negligence on the part of the defendant.

Dernberger v. Baltimore & O. R. Co. 234 Fed. 405; Southern P. Co. v. Pool, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Zilbersher v. Pennsylvania R. Co. 125 C. C. A. 480, 208 Fed. 280; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Chicago, M. & St. P. R. Co. v. Bennett, 104 C. C. A. 309, 181 Fed. 793; Southern R. Co. v. Carroll, 71 C. C. A. 88, 138 Fed. 638; Russell v. Louisville & N. R. Co. — Ky. —, 124 S. W. 841; Central R. & Bkg. Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; St. Louis, I. M. & S. R. Co. v. Steele, 129 Ark. 520, 197 S. W. 288, 15 N. C. C. A. 49; Johnson v. Cleveland, L. & W. R. Co. 11 Ohio C. C. 553.

The violation by an employee of a rule promulgated by an employer for the protection of the employee is an

act of negligence per se, and when it results in an injury to the employee, the latter cannot recover.

Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115; Kansas & A. Valley R. Co. v. Dye, 16 C. C. A. 604, 36 U. S. App. 23, 70 Fed. 24; Abshier v. Louisiana R. & Nav. Co. 141 La. 194, 74 So. 901; Kentucky & T. R. Co. v. Minton, 167 Ky. 516, 180 S. W. 831; Russell v. Louisville & N. R. Co. — Ky. —, 124 S. W. 841; Yoakum v. Lusk, — Mo. App. —, 193 S. W. 635; Central R. & Bkg. Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; Virginia & S. R. Co. v. Hill, 119 Va. 837, 89 S. E. 895; Francis v. Kansas City, St. L. & C. B. R. Co. 110 Mo. 387, 19 S. W. 935; Heskett v. Pennsylvania Co. 157 C. C. A. 518, 245 Fed. 326; St. Louis, I. M. & S. R. Co. v. Steel, 129 Ark. 520, 197 S. W. 288, 15 N. C. C. A. 49; Missouri, K. & T. R. Co. v. Collier, 88 C. C. A. 127, 157 Fed. 347; Southern R. Co. v. Johnson, 111 Va. 499, 69 S. E. 323, Ann. Cas. 1912A, 81; Louisville & N. R. Co. v. Woodward, 99 C. C. A. 479, 176 Fed. 5; Richmond & D. R. Co. v. Finley, 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 229; Union P. R. Co. v. Marone, 159 C. C. A. 188, 246 Fed. 916; Canadian P. R. Co. v. Elliott, 70 C. C. A. 242, 187 Fed. 904; Stone v. Union P. R. Co. 35 Utah, 305, 100 Pac. 365; Moore v. Dublin Cotton Mills, 127 Ga. 609, 10 L.R.A.(N.S.) 772, 56 S. E. 839; Johnson v. Cleveland, L. & W. R. Co. 11 Ohio C. C. 553; Rask v. Atchison, T. & S. F. R. Co. 103 Kan. 440, 173 Pac. 1066.

Mr. F. E. Petit, Jr., also for plaintiff in error.

Messrs. T. W. Duckworth and J. H. Ryckman for defendant in error.

Hunt, J., delivered the opinion of the court:

It is evident that the inspection was being made for defective brake equipment rather than an air test, and, considering the evidence of the practice followed by the inspectors at Yermo, we cannot say that, as a matter of law, it was incumbent upon the inspector who was working under the train to make sure that the other inspector actually placed the signal.

Certainly it is the right of an employer carrier to issue rules for the

safety, guidance, and protection of its employees, and it is the duty of the <sup>—duty to obey rules.</sup> employees to observe such rules.

But, if there is evidence of a custom with respect to the interpretation of a rule which does not clearly cover the particular situation which confronts the employee, the employee is not always negligent in following the custom, and <sup>—customary interpretation of rule.</sup> if in the observance

of the usual practice he is injured through the negligence of his fellow employee, under the statute cited he may have a cause of action for injuries received. But, if we assume that Brown was negligent in not personally seeing that the <sup>—effect of contributory negligence.</sup> flag was placed, surely his negligence was not the sole cause of the accident; for notwithstanding Brown's negligence, if Ables, his fellow inspector, had not negligently failed to place the flag, the accident would not have happened.

It is urged that no duty rested upon the railroad company to place a blue flag on any part of the train under which Brown was working, but that the duty to place such a flag was enjoined upon Brown, the inspector; that he could not delegate or confide the performance of such duty to Ables; and that, if failure to place the flag was approximate cause of the injury, Brown could not recover.

In this connection we have carefully considered the argument of plaintiff in error that it could not have been the intent of Congress, as expressed in the act, to permit of recovery where an injury to an employee has resulted in any way from the negligence of a fellow servant. That may be so, and Reeve v. Northern P. R. Co. 82 Wash. 268, L.R.A. 1915C, 37, 144 Pac. 63, 8 N. C. C. A. 167, sustains the argument. But that argument does not answer the question in the present case. The injury sued upon in the Reeve Case was received by the employee, who was a laborer about cars, by being

Master and  
servant—car  
inspector—  
“blue flag rule”  
—duty to see  
that flag is  
placed.

(258 Fed. 806.)

pushed out of the car by another employee, who was scuffling with a third fellow employee, and brushed against the man who was thrown out. It was held that the injury was not caused by the negligence of a fellow employee, committed while he was prosecuting the business of the employer. Here, however, Brown was giving his undivided attention to his duty, the adjustment of a brake on a car, in order to put the brake in proper condition for the journey about to begin, and Ables had the flag and was also engaged in the business of the employer.

It is not open to argument that under the act cited the old defense of the fellow-servant rule is gone, and we find no reasonable ground upon which to rest a conclusion that an interstate railroad employer can, by a rule made for the safety of the employees, destroy a cause of action in favor of an employee for injury received while performing a duty and directly caused by the negligence of a fellow employee.

The express declaration of the statute (§ 5) that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" created by the act, shall, to that extent, be void, gives aid in the proper interpretation of the act and is inconsistent with the theory advanced by plaintiff in error that Brown made Ables his agent to place the flag and that Ables's negligence is to be imputed to Brown, although Ables was a fellow car inspector.

The two were fellow servants, and the act of the one in relying upon the other did not make a relationship of principal and agent whereby the employer can be absolved.

Considering the context of the statute, it is unimportant whether the negligence of the fellow servant Ables is called the negligence of the master or is called imputed neg-

ligence, for the liability of the carrier arises to any person suffering injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, and no "contract" or "rule" made for the purpose of attempting to establish a relationship between the employee and the carrier, to enable the carrier to exempt itself from the liability created by the act, can be sustained as effective in relieving the carrier.

It is also argued that Brown must be held to have assumed the risk of the injury he sustained as a result of his reliance on his coemployee and the failure of his coemployee to place the flag and so protect him. The point is based upon a portion of the charge of the lower court to the effect that Brown did not assume the risks that were attendant upon the negligence of a fellow servant.

Clearly, under the act, the defense of assumption of risk is open to the carrier, except in actions brought under § 4, which provides that, in an action for damages for injury to an employee, "such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. But Brown was not injured by reason of any defect in the machinery, or by reason of any danger normally or necessarily incident to the occupation of inspecting cars. The accident would not have happened at all but for the negligence of a fellow servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the negligence of his fellow servant. *Watson v. St. Louis, I. M. & S. R. Co.* (C. C.) 169 Fed. 950. In *Boldt*

—delegation of  
duty to place  
blue flag—  
establishment of  
relations.

—assumption  
of risk.



v. Pennsylvania R. Co. 245 U. S. 441, 62 L. ed. 385, 38 Sup. Ct. Rep. 139, the court affirmed the action of the trial court in refusing to charge that "the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents, or employees." The opinion expressed was that the requested charge was erroneous, because the action there brought was not one within the provisions of § 4 of the act. But as far as we are advised it has never been held that in an action brought under the statute, where an employee trusts to another to do an act necessary for his safety, and he himself is not aware of the failure of such employee to do the act, and actually goes on with his work, relying upon the performance of the act by his fellow servant, and by reason of the negligence of the employee relied upon injury follows, the risk of such negligence on the part of the fellow servant is assumed by the injured man.

In *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. ed. 528, 36 Sup. Ct. Rep. 249, upon a writ of error to review a judgment recovered under the Federal Employers' Liability Act, it was argued that the railroad company could not be negligent to an employee whose failure of duty and neglect produced the dangerous condition. The court took it for granted that under the statute recovery by an employee for the consequences of actions exclusively his own could not be had. In qualifying the assumption, the court said in effect that where the injury to the

employee does not result in whole or in part from the negligence of any of the agents or employees of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment, action would not lie. "But," continued the court, "on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployee in the performance of his duty, that neglect must be attributed to the employer; and, if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'" This decision we believe to be applicable to the facts in the case before us. Brown, pursuing the usual practice at Yermo, may have participated in the act of failing to put up the flag; but Ables's failure was, in large part, the direct cause of the damage. Brown relied upon Ables, and in reliance upon him went on to perform his duty. By the express terms of the statute the negligence of Ables may be attributed to the carrier.

We find no error in the record, and affirm the judgment.

### ANNOTATION.

**Right of servant to rely upon performance by another of the duty, equally incumbent upon himself, of complying with the "blue flag rule."**

The present annotation, as indicated by the title, is confined to cases where there was a duty resting upon the in-

jured servant, and the question was whether or not he had a right to rely upon another servant's compliance

with a “blue flag rule.” This, of course, excludes cases where the sole duty of protection lay with another servant, and the question is raised as to the injured servant’s right to rely upon a performance of that duty. A case illustrative of the latter class is *Smith v. Philadelphia, B. & W. R. Co.* (1909) 111 Md. 274, 73 Atl. 818.

The phrase “blue flag rule” as used herein means the rule requiring railroad employees, when engaged in repairing standing trains or cars which are liable to be moved at any time, to post a blue flag or other designated signal as a protection against their being so moved while being repaired, without notice to the employee working thereon.

The decisions in the few cases which have passed upon the question whether or not one servant may rely upon another servant’s compliance with the “blue flag rule” are conflicting, some courts having answered the query in the affirmative and others having arrived at a contrary conclusion.

The reported case (*SAN PEDRO, L. A. & S. L. R. Co. v. BROWN*, ante, 865) is illustrative of those permitting one servant to rely upon the performance of the duty to post signal flags, it having been held that a car inspector may delegate to a fellow inspector the duty of posting signals to protect a train while they are working about it, without making the latter his servant, and that in so relying on another servant he does not assume the risk of such other servant’s negligence, or absolve the railroad company from liability for his negligence in not posting a blue flag as required by a rule of the company.

This decision is supported in principle by the case of *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, wherein it was held that a car repairer may rely upon the promise of his foreman, a vice principal, to set out the required signal flags or to protect him by other means while working under a car, notwithstanding a rule of the company requiring servants to protect themselves by putting out red flags while repairing cars. At the time this case was decided the fellow-servant

rule had not been abrogated, and to allow a recovery it was necessary, as the court did, to find that the foreman was, under the circumstances, a vice principal.

And some support for the conclusion reached in the *BROWN CASE* is afforded by *Canon v. Chicago, M. & St. P. R. Co.* (1897) 101 Iowa, 613, 70 N. W. 613, 2 Am. Neg. Rep. 131, in which it was held that a car repairer was not guilty of contributory negligence as matter of law in not complying with a rule regarding the placing of a red flag as notice that he was working under a train, where he had the express promise of the yard foreman that he would protect him by not allowing any cars to be moved on that track. The court said: “It is said that plaintiff’s intestate was guilty of contributory negligence. This claim is based upon a claimed disobedience of a rule, and upon what is said to have been a waiver of the custom. In the answer, defendant pleads that for the protection of car inspectors the company had promulgated a rule providing that ‘a red flag by day and a red light by night, placed on the end of a car, denote that the car inspectors are at work under or about the car or train. The car or train so protected must not be coupled to or moved until the red signal is removed by car inspectors.’ It is averred that Canon knew of said rule, and did not obey it, and that such disobedience resulted in his death. Whatever may have been Canon’s duty, under other circumstances, he was not, in law, guilty of negligence, under the facts established; for he had the promise of the yard foreman, who had the control of the movement of cars in the yards, that no cars would be sent back upon the track upon which stood the train which he was inspecting. There is no basis for the claim that Canon, in consenting to the removal of the four cars, must be presumed to have known that some of them would be kicked back again on that track, and hence should have ceased inspecting until after the other cars had been returned. He had the express promise of the man who controlled the movement of cars

that no cars would be sent back on that track. He had done everything required of him to protect himself from danger from moving cars, by telling Applegate that he was not through inspecting the train, and that he must not throw any cars in on that track. Having Applegate's promise that no cars would be thrown in on that track, he had a right to rely thereon, and to pursue, as he did, his work, relying upon Applegate to see to it that his safety was not imperiled by cars being kicked down upon the track while he was still inspecting the train. As a matter of law, it cannot be said that Canon was negligent."

On the other hand, in *New York, C. & St. L. R. Co. v. Ropp* (1907) 76 Ohio St. 449, 11 L.R.A. (N.S.) 413, 81 N. E. 748, where the rules of the defendant railroad company required car repairers to protect themselves by placing blue signals at both ends of the car or train on which they were working, and obligated them "in all cases . . . to see for themselves" that such signals were so placed, and the plaintiff expressly contracted to obey these rules, it was held that he could not excuse his failure to comply therewith by showing that he understood that another servant who was working with him had or would place the flags as required, and that his failure to see personally to the posting of the flags constituted negligence per se. In reaching this conclusion, the court among other things said: "He [the plaintiff] claims, and the jury was so instructed by the court, that because of the presence of a superior, Whalen, whose duty to likewise observe the rules is undisputed, and because Whalen had directed the plaintiff where to work and what to do, the plaintiff is entitled to recover, if he 'proceeded to do the work under such conditions and circumstances as gave him to understand, and the right to understand, in face of the rules requiring him to place a blue flag at either end of the cars, that such flags had been so placed by Whalen.' In other words, although he had not been told by Whalen to disregard the rule, and although he had not looked to see

if the signals were placed, and nothing had been said on the subject, he had the right, when called by Whalen to come and help him on the repairs on which Whalen was working, to take it for granted that Whalen had done his duty, or to infer from Whalen's conduct and surrounding circumstances that the rule was suspended for the time being. This theory of the case does not seem to us to be tenable. For aught that appears, the rules were equally obligatory on both Whalen and the plaintiff. They certainly were binding on the plaintiff, and the violation of the rules by Whalen, whether he were a superior or not, could not release the plaintiff from his contractual obligation, which was made for the benefit of both himself and his employer. Nor could Whalen either expressly or impliedly suspend the operation of any rule for a single moment. It does not appear in the record, and is not to be presumed, that he had any authority from the company to make contracts or enact rules for it; and, if he had no authority to make them, he had no authority to break them, or to disregard, abrogate, suspend, or repeal them. Neither can such authority be implied from the fact that Whalen had authority to direct and control the plaintiff in the performance of his duties as a car repairer. His authority to control and direct was authority to control and direct within the limitations of the rules prescribed by the company for the government of all employees. The rules required that car inspectors should 'be fully conversant . . . with instructions issued by the superintendent of motive power,' and that, 'when inspecting and repairing cars that should not be moved, they must protect themselves by placing conspicuously a blue signal, . . . as provided in rule 36.' Both Whalen and the plaintiff, therefore, must have known that rule 378 made it imperative to put out the signals 'in all cases when doing work on or under cars which should not be moved.' There is no room here for misunderstanding or implication. The rule is to apply in all cases, and therefore

neither had Whalen the right to waive the rule in any case, nor had the plaintiff any right to infer a waiver of it in any case. There is not even room for an argument from the necessity of the case; for the plaintiff could have obeyed the order of his superior, and still have protected himself from injury by obeying the rule. He chose rather to take the chances in the performance of a little task which probably would take less time than would be consumed in putting the blue flags at each end of the cut of cars. It was a plain assumption of the risk by the plaintiff, in the sense of taking the chances, a risk which he had expressly agreed with his employer that he would not take.”

And in *Illinois C. R. Co. v. Winslow* (1894) 56 Ill. App. 462, where the rules required employees inspecting or repairing cars to protect themselves by placing blue signals on both ends of the car or train, and plaintiff, a car repairer, placed a blue flag at one end of the train on which he was working and relied upon an inspector's statement that he would post the other end, which, however, the latter neglected to do, and the plaintiff was injured by the moving of the car under which he was working, it was held that the injured repairer was guilty of contributory negligence in relying upon the inspector to protect him, and not personally seeing that the flag was put up on the other end of the train as required by the rule. And in connection with this case see *Brady v. New York, N. H. & H. R. Co.* (1904) 184 Mass. 225, 68 N. E. 227, the decision in which is largely to the same effect.

So, in *Johnson v. Chicago, L. & W. R. Co.* (1896) 11 Ohio C. C. 553, 5 Ohio C. D. 290, a car repairer was held guilty of contributory negligence in going under a car to work in violation of a “blue flag rule,” relying upon the promise of a railroad conductor to protect him, the conductor not being regarded as a superior. The court argued that the car repairer could not set aside the rules of the company and rely upon something which he himself had devised and substituted

for his protection. And again *Pinckney v. Atlantic Coast Line R. Co.* (1911) 89 S. C. 525, 72 S. E. 394, on subsequent appeal in (1912) 92 S. C. 528, 75 S. E. 964, is authority for the proposition that a car repairer cannot excuse his disregard of a blue flag rule by the adoption of the substitute of telling the conductor and getting his promise to protect him, at least where he could have complied with the rule by reasonable effort on his own part.

And in *Abbitt v. Lake Erie & W. R. Co.* (1898) 150 Ind. 498, 50 N. E. 729, 4 Am. Neg. Rep. 478, in holding that where one car repairer relies upon another to protect the car under which he is working, he makes such other his agent so that the latter's negligence is his own, the court said: “It may, however, be affirmed as a correct doctrine, under the authorities, that if Abbitt and Lichtsin were associated together in their work of car inspection at the time of the accident, and if by any arrangement, understanding, or agreement between them, either express or implied, it became Lichtsin's duty, when Abbitt was under the car upon the railroad track during the inspection or work performed by them, to look out for approaching trains or cars, and either signal them to stop or warn Abbitt of their approach, then, in this respect, and to this extent at least, Lichtsin might be said to have been serving the former, and under such circumstances the relation of principal and agent in this regard could be said to exist between them; and if Lichtsin neglected to discharge the duty so imposed upon him, and thereby contributed to the accident in question, such negligence, in legal contemplation, would be the negligence of Abbitt, and justly imputable to him. Or, in other words if, under the circumstances, at the time of the fatal accident, Abbitt attempted or undertook to exercise the care which the law exacted of him through the agency of Lichtsin, then it would be incumbent upon the plaintiff in this action to show, at the time of the accident, freedom from contributory negligence on the part of Lichtsin.”

However, two judges, in dissenting, strongly objected to the application of the doctrine of imputed negligence in the case under consideration.

In *St. Louis, I. M. & S. R. Co. v. Blaylock* (1915) 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563, where the rule provided that "workmen will display the blue signals and the same workmen remove them," and there were different interpretations of the rule, some workmen maintaining that it was the duty of each workman when going under a car to put out the blue flag, and others that such duty fell upon the foreman, it was held that under such circumstances the questions whether a car repairer was guilty of contributory negligence in relying upon the foreman to place the signal, and whether he assumed the risk in that respect, were for the jury. This conclusion, in the opinion of the writer, seemingly leads to the inference that the car repairer would have been regarded as having been guilty of contributory negligence or of having assumed the risk, provided the rule required each workman to put out a signal flag, even though he relied upon the foreman to perform the duty for him, the railroad company having contended that the fact that he relied on the foreman to protect him could make no difference. In other words, the decision seems to import that if it had been the duty of the car repairer to put out the flag, and he failed to do so, he was guilty of contributory negligence, regardless of whether or not he relied upon the foreman to place the signal, which assumption is but another way of saying that one

servant cannot rely upon another servant's compliance with the "blue flag rule." However, this conclusion may not be justifiable, in which case the decision affords no real authority upon the question whether or not one servant, in going under or between cars to work, can rely upon another employee to put out a protecting flag.

Another closely analogous case is *Central R. & Bkg. Co. v. Kitchens* (1889) 83 Ga. 83, 9 S. E. 827. Here the rule requiring workmen about cars to put up a blue flag applied alike to all persons, and it was held no excuse on the part of a car repairer that another servant working on the same cars failed to obey the rule. The court in the headnotes stated the rule as follows: "A rule of a railroad company applicable alike to all persons of a given class is not to be evaded by the failure of one person of the class to observe the rule, where another person of the same class is injured thereby." It does not appear certain, however, that the injured servant relied upon the other servant to put up the danger signal.

And see *Roux v. Morgan's L. & T. R. & S. S. Co.* (1910) 127 La. 240, 53 So. 550, wherein it appears that the injured car repairer told his coworker to put out the blue flags, but in which it was held, without any reference to the specific question of a right to rely on the carrying out of such direction, that where a car repairer works on a car without putting out a blue flag as directed by a rule of the railroad company, there can be no recovery of damages for injuries sustained by him. G. J. C.

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## PEOPLE OF THE STATE OF ILLINOIS

v.

HARVEY MARQUIS et al., Plffs. in Err.

*Illinois Supreme Court — December 17, 1919.*

(291 Ill. 121, 125 N. E. 757.)

### Constitutional law — abatement of nuisance.

1. Intoxicating liquors and vehicles used to transport them in violation of law cannot be summarily destroyed without notice to their owners as

for abatement of a nuisance under the due process clauses of the Constitution.

[See note on this question beginning on page 888.]

**Trial — question for jury — weight of evidence.**

2. The weight of the evidence is a question for the jury.

[See 16 R. C. L. 183.]

**Constitutional law — discrimination in favor of religious society — intoxicating liquor.**

3. Failure to extend the prohibition against intoxicating liquor to that used for sacramental purposes does not unconstitutionally give a preference to any religious denomination, although some such denominations do not use intoxicating liquor for such purposes.

**— criterion as to constitutionality — what authorized.**

4. The question of constitutional power depends not upon what was done in a particular case, but upon what was authorized to be done.

**— due process — condemnation without hearing.**

5. A provision for condemnation, without notice or hearing, of property used for transportation of intoxicating liquor, deprives the owner of his property without due process of law.

[See 6 R. C. L. 450, 451.]

(Duncan and Farmer, JJ., dissent in part.)

**ERROR** to the County Court for McHenry County (Barnes, J.) to review a judgment convicting defendant of violation of the Search and Seizure Act, and denying petitions for delivery to petitioners of their property. *Affirmed as to defendant Marquis. Reversed as to petitioners.*

The facts are stated in the opinion of the court.

Messrs. George Remus and E. V. Orvis, for plaintiffs in error:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure shall not be violated; and no warrant should issue without probable cause, supported by an affidavit particularly describing the place to be searched and the persons or things to be seized.

*Myers v. People*, 67 Ill. 503; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *J. B. Mullen & Co. v. Moseley*, 13 Idaho, 457, 12 L.R.A.(N.S.) 394, 121 Am. St. Rep. 277, 90 Pac. 986, 13 Ann. Cas. 450.

The truck not being kept or used for an unlawful purpose, and because of its great value, could not be taken from Siebold-Schaeffer Company or from Bertha Siemon without allowing to them the right of trial by jury.

*Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *J. B. Mullen & Co. v. Moseley*, 13 Idaho, 457, 12 L.R.A.(N.S.) 394, 121 Am. St. Rep. 277, 90 Pac. 986, 13 Ann. Cas. 450; *Sullivan v. Oneida*, 61 Ill. 242.

The auto truck was not kept or used for an illegal purpose within the meaning of the Search and Seizure Act.

*Moore v. American Transp. Co.* 24 How. 37, 16 L. ed. 680; *State v. Stanley*, 84 Me. 561, 24 Atl. 983; *Com. v. Cotton*, 138 Mass. 500; *Com. v. Patterson*, 138 Mass. 498; *First Cong. Church v. Board of Review*, 254 Ill. 220, 39 L.R.A.(N.S.) 437, 98 N. E. 275; *First Cong. Church v. Holyoke*, 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572; *Provident Sav. Life Assur. Soc. v. Exchange Bank*, 61 C. C. A. 310, 126 Fed. 360; *Harbaugh v. People*, 40 Ill. 294; *Grand Lodge, A. O. U. W. v. Belcham*, 145 Ill. 308, 33 N. E. 886.

Due process includes notice to the party interested.

*Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228; *Re Rosser*, 41 C. C. A. 497, 101 Fed. 562; *Baldwin v. Ely*, 66 Wis. 171, 28 N. W. 392; *Creamer v. Marks*, 64 Pa. 151; *Greene v. James*, 2 Curt. C. C. 187, Fed. Cas. No. 5,766; *Hibbard v. People*, 4 Mich. 125; *State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978.

A statute which by its very procedure condemns before it hears does not give due process of law or any justice at all, but simply renders judgment before trial.

*Jensen v. Union P. R. Co.* 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Moredock v. Kirby*, 118 Fed. 180.

The court had no authority to adjudicate as to the ownership of the truck.

*Sullivan v. Oneida*, 61 Ill. 242.

The arrest of the defendant, Marquis, without a warrant, was illegal and void and a violation of the Constitution.

*Owens v. Way*, 141 Ga. 796, L.R.A. 1915E, 399, 82 S. E. 132, Ann. Cas. 1915C, 963; *People v. Marxhausen*, 204 Mich. 559, 3 A.L.R. 1505, 171 N. W. 557; *People v. Wilson*, 204 Mich. 699, 171 N. W. 564; *People v. Szynekarek*, 204 Mich. 691, 171 N. W. 563.

No warrant could issue without probable cause for search and seizure of property unless supported by affidavit particularly describing the persons or places and the things to be seized.

*Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Myers v. People*, 67 Ill. 503; *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322.

A warrant which does not show upon its face a case in which such warrant may issue is absolutely void.

*Early v. People*, 117 Ill. App. 608; *White v. Wagar*, 185 Ill. 195, 50 L.R.A. 60, 57 N. E. 56.

A search warrant based on an insufficient affidavit to show the purpose for which it is issued and all of the circumstances is absolutely void and may be attacked by certiorari.

*Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872, 11 Am. Crim. Rep. 356; *Com. v. Martin*, 105 Mass. 178; *State v. Spirituous Liquors*, 68 N. H. 47, 40 Atl. 398.

There being no proof that this was a shipment to any particular point in Illinois, and that the burden would be on the state, the state had no right to arrest the carrier who was driving from one state into another.

*Moragne v. State*, 200 Ala. 689, L.R.A. 1918E, 948, 77 So. 322, — Ala. App. —, 78 So. 98; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

Police power has no power to destroy commerce and the carrier himself and his property.

*Missouri P. R. Co. v. Kansas*, 216

U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The constitutional protection against unreasonable seizure of property would go for naught if it should be conceded that an arresting officer may arbitrarily possess himself of the property of a third person, taken from the place of business of such third person without a search warrant.

*Newberry v. Carpenter*, 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 346, 65 N. W. 530.

Messrs. Edward J. Brundage, Attorney General, C. W. Middlekauff, George C. Dixon, Assistant Attorneys General, Vincent S. Lumley, and Charles T. Allen, for the People:

The statute of the state of Idaho making it unlawful for a person to have intoxicating liquor in his possession is constitutional and within the police power of the state.

*Crane v. Campbell*, 245 U. S. 307, 62 L. ed. 309, 38 Sup. Ct. Rep. 98.

The Constitution does not prohibit all search and seizures, but only such as are unreasonable.

*Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085.

Any person possessing intoxicating liquor is liable criminally for any unlawful disposition made by agents, clerks, or servants in his employ, whether he knew they had made such unlawful disposition of said liquor or not.

*Mullinix v. People*, 76 Ill. 211; *Noecker v. People*, 91 Ill. 494; *People v. Jones*, 280 Ill. 259, 117 N. E. 417.

Unless a statute violates some express provision of the Constitution, it must be held to be valid.

1 *Lewis's Sutherland*, Stat. Constr. § 85; *Dewey v. United States*, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981; *McCully v. State*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134.

Forfeiture of property wrongfully used is within the power of the legislature.

*White Auto Co. v. Collins*, 136 Ark. 81, 2 A.L.R. 1594, 206 S. W. 748; *United States v. 1 Buick Roadster Automobile*, 244 Fed. 961; *United States v. 2 Horses*, 2 Ben. 529, Fed. Cas. No. 16,578; *United States v. Mincey*, 5 A.L.R. 211, 165 C. C. A. 575, 254 Fed. 287; *United States v. 2 Bay Mules*, 36 Fed. 84; *Dobbin's Distillery Co. v. United States*, 96 U. S. 395, 24 L. ed. 637; *Police Comrs. v. Wagner*, 93 Md. 195, 52 L.R.A. 775, 86 Am. St. Rep. 423,

48 Atl. 455; Gray v. Kimball, 42 Me. 307; Com. v. Certain Intoxicating Liquors, 107 Mass. 400; Skinner v. Thomas, 171 N. C. 98, L.R.A.1916E, 338, 87 S. E. 976; 22 Cyc. 1681; White Auto Co. v. Collins, 136 Ark. 81, 2 A.L.R. 1594, 206 S. W. 748; Moody v. McKinney, 73 S. C. 438, 53 S. E. 543; Maples v. State, — Ala. —, 82 So. 183; State v. Hughes, — Ala. —, 82 So. 104; Glennon v. Britton, 155 Ill. 232, 40 N. E. 594; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; United States v. 7 Barrels of Distilled Oil, 6 Blatchf. 174, Fed. Cas. No. 16,253; Boggs v. Com. 76 Va. 994; Glenn v. Winstead, 116 N. C. 451, 21 S. E. 393; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Bobel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; Fuller v. People, 92 Ill. 182; Soby v. People, 134 Ill. 66, 25 N. E. 109.

The right to trial by jury, in the class of cases in which it was enjoyed before the adoption of the Constitution, is preserved inviolate by that instrument, but in all other cases the legislature may provide for a hearing or trial without a jury.

Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054, 15 Am. Crim. Rep. 689; Ross v. Irving, 14 Ill. 171; Commercial Ins. Co. v. Scammon, 123 Ill. 601, 14 N. E. 666; Spring Valley v. Spring Valley Coal Co. 173 Ill. 497, 50 N. E. 1067; Mills Novelty Co. v. King, 174 Ill. App. 559.

It is not a novelty to subject property used for an unlawful purpose to forfeiture.

Maples v. State, — Ala. —, 82 So. 183; State v. Hughes, — Ala. —, 82 So. 104; White Auto Co. v. Collins, 136 Ark. 81, 2 A.L.R. 1594, 206 S. W. 748; Marasso v. Van Pelt, — Fla. —, 81 So. 529; Barbour v. State, 146 Ga. 667, 2 A.L.R. 1095, 92 S. E. 70; Schmitt v. F. W. Cook Brewing Co. — Ind. —, 3 A.L.R. 270, 120 N. E. 19; State v. Taggart, — Iowa —, 172 N. W. 299; State v. McManus, 65 Kan. 720, 70 Pac. 700; Gray v. Kimball, 42 Me. 299.

Dunn, Ch. J., delivered the opinion of the court:

Harvey Marquis left Kenosha, Wisconsin, in the afternoon of August 26, 1919, for Chicago, driving an auto truck loaded with eleven barrels of bottled beer. He was advised not to go through Lake county

for fear of being arrested, but to go through McHenry county, and it would be all right. Accordingly he chose a road through McHenry county, and while in that county after dark, having no lights, he drove off the road into a farmyard 100 or 200 feet from the road, stopped and went to sleep on the truck. Soon after he was awakened by a deputy sheriff, arrested and taken to Woodstock, the county seat, and placed in jail, the deputy sheriff putting the truck and its load under the care of a guard, who watched them until they were taken possession of by the sheriff. The next day the state's attorney filed an information in the county court against Marquis for violating the Search and Seizure Act. On September 5th an amended information was filed charging the defendant with the transportation of intoxicating liquor over public highways, contrary to law, and after a trial, upon his plea of not guilty, he was convicted and sentenced to pay a fine of \$50 and costs. On August 27, 1919, the state's attorney filed his complaint under oath, stating that he had reasonable cause to believe that intoxicating liquor was being transported in prohibition territory in a certain auto truck by H. Marquis and others named, and praying for a search warrant. The county judge issued a search warrant bearing the date of the previous day. The warrant was returned by the sheriff showing that he had seized eight and one half barrels of bottles containing beer and one Diamond-T truck bearing Illinois license No. 358,408, and that he had arrested and held in custody H. Marquis, the driver of the truck on which the intoxicating liquor was being transported. September 5th an amended complaint was filed, which differed from the other only in stating that the intoxicating liquor was being unlawfully transported, and that the auto truck was in the town of Burton, in McHenry county, instead of in McHenry county. What is called an amended search warrant was issued conform-



ing to the amended complaints. On the same day Bertha Siemon and the Siebold-Schaeffer Company, each claiming to be the owner of the auto truck, filed petitions praying for the delivery of the auto truck to the respective petitioners, and Robert A. Grace, claiming to be the owner of the beer, prayed for its delivery to him. The petitions were summarily heard by the court, which found that the truck was being used as a vehicle to transport illegally over the public highways in prohibition territory beer containing more than  $\frac{1}{2}$  of 1 per cent by volume of alcohol; that the barrels containing the beer were not labeled or marked on the outside cover so as to plainly show the true name and address of the consignor and consignee, or the kind and quantity of liquor contained, or the purpose for which said liquor was to be used by the consignee, or the place where such liquor was to be used by the consignee; that the beer, at the time of its seizure, was in the truck and was being illegally transported over the highways of McHenry county in prohibition territory, contrary to the provisions of the Search and Seizure Law of the state, and said beer and truck were at the time in the possession of Harvey Marquis, the defendant who was then driving the truck. The judgment of the court was that the auto truck and the beer be adjudged forfeited in accordance with the provisions of the Search and Seizure Law, and it was ordered that the sheriff proceed forthwith to destroy them by taking them to a suitable place within 2 miles of the courthouse, thoroughly saturating them with oil of a highly inflammable character, and publicly burning and destroying them between the hours of 10 o'clock in the morning and 3 o'clock in the afternoon, within five days of the date of the judgment. The defendant Marquis, and the petitioners have sued out a writ of error to reverse the judgment of the county court.

It is contended that the evidence was insufficient to prove Marquis

guilty beyond a reasonable doubt, because he had no knowledge of the contents of the barrels other than that indicated by the labels, which stated that the contents were non-intoxicating. He had driven the truck from Chicago to Kenosha with a load of store fixtures and household furniture, with directions from his employer to try to get a return load. While he was trying to get a load to haul back to Chicago, he met Grace about two blocks from the Blatz brewery, who wanted him to take a load of barrels, which were labeled nonintoxicating, to Chicago. The barrels were labeled, "Blatz private stock; nonintoxicating." Grace had the truck taken to the brewery and loaded and brought back to Marquis. The barrels were not consigned to anyone. There was no agreement about the price for their transportation. Marquis was to take them to the office of his employer in Chicago, and Grace was to call at the office and tell where they were to be taken. Marquis was told not to go through Lake county on account of the Zion City authorities, but to go around through McHenry. The weight of the evidence is a question for the jury, and it is not surprising that they should have believed that the defendant was seeking to evade the law.

*Trial-question  
for jury—  
weight of  
evidence.*

Various objections are urged against the constitutionality of the Search and Seizure Act, on which the prosecution is based. Laws 1919, p. 930. It is argued with apparent earnestness that the statute violates that part of § 3 of article 2 of the Constitution which prohibits the giving of any preference to any religious denomination or mode of worship because its prohibition does not extend to intoxicating liquors for sacramental purposes. It is said that some religious organizations use wine for such purposes and others do not, and that therefore the act gives a preference to those using wine and grants them a special privilege or immunity. The same

argument would apply to the intoxicating liquor used for medicinal, chemical, mechanical, and manufacturing purposes, all of which are recognized as legitimate uses of intoxicating liquors. These, as well as sacramental uses, are expressly exempted from the prohibition of the act in question and are left to be controlled by such other restrictions and regulations as are or may be provided by the laws of the state or the United States. The manufacture, transportation, and sale of intoxicating liquor for sacramental purposes are in no way interfered with by the act, but are free to all persons and all religious denominations to the same extent as before the passage of the act. The right

**Constitutional  
law—discrim-  
ination in favor  
of religious  
society—  
intoxicating  
liquor.**

to use intoxicating liquors for such purposes exists in all. It is not a special privilege in those exercising the right

because others who also have the right do not exercise it.

The most serious objection to the judgment questions the court's authority to order the destruction of the property. Marquis, who was transporting the beer, was not the owner of either the truck or the beer. He was a driver in the employ of the owner of the truck, the Siebold-Schaeffer Company, a corporation engaged in the business of teaming and hauling. There is no evidence that the corporation had any notice of the character of the load which Marquis was hauling and which he had procured independently in Kenosha, or that it was a participant in the violation of the law. Bertha Siemon was the owner of a chattel mortgage for \$600 on the truck. It was not legally acknowledged and had not been recorded, but the evidence shows that it was given for a valid debt, and that it was valid between the parties. She was not shown to have had any knowledge of the unlawful use of the automobile. Grace, the other plaintiff in error, was the owner of the beer. He caused it to be loaded

and shipped to Chicago. Under the Search and Seizure Act all territory in Illinois was prohibition territory by virtue of the act of Congress called the War Prohibition Law (Act Nov. 21, 1918, chap. 212, 40 Stat. at L. 1045). No question was made about the operation of this law, and the transportation of the beer upon any highway in Illinois to Chicago was a violation of the Search and Seizure Act, in which Grace participated.

Under § 16 of the Search and Seizure Act all intoxicating liquor manufactured, kept for sale, used, disposed of, or transported within prohibition territory in violation of any law of this state, with all vessels containing the same, and all implements, furniture, and vehicles kept or used for any such purposes, are declared to be common nuisances and subject to seizure, confiscation, and destruction in the manner provided by the act. This section and § 17 provide for the issuing of a search warrant upon complaint in writing verified by affidavit, and for its execution by the search of the place described in the warrant and the seizure of all intoxicating liquor there found, all vessels containing the same, and all implements, furniture, and vehicles kept or used for the purpose of violating or with which to violate any law of the state. The warrant further requires the arrest of any and all persons in whose possession the articles seized are found, and the bringing of them, together with the article seized, before the officer issuing the warrant or some other judge or justice of the peace having cognizance of the case. Section 17 provides that any claimant shall be entitled to have his right of property in such liquor and other property tried in a summary manner before the judge to whom the search warrant may have been returned, but does not require any notice to be given. Section 18 provides that no intoxicating liquor or other property seized under the act shall be taken from the custody of the officer by writ of replevin or

other process, while any proceeding provided for in the act is pending, and that a final judgment of forfeiture of such intoxicating liquor or property shall be a bar to all suits for the recovery of the same or the value thereof, or for any damages arising by reason of the seizing or detention thereof. Section 19 requires the officer serving the search warrant to make and file an information against any person arrested, charging the violation of any of the provisions of any statute or municipal ordinance which may appear to have been committed by such person, and provides that the trial shall take place as speedily as possible and shall have preference over other cases. As soon as such complaint is disposed of, if it shall appear that the intoxicating liquor was manufactured, kept for sale, used, disposed of, or transported in violation of any of the provisions of any statute or municipal ordinance, the same, with the vessels, implements, furniture, and vehicles seized therewith, shall be adjudged forfeited and ordered forthwith destroyed in the manner the court may direct.

The act contains no provision for giving notice to any person except the person in whose possession the intoxicating liquor and vessels containing it, and all implements, furniture, and vehicles kept or used for the purpose of violating or with which to violate any law of this state, are found. Upon conviction of the person in possession it requires all such intoxicating liquor and other property to be forthwith destroyed. If the defendant is not the owner of the property seized, no provision is made for notice to the owner or any person interested other than the defendant, but the property seized may be adjudged forfeited and ordered destroyed forthwith, without any reference to the interest of such owner or other person interested. The property cannot be replevied or taken from the custody of the officer by any process, and the final judgment is declared a bar to all suits for the recovery of the

property or its value or for any damages arising by reason of its seizure or detention, though if any claimant appears he may have his right of property tried in a summary manner.

Is it within the constitutional power of the legislature thus to authorize the destruction of property, without notice to the owner? It is true that in this case the plaintiffs in error did have knowledge of the proceeding, appeared, and had a summary hearing of their claim of property, but the question of constitutional power does not depend upon — criterion as to constitutionality — what authorized.

what was done in the particular case, but upon what the statute authorized to be done. Due process of law in the regular course of judicial proceedings requires notice to the defendant before he or his property can be condemned, as a matter of right, and not of favor, and a law which purports to authorize condemnation without notice confers no authority and is no justification for a judgment against him, even though, as a matter of fact, it may happen that he had knowledge of the proceeding. In *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87, the court said: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289."

In the case cited a statute purported to authorize an assessment upon the lands benefited of the costs of a local improvement, but did not provide for notice to the owner. The court said: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and

give them the right to a hearing and an opportunity to be heard. . . . The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done."

The doctrine thus announced has been followed in many other cases. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625; *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

A summary hearing, of which no notice is required to be given to a person whose rights ~~—due process—~~ are affected, and a ~~condemnation~~ judgment upon such ~~without hearing.~~ hearing, do not constitute due process of law. Such a judgment is not binding upon the party against whom it is rendered and confers no rights against him or his property. The judgment of the court provided for by the Search and Seizure Act, ordering the forfeiture and destruction of the intoxicating liquor and of all the property seized with it, was ineffectual as a judicial condemnation of the property of the plaintiffs in error Siemon, the Siebold-Schaeffer Company, and Grace. The question presented is therefore the same as if the statute, instead of requiring the property to be brought before the judge, had authorized its destruction by the officer seizing it, if it were employed in violating the law. Could the legislature authorize the destruction of the property without a judicial proceeding?

There are cases in which the summary abatement of nuisances by executive officers without a judicial condemnation, and the destruction ~~—abatement of~~ of articles used in ~~nuisance.~~ their maintenance, may be authorized

by the legislature. "Where the condition of a thing is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is incapable of being

put to any lawful use by the owner, it may be treated as a nuisance per se. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. Rotten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and imminently dangerous structures are the most conspicuous instances of nuisances per se." Freund, *Pol. Power*, § 520.

Cases of this character in which the power of summary abatement was sustained are *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; *Miller v. Horton*, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *New Orleans v. Charouleau*, 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46; *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; *Sings v. Joliet*, 237 Ill. 300, 22 L.R.A.(N.S.) 1128, 127 Am. St. Rep. 323, 86 N. E. 663; *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054, 15 Am. Crim. Rep. 689; and *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89. The right of abatement in such cases is limited to nuisances per se, or to cases of imminent danger to the public health or safety, or to articles dangerous to the public welfare the possession of which is prohibited by law, and the abatement must be limited to the necessity of the case and no wanton or unnecessary destruction must be occasioned. "The power of summary abatement does not extend to property in itself harmless and which may be lawfully used, but which is actually put to unlawful use or is otherwise kept in a condition contrary to law. . . . The unlawful use may, however, be punished, and the punishment may include a forfeiture of the property used to commit the unlawful act. . . . Such forfeiture is not an exercise of the police power, but of the judicial power; i. e., the taking of

the property does not directly subserve the public welfare, but is intended as punishment for an unlawful act. Hence forfeiture requires judicial proceedings, either personal notice to the owner or at least a proceeding in rem, with notice by publication." Freund, Pol. Power, §§ 525, 526.

In *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301, it was held that an ordinance declaring all intoxicating liquors kept in the town for the purpose of being sold or given away as a beverage, to be drunk in the town, a nuisance, and directing the police officers to abate the nuisance by removing the liquor beyond the town limits, did not authorize the officers to seize and carry away intoxicating liquors without first having the question of violation of the ordinance judicially determined.

In *Baldwin v. Smith*, 82 Ill. 162, a municipal ordinance provided that upon the revocation of a dramshop license the town constable should immediately close up the grocery of the licensee, but the licensee recovered a judgment against the constable and others for taking possession of his grocery, which was affirmed, the court saying that the saloon must be adjudged a nuisance before it could be abated. There must first be legal proceedings.

In *Hey Sing Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, an owner of boats and nets lent them to a Chinese fisherman, who used them in violation of a statute (Penal Code, § 636) which provided that all nets, seines, fishing tackle, boats, or other implements used in catching or taking fish in violation of the statute should be forfeited, or might be seized by a peace officer of the county and destroyed or sold at public auction, upon notice posted in the county for five days. The court said: "But the statute under consideration contained no provisions whatever for determining whether the property was liable to condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their

possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days. Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure everyone within the state in his rights of liberty and property."

In *State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978, it is said: "Unless, therefore articles seized are of such a character that the law will not recognize them as property, entitled as such to its protection, under any circumstances, they cannot be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their unlawful use, and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use are as implements for gambling."

The case of *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647, was an action against an officer for the possession of nets used in fishing. The court held the statute authorizing the confiscation of the property by the officers to be unconstitutional, saying: "While the seizure may be made in the first instance by an officer of the law doing no unnecessary damage, the confiscation must be made by the judgment of a court having jurisdiction of the subject-matter. This section gives the right of confiscation, but fails to provide a legal proceeding by which the confiscation may be adjudged, and, there being no other statute providing a proceeding in such cases, it attempts to take and sell private property and place the proceeds in the public treasury without any process of law. . . . Proper legal proceedings are always necessary to adjudge a forfeiture or confiscation, and to permit officers or private persons to seize, sell, or

appropriate private property without legal proceedings, under a claim of confiscation, would be inconsistent with the principles of constitutional government, and would soon lead to fraud, corruption, oppression, and extortion."

A statute of the state of Nebraska (Comp. Stat. 1903, chap. 31, art. 3, § 3) provided that all guns, ammunition, dogs, blinds, decoys, and fishing tackle in actual use by any person while hunting or fishing without the license required by the act should be forfeited to the state, and made it the duty of every officer charged with the enforcement of the act to seize, sell, or dispose of the same in the manner provided for the sale or disposition of property on execution and to pay over the proceeds thereof to the county treasurer for use of the school fund. Three persons were hunting in violation of the game law, using shot-guns belonging to one of the hunters. A deputy game warden seized the guns, and the owner brought an action of replevin for them and recovered a judgment, which the supreme court affirmed in *McConnell v. McKillip*, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898. The court said: "The legislature has not declared a gun to be a public nuisance and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common-law forfeiture of goods upon conviction of a crime. . . . There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which therefore may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only

becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect. If the property seized by a gamekeeper or warden were a public nuisance, such as provided for in § 1, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding, and the great weight of authority is to the effect that such common-law rights have not been abrogated or set aside by the provisions of the Constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has a right to deprive the owner of his property summarily, without affording an opportunity for a hearing and without due process of law."

In *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, a statute of the state declared all nets set in certain public waters in violation of any law enacted for the protection of fish to be a public nuisance, and provided that they might be abated and summarily destroyed by any person, and that it should be the duty of every game constable to seize, remove, and forthwith destroy the same, and that no action for damages should lie against any person on account of such seizure and destruction. The supreme court of New York held this section to be constitutional. In the course of the opinion the court said: "The inquiry in the present case comes to this: Whether the destruction of the nets set in violation of law, authorized and required by the Act of 1883, is simply a proper, reasonable, and necessary regulation for the abatement

of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owners' right of property in the nets, in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power to abate the nuisance. The owner of the nets is deprived of his property, but not as the direct object of the law, but as incident to the abatement of the nuisance. . . . But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton and unnecessary injury must be committed. 3 Bl. Com. p. 6, note. It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance."

None of the reasons mentioned by the court apply to the present case. The destruction of the automobile is no more a necessary regulation for the abatement of the nuisance than the destruction of the house used for the sale of intoxicating liquors contrary to law or of a house of ill fame would be necessary to abate that nuisance, and the court expressly states that the tearing down of a building so kept would not be justified as the exercise of the power of summary abatement, and that a statute authorizing it would add nothing to the justification. The only object the destruction could have would be the punishment of the owner or the prevention of the future unlawful use of the automobile, and the court says that the legislature could not decree the destruction or forfeiture of property for these purposes. The controlling argument seems to have been the comparatively small value, but

this argument has no application in this case. The value of the property affected by the Search and Seizure Act cannot be assumed to be "comparatively small."

The judgment of the supreme court of New York was affirmed by the Supreme Court of the United States (*Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499), the court saying: "In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned or employed in smuggling or other illegal traffic, distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests it may exercise a large liberty of choice in the means employed."

The argument of the small value of the property involved does not

affect the principle of constitutional power or tend to show the summary destruction of the property to be reasonably essential to the suppression of the illegal use, as was pointed out by the Chief Justice Fuller in his dissenting opinion, in which two of the associate justices concurred. None of the instances of summary abatement which the court mentions rest in any degree on the fact that the property is of little value. In the present case it does not appear that the property is of little value, and the decision of the Supreme Court of the United States, that, where the property is of little value, the legislature may declare it a nuisance and subject to summary abatement, if it might otherwise be entitled to weight, is not applicable. Under this law a man's automobile may be stolen from his garage, loaded with intoxicating liquor stolen from his cellar, where it is lawfully kept, driven on the public highway of the state in violation of law, seized by an officer, taken, with the thief who stole it, before a judge, condemned, and destroyed with no notice to the owner, who may have no knowledge of the occurrence until long after his property has been destroyed.

Our conclusion is that the provision of the Search and Seizure Act for the destruction of the intoxicating liquor and other property seized, under the order of the court, without providing that notice shall be given to the owner or persons interested in the property, does not afford due process of law and is a violation of the Constitution. The statute having provided no lawful procedure for condemning the property to destruction, the court was without authority to make any order for that purpose.

The judgment will be affirmed as to the plaintiff in error Harvey Marquis and reversed as to the other plaintiffs in error, and the cause remanded to the County Court of McHenry County.

Reversed in part and remanded.

Duncan, J., dissenting:

I concur in that part of the decision of the majority of the court that deals with and holds that the provisions of the Search and Seizure Act providing for the seizure and destruction of intoxicating liquors and other property used in its transportation are void because in violation of the Constitution. I cannot concur with that portion of the decision which apparently recognizes the validity of the provisions of the statute which provide, in substance, that intoxicating liquors cannot be legally transported in this state and delivered to any person or consignee for any use or purpose other than that named in the act. The act clearly provides and intends, when considered in its entirety, that intoxicating liquors can only be lawfully transported in this state when the same are to be sold or used for medicinal, sacramental, chemical, mechanical, or manufacturing purposes. Section 3 of the act specifically so provides. The only exception or provision in that section throwing any doubt upon this interpretation is the proviso in that section that nothing in the act shall be construed to forbid "any consignee from transporting his vessel or package of intoxicating liquor from the nearest place of delivery to the nearest carrier to the place where such liquor is to be used." All semblance of such doubt is removed by § 7 of the act, which specifically provides that no carrier shall within prohibition territory turn over or deliver any intoxicating liquor, under any circumstances whatever, to any consignee whomsoever, except when consigned: First, to a druggist; second, wine to any bona fide church or religious society for sacramental purposes; third, alcohol to any person for chemical, mechanical, or manufacturing purposes. Section 9 of the act permits intoxicating liquor to be sold by a druggist and delivered to a sick person on a written prescription of a physician who has personally examined such sick person and



shall therein state that such person is in immediate need of the kind and amount of liquor prescribed, and shall also state definitely the place where such liquor is to be used or administered. Under § 13 of the act any consignee, purchaser, or person to whom any intoxicating liquor shall be delivered under the provisions of the act may receive a written permit from the sheriff to remove such liquor to another designated place, and the giving of such permit is wholly within the discretion of such officer.

No intoxicating liquors except those that are held and to be disposed of and used for the purposes aforesaid are permitted to be transported under this act within prohibition territory in this state by any person, as principal, clerk, or servant. The whole state is declared to be prohibition territory by the decision in this case. "Intoxicating liquor" is defined by the act to include all distilled, spirituous, vinous, fermented, or malt liquor which contains more than  $\frac{1}{4}$  of 1 per cent by volume of alcohol, and all alcoholic liquids, compounds, and preparations, whether proprietary, patented, or not, which are potable, and which are capable of or suitable for being used as a beverage. It is thus clearly made to appear that no legal owner of any cider, wine, or beer containing more than  $\frac{1}{4}$  of 1 per cent of alcohol, whether heretofore legally made by himself, from his own apples, grapes, or other products grown by himself, or whether heretofore legally purchased and stored in his cellar or home for his own and his family's private home use as a beverage, is permitted by this act to transport and remove the same, either by himself or by another, to another place or home to be there used by himself and family as a beverage. It also prohibits all possessors and owners of all other intoxicants whatever that were heretofore legally bought and stored by them and for their own private use as a beverage from in any way

transporting such liquors to any other place or home they may desire or have necessity to remove them in order that they may use them for such purpose.

It ought not to require any learned discussion or citation of authorities to convince any court or lawyer that such a restriction upon the use or upon the transportation of property for private use is an invasion of the constitutional right of every citizen in this state. No court has ever declared, so far, as I know, that a man has not the constitutional right to use as a beverage intoxicating liquor legally purchased and stored by him for such purpose, when used in moderation. He is denied that right when he is prohibited by statute from removing that liquor to another home or repository when necessity compels him to remove it in order that he may so use it. Such a denial is an invasion of his right of property. The decision of the court in this case recognizes the right of property in the owner of the beer mentioned in this case and holds that it cannot be destroyed under this act, but must be restored to such owner; yet in the same decision the court sustains the act which provides that it cannot be legally transported to or by the owner, to be used by himself as a beverage. It is his property and must be restored to him, but he cannot move and use it for any purpose except as provided by the act. This amounts virtually to confiscation when we come to consider the proposition that beer's recognized use in this country is almost exclusively as a beverage.

I believe that this statute is also entirely void as to the provisions in reference to the transportation of intoxicating liquor. It is clear that it is void in the particular already named, wherein it prohibits an owner from transporting such liquor to another home or place for his own use when necessity compels him to remove it to secure him such use. The general rule is that a statute void in part is void as a whole, if

all the provisions of the act are so interwoven as to be incapable of distinct separation or are of such a character that it cannot be said that the legislature intended that the valid parts shall be enforced if the other parts fail. 1 Lewis's Sutherland, Stat. Constr. 2d ed. § 270. The rule is more stringent in regard to criminal statutes. "A law void as to certain property (intoxicating liquors) already possessed at the passage of the law, but which would be valid if confined to such property subsequently acquired, is wholly void, being general, so as to include both in penal destruction of value." *Id.* § 299. I am satisfied that the legislature would never have passed the Search and Seizure Act with reference to the transportation of intoxicating liquors if it had known that so much of it was void as has been declared so by the opinion of the court in this case and as indicated in this dissenting opinion.

It necessarily follows from the foregoing discussion that it is my judgment that plaintiff in error Marquis was not proven guilty of any offense against the laws of this state. He was simply charged with unlawfully transporting intoxicating liquors containing more than  $\frac{1}{2}$  of 1 per cent alcohol in a certain auto truck over certain public highways in the county of McHenry, within prohibition territory, etc. It was neither charged nor proved in the trial the purpose for which the liquors were to be transported and used. If they were to be used by the consignee and legal owner for his own private use as a beverage, such transportation and use were legal, although prohibited by said act. Such an owner for such a use had a right to transport such liquors, either by himself or another as his agent, and the agent would be no more guilty of an offense against the law than his principal. If the act of transportation had been for the unlawful purpose of selling the intoxicating liquor, and the act prohibiting its transportation for sale could be sustained as

valid on that ground, the court could not then legally assume, without proof, that the transportation was for such unlawful purpose merely because of the fact that Marquis was purposely avoiding certain towns and counties where he might be arrested under this act. The act provides that it is unlawful for the owner to transport such liquor for his own use, which rendered that much of the act void, but Marquis was as likely to be arrested for the violation of that part of the law as any other portion of it that might be held valid. So in any event, whether the act be only void in part or void in toto, he cannot be properly convicted under the evidence. When a person's acts and conduct are such as to lead to two reasonable conclusions, one that he is evading certain towns and counties because he is likely to be arrested for doing a lawful act prohibited by an invalid part of a statute, and the other that he is doing an unlawful act prohibited by the same statute, he is entitled to the presumption that he was doing the lawful act, and not the unlawful act. Marquis did not have to intentionally take all chances of an unlawful arrest to be entitled to his legal presumption of innocence. So in any view of the case I do not think the state made out any case against him. The judgment as to him should be reversed.

For the foregoing reasons I respectfully dissent from that part of the decision of the court sustaining the judgment of conviction as to plaintiff in error Marquis.

Farmer, J., also dissenting:

I agree with that part of the opinion of the court which holds that the provisions of the act authorizing the destruction of property are unconstitutional and void, and I agree with the dissenting opinion of Mr. Justice Duncan that those provisions are so interwoven with the other provisions of the act and are so material a part of it that it cannot be presumed the legislature

intended that if those provisions were void the remainder of the act should be retained and enforced. It is my view, therefore, that the en-

tire act should be held unconstitutional.

Petition for rehearing denied February 5, 1920.

## ANNOTATION.

### Constitutionality of statutes providing for confiscation or destruction, without notice, of intoxicating liquors, and vehicles or other property used in connection with same.

- I. In general, 888.
- II. Theory of nuisance per se, 888.
- III. Proceedings in rem, 889.
- IV. Decisions requiring notice, 891.
- V. Miscellaneous, 893.

#### *I. In general.*

For forfeiture by innocent vendor of article sold conditionally and used by vendee in violation of law, see the annotation to *H. A. White Auto Co. v. Collins*, 2 A.L.R. 1596.

For constitutional guaranties against unreasonable searches and seizures as applied to search for or seizure of intoxicating liquor, see the annotation to *State v. Marxhausen*, 3 A.L.R. 1514.

It will be seen that it is held in the reported case (*PEOPLE v. MARQUIS*, ante, 874) that a statute is unconstitutional which directs that intoxicating liquors, and the vehicles used to transport them in prohibition territory, shall be seized and destroyed, when such statute is without provisions requiring notice to the owner or person interested other than the person in possession, the owner in this case being not in possession and being, it was alleged, innocent of any guilt; as such statute did not afford due process of law.

#### *II. Theory of nuisance per se.*

A statute providing for the destruction of intoxicating liquors without notice to the owner has been sustained on the ground that the liquor is an outlaw; as, for example, where the statute declared that there shall be no property rights in intoxicating liquors when possessed in a quantity in excess of that permitted by the statute. Thus, in *Delaney v. Plunkett* (1916) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E.

561, Ann. Cas. 1917E, 685, it was held that "liquors of the prohibited classes cannot be kept at all in certain places, cannot be kept in excess of limited quantities anywhere, and cannot be sold; and where such liquors are kept in excess of the quantities allowed, the keeping or possessing of them is unlawful. The qualities of property theretofore existing in them were taken away, and it was competent for the legislature to declare that they should be seized, condemned, and destroyed, upon order of the judge of the court having jurisdiction; and such provision was a valid exercise of the police power of the state, and not unconstitutional on the ground that it did not provide for a hearing." The court said: "No hearing was necessary before the issuance of an order by the proper court for the destruction of the liquors seized and taken in accordance with the directions of this act. The liquors on hand in each case were in excess of the amount which the law allows to be in the possession of any one person at one time. Consequently the possession was unlawful. Under the provisions of the law, the person in possession had no right to keep the liquor for his personal use, nor for any domestic or social purpose. If he could not have it in possession, he could not handle it; and, of course, under our law as it stands, he could not sell it. . . . A hearing, where it was admitted that the thing seized was liquor in quantities in excess of that allowed by law, was entirely unnecessary. Suppose that a hearing had been had, what questions could have been raised before the judge? If it had been contended that the liquors seized were not intoxicating nor alco-

holic, that they did not belong to any of the inhibited classes, or that they were not in quantity such as to make their possession unquestionably unlawful, and that they were about to be destroyed, then there would have been subject-matter for a hearing and a trial. So far as this act provides for the seizure, condemnation, and destruction of liquors, it provides for nothing more than for the seizure and destruction of that which it is absolutely unlawful to keep. And the seizure of these goods, in the present cases, their condemnation, and the order for their destruction, violated no constitutional right."

Where the party complaining was an innocent lienor of an automobile whose lien existed prior to the statute, the court sustained as a valid exercise of the police power such statute, which provided for the forfeiture and sale of a vehicle used in the unlawful transportation of intoxicating liquors upon the conviction of the person in charge thereof and seized therewith, after a trial of such person upon a complaint filed against such person and also against the vehicle, the statute declaring that "said party and vehicle shall be held for trial as in a criminal action." The court said: "We hold that, upon seizure of the car and conviction of the owner, the car, in the language of the act, became 'a common nuisance' in which there was 'no property rights of any kind whatsoever.'" *Robinson v. Cadillac Motor Car Co. v. Ratekin* (1920) — Neb. —, 177 N. W. 337.

### III. Proceedings in rem.

Statutes requiring the destruction of intoxicating liquors and their vehicles are usually considered as providing for a proceeding in rem. These statutes as a rule require notice to be given to the keeper or owner, if known, and often provide for posting or publishing notices. Statutes of this character would seem to be valid within the general theory of proceedings in rem, that is, that possession of the res gives jurisdiction, and that the seizure is notice to everybody, including the person in possession, who is in

theory the owner or his agent, and that no other notice is required unless provided for by the statute. A heavy strain is put upon this doctrine by cases such as the reported case (*PEOPLE v. MARQUIS*, ante, 874), where it appears that it was sought to forfeit the automobile of an innocent party under a statute which did not necessarily require notice to him. And as has been seen, it was held by the court that by reason of the failure to require notice such a statute did not afford due process of law. The court does not characterize the proceeding as one in rem, but such it seems to have been. No state of affairs can be satisfactory which enables the government to forfeit the lawful property of an innocent person without compensation.

Statutes providing for the destruction of intoxicating liquors by means of a proceeding in rem are valid although they do not require personal notice to the owner. *Campbell v. State* (1908) 171 Ind. 702, 87 N. E. 212; *Steward v. State* (1913) 180 Ind. 397, 108 N. E. 316; *State v. McManus* (1902) 65 Kan. 720, 70 Pac. 700; *Stahl v. Lee* (1905) 71 Kan. 511, 80 Pac. 988; *Lincoln v. Smith* (1855) 27 Vt. 328; *Johnson v. Williams* (1876) 48 Vt. 565; *State v. Intoxicating Liquor* (1909) 82 Vt. 287, 73 Atl. 586; *Landers v. Com.* — Va. —, 101 S. E. 778.

See also *Farley v. Liquors Seized in Car* (1913) 80 Misc. 32, 141 N. Y. Supp. 696, *infra*, IV.

In *Tracey v. Corse* (1874) 58 N. Y. 143, the court said: "That the proceeding is in rem does not dispense with the rule of universal justice, that a party shall not be condemned without an opportunity to be heard. It is true that he is not entitled to personal notice before a court can adjudge the forfeiture of his property, but he must have notice, either actual or constructive, of the proceeding or it will be void. The custody of the res may be constructive notice that the court having possession will proceed to adjudicate upon it, and notice may be given in this way or by publication, according to the usual practice of the court, and then he is bound to defend or as-

sert his rights if he has any. Notice in this way may never in fact reach him; in many cases the giving of personal notice is impracticable, nor is it required; but the rule requiring notice, either actual or constructive, is fundamental and ought never to be departed from."

In a proceeding in rem for the destruction of intoxicating liquors the court said, referring to the statutory requirement that a copy of the warrant and notice of the hearing be posted if no one was found in possession of the liquors: "The notice by posting provided is constructive notice, and is notice to all persons claiming an interest in the property. The matter of notice in such cases is a legislative one, and constructive notice is sufficient." *Campbell v. State* (1908) 171 Ind. 702, 87 N. E. 212. The same was held in *Steward v. State* (1913) 180 Ind. 397, 103 N. E. 316.

A statute providing for notice to the keeper of the liquors, who is maintaining the place where they are kept as a common nuisance, and for a posting of a copy of the notice in such place, is sufficient, as the proceeding is one in rem as to the liquors regardless of whether there has been an arrest or conviction of the person charged with maintaining such place. *State v. McManus* (1902) 65 Kan. 720, 70 Pac. 700; *Stahl v. Lee* (1905) 71 Kan. 511, 80 Pac. 983.

In *Lincoln v. Smith* (1855) 27 Vt. 328, the court upheld a statute providing for the destruction of intoxicating liquors kept for the purpose of sale, which declared that "the owner or keeper of the liquor so seized, if he be known to the officer seizing the same, shall be summoned by him to appear forthwith before the justice issuing the warrant; and if he fail to appear, or to show by satisfactory evidence," etc., "such liquor shall be adjudged forfeited, and shall be destroyed." The court considered the proceeding one in rem and said: "The statute makes it the duty of the officer to summon the owner or keeper, etc., if known to him. What possible objection is there to this? If it should be said that the officer may summon

a person, as owner or keeper, on mistaken ground, and that the property might be condemned and destroyed without an opportunity being given to the true owner to appear and defend, a sufficient answer to this is, if such should be the case, and the property be proceeded against without any further notice, that the true owner would not be bound by the proceeding." But stated further: "As in the present case Lincoln was summoned by the officer to appear before the magistrate, and did appear to claim the property, there is no occasion to spend time with the 13th section, which provides for giving notice, and prescribes the course of proceeding where the owner or keeper is unknown to the officer."

In *Johnson v. Williams* (1876) 48 Vt. 565, supra, the court said: "The proceedings were strictly in compliance with the provisions of the statute. They are in the nature of proceedings in rem, and, if regular, fix the status of the property, and in that respect are binding upon all the world. All the notice required by the statute was given. The person to whose keeping the plaintiff had intrusted this property was notified. If he failed to appear to contest the adjudication of forfeiture, or to notify the plaintiff, so that he could appear for that purpose, the consequences of such failure must fall upon the plaintiff. It does not avoid the legality of those proceedings, or change the status of the property as fixed by that adjudication."

In *State v. Intoxicating Liquor* (1909) 82 Vt. 287, 73 Atl. 586, supra, the court, in sustaining the statute, said: "It is objected that the statute on which the proceeding is founded is unconstitutional because it nowhere provides for notice to the owner of the liquor seized unless he is known to the officer making the seizure. It is said that the previous statutes providing for the seizure and condemnation of liquor, and whose constitutionality has been upheld by this court, have had a provision for some kind of notice in such cases. But none of them had a provision for

any kind of notice except by summons, only when no one was known who could be notified in that way, not only the owner, but the keeper and possessor as well, in which case a written notice of the proceedings was to be posted in some public place for such a time. But now, if the owner or keeper of the liquor is unknown to the officer, and no one is found in possession or custody of it, instead of posting a notice of the proceedings, the owner or occupant of the building or apartments in which the liquor is found is to be apprehended if known to the officer or can be ascertained by him. This mode of notifying the owner in the event named, is a substitute for the former mode of notifying him by posting the proceedings in the like event. So it cannot be said that the statute is essentially different in this respect from what it was when its constitutionality was upheld by the court. But to consider the matter farther,—the theory of the law is, as said in *Windsor v. McVeigh* (1876) 93 U. S. 274, 23 L. ed. 914, that all property is in the possession of its owner in person or by agent, and therefore that its seizure will operate to impart notice thereof to him."

In *Landers v. Com.* (1919) — Va. —, 101 S. E. 778, *supra*, the court said: "It must be borne in mind that this is a proceeding in rem, and that personal service of notice is not necessary to its validity. . . . The citation provided by clause (a) is a general citation of 'all persons concerned in interest,' and the method of service prescribed is by publication. The persons concerned in interest may be wholly unknown, but that is immaterial. If the publication is duly made, the interest of such persons will be as completely forfeited as if their names were inserted in the publication. . . . The seizure of the res brings it into the custody of the court, but does not confer jurisdiction upon the court to render a judgment in rem. It is just as essential in such case that there should be constructive notice as it is in personal judgments that there should be personal notice. The legislature may prescribe such form of no-

tice as it sees fit. The manner of notification is immaterial, but the notification itself is indispensable. *Windsor v. McVeigh* (U. S.) *supra*."

It may be noted that in *State v. Brennan's Liquors* (1856) 25 Conn. 278, the court said, in a case where the keeper of the liquors appears to have been the owner: "The proceeding in this case is a proceeding in rem. The statute provides that liquor unlawfully kept for sale shall be deemed a nuisance. The object is to have it seized and destroyed as such. After the liquor has been seized, and thus brought within the jurisdiction of the magistrate, he is to appoint a time and place for the hearing, and give notice to the person in whose possession it was found, and all other persons interested, by serving a written notice upon him, and setting up another upon the public signpost, for a period of at least two weeks, for them to appear, if they see cause, and defend. And any person may appear and be made a party defendant. . . . It is to be presumed that the magistrate will discharge the duty conferred upon him properly; that he will not decree a forfeiture, if the party in interest is not before the court, without giving him due notice to appear; or if it should appear that the person having it, with intent to sell, was a mere trespasser, and the true owner was chargeable with no fault or neglect."

#### IV. Decisions requiring notice.

If the proceeding for the destruction of the liquors is criminal it will of course require all the constitutional safe guards of criminal proceedings.

A state (Rhode Island) statute providing that intoxicating liquors "be seized and detained, and adjudged forfeited, if the owner or keeper fail to appear, and if he do appear, that he shall be fined or imprisoned, if found guilty," brings into action "a criminal process both against the owner and his property," and if it provides for no notice to the owner and permits him to have a jury trial only on certain onerous conditions, it is invalid. *Greene v. Briggs* (1852) 1 Curt. C. C. 311, Fed. Cas. No. 5,764.

Where a statute provides for confiscation and forfeiture of intoxicating liquors by a proceeding both civil and criminal, and does not provide for notice to or a trial of the accused, it cannot be sustained. *Hibbard v. People* (1856) 4 Mich. 125.

Compare Kansas cases *supra*, III.

• It has been held that where a statute for the forfeiture of liquors unlawfully kept for sale provided for no notice of any allegation of the facts necessary to warrant a forfeiture or of any proceeding against the liquors to be given, the provision as to forfeiture was void. *State ex rel. Potter v. Snow* (1854) 3 R. I. 64, followed in *Greene v. James* (1854) 2 Curt. C. C. 187, Fed. Cas. No. 5,766.

A town ordinance declaring a nuisance all intoxicating liquors kept within the limits of said town, for the purpose of being sold or given away, as a beverage, to be drunk within said town, and directing the police officers to abate said nuisance by removing the liquor beyond the town limits, cannot authorize the officers to take the property away without giving the owners an opportunity to be heard before a court in defense. *Darst v. People* (1869) 51 Ill. 286, 2 Am. Rep. 301.

In condemning charter and ordinance the court in *Sullivan v. Oneida* (1871) 61 Ill. 242 said, *inter alia*: "The charter permits their seizure without any notice to the owner. The ordinance is but a slight, if any, improvement. It authorizes the seizure of the liquors and the arrest of the person. But if he is not found, no notice, actual or constructive, is provided for."

See also the reported case (*PEOPLE v. MARQUIS*, ante, 874).

In *Fisher v. McGirr* (1854) 1 Gray (Mass.) 1, 61 Am. Dec. 381, where the court condemned a statute for the destruction of intoxicating liquors, it is not very clear what defects were considered vital, but the decision is perhaps based on the general looseness of the statute. The court seems to consider that though the proceeding be *in rem*, it is very highly penal, and should be conducted with the strictness of a

criminal proceeding, including notice to the owner.

Where the notice which was to be delivered to the keeper if present at the time of the seizure, a copy of which was also to be posted, was to those claiming any right, title, or interest in the liquors, it was held in *Clement v. Liquors Seized* (1909) 62 Misc. 27, 115 N. Y. Supp. 162, that the "innocent owner of bottles in which beer is kept by a third person in violation of the New York Liquor Tax Law will not lose such bottles under the statute providing that liquors kept 'for the purpose of sale or distribution therein, in violation of the provisions of this act, and the vessels in which such liquors are contained, are declared to be a nuisance and are forfeited to the state when seized, and such forfeiture declared in the manner provided in this section.'" The court, after pointing out that the legislature had not absolutely prohibited the manufacture or sale of intoxicating liquors, said: "While, within the reasonable exercise of its police power, the legislature may provide for the confiscation, forfeiture, and destruction of liquors kept for the purpose of sale or distribution contrary to the Liquor Tax Law, and may perhaps have the right to provide for a destruction of the vessels containing such liquors when owned or claimed by the guilty possessor, I cannot concede the right to order the destruction of such vessels when owned or claimed by another without any manner of notice to such owner or opportunity to be heard. . . . I fail to see that the destruction of bottles in such a case has appropriate or direct or in any manner necessary or reasonable connection with the main purpose of the law; and in so far as said section directs such destruction without regard to the ownership of the vessels it is not a fair and reasonable exercise of the police power, and is in conflict with the constitutional provisions" prohibiting the deprivation of the property of a person without due process of law.

After the decision of *Clement v. Liquors Seized* (N. Y.) *supra*, the legislature of the state of New York passed § 33 amending the defect in

§ 31c of the Liquor Tax Law, by providing that notice be given to the owner of the vessels containing the liquors, and giving such owner an opportunity to be heard. Under this amended statute it was held in *Farley v. Liquors Seized in Car* (1913) 80 Misc. 32, 141 N. Y. Supp. 696, that bottles of an innocent owner might be forfeited in an action in rem as the amendment removed the objection to the former act, and therefore the statute as amended did not violate the Constitution of the United States or of the state of New York, providing that no person shall be deprived of property without due process of law.

#### V. Miscellaneous.

It may be noted that it was held in *Herlihy v. Donohue* (1916) 52 Mont. 601, L.R.A.1917B, 702, 161 Pac. 164, Ann. Cas. 1917C, 29, 14 N. C. C. A. 1022, that "militia officers called to suppress an insurrection are personally liable for destroying without hearing or adjudication the stock of a saloon keeper for neglecting to obey an order to keep his saloon closed between specified hours, where there is nothing to show necessity for such destruction."

In *Beavers v. Goodwin* (1905) — Tex. Civ. App. —, 90 S. W. 930, it was held that an act providing for the seizure of intoxicating liquors without stating what is to be done with them is unconstitutional.

Where intoxicating liquors were seized under a statute providing for such seizure without notice to anyone, on an affidavit of belief that they were being kept or offered for sale or sold in violation of law, the statute provided that "any person may, by affidavit, claim the liquor seized, and there-

upon an issue is to be made up to try the claim. If no one claim the liquors, they are to be destroyed." It was held that one who had made claim to the liquors could not insist that the statute was unconstitutional as not providing for notice. The court said that whether the statute "is constitutional or not,—and we are inclined to think it is, although not now deciding that point,—this appellant is in no condition to question it on the ground on which he puts his assault. His own contention is that the act is unconstitutional because not providing for notice, and yet the appellant appeared, and has contested the case through all the courts. The only purpose notice would serve has been accomplished in his case, and courts do not pass upon the constitutionality of statutes at the instance of parties not in a position to question them." *Quin v. State* (1903) 82 Miss. 75, 33 So. 839.

While beyond the scope of this annotation as not discussing the constitutional question, reference may be here made to *State v. Davis* (1919) — Utah, —, 184 Pac. 161, where the court reversed a judgment of forfeiture of an automobile in which intoxicating liquors were being illegally transported, on the ground that the statute, while authorizing the confiscation of such vehicles in general, did not exact the confiscation of vehicles as against innocent owners or lienors who were without knowledge or information as to the illegal use. Frick, J., wrote a dissenting opinion, expressing the view that the statute did not expressly authorize the confiscation at all of the vehicles in which liquor was being transported, and that the courts should not by construction give such a meaning to the statute. B. B. B.



## BANK OF OXFORD, Appt.,

v.

J. S. LOVE et al., State Bank Examiners.

*Mississippi Supreme Court (Division A) — June 19, 1916.*

(111 Miss. 699, 72 So. 133.)

**Bank — supervision of examiners — impairing contract rights.**

Placing under the supervision of state bank examiners a bank whose charter gives control of it to its stockholders, so that the examiners may make certain requirements as to capital, collaterals, and general conditions, and require its liquidation under certain circumstances inimical to the public interests, does not impair its constitutional contract rights.

[See note on this question beginning on page 898.]

**APPEAL** by complainant from a decree of the Chancery Court for Hinds County (Taylor, Ch.) sustaining a demurrer to and dismissing a bill filed to enjoin defendants from interfering with plaintiff's affairs, and to recover money paid by it under protest for their support. *Affirmed.*

The acts are stated in the opinion of the court.

Messrs. Mayes & Mayes for appellant.

Mr. George H. Ethridge, Assistant Attorney General, for appellees.

Holden, J., delivered the opinion of the court:

The appellant, Bank of Oxford, filed its bill in the chancery court of Lafayette county, seeking to enjoin the state bank examiners, J. S. Love et al., appellees, from interfering, under the State Banking Law enacted in 1914, with its stockholders and directors in the administration of its internal affairs, and to recover the money paid by it under protest under the State Banking Law for the support of the said bank examiners. From a decree denying the relief sought by the Bank of Oxford, it appeals here.

Briefly stated, the allegations of the bill are that the Bank of Oxford was organized under and incorporated by a special act of the Mississippi legislature approved in March, 1872; that said incorporating act was promptly accepted by appellant, the requisite amount of capital stock paid in, and that the corporation duly organized and commenced its banking business under such charter, and has conducted its business as such continuously from the date

of its organization up to the date of the filing of this bill; that, in and by said charter, it was provided, amongst other things, that the bank shall have the right and exercise the privileges appertaining to a general banking, exchange, and brokerage business, with all the powers of a body corporate; that § 4 of said bank charter provides "that the business of said bank shall be confided to and controlled by its stockholders under such rules of laws and regulations as said company may see fit to adopt, provided that the same be not in conflict with the Constitution of the United States or of this state."

The bill then sets forth the enactment by the Mississippi legislature on the 9th day of March, 1914, of the act establishing a banking department, and that by § 10 of such act it is provided that the bank examiners thereby created should examine twice a year, and oftener if necessary, at irregular intervals and without prior notice, the banks organized under the laws of the state; that § 11 of said act provides that at such examinations the examiners should have the power and duty to examine the cash, bills, collaterals, securities, books of account, the

condition of affairs at the bank, the mode of conducting and managing the affairs of the bank, the actions of its directors, and the investment of the funds of the bank; that § 21 of said act provides that if any bank examiner should, from any such examination, be of opinion that any bank is insolvent, or that its condition is such that a further continuance of its business is hazardous to its creditors, depositors, or the public, or that the bank has failed to comply with any rules or instructions provided by law, he should forthwith call a meeting of the board of examiners and report the facts to such meeting; that § 20 of said act provides that if the said board should find any bank is attempting to do business with less than the minimum capital required by law, or without having its full capital stock paid in, or that any bank is insolvent, or that any bank has for any reason failed, it shall be the duty of the board of examiners forthwith to liquidate the said bank as provided in such statute; that such board should proceed to liquidate the business if the bank has made a payment of dividends contrary to law, or made any charges against the surplus account contrary to law, or suffered its capital to remain impaired after a thirty-days' notice, or allowed its reserve fund to remain below the minimum after thirty days' notice, or for persistent violation of any other provisions of the law. The bill then sets up the guaranty clause of the United States Constitution (art. 1, § 10), and alleges that because of such charter and such constitutional provision the state legislature had no power to subject the affairs of the appellant bank to the inspection, examination, decision, and control of said board of examiners, or to give the board of examiners any power in connection with or over the management of the bank's affairs, or to order or superintend any liquidation thereof. The bill then sets forth that the bank examiners, J. S. Love et al., appellees, were

threatening to interfere with the affairs of said bank and to exercise the power provided for by said act of the state legislature, applying the same to said bank; and it invoked its immunity and exemption from such supervision and control under said contract clause of the Constitution of the United States. The prayer of the bill asks for an injunction against the bank examiners from interfering with its affairs, and also for a return of the tax so paid by it under such protest.

To this bill bank examiner J. S. Love et al., demurred; which demurrer was sustained by the chancellor, and the bill was dismissed.

The question presented to us here for decision is whether or not the Bank of Oxford, holding a legislative charter of date March —, 1872, which provides "that the business of said bank shall be confided to and controlled by its stockholders under such rules of law and regulations as said company may see fit to adopt, provided that the same be not in conflict with the Constitution of the United States or of this state," is exempt from the operation of the State Banking Law enacted by the legislature in 1914; in other words, whether or not said bank, by its charter, is immune from the supervision and regulation provided for by the said Act of 1914. It will be observed that the appellant bank does not contend that the supervision and regulation of state banks imposed by said Act of 1914 is unreasonable, but appellant's contention here is based solely upon the ground that the act of the legislature of 1914 is not to be applied to it, as this would be an impairment of its charter rights of contract with the state, and therefore violative of its constitutional right of contract under the guaranty clause of the Federal Constitution (art. 1, § 10); that on account of the contract with the state as evidenced by its charter granted in 1872, the legislature now has no power to subject the affairs of the bank to the rules and

regulations as provided in the said Banking Law of 1914.

It is not clear to us that the operation of the State Banking Act of 1914 conflicts with or interferes with the substantial rights of the appellant bank under its charter. The law undertakes to reasonably supervise and regulate the affairs of the bank with reference to its solvency and safety as to the public use, and public welfare; but we will concede, for the purposes of the discussion, that the Act of 1914 contravenes and interferes with the charter rights of the appellant bank, as granted to it by the legislature in 1872, in the management of its internal affairs. This raises the question of whether or not such rights of exemption, as claimed by the appellant bank under its charter, could be lawfully granted to it by an act of the legislature of 1872. In other words, did the legislature have the power and authority to grant to the appellant bank, through its charter, immunity and exemption from any reasonable regulations that might thereafter be imposed by the state under its inherent police power? We think not. It is contended by counsel for appellant that this kind of legislative contract cannot be restricted or controlled by the police power of the state, but that the police power extends only to matters affecting the public health or the public morals; but we think the authorities have settled the law contrary to the contention of counsel for appellant.

"The police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest." 22 Am. & Eng. Enc. Law, 916.

"The police power is a governmental function, and neither the state legislature, nor any inferior

legislative body to which a portion of such power has been granted, can alienate, surrender, or abridge the right to exercise such power by any grant, contract, or delegation whatsoever." 22 Am. & Eng. Enc. Law, 921.

"The nature of the business done by banks in dealing with money, receiving deposits for safe-keeping, discounting paper, and loaning money, is such and is so affected with the public interest as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exist between the bank and its patrons, and the difficulty which depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial condition of banks, are sufficient to justify police control and inspection." 22 Am. & Eng. Enc. Law, 933.

It seems to be settled by the United States Supreme Court that the banking business is affected with a public use, and that it is within the power of the legislature to enact laws under their police power regulating the banking business. *Noble State Bank v. Haskell*, 219 U. S. 104, 32 L.R.A. (N.S.) 1062, 55 L. ed. 112, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189. The rights and powers granted to the appellant bank in its charter from the legislature in 1872 are only such powers as might be exercised by an individual, subject to the regulation and control of the legislature; and the legislature had no authority to surrender this power of control and regulation in the interest of the public welfare.

"No legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079 (headnote).

"The police power of a state extends to the regulation of the banking business, and even to its prohibi-

tion, except on such conditions as the state may prescribe." Noble State Bank v. Haskell, supra (headnote).

Thus, in paragraph 3 of the headnotes of the last above-cited case, it was held that the enactment of the banking law, similar to the one in Mississippi, was within the police power of the state, and did not infringe the obligations of a charter contract. On page 111 of 219 U. S., the court, in speaking of the police power, said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

The same conclusion was reached in *Shallenberger v. First State Bank*, supra, involving the constitutionality of a Nebraska statute; and the constitutionality of the law was upheld also in the case of *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189. In the case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, the court in discussing charter rights and the contract clause of the Federal Constitution, says: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it

does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'salus populi suprema lex,' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302."

In the case of *Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193, it is said in the third paragraph of the headnotes: "A grant to a railroad company, in general terms, of authority to fix its rates of compensation, is not a renunciation of legislative power to secure reasonable rates. Every presumption is against such renunciation. But where it is clear that the legislature intended to partially renounce such control by conferring upon the company the right to fix its rates within limits, the fixing of such limits, in the charter, is a specification of what will be a reasonable exercise of the authority conferred, and is to that extent a renunciation of the state's control."

Therefore, following the sound and safe conclusions reached in the foregoing authorities, we find the law to be that the police power of the state extends to the regulation of the banking business, and it cannot be surrendered by the legislature. And we hold that the appellant, Bank of Oxford, conducting a banking business, is affected with a public use; that the Act of 1914, reasonably regulating the conduct and affairs of banks, is within the police power of the state, and is valid; and that the rights and powers granted to the appellant bank by the legislature of 1872 are null and void, in

Bank—supervision of examiners—impairing contract-rights.

so far as they conflict with the operation of the Banking Law of 1914, for the reason that the legislature had no authority to renounce the state's control over the conduct and business of the appellant bank, under its police power.

The Banking Act of 1914 was designed and enacted primarily for the purpose of regulating the affairs and duties of the banks toward the public, and to prevent injury and losses on account of negligence or fraud. The banking business is one in which the public may be easily injured and defrauded, and a law for the supervision and regulation of

the business by the state is a wholesome piece of legislation. The Act of 1914 imposes reasonable regulations, and only such restraints as make for sound banking business and a protection of the public welfare.

In view of these conclusions, we are clearly of the opinion that the judgment of the lower court should be affirmed.

Affirmed by the Supreme Court of the United States November 10, 1919 (U. S. Adv. Ops. 1919-20, p. 20) 250 U. S. 603, 63 L. ed. 1165, 40 Sup. Ct. Rep. 22.

### ANNOTATION.

#### **Examination and supervision of banks by public officers as impairment of charter rights.**

Research has disclosed but little authority directly on the question indicated by the title to this note. While there are a number of cases dealing with the question of the constitutionality of statutes relating to banks in which it was contended that charter rights were violated, the issues raised have frequently been of a somewhat general nature, and not peculiar to banking corporations. There are many cases on the question of the regulation of banks under the police power of the state. But in few of these, it seems, has the validity of governmental regulation been considered from the standpoint of its effect on charter rights. It is said in 3 R. C. L. p. 379, § 5, that "since banks are indispensable agencies through which the industry, trade, and commerce of all civilized countries and communities are carried on, the business which they transact, though for private profit, is of a pre-eminently public nature, and is therefore universally recognized as a proper subject of legislative regulation under the police power of the state."

It will be observed that the decision of the state court in the reported case *BANK OF OXFORD v. LOVE*, ante, 894) is based on the ground that, assuming that the statute in question providing

for an examination and liquidation, under certain conditions, of banks by public officers, contravened charter rights, the statute was nevertheless constitutional as a valid exercise of the police power, which the state had no right to surrender. The decision, assuming that the statute properly came within the police power, appears to be in accord with the general rule stated in 8 Cyc. 865, that "a legislature cannot, by any contract, divest itself of its police power, the maxim, 'salus populi suprema lex' necessarily applying." The decision is affirmed by the United States Supreme Court in (United States Adv. Ops. 1919-20, p. 20) 250 U. S. 603, 63 L. ed. 1165, 40 Sup. Ct. Rep. 22, on the ground that the statute, in authorizing examination and reports of banks by bank examiners, and assessing banks each year  $\frac{1}{40}$  of 1 per cent of their total assets for the maintenance of the state banking department, did not impair the contract contained in the provision of the charter that the business of the bank should be confided to and controlled by the stockholders under such rules of law and regulations as the bank might see fit to adopt, provided the same did not conflict with constitutional provisions. The court said that the charter contained nothing which purported to

take away the commonly recognized power of the state to establish such reasonable and general regulations of banks as might be essential to public safety, and to enforce them through a board supported by moderate assessments upon those engaging in the business.

A statute providing for the examination of banks by bank commissioners, and authorizing them, in case they are of the opinion that a bank is insolvent or in such condition that the further transaction of business by it would be hazardous to the public or depositors, and that the bank has exceeded its powers or failed to comply with the rules and restrictions provided by law, to apply to a justice of the supreme court for an injunction to restrain it from the further transaction of business until a hearing is had, and providing that the justice shall forthwith issue such process and after a full hearing may dissolve or modify the injunction or make it perpetual, was held in *Com. v. Farmers' & M. Bank* (1839) 21 Pick. (Mass.) 542, 32 Am. Dec. 290, not unconstitutional as applied to an existing bank, on the theory that it impaired the obligation of the contract between the bank and the state by diminishing, through an injunction granted before a hearing, the time during which the charter empowered the corporation to act. The court considered such an injunction as analogous to the compulsory process issued in other cases for the purpose of taking the subject of controversy into the custody of the law during the inquiry, of preventing further loss, and securing the means of affording redress.

In *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, it was held that contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case

it or any other bank existing under the state laws becomes insolvent, unless the statute deprives the bank of liberty or property without due process of law. The view was taken in this case that the police power of the state extends to the banking business and even to its prohibition, except on such conditions as the state may prescribe. The case was approved and followed on similar facts in *Shallenberger v. First State Bank* (1911) 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189, reversing (1909) 172 Fed. 999.

In *Re Opinion of Justices* (1852) 9 Cush. (Mass.) 604, it was held that the *Provident Institution for Savings* in Boston, the charter of which was in general terms, without a grant of particular powers or privileges as to the manner of conducting business, and did not prescribe a mode for the making of investments, but provided merely that all deposits received should be used and improved to the best advantage, was not exempt from the operation of statutes enacted after its incorporation, prescribing the mode of investment for savings banks.

And in *Malone v. Provident Inst. for Sav.* (1909) 201 Mass. 28, 86 N. E. 912, affirmed in (1911) 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661, it was held that charter rights of savings banks were not unconstitutionally impaired by a statute providing that deposits which had remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representative.

The annotation does not cover such questions as that involved in *Smathers v. Western Carolina Bank* (1904) 135 N. C. 410, 47 S. E. 893, as to the power of a legislature to enact statutes relating to stockholders' liability, as applied to existing banks. See, in this connection, *Cummings v. Spaunhorst* (1877) 5 Mo. App. 21, holding that a statute making bank officers who assent to the reception of deposits or the creation of debts by the bank, with knowledge that it is insolvent or in

failing circumstances, individually responsible for such deposits or debts, did not, as applied to the officers of a bank previously created by special charter, impair the obligation of the contract between the bank and the state. The court said: "This has nothing to do with the franchise of the corporation; but it would not matter if the corporation were incidentally affected. This corporation is subject, as are its officers, to the police power of the state, and the provisions of its charter cannot exempt it from regulations made in the exercise of that power. . . . Nor need the regulations be any more distinctly made in the exercise of the police power, than as indicating an intent to carry out a policy which the state deems essential for the protection of rights in property; and regulations so made do not, because they incidentally affect it, impair the obligation of a contract."

Without intending to cover the particular question involved, attention is called in this connection to a number of cases, some of which are cited in the reported case (*BANK OF OXFORD v. LOVE*, ante, 894), which show the broad application of the police power where banking institutions are involved, and sustain the validity, as a proper exercise of this power, of statutes imposing various regulations on banking corporations, although the opinions do not particularly consider the matter from the standpoint of impairment of contract obligations contained in the banks' charters.

**United States.**—*Assaria State Bank v. Dolley* (1911) 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189, affirming 175 Fed. 365 (bank guaranty law); *Engel v. O'Malley* (1911) 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190 (statute requiring the licensing of private bankers); *Dolley v. Abilene Nat. Bank* (1910) 32 L.R.A.(N.S.) 1065, 102 C. C. A. 607, 179 Fed. 461 (bank guaranty law).

**Idaho.**—*State use of Allen v. Title Guaranty & S. Co.* (1915) 27 Idaho, 752, 152 Pac. 189 (statute authorizing bank commissioner to take charge of insolvent bank).

**Kansas.**—*Blaker v. Hood* (1894) 53

Kan. 499, 24 L.R.A. 854, 36 Pac. 1115 (statute creating office of bank commissioner and requiring reports by banks and submission to investigation); *Schaaake v. Dolley* (1911) 85 Kan. 598, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas. 1913A, 254 (statute authorizing charter board to refuse bank charter if it determines against the public necessity of the business in the community where it is sought to establish the bank).

**Kentucky.**—*American Southern Nat. Bank v. Smith* (1916) 170 Ky. 512, 186 S. W. 482, Ann. Cas. 1918B, 959 (public policy making banking corporations subject to the visitatorial powers of the government creating them).

**Minnesota.** — *Carlson v. Pearson* (1920) — Minn. —, 176 N. W. 346 (statute imposing on the State Securities Commission the duty of determining whether a certificate of authority to do business as a bank should issue).

**Missouri.** — *Citizens Bank v. Wells* (1916) 269 Mo. 190, 190 S. W. 314 (statute authorizing directors of bank to appoint and remove cashier or other officer at pleasure).

**North Dakota.**—*State ex rel. Goodsill v. Woodmansee* (1890) 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970 (statute providing minutely for organization and government of banks and requiring incorporation).

**Oregon.**—*Mulkey v. Bennett* (1920) — Or. —, 186 Pac. 1115 (statute providing that the superintendent of banks should make an examination of a proposed bank, and should issue a charter, if on examination it appeared that the bank was lawfully entitled to begin business and the directors and officers were competent to engage in the business, and if in the superintendent's opinion the organization of the bank was justified).

**South Dakota.** — *St. Charles State Bank v. Wingfield* (1915) 36 S. D. 493, 155 N. W. 776 (statute requiring reserve fund).

**Wisconsin.**—*Weed v. Bergh* (1910) 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664 (statute requiring incorporation of private banking concerns).

The question has arisen in a number of cases as to the constitutionality of

statutes authorizing a public officer to take charge of the assets of banks upon suspicion of insolvency. But these decisions also turn on other questions than charter rights. For instance, in *State Sav. & C. Bank v. Anderson* (1913) 165 Cal. 437, L.R.A. 1915E, 675, 132 Pac. 755, affirmed in (1914) 238 U. S. 611, 59 L. ed. 1488, 35 Sup. Ct. Rep. 792, it is held that a bank is not deprived of its property without due process of law by proceedings under a statute authorizing the bank superintendent to take possession of its assets whenever he shall have reason to conclude that it is in an unsound condition, or that it is unsafe or inexpedient for it to continue business. And the authorities generally appear to sustain the proposition that a statute authorizing a state officer to take charge of a bank which he con-

cludes is in an unsafe condition, and providing also for a judicial review of such action, is within the police power of the state, and does not deprive any person of his property without due process of law, nor deny to any the equal protection of the laws. See, for example, on this proposition, the following cases: *Montgomery Bank & T. Co. v. Walker* (1913) 181 Ala. 368, 61 So. 951, approved in *McDavid v. Bank of Bay Minette* (1915) 193 Ala. 341, 69 So. 452; *Blaker v. Hood* (1894) 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115; *Jeffries v. Bacastow* (1913) 90 Kan. 495, 135 Pac. 582; *Cartmell v. Commercial Bank & T. Co.* (1913) 153 Ky. 798, 156 S. W. 1048; *State ex rel. Sparks v. State Bank & T. Co.* (1909) 31 Nev. 456, 103 Pac. 407, 105 Pac. 567.

R. E. H.

## EX PARTE WILLIAM P. CARROLL, Appt.

*Texas Court of Criminal Appeals — November 26, 1919.*

(— Tex. Crim. Rep. —, 217 S. W. 382.)

### Extradition — revocation of parole.

1. A convict whose parole is revoked because of breach of conditions is subject to extradition.

[See note on this question beginning on page 903.]

— effect of warrant — right to hold in restraint.

2. The issuance of a warrant in an extradition proceeding, the sufficiency of which is not questioned, establishes prima facie authority to hold the one against whom it is issued in restraint.

[See 11 R. C. L. 749.]

— proceeding against convict.

3. A convict is subject to extradition as well as an accused.

[See 11 R. C. L. 732.]

— burden of proof — violation of parole.

4. The issuance of a warrant by the

governor in extradition proceedings charging violation of a parole implies that the parole was violated, and the authorities of the state where the arrest is made need not show that fact.

— effect of remaining in state until expiration of time fixed in sentence.

5. The fact that a paroled convict remains in the state until after the expiration of the time limited in his sentence does not prevent his extradition for violation of his parole if he then leaves the state before the term of imprisonment has been served.

APPEAL by relator from an order of the Criminal District Court for Harris County (Robinson, J.) refusing to release him, upon hearing of his application for a writ of habeas corpus, from custody under extradition proceedings. *Affirmed.*

The facts are stated in the opinion of the court.



Messrs. Meek & Kahn for appellant.

Messrs. Alvin M. Owsley, Assistant Attorney General, and E. T. Branch, for the State:

Relator having been convicted under an indictment for forgery in Massachusetts, and not having served the time for which he was convicted, having left that state and being found in Texas, is a fugitive from justice.

Dolan's Case, 101 Mass. 219; Drinkall v. Spiegel, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 870; Bishop, New Crim. Proc. § 220, subd. 4; 2 Moore, Extradition, § 530, p. 839; Ex parte Bergman, 60 Tex. Crim. Rep. 15, 130 S. W. 174; Hollon v. Hopkins, 21 Kan. 638; People ex rel. McCoy v. Warden, 3 N. Y. Crim. Rep. 370; Colon's Case, 148 Mass. 168, 19 N. E. 164; Ex parte Reggel, 114 U. S. 652, 29 L. ed. 253, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; 20 R. C. L. art. 60.

Morrow, J., delivered the opinion of the court:

The appeal is from an order of the district court of Harris county refusing to release appellant upon hearing of his application for writ of habeas corpus. His restraint is under an executive warrant issued by the governor of this state upon the requisition of the governor of the state of Massachusetts. The issuance of the war-

rant, the sufficiency of which is not questioned, establishes prima facie the authority to hold the relator. Ex parte Nix, — Tex. Crim. Rep. —, 212 S. W. 507, and authorities therein referred to; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, and annotations in Rose's Notes on U. S. Reports, Rev. ed. vol. 13, p. 170.

The documents filed with the secretary of state and upon which the requisition was granted, which were put in evidence by relator, show that on January 13, 1913, the relator was convicted of forgery and sentenced to confinement in the penitentiary for not more than four years; that on the 25th day of July, 1915, he was permitted to go at large upon parole; that subsequently, in January, 1916, the board of paroles of

the state of Massachusetts at a meeting passed a resolution revoking the permit to be at liberty, and issued a warrant for the rearrest of the relator and his confinement for the unexpired time of his sentence, which warrant recites that the board of paroles was acting in pursuance of a certain provision of the laws of Massachusetts, and that the revocation was ordered for the reason that William P. Carroll "had left his home and employment without permission, has not reported as directed, and his whereabouts are unknown to this office."

The fact that relator had been convicted under the indictment charging him with forgery does not prevent his extradition. On the sub-  
—proceeding  
—against  
—convict.

ject, from Moore on Extradition, vol. 2, § 530, we take the following: "The term 'charged' applies to persons convicted as well as to persons merely sought for the purpose of trial. Where a person is convicted of crime, his sentence of imprisonment can be satisfied only by actual service of his term in prison. Hence, if he escapes, the term ceases to run, and he may, after its nominal expiration, be brought back to serve the unexpired balance of his term."

See Drinkall v. Spiegel, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830; Ex parte Bergman, 60 Tex. Crim. Rep. 15, 130 S. W. 174.

If it would have been permissible to show that the revocation of his parole was unauthorized or not within the scope of the power of the board of paroles (and this is questionable), such proof was not furnished; and the relator, having broken the condi-

tions upon which  
—revocation of  
—parole.  
his freedom from confinement depended, was in no better position than if he had escaped by force. Drinkall v. Spiegel, supra; Ex parte Williams, 10 Okla. Crim. Rep. 346, 51 L.R.A.(N.S.) 668, 136 Pac. 598.

It was not incumbent upon the respondent to prove the terms of the

parole. The issuance of the writ by the governor implies that it was rightfully done, and the implication obtains until overcome by proof. The affidavits found among the papers filed by the governor, in which the terms of the parole were set out and its breach declared, in no sense vitiated the warrant. The other documents accompanying the requisition were sufficient to support it. Moreover, the law does not prescribe the manner in which the executive of the fugitive state may determine the question of fact as to whether the accused is a fugitive from justice, and we are aware of no legal obstacle to the consideration by the governor of the affidavits mentioned. *Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, 52 L. ed. 121, 28 Sup. Ct. Rep. 58; U. S. Stats. Anno. vol. 2, p. 891, Comp. Stats. § 10,118; *Ex parte McDaniel*, 76 Tex. Crim. Rep. 184, 173 S. W. 1018, Ann. Cas. 1917B, 335.

The relator's evidence does not negative the fact that he had breached the parole. It does not purport to give the terms of the parole. Its extent is to say that the relator remained in Massachusetts continuously from the time of his conviction until January, 1918, and that when he was paroled all that was said to him by the warden of

the penitentiary was: "Here are \$3. You are discharged." The trial judge regarded this evidence as insufficient to discharge the burden which was upon relator to show that he was not a fugitive from justice. It was undisputed that he had been charged by indictment and convicted to serve in the penitentiary; that he was released on parole; that the legally constituted authorities had declared his parole breached and revoked; that he had not served the remainder of his term in the penitentiary; had left the state in which he was convicted, and come to Texas. The fact that he remained in Massachusetts until after the expiration of the time when his term of imprisonment would have ended is without weight on the issues involved. His attitude was tantamount to that of an escaped convict from the time his permit to remain at large was breached and revoked. The lapse of time intervening before he left the state did not satisfy the penalty against him. *R. C. L.* vol. 20, p. 570, § 59; also vol. 8, p. 231, §§ 229 and 232.

We find no error in the record. The judgment is affirmed, and the relator remanded to the custody of the sheriff.

Petition for rehearing denied January 14, 1920.

## ANNOTATION.

### Extradition of one who violates parole.

It will be seen that it is held in the reported case (*EX PARTE CARROLL*, ante, 901) that one released from prison on parole, who violates his parole, which is revoked, and who goes to another state, may be extradited as a fugitive from justice, on the theory that he is a convict whose term has not expired, and that this is so although he remained in the demanding state until after the original period of his sentence had expired.

It is the law that one released from

prison on parole who violates the terms of his parole may be extradited from another state as a fugitive from justice on the ground that he is a convict whose time has not expired, and who therefore is "charged with crime" under the United States Constitution. *Hughes v. Pfanz* (1905) 71 C. C. A. 234, 138 Fed. 980; *Drinkall v. Spiegel* (1896) 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830; *Re Gertz* (1913) 21 Haw. 526; *Re Weinhouse* (1919) — Mo. App. —, 216 S. W. 548 (obiter); *Ex parte Wil-*

*Hams* (1913) 10 Okla. Crim. Rep. 344, 51 L.R.A.(N.S.) 668, 136 Pac. 597, *EX PARTE CARROLL* (reported herewith).

So it has been held in Canada that a person from the United States who had broken his parole in that country, where he had been convicted of an extraditable offense and subsequently paroled, could be extradited, although the breaking of parole is not an extraditable offense, as he was a fugitive from justice under the Canada statute. The court said: "Possibly, a defendant who has broken his parole would not be considered a fugitive from justice within the popular meaning of the phrase, but the phrase is given an enlarged meaning by § 2 (d) of our Extradition Act, which states that 'fugitive' means a person being in Canada who is accused or convicted of an extradition crime committed within the jurisdiction of a foreign state." *United States v. Allison* (1918) — N. S. —, 42 D. L. R. 595.

In *Drinkall v. Spiegel* (1896) 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830, *supra*, it was held that a prisoner in a reformatory who violates a parole permitting him to go into one state where employment had been obtained for him, by going into another, is a fugitive from justice within U. S. Const. art. 4, § 2, providing for extra-

dition of any person charged with a crime who shall flee from justice and be found in another state.

In *Reg. v. Holloway Prison* (1898) 14 Times L. R. (Eng.) 252, where one who had been convicted in Holland, and had leave to serve his sentence later, went to England, and some time afterwards the Dutch government demanded his extradition, it was held that he must be given up as he had not been "discharged" within the terms of the extradition treaty with Holland.

But where the probation laws of a state provided for release on probation, and a statute further provided that if on a first conviction of simple larceny the person convicted makes full restitution he shall not be imprisoned in the state's prison, one indicted for larceny pleaded guilty, made what was accepted as restitution, and was allowed to go without bond on the understanding that he was released from all prosecution, it was held that he could not thereafter be extradited for the larceny. *Re Weinhouse* (1919) — Mo. App. —, 216 S. W. 548.

It may be noted that it was held in *Carpenter v. Lord* (1918) 88 Or. 128, L.R.A.1918D, 674, 171 Pac. 577, that a convict on parole is within the operation of a statute forbidding his rendition to another state when he is in custody under judgment of conviction for crime. B. B. B.

GEORGE A. HARTMAN et al., Respts.,

v.

CITY OF PENDLETON et al., Appts.

*Oregon Supreme Court (Dept. No. 1) — January 27, 1920.*

(— Or. —, 186 Pac. 572.)

**Trust — for library — right to accumulate income.**

1. Under a bequest of a fund, the annual income of which is to be expended for the benefit of a library, the income must be applied annually and not hoarded.

[See note on this question beginning on page 915.]

**Will — construction — extrinsic evidence.**

2. Where the language employed in a will is clear and of well-defined force

and meaning, extrinsic evidence of what was intended in fact cannot be adduced to explain, qualify, enlarge, or contradict this language.

**Association — right to hold property.**

3. An unincorporated association may take and hold property given it by will, at least to the extent that it cannot be taken back by testator's representatives.

[See 5 R. C. L. 312.]

**Trust — unincorporated association as trustee.**

4. An unincorporated association cannot become a trustee of a library for the use of someone else.

[See 5 R. C. L. 316.]

**Will — devise for library — interpretation.**

5. A devise of a fund in trust for a library of the commercial association of a particular city cannot, where such association owns a library, be shown to be intended for the benefit of a public library, especially where the will provides that, if for any cause the com-

mmercial association ceases to exist for a specified time, the fund shall revert to testator's estate.

**Trust — for library — power of trustees.**

6. A bequest to trustees of a fund the income of which is to be used for the benefit of a library of an association does not require the trustees to turn the income over to the association, but they may make the expenditures themselves.

**Costs — liability of trustee.**

7. A trustee of a fund established for benefit of a library will not be mulcted with costs for awaiting the judgment of the court in case a dispute arises as to the proper beneficiary, where he acts in good faith, although he does not comply strictly with the terms of the trust.

**APPEAL** by defendants from a decree of the Circuit Court for Umatilla County (Anderson, J.) in favor of plaintiffs, in a suit for the construction of the will of Samuel P. Sturgis, deceased. *Modified and affirmed.*

Statement by McBride, Ch. J.:

This is a suit primarily to have interpreted a certain clause in the will of Samuel P. Sturgis, deceased, and arises out of the following circumstances:

On the 7th day of January, 1896, Samuel P. Sturgis executed in due form a will containing the following provision: "I give and bequeath to James A. Fee and Edward D. Boyd, as trustees, the sum of five thousand (\$5,000) dollars in trust, to be invested by them, and the annual income derived therefrom to be used by them, for the benefit of the library of the Commercial Association of Pendleton, of the city of Pendleton, Oregon; but if from any cause said Commercial Association of Pendleton ceases to exist for a period of three years, then all of said \$5,000 shall revert to my estate and become the property of my wife, Lina H. Sturgis, in fee simple."

A month later Samuel P. Sturgis died from the sickness from which he was suffering when the will was executed.

We have now practically two claimants to the benefits of this bequest, namely, the city of Pendleton,

for the purpose of its municipal library, and the Commercial Association of Pendleton, for the benefit of its library.

The Commercial Association of Pendleton claims that it is the beneficiary under the terms of the will, while the defendants claim that the Pendleton Public Library, at present a municipal institution of the city, is the beneficiary. The surviving trustee under the will, taking the latter view and desiring to expend the income of the trust funds for the purposes of the library of the Pendleton Public Library, the Commercial Association, by its library committee, duly authorized so to do, commenced this suit to have the will interpreted, making the city of Pendleton, the members of its library board, and Judge James A. Fee, the surviving trustee, parties defendant, all of whom answered, setting up the claim of the Pendleton Public Library to the bequest.

Messrs. James A. Fee, R. W. Montague and Stephen A. Lowell for appellants.

Messrs. Raley & Raley for respondents.

McBride, Ch. J., delivered the opinion of the court:

This suit is not brought to correct an alleged mistake in the will of Samuel P. Sturgis. The plaintiffs claim that the testator made a perfect will, making it the beneficiary, and allege that defendants claim a different interpretation, whereupon it asks that the true purpose and intent of the document be judicially declared. The defendants, on the other hand, claim, that the Pendleton Public Library was the beneficiary, and that there are ambiguous terms used, and ask a decree construing the will to mean that the trust fund therein provided was bequeathed to and belongs to the Pendleton Public Library, and that the same is the property of the people of the city of Pendleton.

If there is any ambiguity in the terms of the will, it is latent and not apparent on the face of the instrument. Anyone ignorant of local conditions and controversies would, upon reading the clause in dispute, at once conclude: (1) That there was at the time an organization known as the Commercial Association of Pendleton; (2) that it had a library; (3) that its habitat was the city of Pendleton, Oregon, and (4) that it was the intent of the testator that the trustees named in the will should expend the income of the fund so bequeathed for the benefit of that library. If the first three of these conditions actually existed, the fourth necessarily follows as a matter of law.

Before considering the testimony in the instant case, it may be well to advert to some firmly established principles laid down for the construction of wills, because there is no branch of judicature which, beyond this, so much requires adherence to those rules which the wisdom and experience of generations have developed.

The remark of Tindal, Ch. J., in *Doe ex dem. Clarke v. Ludlam*, 7 Bing. 279, 131 Eng. Reprint, 108, is one of universal application: "I agree in the necessity of adhering

to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it."

One of these rules is this: Where the language employed in the will is clear and of well-defined force and meaning, extrinsic evidence of what was intended in fact cannot be adduced to explain, qualify, enlarge, or contradict this language, but the will must stand as written.

Will—construction—extrinsic evidence.

Applied to the concrete case, if there was in fact in Pendleton, Oregon, a library of the Commercial Association of Pendleton, extrinsic evidence cannot be introduced to show that the testator intended that the "Pendleton public library" was to be the beneficiary. The pivotal question in this case, therefore, is: Was there in existence at the time this will was executed an organization known as the "Commercial Association of Pendleton," and did it own a library? If these two facts existed, they settle the contention in favor of the plaintiff. If either is wanting, then it will be proper, rather than the bequest should be allowed to fail because of an equivocal description, for the court to seek in extrinsic evidence an interpretation of the testator's intention.

Thus, in *Re Taylor*, L. R. 34 Ch. Div. 255, 56 L. J. Ch. N. S. 171, 56 L. T. N. S. 648, 35 Week. Rep. 186, where the testator devised property to "my cousin Harriet Cloak," when in fact a cousin of that name had been married and no longer bore it, and there was another Harriet Cloak, the wife of a cousin of the testator, parol evidence was admitted to show that the latter was

the person for whom the legacy was intended.

And in *Gilmer v. Stone*, 120 U. S. 586, 80 L. ed. 784, 7 Sup. Ct. Rep. 689, where a residuary estate was given for equal division "between the board of foreign and the board of home missions," and it appeared that there were such boards in various religious denominations, evidence was admitted to show that the testator, being a zealous Presbyterian, must have intended the bequest for boards of that denomination.

On the other hand, if there is in existence a party of the name designated in the will, extrinsic evidence will not be admitted to show that another party with a different, though closely similar name, was intended.

Thus in *Tucker v. Seaman's Aid Soc.* 7 Met. 188, where one Nathaniel Tucker gave a legacy to the "Seaman's Aid Society in the city of Boston," another society, the "Seaman's Friend Society" in the same city, claimed the legacy and offered evidence to prove that the testator had no knowledge of the existence of the society named in his will; that he knew of the existence of said other society, was deeply interested in its objects, and had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy, as made to said society; that the scrivener, not knowing the existence of said society, told the testator that the name of the society was the "Seaman's Aid Society," and the testator thereupon submitted to having that name inserted. The supreme court held the evidence to be inadmissible, and sustained the bequest as it appeared in the will. The opinion of Chief Justice Shaw completely covers every phase of the proposition here discussed, and it is unnecessary to cite other precedents.

It being conceded in this case that when the will was executed there was in existence in the city of Pen-

dleton an organization known as the "Commercial Association of Pendleton," we pass to the vital proposition in this case: Did the association at the time have a library? We must, from the terms of the bequest, assume that the testator thought there was a library connected with the association, because the bequest is conditioned upon the continued existence of the commercial association. The testator says: "If, from any cause, said Commercial Association of Pendleton ceases to exist for a period of three years, then all said \$5,000 shall revert to my estate."

This is not the language of a man making a gift to the general public. If the commercial association was not the ultimate party to be benefited, why make the bequest contingent upon the continued existence of that association. If a testator makes a bequest in favor of A, it would not be unnatural that he should provide that, in case of A's death, the money should revert to the testator's estate; but, if the bequest should be made to A, with the provision that it should revert in case of the death of a stranger, the sanity of the testator would be questioned.

Here the bequest is a Siamese twin to the commercial association. It dies with it, or at least as soon thereafter as the lapse of time has demonstrated that the association is dead beyond revival. To the writer this is strong evidence that the ultimate benefit of the bequest was intended for the commercial association, and that, while no doubt the testator expected and hoped the people of Pendleton would share in that benefit, he expected that benefit to flow through the channel of the commercial association and not otherwise. He thought, and nobody was perhaps better acquainted with the facts, that the commercial association, and not the public generally, owned a library and that, through the trustees he had appointed, that library would be kept up primarily for the benefit of the association,

and incidentally perhaps for the general public.

We take it to be fairly well-settled law, at least by the better authorities, an unincorporated association may take and hold personal property, at least to the extent that the person giving or selling such property to it cannot retake it or otherwise dispose of it; so that if one gave a book, or money to buy a book, to the commercial association for its library, that person could not retake the book or reclaim the money on the pretext that the donee was incapable of holding it. Such associations would be treated in equity as quasi partnerships, each member of which would be entitled to an interest in the property donated or purchased. 5 R. C. L. 312; *Whipple v. Parker*, 29 Mich. 369; *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149; *Snowden v. Crown Cork & Seal Co.* 114 Md. 650, 80 Atl. 510, Ann. Cas. 1912A, 679, and note to case, as reported in the last-mentioned work. There is not a solitary reason for the holding of some courts that gifts to nonincorporated associations are invalid, except blind adherence to outworn precedents.

The capacity of the Commercial Association of Pendleton to found a library being established, we now advert to the testimony relative to the actual existence of such a library at the time the will in question was executed. The first mention of a library in connection with the work of the commercial association is found in its minutes of March 24, 1894, where it is recorded that the chair announced, among other matters, as one of the objects of the meeting, that it was proposed to take up the matter of establishing a library, and the further recital that "all matters were placed under discussion and fully considered."

The discussion may have had some effect, for, on April 3, 1894, we have a statement in the address of Colonel Boyd, president of the association, to this effect: "In addition

to all this a cabinet has just been placed in the middle room of the association for the reception of books and periodicals, which it is desired to present, thus making a beginning for a library which is much needed in the city. Mr. C. S. Jackson has lately donated to the association complete files of the Congressional Record for several years past and up to date, together with many valuable books, for which he has placed this association under obligation."

So far as the testimony shows, this donation of Mr. Jackson was the first thing beyond mere talk that occurred in the direction of establishing a public library in Pendleton, and, it seems fair to assume that the books given by him were intended to become the property of the association. That he hoped and expected from this little beginning, and the efforts of himself and others, a library would develop which would, under the management of the association, be valuable to the association and of use to the general public, is apparent from his testimony, and, while he perhaps did not give a thought as to where the legal title to the books presented by him would technically vest, it is plain he regarded the association as the donee.

On the same day that Colonel Boyd's address was delivered, to wit, April 3, 1894, an honorary membership in the association was instituted with a membership fee of \$20, and the fees so obtained were set aside as a sinking fund for the purpose of establishing a library, and a committee consisting of James A. Fee, Fred R. Mellis, and Jesse Farling was created, under the designation of a "library committee."

On March 27, 1894, Judge Fee, in an interview with a reporter of the *East Oregonian* newspaper, urged the formation of a public library in Pendleton, under such auspices as should secure permanency, and suggested tentatively that the commercial association should take the matter up and devote a certain sum to the support of it, as well as to the

augmentation of the volumes upon the shelf. He suggested that no member then active in the organization would be any the less attracted to the rooms of the association, and that no doubt many others would become members because they would then know that the fees and dues would go to the support of an institution which was broad, and reaching out to build up the community in a literary as well as social and business way. If the association could not do this, then he suggested that some other nonsectarian institution, which all citizens might join with in building up a creditable library, should undertake the work. The suggestion was approved editorially as one which should be acted upon, to the end that Pendleton might have a public library.

On March 31, 1894, a social organization known as the "Columbian Congress" held a banquet, at which the sum of \$75 over expenses was realized, and at the motion of Judge Fee this sum "was turned over to the commercial association to be used as a nucleus in starting a reference library for the use of the city."

On May 1, 1894, the library committee reported to the association that they had secured subscriptions in the sum of \$600, and asked the association for instructions in regard to the plan of carrying on the library work. They were given a vote of thanks and directed to formulate a plan of carrying on the library, and directed to report at the next meeting.

On May 4 or 5, 1894, a library festival was held in aid of the library. In the papers of that date the event is spoken of as having been brought about by the labors of the "commercial association library festival committee, Messrs. Fee, Mellis, and Farling." The testator, Mr. Sturgis, presided, and about \$1,700 in money and books were subscribed. The newspaper article congratulated the city on the fact that Pendleton had a library promised,

and the means of securing it assured.

At a meeting of the association on June 12, 1894, it was moved and carried that the secretary be instructed to prepare an amendment to the by-laws, making the library committee a permanent one, but there is no record that this was ever done.

On November 6 and December 4, 1894, the committee reported progress, and on January 9, 1895, reported the purchase of books and the preparation of shelves. On February 12th, it was moved and carried that the library be insured for \$1,000. On March 5, 1895, it was moved and carried that members of the association pay no fees or dues to the library, in consideration of the association bearing its expenses, and at the same meeting it was ordered that the library committee be empowered to adopt such rules and regulations as are necessary to conduct the affairs, and that Colonel Boyd be added to the library committee, and that the library be opened on the succeeding Monday.

On March 9, 1895, rules and regulations governing the control of the library were promulgated by the library committee. These rules, as a whole, are similar to those governing all public libraries, but contain provisions which, standing by themselves, would seem to rather favor defendant's contention that the commercial association was merely the host, so to speak, of another association, called the library association. The rules are entitled "Library Rules and Regulations under Which Books May Be Read and Taken from the Rooms."

The provisions above alluded to are as follows:

"(1) The commercial association agrees to furnish a room for library purposes and a room in which members of the library association may read during the afternoon of each day from 2 o'clock until 5, except Sundays, legal holidays, and days upon which special meetings of the commercial association may be



called, and to furnish lights, fuel, and a supply of current literature for library purposes, and to pay a librarian for caring for said library, and as a consideration for the benefits of the library the members of the commercial association, both active and honorary, who are in good standing, shall be entitled to membership in the library association, without the payment of any additional dues or fees.

"(2) Any person of good moral character and deportment shall be entitled to membership in said library association, upon the payment of \$2.50 initiation fee, and 25 cents monthly dues, payable monthly in advance."

Judge Fee, who took a prominent and perhaps the leading part in procuring subscriptions of money and books for the library, states that, according to his recollection of the circumstance, a contract was drawn at the same time the rules were prepared, whereby the commercial association agreed to furnish rooms, light, janitor, and librarian services, and for that concession the members of the commercial association became members of the library association, without payment of other dues or fees, while other persons not members of the commercial association were required to pay a membership fee of \$2.50 and 25 cents a month as dues. His view and recollection of the whole matter may be summed up in the following excerpt from his testimony on cross-examination:

Q. Then in the minutes of March 6, 1900, . . . appears, "President Fee appointed the following committee, library committee, Guernsey, Boyd, Foster, Lowell, and Smith," would you say that was true?

A. Yes sir; I think possibly that is true, but that is nearly six years after the library was founded. Colonel, however, being president of the association, didn't change my views as to the Sturgis books and didn't change my views that the commercial association did not own

that library, but that it belonged to the people of the city of Pendleton, who had paid for it.

Q. After that was your view of it, or if that was your view of it, why was it being conducted, and under what arrangement was it being conducted, by the commercial association?

A. I have explained that Colonel, we got together, and as the result of a conversation between myself and Mr. Sturgis the movement was started, and after it had gotten along further, and it became a thing to be dealt with on the behalf of the public, the committee was appointed to solicit funds, and it was then understood that the library belonged to the people, and was to be a public library, and that at Mr. Sturgis's suggestion, as I recall it, the contract I mentioned and the rules and regulations were prepared. Now as I intended to say, if I have not said it, Mr. Sturgis was a man of wide business experience, and, lest there should be any misunderstanding with the people who had originated the founding of the library, he suggested that a contract be prepared, which I think was prepared, and which was signed. As to the legal matters, whether myself and the other members on the library committee could enter into a contract with the association at that time on behalf of the public, is a question for the court. I thought we had that power and that is the capacity in which we were undertaking to act.

Q. It is your contention there was a contract in existence between someone representing the commercial association, and someone representing the general public, whereby this arrangement was entered into?

A. That is my recollection of having dictated that contract to Mr. Wheeler, and that it was signed at the same time that the rules and regulations were dictated to go with that contract, and I think that I stated that in my remarks at the hall in 1908, at the time the library

was transferred to the city hall, that the commercial association agreed to furnish rooms, light, janitor, and librarian service, and for that the members of the commercial association became members of the library association, and other persons were required to pay \$2.50 under the rules to become members of that association, and to pay a monthly due of 25 cents for access to the library, and that that is the way in which I have always believed that the two independent organizations existed, one representing the library association and being the library association, which was the committee in the commercial association, and the commercial association itself being the other party.

No contract of the character mentioned is found in the papers of the commercial association, and Judge Fee kept no copy; neither is there anything in the records or files of the commercial association indicating its assent to or authorization of such a contract. Judge Fee's recollection as to who signed the contract is indistinct, and, while his word imports absolute verity so far as his recollection of a transaction occurring a third of a century ago extends, it is the experience of all of us that vague memories are unsafe as evidence, and in this case it is more than possible that the witness has confounded the preparation of the rules with the preparation of a contract, especially as the resolution under which the library committee acted authorized them to prepare rules and regulations for the conduct of the library, but made no reference to any contract with anybody.

It is difficult to see how the committee of the commercial association could contract with itself, or how any officer of the association could contract for the association without express authority, and evidence of the making of such a contract would, at best, be only valuable as indicating the idea and intent of persons active in the matter, as to who were the real owners of the library. The

same may be said as to the testimony of the many witnesses introduced, as to their understanding of the situation when donations for the benefit of the library were made.

A large number of witnesses who were in a position to know, including officers and charter members of the commercial association, and the widow of the testator, testified that their understanding had always been that the library was the property of that association. A less number, though with equal means of knowledge, testified that their understanding was that the library was the property of the people of the city of Pendleton, and that they would not have made the donations had they understood that the commercial association was to be the owner of the books. The fact is apparent that little thought was in fact given by subscribers to the fund and donors to the library as to what body was to be the technical legal owner of the library. The commercial association was composed of the leading citizens of Pendleton and had the confidence of the public. When it assumed to take the lead in organizing a library, everybody was satisfied that it would act fairly by the public, and that, irrespective of the question of technical ownership, the public, under reasonable rules and restrictions, would have access to it.

No one seems to have expected that the library would be a free library in the sense that everyone could have the use of it without money and without price, and, although from the beginning the rules promulgated required the payment of a membership fee and dues, we hear of no objection to this requirement.

There were no officers or agents of the library selected by the public, or any association of the public, except the commercial association. It appointed the library committee and the librarian, and reports were made to it. It insured the books. If it was not the owner of the legal title, it is difficult to say where that

title was lodged. It could not reside in the committee appointed by the association, nor in the librarian who took care of the books, nor the janitor who swept the rooms and dusted the shelves. It was not in the persons who contributed the money to purchase books, or in those who donated books; each one of these, when he made his contribution and parted with possession of the thing contributed, was divested of the legal title thereof. He could not sue in his own name to replevin the books contributed, even from an outright thief. The commercial association might sue, and so far as we can see it was the only party who could have sued. In its capacity as

an association it could own a library; but by a long series of decisions, which

seem to have crystallized into law, it could not be the trustee of a library for the use of someone else.

From all the testimony the salient points of which we have attempted to indicate, we conclude that the commercial association had a library at the time the will was made. It was certainly the owner of the books contributed by Mr. Jackson before any other contribution was made, and we are of the opinion that the weight of the evidence indicates that the bulk of the contributions thereafter made were intended to be to the commercial association, with the expectation that it would apply them to the upbuilding of a library to which the citizens of Pendleton would be permitted to have access. The name which the library received is not material. It was sometimes called the "Commercial Association Library," but most frequently the "Pendleton Public Library," a name which was probably suggested by the testator who was active in promoting it. The library was public, and was located in Pendleton, and the name was appropriate, but giving that name did not dedicate it to the free use of everybody, nor transfer the title to the municipality.

We conclude that, at the time the testator made the will in question, there was in the city of Pendleton a library owned by the "Commercial Association of Pendleton," and that it was the intention of the testator to make that library the beneficiary. As before remarked, there is no ambiguity on the face of the will. It can only be rendered ambiguous by assuming that the Commercial Association of Pendleton had no library, and that therefore the

Will—device  
for library—  
interpretation.

testator must have intended the bequest to apply to some other institution. If the association had a library, whether of 20 or 20,000 volumes, the bequest must stand as written, and, as we have attempted to show, it did have a library, and it is evident from the concluding clause of the bequest, which made it contingent upon the continued existence of the commercial association, that this library was in the mind of the testator when he made his will, and that there was probably in his bequest the double motive: first, to make the association, of which he was an enthusiastic member, attractive and interesting; and second, to benefit the community which was enjoying the benefit of the library already installed, and perhaps further to insure the permanency of both the commercial association and the library.

But it is useless to speculate upon the motives which may have influenced the testator in making the bequest. There was in existence in Pendleton a library of the character described in the will, and, that fact being ascertained, it follows as a necessary consequence that we cannot divert the bequest to some other institution. It is very probable that were the testator making his will to-day, or if it had been made in 1908, the present library of the city of Pendleton would have been the beneficiary; but we are dealing with the situation as it appeared to the testator in 1896, and, viewing that situation in the light of the evi-

(— Or. —, 186 Pac. 572.)

dence, we are of the opinion that the library of the commercial association, the library then in its rooms and to which we find it had the legal title, was the one for the benefit of which the trustees were required to expend the income from the bequest.

Concerning the propriety of removing the library from the rooms of the association to the city hall, and thereafter to the Carnegie library building, we express no opinion. Perhaps these removals were the best that could have been done under the circumstances, and it is possible that if the last removal had been made openly, much of the exasperation and ill feeling which have crept into this contest would have been avoided.

We find that the Commercial Association of Pendleton is entitled to the custody of the books removed from the commercial association's rooms to the city hall, and to all books since purchased with funds from the Sturgis bequest.

The fact that the association consented to the removal of the books to the city hall does not, from the evidence, appear to have been a gift or a relinquishment of title, but a mere expedient to place the library in a place where it would be more accessible to the public, and the fact that since that time the commercial association has not interfered in its management must be referred to the conditions under which the books were obtained in the first place. There is no convincing, if indeed any, evidence of an intent on the part of the association to make a gift of these books to the city of Pendleton, and under the circumstances there was no necessity for it to interfere in the management of the library in its new location.

We do not interpret the will as requiring the trustees to pay over the income of the fund to the commercial association, or its library committee, to be by them expended. The bequest is to the trustees, and we think it was the intention of the

testator that they were the persons who should use the funds for the benefit of the library. <sup>Trust—for library—power of trustees.</sup>

If, in their judgment, it seemed proper to turn the income over to the association, or its library committee, to be in that way expended for the purchase of books or supplies, they had a right to do so; but we are of the opinion that, if such a course should seem best, the trustees themselves had a right to select the books or supplies, and to purchase them. The trustees were both gentlemen of more than ordinary literary acquirements, and therefore well qualified to appraise the needs of the library and to select accordingly; they were close friends of the testator, and the fact that he selected them as trustees, instead of making his bequest to the association itself, or providing that the funds should be managed by trustees selected by the institution, or by its library committee, indicates that he intended that they were the persons in whose judgment the testator intended to place discretion as to the expenditure of the money derived from the income of the fund created. The language of the bequest supports the construction above indicated: "The annual income derived therefrom to be used by them (the trustees) for the benefit of the library," etc.

Another contention arises over the construction of the words "annual income." It is contended by plaintiffs that these words indicate that it was the intention of the testator to require the trustees to expend the income annually for the benefit of the library. We are of the opinion that it was the intention of the testator that the income should be applied annually, and not hoarded. There is a dearth of authority on this subject, and we have not been able to find any case in which the phrase has been construed in connection with a case arising out of a bequest, although the <sup>—right to accumulate income.</sup> tendency of the courts seems gen-

erally against permitting accumulations unless specifically provided for in the will. The question is difficult of solution upon precedent.

A case similar in principle is that of *Catlin v. Lyman*, 16 Vt. 44, in which it is provided that the maker of a promissory note would pay the sum stated in ten years, "with annual interest," and on behalf of the maker it was contended that the word "annual," used as an adjective, was intended to modify interest, and meant only the computation of interest by annual rests, and that the whole amount, principal and interest, did not become due until ten years from date; but it was held that the contract would not be so construed, but that "annual interest," in legal contemplation, was the same as if written "interest annually," and that the interest on the note was due and payable each year.

The same principle seems applicable here, and was evidently so understood by the trustees, who honored the requisition of the library committee for books until a misunderstanding arose to which we shall presently advert. We conclude that it was the duty of the trustees to apply the income of the fund annually to the needs of the library, so long as it should be maintained by the association, or until it had ceased to exist. This conclusion suggests difficulties and is one upon which courts might differ; but, taking into consideration the general rule as to the vesting of bequests, and the particular circumstances existing at the time the will was executed, we conclude that the construction we have adopted expresses the intent of the testator. This leads to an affirmation of the decree, except so far as it allows the *cestui que trust* to select the books.

Another question arises as to costs, and as to that we think it would be unfair to compel the defendant, who has, from his point of view, only striven to protect the fund, to pay the expense of defending this action. His management

has been painstaking and admirable. In his hands, in addition to a considerable expenditure for books, the fund has trebled in amount. He has given his time and credit to increasing and protecting it. His motives have been misconstrued and his integrity assailed for doing what he no doubt thought his dead friend desired him to do in relation to the matter, and the association no doubt will now be able to secure a better library than if it had received the annual dribblets from an uncertain income.

In addition to this, he had learned from Colonel Boyd, his cotrustee, that about \$400 of the library fund of the association had been transferred to the general fund, and this impression, whether well or ill founded, seems to have created some distrust as to the proper application of the bequest by the library authorities. It is due to the association to say that there is no direct evidence that the conversion ever took place, or that, if it did, it was in any way a breach of trust, or of its professions to those who had aided in building up the library.

There is one transaction which, unexplained, probably impressed the mind of Colonel Boyd, and afterwards, when he reported it to Judge Fee, also raised a suspicion in his mind that the funds dedicated to the use of the library were being expended for other purposes, and that circumstance appears on the record as follows: In April, 1894, when the question of establishing a library was being discussed, and before any large contributions for that purpose had been made, a by-law was passed, providing for the admission of honorary members of the association at a fee of \$20, which fees were to constitute a sinking fund for the purpose of establishing a library. This was in April, 1894. In November, 1896, several months after this bequest became effective by the death of the testator in February of that year, it was resolved by the association that the sinking fund be abandoned, and the money

turned into the general fund. This, on the face of it, would appear to have been a breach of faith with the testator, and other contributors, and while the transaction may have been perfectly fair and proper, it has not been explained in the testimony, and is possibly the transaction discussed by Colonel Boyd and reported to Judge Fee, and which caused him to withhold further contributions to the fund from the proceeds of the testator's bounty.

In any event, we are satisfied that he did not act in bad faith, but upon his honest convictions and with the intent to carry out the desires of the testator, as he understood them. This has not been so plain a case that this court has been able to decide it at first blush, or indeed except with the most careful delibera-

tion, and the trustee—with one part of the community demanding the application of the fund to one library, <sup>Costs—liability of trustee.</sup> and another group of citizens to another—ought not to be mulcted in costs because he waited for the advice of the court as to how he should apply it.

The decree will therefore be modified in so far as it provides for the recovery of costs from the defendant, and, with the exception of the two modifications above referred to, the decree will be affirmed and the defendant directed to apply the accumulated surplus of the fund to the purposes of the library of the Commercial Association of Pendleton.

Harris, Benson, and Johns, JJ., concur.

### ANNOTATION.

#### Right of trustee to accumulate income under will or other instrument directing him to use it.

Cases in which some discretion as to accumulating or paying over the income was vested in the trustee by the terms of the trust are beyond the scope of the annotation.

An extended search discloses no decision in addition to that in the reported case (*HARTMAN v. PENDLETON*, ante, 904), upon the question whether a direction to testamentary trustees that the "annual income" of the trust moneys "be used by them" for the benefit of a certain charity requires an annual application of the income, or permits an accumulation thereof. The decision, however, to the effect that the income must be applied annually, and not accumulated, based as it was upon the theory that such was the intention of the testator, is seemingly in accord with the general principles usually applied in similar cases, namely, that the rights, powers, and duties of trustees, being questions of construction, are derived from and measured or ascertained by the instrument creating the trust, that the rules governing the execution of trusts generally apply to

testamentary trusts, and that, in construing wills, the intention of the testator usually controls.

There are a few analogous decisions which throw some light upon the question under annotation, and in the main support the conclusion reached in the *HARTMAN CASE*.

Thus, in *Worcester City Miss. Soc. v. Memorial Church* (1904) 186 Mass. 531, 72 N. E. 71, where it was directed that the income of a trust estate should be collected semiannually, and applied to defray the expenses of maintaining a minister and public worship in a certain house of worship, it was held that the net income should be expended from year to year for the purposes mentioned, and that no part thereof could be held back.

So, in *McLane v. Cropper* (1895) 5 App. D. C. 276, on subsequent appeal in (1895) 6 App. D. C. 122, it was held under a will giving a fund to trustees with directions "to take the rents, issues, and profits thereof and apply the same to the use of my said daughter Annie (paying the same over to her)

for life," that such daughter was entitled to all of such income, and could compel the trustees to distribute the same, although the will also required the trustees on her death to pay over "the principal thereof, with all the accumulations." The court maintained that the latter provision did not show an intention to the contrary, and that if any special significance was to be attached to the word "accumulations," it must have reference to probable increases in corporate stock, of which the estate largely consisted.

And in *Gasquet v. Pollock* (1896) 1 App. Div. 512, 37 N. Y. Supp. 357, affirmed on opinion below in (1899) 158 N. Y. 734, 53 N. E. 1125, where it was directed that the income of property bequeathed in trust be applied to the "use" of testator's daughter, it was held that the words "applied to the use of" are equivalent to the words "paid over to," and that the daughter was entitled to have the whole income paid over as it accrued, so that the trustees could not accumulate any portion thereof above what was necessary for her support. But in connection with the *Gasquet Case* see *Re McCormick* (1898) 22 Misc. 309, 49 N. Y. Supp. 1119, affirmed in (1899) 40 App. Div. 73, 57 N. Y. Supp. 548, which was affirmed without opinion in (1900) 163 N. Y. 551, 57 N. E. 1116, wherein it was held that, under a testamentary trust directing that the income be ap-

plied to the "support, maintenance, and education" of the infant beneficiary until of age, the trustees were allowed the exercise of a discretion as to the amount necessary for such purpose and an accumulation of the balance. In reaching this conclusion the surrogate (22 Misc. 309) overruled the contention that the trustees were empowered to exercise no discretion, but must apply, each and every year, the total amount of the income from the trust estate to the support, maintenance, and education of the beneficiary.

And see *Re Steele* (1899) 124 Cal. 533, 57 Pac. 564, wherein the court seems to have been of the opinion that there can be no accumulations where, under the terms of the will, the entire income is to be distributed annually.

In *Haynes v. Carr* (1900) 70 N. H. 463, 49 Atl. 638, where property was devised to trustees "to expend in their discretion, in such sums, at such times, and in such manner as may seem to them advisable, the income" thereof for certain charitable and educational purposes, it was held that the trustees were vested with a discretion only as to the details of the execution of the trust, and not with a discretion to expend or not to expend, the court saying that the direction in the will was not "to expend the income or to add it to the principal, in their discretion." G. J. C.

## CITY OF CHICAGO et al.

v.

WILLIAM L. O'CONNELL et al., Appts.

*Illinois Supreme Court — April 19, 1917.*

(278 Ill. 591, 116 N. E. 210.)

### Public Service Commission — power over street railways — right of city.

1. The legislature is not deprived of the power to confer upon a public service commission control of the schedules, routing, and style of cars of a street railway in a municipality by a constitutional provision that no law shall be passed granting the right to construct and operate any street railroad within any city without consent of the local authorities.

[See note on this question beginning on page 935.]

— exception from authority — utilities owned by municipality.

2. That a municipality has an option to purchase the street railways within its limits and a voice in their management does not bring it within an exception in a definition of public utilities over which the Public Service Commission has authority of such utilities as are or may hereafter be owned by a municipality.

**Constitutional law — taking property — regulating street railways.**

3. Neither a street railway company nor a city having an interest in its net earnings is deprived of its property without due process of law, nor is the property of either taken for public use without just compensation, by an order of the Public Service Commission made under statutory authority regulating the schedules, routing, and type of cars to be used on the road.

[See note in 5 A.L.R. 43.]

**Public utility — power of legislature to control.**

4. The legislature has power to exercise reasonable regulation and control over public utilities.

[See 25 R. C. L. 1178.]

**Constitutional law — police power — regulation of public utilities.**

5. The regulation of public utilities is a phase of the exercise of the police power of the state.

[See 25 R. C. L. 1178.]

**Legislature — power to delegate exercise of police power.**

6. The legislature may confer the right to exercise the police power upon agencies created by it, and may recall power delegated to one agency and confer it upon another.

[See 25 R. C. L. 1178.]

— discretion as to exercise of police power.

7. In the exercise of its police power the legislature may interfere with the management of public utilities whenever public interests demand, and it has a large discretion to determine not only what the interests of the public

require, but what measures are necessary for the protection of such interests.

[See 4 R. C. L. 561, 562; 6 R. C. L. 224, 228.]

**Constitutional law — exercise of police power — validity.**

8. A rightful exercise of the police power in the supervision of public utilities does not deprive them of their property without due process of law, or deny compensation, nor does it impair the obligation of any contract.

[See 4 R. C. L. 562; 6 R. C. L. 225.]

— extent of police power — control of operation of public utilities.

9. The police power does not extend to the control of the person who shall operate a public utility or to what disposition shall be made of its profits.

— impairing obligation of contract.

10. An order of a public service commission changing, under statutory authority, schedules, routing, and types of cars of a street railway company from those fixed by the contract ordinance under which the railway is operating, does not unconstitutionally impair the obligation of the contract ordinance, since, such matters relating to the comfort and welfare of the public, the municipality had no authority to make binding contracts regarding them.

[See 25 R. C. L. 1178.]

**Injunction — to test reasonableness of order.**

11. The reasonableness of an order of a public service commission cannot be tested in a proceeding to enjoin its enforcement, where the statute provides for testing it by appeal.

**Constitutional law — due process — order without hearing — rehearing.**

12. One not made a party to a proceeding before a public service commission which results in an order affecting his interests is not deprived of his property without due process of law if the statute provides for a rehearing upon his application.

(Carter, J., dissents.)

**APPEAL** by defendants from a decree of the Circuit Court for Cook County (Taylor, Jr., J.) overruling demurrers to a bill and cross bill filed to enjoin defendants from enforcing an order made by the Commission relating to the equipment and operation of cars in the plaintiff city. *Reversed.*

The facts are stated in the opinion of the court.



Messrs. P. J. Lucey, Attorney General, William B. Scholfield and Timothy F. Mullen, Assistant Attorneys General, for appellants:

The bill fails to show any defect in the passage of the act.

People ex rel. Sellers v. Brady, 262 Ill. 578, 105 N. E. 1; People v. Braun, 246 Ill. 428, 92 N. E. 917, 20 Ann. Cas. 448; People ex rel. Springfield v. Edmands, 252 Ill. 108, 96 N. E. 914; Nakwosas v. Western Paper Stock Co. 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467.

The Public Utilities Law is not in conflict with the constitutional provisions requiring a separation and distribution of the powers of government.

State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; People v. Harper, 91 Ill. 357; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Georgia R. & Bkg. Co. v. Smith, 70 Ga. 694; State ex rel. Railroad & Warehouse Commission v. Chicago, M. & St. P. R. Co. 38 Minn. 281, 37 N. W. 782; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; Sabre v. Rutland R. Co. 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; Klaffer v. State Examiners, 259 Ill. 15, 46 L.R.A. (N.S.) 532, 102 N. E. 193, Ann. Cas. 1914B, 1221.

The Public Utilities Law does not attempt to confer arbitrary powers on the Commission, since all its orders must be lawful and reasonable, and are subject to review in the courts.

State Public Utilities Commission ex rel. Beck v. Toledo, St. L. & W. R. Co. 267 Ill. 93, P.U.R.1915B, 879, 107 N. E. 774.

The act does not conflict with the constitutional provisions forbidding the passage of local or special laws in certain cases.

People v. Kaelber, 253 Ill. 552, 37 N. E. 1068; Chicago & S. Traction Co. v. Illinois C. R. Co. 246 Ill. 146, 92 N. E. 583; Danville v. Danville Water Co. 180 Ill. 235, 54 N. E. 224.

The act does not purport to vest in the Commission power and control over the streets, and though it does empower the Commission to regulate

the service of street railways within the city, it is not in contravention of § 4 of art. 11, or § 34 of art. 4 of the Constitution.

State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; Chicago & S. Traction Co. v. Illinois C. R. Co. 246 Ill. 146, 92 N. E. 583; Chicago City R. Co. v. South Park, 257 Ill. 602, 101 N. E. 201; Missouri River Teleph. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67; Denver v. Mercantile Trust Co. 120 C. C. A. 100, 201 Fed. 790; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 492, 26 Sup. Ct. Rep. 261; Metropolitan City R. Co. v. Chicago, 96 Ill. 620; Hunt v. Chicago Horse & Dummy R. Co. 121 Ill. 638, 13 N. E. 176; Doane v. Chicago City R. Co. 160 Ill. 22, 35 L.R.A. 588, 45 N. E. 507.

The order does not impair the obligation of any contract protected by the Constitution nor deprive the city of its property without due process of law, nor take the private property of the city or companies without compensation, nor deny to the city or the companies the equal protection of the laws in any unconstitutional way.

Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363, affirmed in 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Danville v. Danville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118, affirmed in 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; Freeport Water Co. v. Freeport, 186 Ill. 179, 57 N. E. 862, affirmed in 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, L.R.A.1915F, 744, 142 N. E. 491, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; Gillette v. Aurora R. Co. 228 Ill. 261, 81 N. E. 1005; Chicago v. Chicago City R. Co. 222 Ill. 560, 78 N. E. 890; Venner v. Chicago City R. Co. 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607; Chicago v. Chicago City R. Co. 272 Ill. 245, 111 N. E. 983; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

Mr. Everett Jennings also for appellants.

Messrs. Samuel A. Ettelson, Chester E. Cleveland, Ralph G. Crandall, W. W. Gurley, Horace Kent Tenney, Harry P. Weber and George W. Miller, for appellees:

Equity will enjoin the acts of public officers or bodies assuming powers which do not belong to them, or acting under an unconstitutional or otherwise invalid statute, which infringe upon or violate either public or private rights or which will result in injury not susceptible of reparation in the ordinary course of proceedings at law; or when the aid of equity is necessary to prevent a multiplicity of suits.

High, Inj. 4th ed. §§ 1308, 1309; 5 Pom. Eq. Jur. §§ 321, 322; Huston v. Des Moines, 176 Iowa, 455, 156 N. W. 883.

Equity will restrain the enforcement of an order or of a penalty for the violation of an order made by a state commission alleged to be an arbitrary, unreasonable, or unconstitutional invasion of private property rights.

Phoenix R. Co. v. Geary, 239 U. S. 277, 281, 60 L. ed. 287, 288, 86 Sup. Ct. Rep. 45; Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Towers v. United R. & Electric Co. 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170.

The city had the right to file a bill for the enforcement or protection of its rights under the traction ordinances.

Metropolitan City R. Co. v. Chicago, 96 Ill. 620; Barre v. Barre & M. Power & Traction Co. 88 Vt. 304, 92 Atl. 237.

An order of the Commission beyond its powers and jurisdiction or in violation of the Constitution is not controlled by appeal provisions, and application for relief may be made to the same courts and in the same manner as are available to vindicate personal and property rights generally.

State ex rel. Public Service Commission v. Skagit River Teleph. & Teleg. Co. 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885; Bessette v. Goddard, 87 Vt. 77, 88 Atl. 1; Railroad Commission v. Saline River R. Co. 119 Ark. 239, P.U.R. 1915F, 191, 177 S. W. 896.

If the Public Utilities Act be construed as excluding resort to any of the circuit courts of the state of competent jurisdiction to protect the property of a public utility corporation

against an order of the Commission beyond its powers or in violation of the constitutional guaranties, then such provision is void.

People v. Young, 72 Ill. 411; Berkowitz v. Lester, 121 Ill. 99, 11 N. E. 860; People ex rel. Board of Administration v. Peoria & P. U. R. Co. 273 Ill. 440, P.U.R.1916E, 795, 118 N. E. 68; Public Service Electric Co. v. Public Utility Comrs. 88 N. J. L. 603, P.U.R.1916D, 107, 96 Atl. 1013; Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595; Aurora v. Schoeberlein, 230 Ill. 496, 82 N. E. 860; Conover v. Gatton, 251 Ill. 587, 96 N. E. 522; Railroad & Warehouse Commission v. Litchfield & M. R. Co. 267 Ill. 337, 108 N. E. 347; Hoffman v. Paradis, 259 Ill. 111, 102 N. E. 253; Sixby v. Chicago City R. Co. 260 Ill. 478, 103 N. E. 249, Ann. Cas. 1914D, 539; Blake v. De Jonghe Hotel & Restaurant Co. 263 Ill. 471, 105 N. E. 323; Woodruff v. Kellyville Coal Co. 182 Ill. 480, 55 N. E. 550; Kennedy v. Le Moyne, 188 Ill. 255, 58 N. E. 903; Milne v. People, 224 Ill. 125, 79 N. E. 631; Galpin v. Chicago, 269 Ill. 27, L.R.A. 1917B, 176, 109 N. E. 713.

The order of the Commission is beyond the powers conferred by the Public Utilities Act.

Gathright v. H. M. Byllesby & Co. 154 Ky. 106, 157 S. W. 45; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; De Motte v. Valparaiso, 161 Ind. 319, 66 L.R.A. 117, 67 N. E. 985; Venner v. Chicago City R. Co. 236 Ill. 349, 86 N. E. 266; Warner v. King, 267 Ill. 82, 107 N. E. 887; Barrett Mfg. Co. v. Chicago, 259 Ill. 578, 102 N. E. 1017; Black, Interpretation of Laws, 2d ed. p. 385; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Public Service Electric Co. v. Public Utility Comrs. 88 N. J. L. 603, P.U.R. 1916D, 107, 96 Atl. 1013; State ex rel. Shaver v. Iowa Teleph. Co. 175 Iowa, 607, 154 N. W. 678, Ann. Cas. 1917E, 539; Belfast v. Belfast Water Co. 115 Me. 284, L.R.A.1917B, 908, P.U.R. 1917A, 313, 98 Atl. 738; Andrews v. Heiney, 178 Ind. 1, 43 L.R.A.(N.S.) 1023, 98 N. E. 628, Ann. Cas. 1915B, 1136; State ex rel. Public Service Commission v. Vandalia R. Co. 183 Ind. 49, P.U.R.1915B, 981, 108 N. E. 97; Lansing v. Michigan Power Co. 183 Mich. 400, 150 N. W. 250; American Ice Co. v. New York, 217 N. Y. 402, 112 N. E. 170.

The ordinance grants constitute

valid and binding contracts, constitutionally protected against impairment.

Venner v. Chicago City R. Co. 258 Ill. 523, 101 N. E. 949; People v. Chicago, 270 Ill. 188, 110 N. E. 366; People ex rel. Dwight v. Chicago R. Co. 270 Ill. 278, 110 N. E. 394; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; West Chester v. Postal Teleg. Cable Co. 227 Pa. 384, 76 Atl. 65; McKeesport v. McKeesport & R. Pass. R. Co. 252 Pa. 142, 97 Atl. 184; St. Louis & M. River R. Co. v. Kirkwood, 159 Mo. 239, 53 L.R.A. 300, 60 S. W. 110; St. Louis v. United R. Co. 263 Mo. 387, 174 S. W. 78; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Kittinger v. Buffalo Traction Co. 160 N. Y. 377, 54 N. E. 1081; Re New York & N. S. Traction Co. (N. Y.) P.U.R. 1915F, 11; Mitchell v. Dakota Cent. Teleph. Co. 25 S. D. 409, 127 N. W. 582; Vermillion v. Northwestern Teleph. Exch. Co. 111 C. C. A. 21, 189 Fed. 289; People ex rel. Dwight v. Chicago R. Co. 270 Ill. 278, 110 N. E. 394; Venner v. Chicago City R. Co. 236 Ill. 349, 86 N. E. 266; Blair v. Chicago, 201 U. S. 400, 457, 50 L. ed. 801, 825, 26 Sup. Ct. Rep. 427; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 386, 46 L. ed. 592, 607, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 515, 51 L. ed. 1155, 1163, 27 Sup. Ct. Rep. 762; Birmingham Waterworks Co. v. Birmingham, 211 Fed. 497; Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Shreveport Traction Co. v. Shreveport, 122 La. Ann. 1, 129 Am. St. Rep. 345, 47 So. 40; Barre v. Barre & M. Power & Traction Co. 88 Vt. 304, 92 Atl. 237; Christian-Todd Teleph. Co. v. Com. 156 Ky. 557, 161 S. W. 543; 3 Dill. Mun. Corp. 5th ed. § 1230; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Russell v. Sebastian, 233 U. S. 195, 204, 58 L. ed. 912, 921, L.R.A. 1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 192, 59 L. ed. 184, 191, L.R.A.1918E, 874, 35 Sup. Ct. Rep. 72,

Ann. Cas. 1915A, 906; Monett E. L. Power & Ice Co. v. Monett, 186 Fed. 860; Mitchell v. Dakota Cent. Teleph. Co. 25 S. D. 409, 127 N. W. 582.

The order impairs the obligation of the contracts between the city and the companies, the contract between the companies themselves, and the contracts between the city and the companies as against the rights of bondholders; and deprives the companies, the city, and the bondholders respectively of their property without due process of law, and takes their property without compensation.

Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 318, 58 L. ed. 229, 244, 34 Sup. Ct. Rep. 48; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Wilmington City R. Co. v. Taylor, 198 Fed. 159; People v. Chicago West Div. R. Co. 18 Ill. App. 125, affirmed in 118 Ill. 113, 7 N. E. 116; Quincy v. Bull, 106 Ill. 337; Madison v. Alton, G. & St. L. Traction Co. 235 Ill. 346, 85 N. E. 596; People ex rel. Dwight v. Chicago R. Co. 270 Ill. 278, 110 N. E. 394; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, L.R.A.1918E, 874, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906; Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; Pocatello v. Murray, 173 Fed. 382; Birmingham Waterworks Co. v. Birmingham, 211 Fed. 497; Shreveport Traction Co. v. Shreveport, 122 La. Ann. 1, 129 Am. St. Rep. 345, 47 So. 40; Detroit Citizens' Street R. Co. v. Detroit, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809; 3 McQuillin, Mun. Corp. § 1269; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Chicago v. New York, C. & St. L. R. Co. 132 C. C. A. 645, 216 Fed. 735; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 99 Fed. 812; State ex rel. Weatherly v. Birmingham Waterworks Co. 185 Ala. 388, 64 So. 23, Ann. Cas. 1916B, 166; State ex rel. Fullerton v. Des Moines City R. Co. 159 Iowa, 259, 140 N. W. 487; Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552; Venner v. Chicago City R.

Co. 258 Ill. 523, 101 N. E. 949; *Terre Haute & P. R. Co. v. Robbins*, 247 Ill. 376, 93 N. E. 398; *Gathright v. H. M. Byllesby & Co.* 154 Ky. 106, 157 S. W. 45; *Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 48 L.R.A. (N.S.) 1084, 30 Sup. Ct. Rep. 615; *De Motte v. Valparaiso*, 161 Ind. 319, 66 L.R.A. 117, 67 N. E. 985; *Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 266 Ill. 567, P.U.R.1915B, 872, 107 N. E. 841; *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 425; *Wilmington City R. Co. v. Taylor*, 198 Fed. 159.

The order of the Commission is not sustainable as a legitimate exercise of the police power of the state.

*Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Home Teleph. & Teleg. Co. v. Los Angeles*, 155 Fed. 554; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 15, 43 L. ed. 341, 347, 19 Sup. Ct. Rep. 77; *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 1; *West Chicago Street R. Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112; *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; *People v. Weiner*, 271 Ill. 74, L.R.A.1916C, 775, 110 N. E. 870, Ann. Cas. 1917C, 1065; *Sanitary Dist. v. Chicago & A. R. Co.* 267 Ill. 252, 108 N. E. 312; *Chicago v. Chicago Oak Park Elev. R. Co.* 250 Ill. 486, 95 N. E. 456; *Mehlos v. Milwaukee*, 156 Wis. 591, 51 L.R.A. (N.S.) 1009, 146 N. W. 882, Ann. Cas. 1915C, 1102; *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886.

The order of the Commission is unreasonable.

*Pacific Teleph. & Teleg. Co. v. Eshleman*, 66 Cal. 640, 50 L.R.A. (N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; *Bessette v. Goddard*, 87 Vt. 77, 83 Atl. 1; *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185.

Cooke, J., delivered the opinion of the court:

On October 18, 1915, the city of Chicago filed a bill for injunction in the circuit court of Cook county,

seeking to restrain the State Public Utilities Commission and the members thereof from enforcing a certain order made by the Commission on September 29, 1915, relating to the equipment and operation of street cars in the city of Chicago. The order complained of required the Chicago Surface Lines, the Chicago City Railway Company, and the Chicago Railways Company to operate street cars upon their lines at intervals to be determined by methods prescribed in the order, according to the relative seating capacity of cars passing a given point during certain periods fixed by the order and the aggregate number of passengers carried on said cars during such periods; to provide "turn-back" or "loop-back" service in the territory outside the loop district sufficient to comply with the service standard prescribed by the order; to prepare and submit to the Commission, within sixty days, a comprehensive plan for the rerouting of cars in order to secure maximum track capacity; to proceed at once to acquire the equipment necessary to carry out the provisions of the order; to install within sixty days and use such trailers as may be necessary during the rush-hour period to comply with the service standard prescribed by the order; to make application within thirty days to the proper municipal authorities of the city of Chicago for necessary permits and authority, and to the property owners for the necessary frontage consents authorizing and empowering the railway companies to make such track changes as may be required to enable them to comply with the provisions of the order; to display on all cars separate route and destination signs on the front and a route sign on the side; and to hereafter submit to the Commission the plans for all new passenger cars and for the remodeling of all old passenger cars for approval of the width of passageways, height of steps, type and location of seats, platform arrangements, and such other details as affect the adequacy

of service as the Commission may, from time to time, require. The Commission retained jurisdiction of the cause for the purpose of making any necessary modification of the order and such supplemental orders as it should deem proper and just.

The bill alleges that the city of Chicago was organized as a municipal corporation more than seventy years ago under a special charter, and was subsequently, on May 3, 1875, organized under the City and Village Act of 1872 (Hurd's Rev. Stat. 1915-16, chap. 24); that the Chicago City Railway Company was organized as a corporation under certain special acts of the legislature, and the Chicago Railways Company, the Calumet & South Chicago Railway Company, and the Southern Street Railway Company were organized under the general Incorporation Act of this state. The bill then alleges that the city of Chicago, on February 11, 1907, passed two certain ordinances, which were approved by the voters of the city at an election held April 2, 1907, and which are commonly referred to as the "settlement ordinances,"—one authorizing the Chicago City Railway Company to construct, maintain, and operate a system of street railways in the city of Chicago, and the other authorizing the Chicago Railways Company to construct, maintain, and operate a system of street railways in the city of Chicago, upon the terms and conditions therein prescribed,—and alleges that the settlement ordinances were thereafter accepted by the Chicago City Railway Company and the Chicago Railways Company, and that the latter company thereafter, on February 25, 1908, acquired title to the street railway properties theretofore known as the Chicago Union Traction System; that thereafter, on March 30, 1908, the city council passed an ordinance authorizing the Calumet & South Chicago Railway Company to construct, maintain, and operate a system of street railways in the city of Chicago upon substantially the same

terms and conditions as were contained in the settlement ordinances, and that this ordinance was accepted by the Calumet & South Chicago Railway Company on June 1, 1908; that thereafter, on March 15, 1909, the city council passed an ordinance authorizing the Southern Street Railway Company to construct, maintain, and operate a system of street railways in the city of Chicago upon substantially the same terms as contained in the settlement ordinances, which ordinance was accepted by the Southern Street Railway Company. The bill alleges that the settlement ordinances and the two subsequent ordinances above mentioned together embodied a plan for the comprehensive rehabilitation, construction, reconstruction, equipment, re-equipment, and extension of the street railway systems in the city, for the establishment of through routes, the exchange of transfers, the purchase of the surface lines by the city at some future time, the rates of fare to be charged, and the division of the net earnings of the railways between the city and the companies, and for the creation of a permanent expert supervising board. The bill further alleges that on November 13, 1913, the city council passed an ordinance authorizing and requiring unified operation of the surface street railways in the city of Chicago, which ordinance is commonly referred to as the "unification ordinance;" that the four companies above mentioned accepted this ordinance, and in compliance therewith entered into an operating agreement in the form prescribed by the unification ordinance.

The bill alleges that the ordinances above mentioned constitute valid and binding contracts between the city of Chicago and the respective street railway companies, and charges that the order of the Commission, and the Public Utilities Act (Hurd's Rev. Stat. 1915-16, chap. 111a), in so far as it purports to confer upon the State Public Utilities Commission power and author-

ity to make such order, impair the obligation of such contracts and deprive the city of property without due process of law, take the city's private property without compensation, deny the city the equal protection of the laws, and deprive the city of the jurisdiction and control conferred upon it by the Constitution over the street railways within the city, contrary to and in violation of §§ 2, 5, 13, 14, and 19 of article 2, and § 4, art. 11, of the state Constitution, and of § 10 of article 1 and the 14th Amendment of the Constitution of the United States, and that the order is ultra vires because the Public Utilities Act, properly construed, does not deprive the city of the power, authority, and control vested in it by the Constitution and statutes of the state over its streets and over the construction and operation of street railways therein.

The Chicago City Railway Company, the Chicago Railways Company, the Calumet & South Chicago Railway Company, and the Southern Street Railway Company, defendants, after answering the bill, filed a cross bill, seeking the same relief as that sought by the original bill. The cross bill is substantially the same as the original bill, except it sets out in detail a history of the development of the present system of street railways in the city of Chicago. The additional matters contained in the cross bill, as well as the provisions of the settlement ordinances and the unification ordinance, are fully set forth in the opinions filed in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Venner v. Chicago City R. Co.* 236 Ill. 349, 86 N. E. 266; *Venner v. Chicago City R. Co.* 258 Ill. 523, 101 N. E. 949; *People ex rel. Dwight v. Chicago R. Co.* 270 Ill. 87, 110 N. E. 386, Ann. Cas. 1917B, 821; *People v. Chicago*, 270 Ill. 188, 110 N. E. 366; and *People ex rel. Dwight v. Chicago R. Co.* 270 Ill. 278, 110 N. E. 394. It is therefore unnecessary to set them out in detail in this opinion. It will

here suffice to briefly mention certain provisions of the settlement ordinances and the unification ordinance.

The settlement ordinances granted to the street railway companies permission and authority to construct, reconstruct, maintain, and operate a system of street railways upon and along certain streets in the city of Chicago for a period of twenty years, subject to the terms, provisions, and conditions of the ordinances, and in consideration thereof the street railway companies surrendered and released all rights in the streets of the city other than those granted by the settlement ordinances. The settlement ordinances created a board of supervising engineers, to consist of three members,—one to be appointed by the city and one by the street railway companies, and the third member was designated by name in the ordinances,—and provided that all construction, reconstruction, equipment, re-equipment, extensions, and additions should be done, made, and acquired under the direction and supervision of the board of supervising engineers, and that all contracts and payments therefor should be made only upon the written approval of said board; that the cars to be thereafter acquired by the railway companies should be of the number, character, and equipment specified in the settlement ordinances, and of a finish, style, and type approved by the board of supervising engineers. The settlement ordinances prohibited the use of trailers, fixed the rates of fare to be charged, provided for the issuance and exchange of transfers, and prohibited the issuance of passes to persons other than employees of the companies, and certain officers of the city. The companies were required to co-operate in establishing specified through routes and such additional through routes as should be required by the board of supervising engineers. They were also required to sprinkle, clean, pave, and keep in repair the portions of the

streets occupied by them, to provide reserve funds for maintenance and repair and for renewals and depreciation, and to expend therefrom and for such purposes a specified minimum amount each year, subject to the direction and control of the board of supervising engineers. The board of supervising engineers was given power to regulate the salaries and compensation of directors, officers, agents, and attorneys of the companies. The city reserved the right to purchase, on the 1st day of February or August of any year, upon six months' previous notice, the entire street railway system of the companies at a price to be fixed in accordance with the method prescribed by the ordinance, viz.: The purchasable value of the property as of a certain date was fixed by the ordinance, and, in determining the price to be paid by the city when it exercised its option of purchase, there was to be added to the purchasable value so fixed the value of all property, equipment, and additions subsequently supplied, purchased, or acquired, and all future capital expenditures as approved and certified by the board of supervising engineers. The city also reserved the right, within the terms of the grant, to designate another corporation as its licensee to purchase the property upon the same terms, with the proviso that a bonus of 20 per cent should be paid unless the new company should enter into a contract to turn over to the city, directly or in reduced fares, all net proceeds over and above 5 per cent upon its investment and interest thereon at a rate not exceeding an additional 5 per cent. It was further provided that the net receipts of the companies, as defined in the ordinances, should be divided between the city and the companies in the proportions of 55 per cent to the city and 45 per cent to the companies, provided, however, that the companies should have the right to charge and receive the fares fixed by the settlement ordinances. In each of the settlement ordinances

the city reserved the right to make all reasonable regulations for the safety, welfare, and accommodation of the public.

By the unification ordinance the street railway companies were required to furnish unified traction service within the limits of the city of Chicago, the same and with like effect as though all the surface lines within the city were owned and operated by one company. This ordinance provided for the through routing of cars, the elimination of switchbacks in the downtown district, the substitution of loops or transfer stations for switchbacks in the outlying districts when so ordered by the city council and approved by the board of supervising engineers, and required the companies to furnish to the board of supervising engineers operating schedules and other details relating to the operation of their lines. It also required the companies to purchase a sufficient number of additional cars to utilize at all hours the additional track facilities in the downtown district, made available by the through routing of cars prescribed by the ordinance. The contract which the street railway companies were by the unification ordinance required to enter into is, in substance, set forth in *People v. Chicago*, 270 Ill. 188, 110 N. E. 366, *supra*.

The State Public Utilities Commission and the members thereof demurred to the original bill and cross bill. The demurrers were overruled, and the Commission and the members thereof having elected to stand by their demurrers, a decree was entered perpetually enjoining the enforcement of the order. From that decree the State Public Utilities Commission and the members thereof have prosecuted this appeal.

In support of the decree of the circuit court appellees contend: First, that the Commission was without power to make the order complained of, because the Constitution of this state, by § 4, art. 11, grants to cities the exclusive power to regulate and

control the operation of street railways upon their streets, and because § 10 of the Public Utilities Act excludes from the operation of the act public utilities in which a city is interested, as the city of Chicago is interested in the street railways of the city of Chicago; second, that the order of the Commission deprives the railway companies and the city of property without due process of law, in violation of § 2, art. 2, of the state Constitution, and in violation of the 14th Amendment of the Federal Constitution; third, that the order of the Commission takes and damages the private property of the railway companies and of the city for public use without just compensation, in violation of § 13 of art. 2 of the state Constitution; and, fourth, that the order of the Commission, and the Public Utilities Act in so far as it empowers the Commission to make the order, impair the obligation of contracts existing between the city and the railway companies and bondholders of the railway companies, in violation of § 14, art. 2, of the state Constitution.

Section 4 of article 11 of our Constitution provides that "no law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad."

And in *Venner v. Chicago City R. Co.* 258 Ill. 523, 101 N. E. 949, and again in *People v. Chicago*, supra, we said that "the Constitution commits to the city the control of the operation of street railways in its streets."

It is upon this section of the Constitution and this statement contained in the two cases above cited that appellees rely in support of their contention that the Commission was without power to make the order complained of, because the Constitution grants to the city

exclusive power to regulate and control the operation of street railways upon the streets of the city. In the recent case of *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, 330, Ann. Cas. 1917C, 50, in considering the same contention here made, we said with reference to the constitutional provision above quoted (p. 570): "That provision is simply a limitation of the general powers of the legislature, and in one particular only. It provides, in substance, that the legislature may not grant the right to construct and operate a street railroad within a municipality without requiring the consent of the local authorities having control of the streets or highways proposed to be occupied. That section of the Constitution does not, by implication or otherwise, attempt to divest the state of its paramount authority and control of streets and highways" (citing *Chicago & S. Traction Co. v. Illinois C. R. Co.* 246 Ill. 146, 92 N. E. 583).

The statement made in *Venner v. Chicago City R. Co.* and in *People v. Chicago*, supra, that the Constitution commits to the city the control of the operation of street railways in its streets, merely means that the Constitution has conferred upon the city power to determine whether street railways shall be operated upon the streets of the city, and, if so, upon what streets. To this extent, and no further, the Constitution has committed to the city the control of the operation of street railways in its streets.

Public Service  
Commission—  
power over  
street railways  
—right of  
city.

Section 10 of the Public Utilities Act provides that the term "public utility," when used in the act, "means and includes every corporation, company, association, joint-stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be



owned or operated by any municipality) that now or hereafter: (a) May own, control, operate or manage, within the state, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons; . . . or that (b) may own or control any franchise, license, permit or right to engage in any such business."

Appellees contend that the street railways in the city of Chicago are within the exception contained in the above statutory definition of a public utility, and are therefore not within the provisions of the act nor under the jurisdiction or control of the Commission, because the city has secured a vested right for the purchase of these railways and a vested right to participate in the management and operation thereof.

In our opinion the language of § 10, relied upon by the appellees, can only be reasonably construed to mean that public utilities owned or operated by municipalities when the act became effective should not be subject to the provisions of the act, and that thereafter, as soon as a municipality should become the owner or take over the operation of a public utility, such public utility should thereby be withdrawn from the operation of the act. Although the city of Chicago has, by contract, obtained an option to purchase the street railways in the city at a price agreed upon, and has been given a voice in the management of the affairs of the street railway companies, it has not yet become the owner of the street railway properties, nor can it be said that the operation of the street railway system has been turned over to the city. The street railways of the city of Chicago are clearly within the provisions of the act which give the Commission power to make the order involved in this case.

The principal ground relied upon by appellees in support of the decree of the circuit court is that the or-

der of the Commission, and the Public Utilities Act in so far as it purports to confer upon the Commission power to make the order, deprive the railway companies and the city of property without due process of law, take and damage the private property of the railway companies and the city for public use without just compensation, and impair the obligation of contracts theretofore made between the city and the railway companies, in violation of the provisions of the state and Federal Constitutions. It is our judgment that the order is not subject to the constitutional objections urged against it. The power of the legislature to exercise reasonable regulation and control over public utilities was upheld by this court, shortly after the adoption of our present

Constitutional law—taking property—regulating street railways.

Public utility—power of legislature to control.

Constitution, in *Munn v. People*, 69 Ill. 80, where it was held that such regulation was not in violation of either § 2, art. 2, § 13, art. 2, or § 22, art. 4, of the state Constitution, nor in contravention of the 14th Amendment of the United States Constitution. That case was reviewed by the Supreme Court of the United States, and the judgment was affirmed. *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84. The Supreme Court of the United States in its opinion said: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

This decision has become one of the landmarks of American law, and has been frequently cited, followed, and approved in applying the rule that when private property is devoted to a public use it is subject

to public regulation. *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *State Public Utilities Commission v. Monarch Refrigerating Co.* 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528.

The regulation of public utilities is one phase of the exercise of the police power of the state. The police power may be exercised by the legislature directly, or it may be exercised indirectly by conferring the power upon agencies created by the legislature. The power is an attribute of sovereignty, and is primarily vested in the legislature, which has the right to recall it at any time from the agency to which it has been delegated, and after being recalled to retain it or confer it upon some other agency of government. In the exercise of this power the state may interfere whenever the public interests demand such interference, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84. In *Illinois C. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698, it was said: "All property devoted to public uses takes on a nature or qualification quasi public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizen is not subjected. Rights purely and exclusively private, in no wise affecting others, and in no way affecting public morals, are not regarded as being within the control of the police power; nor can mere private property be taken for public uses without making to the own-

Constitutional law—police power—regulation of public utilities.

Legislature—power to delegate exercise of police power.

—discretion as to exercise of police power.

er just compensation; yet the law has always required the citizen to so use his property as not unnecessarily to injure another, and, to compel the observance of that rule, even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or to a corporation, becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed on the owners of mere private property, used purely and exclusively for private interests. The distinctions in this regard have been uniformly observed."

Again, in *Burdick v. People*, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, we said: "The business of a common carrier is a public employment. The franchises of railroads, acting under charters or acts of incorporation, are of a public nature so far as the safety, convenience, and comfort of passengers are concerned. Reasonable regulations, affecting the conduct of such public employments, are fit subjects for legislative action. The lawmaking power may provide means for remedying such evils as, in its opinion, may exist in the management of these public agencies of transportation, and in doing so it may sometimes impose restrictions, which are deemed to be necessary, upon the use and enjoyment of property."

A more concrete statement of the law as applied to the facts in this case is contained in *Chicago v. Chicago City R. Co.* 272 Ill. 245, 111 N. E. 983, as follows: "The police power may be exercised in a variety of ways in the regulation of street-

car traffic for the public safety or convenience, such as providing against the overcrowding of cars, compelling proper seating facilities, specifying the side of the street at which stops shall be made, and any other matter which shall promote the public safety, comfort, or convenience."

A rightful exercise of the police power is not a violation of any of the provisions of the Constitution upon which appellees rely (*Munn v. People*, and *Burdick v. People*, *supra*; *People v. Weiner*, 271 Ill. 74, L.R.A. 1916C, 775, 110 N. E. 870, Ann. Cas. 1917C, 1065; *Durand v. Dyson*, *supra*; *Greene v. L. Fish Furniture Co.* 272 Ill. 148, 111 N. E. 725); and statutes affecting the owners of public utilities by lessening their privileges, regulating their charges, and increasing their burdens, within reasonable bounds, are uniformly held valid (*Chicago v. Cicero*, 210 Ill. 290, 71 N. E. 356).

Appellees contend, however, that the settlement ordinances and the unification ordinance, having been accepted and acted upon by the railway companies, constitute binding contracts between the city and the railway companies, and that their obligation cannot be impaired by any act of the legislature or by any order of the State Public Utilities Commission. Appellees' contention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort, or convenience. Thus the grant of the right to the railway companies to construct and operate street railways in the city, the agreement to divide the net receipts between the railway companies and the city, and the option given to the city to purchase the railway properties at a certain price are all matters which do not affect the public safety, welfare, comfort, or convenience, because it is immaterial to the public what person or corpora-

tion operates the street railways, or what disposition is made of the profits, and over those matters neither the state nor the State

—extent of  
police power—  
control of  
operation of  
public utilities.

Public Utilities Commission has any control by virtue of the police power. Nor has the Commission by the order here complained of assumed to exercise control over any such matters. The order requires only such things to be done by the railway companies as will, in the judgment of the Commission, improve the service furnished the public, and in so far as the order conflicts with the ordinances concerning such matters, the order of the Commission supercedes and sets aside the provisions of the ordinances, but does not, within the meaning of the constitutional prohibition, impair the obligation of any contract, because the city had

—impairing  
obligation of  
contract.

no power to contract away any of the police powers delegated to it by the legislature. In *Chicago v. Chicago Union Traction Co.* 199 Ill. 259, 59 L.R.A. 666, 65 N. E. 243, we said: "The city, as the representative of the state, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety, and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety, or comfort of the people. 'No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police pow-

er, for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.' Elliott, Roads & Streets, p. 801."

Again in *Otis Elevator Co. v. Chicago*, 263 Ill. 419, 52 L.R.A.(N.S.) 192, 105 N. E. 338, referring to the police power, we said: "But the power is incapable of alienation, and no valid contract can be made which assumes to surrender or alienate such a power which is required to continue in existence for the welfare of the public."

The principle is again recognized in *Chicago v. Chicago City R. Co.* supra, in the following language: "It is true that a municipality cannot contract away the right to exercise the police power to secure and protect the morals, safety, health, order, comfort, or welfare of the public, nor limit or restrain by any agreement the full exercise of that power."

We have accordingly held that a city cannot contract away its right, under the police power, to fix reasonable rates to be charged by a public utility furnishing water to the city and its inhabitants. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363; *Danville v. Danville Water Co.* 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862.

If the city of Chicago, in entering into the contracts with the railway companies, has seen fit to make its option to purchase the street railway system, or its right to a certain portion of the net receipts derived from the operation of the system, or any other rights reserved to it by the ordinances, dependent upon the non-exercise of the police power by the state, it cannot be heard to complain that by the exercise of the police power by the state, through the State Public Utilities Commission, it will lose its right to those benefits reserved to it by the ordinances.

8 A.L.R.—59.

Appellees contend that the order is unreasonable, and that the Commission should therefore be enjoined from enforcing it. The question of the reasonableness of the order cannot be determined in this proceeding. The Public Utilities Act provides for a hearing before the Commission upon that question, at which the person or corporation complained of is entitled to be heard and to introduce evidence, and if such person or corporation desires to contest the reasonableness of the order made by the Commission after such hearing, he or it is by the act allowed an appeal to the circuit court of Sangamon county and a further appeal to this court. The statutory method of reviewing the reasonableness of orders of the Commission is exclusive.

Injunction—to  
test reasonableness  
of order.

It is also urged that, as the Calumet & South Chicago Railway Company, the Southern Street Railway Company, and the city of Chicago were not made formal parties to the proceedings before the Commission, those proceedings, so far as they are concerned, were ex parte, and the order amounts to a taking of their property without due process of law. Even though the two railway companies last mentioned and the city were not made parties to the proceedings before the Commission, they were not thereby deprived of a hearing before the Commission. Section 67 of the Public Utilities Act provides:

Constitutional  
law—due  
process—order  
without hearing  
—rehearing.

"After any rule, regulation, order or decision has been made by the Commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the Commission may grant and hold such rehearing on said matters, if in its judgment suf-

ficient reason therefor be made to appear."

The provision for a review of the decision of the Commission upon the rehearing is the same as the provision for review of the original order. None of the appellees have therefore been deprived of a hearing upon the reasonableness of the order made by the Commission, and have not been deprived of property without due process of law.

The matters set up in the bill and cross bill were not sufficient to warrant the court in granting an injunction restraining the enforcement of the order of the Commission, and the demurrers to the bill and cross bill should therefore have been sustained.

The decree is reversed, and the cause is remanded to the Circuit Court, with directions to sustain the demurrers to the bill and cross bill.

**Carter, J., dissents.**

Petition for rehearing denied June 7, 1917.

Appeal from subsequent appeal, 281 Ill. 257, 117 N. E. 1010, dismissed by the Supreme Court of the United States, November 10, 1919 (U. S. Adv. Ops. 1919-20, p. 63) 250 U. S. 651, 63 L. ed. 1189, 40 Sup. Ct. Rep. 53.

#### NOTE.

The power of Public Service Commission with respect to the regulation of street railways is the subject of annotation in 5 A.L.R. 86, which cites the reported case (*CHICAGO v. O'CONNELL*, ante, 916). The reporting of that case in this series was deferred because of the pendency of an appeal to the United States Supreme Court, which has now been dismissed ((U. S. Adv. Ops. 1919-20, p. 63) 250 U. S. 651, 63 L. ed. 1189, 40 Sup. Ct. Rep. 53), from a decision of the Illinois supreme court upon a subsequent appeal in (1917) 281 Ill. 257, 117 N. E. 1010, in the reported case.

EMMA CHANDLER, Appt.,

v.

INDUSTRIAL COMMISSION OF UTAH et al., Respts.

*Utah Supreme Court — November 7, 1919.*

(— Utah, —, 184 Pac. 1020.)

**Workmen's compensation — making delivery — dog bite — injury arising out of employment.**

1. Injury by dog bite while one employed to deliver packages is making a delayed delivery in the morning, while on his way between his home and the place where the vehicle utilized by him in his work is stored, to procure it for his day's work, arises out of the employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 935.]

**Statutes — construction — Workmen's Compensation Act.**

2. The provision of the Workmen's Compensation Act allowing compensation for injuries "arising out of and in the course of the employment" should be liberally construed so as to effectuate its purpose.

**Workmen's compensation — resolving doubt in favor of employee.**

3. Any doubt respecting the right to compensation under the Workmen's

Compensation Act should be resolved in favor of the employee or his dependents, as the case may be.

**— hazard common to public — effect.**

4. An employee is not deprived of the right to compensation under the Workmen's Compensation Act by the fact that the public or a portion of it is exposed to the same hazard as that out of which the injury to the employee arises.

(— *Utah*, —, 184 Pac. 1920.)

**APPEAL** by claimant from a judgment of the District Court for Weber County (Agee, J.) sustaining a demurrer to and dismissing an action brought under the Workmen's Compensation Act, to recover compensation for the death of her husband from a dog bite alleged to have been received in the course of his employment. *Reversed*.

The facts are stated in the opinion of the court.

Messrs. Chez & Barker, for appellant:

The injuries sustained by deceased arose out of, and in the course of, his employment.

*Chicago Packing Co. v. Industrial Bd.* 282 Ill. 497, 118 N. E. 727; *Industrial Commission v. Aetna L. Ins. Co.* — Colo. —, 3 A.L.R. 1386, 174 Pac. 589; *Re Ayers*, — Ind. App. —, 118 N. E. 386; *Holland-St. Louis Sugar Co. v. Shraluka*, — Ind. App. —, 116 N. E. 330; *Re Harraden*, — Ind. App. —, 118 N. E. 142; *Milwaukee v. Althoff*, L.R.A. 1916A, 327, and note, 156 Wis. 68, 145 N. W. 288, 4 N. C. C. A. 110; *McPhee's Case*, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257; *Mueller Constr. Co. v. Industrial Bd.* 283 Ill. 148, L.R.A.1918F, 891, 118 N. E. 1028, Ann. Cas. 1918E, 808; *Beaudry v. Watkins*, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; *Globe Indemnity Co. v. Industrial Acci. Commission*, 36 Cal. App. 280, 171 Pac. 1088; *Mueller Constr. Co. v. Industrial Bd.* 283 Ill. 148, L.R.A.1918F, 891, 118 N. E. 1028, Ann. Cas. 1918E, 808; *Stacy's Case*, 225 Mass. 174, 114 N. E. 206; *Re Loper*, — Ind. App. —, 116 N. E. 324; *Pace v. Appanoose County*, — Iowa, —, 168 N. W. 916, 17 N. C. C. A. 682; *Eugene Dietzen Co. v. Industrial Bd.* 279 Ill. 1, 116 N. E. 684, Ann. Cas. 1918B, 764, 14 N. C. C. A. 125; *Granite Sand & Gravel Co. v. Willoughby*, — Ind. App. —, 123 N. E. 194; *Great Lakes Dredge & Dock Co. v. Totzke*, — Ind. App. —, 121 N. E. 675; *Bachman v. Waterman*, — Ind. App. —, 121 N. E. 8; *Larke v. John Hancock Mut. Ins. Co.* 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; *Elk Grove Union High School Dist. v. Industrial Acci. Commission*, 34 Cal. App. 589, 168 Pac. 392, 15 N. C. C. A. 148; *De Mann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380; *Walther v. American Paper Co.* — N. J. L. —, 98 Atl. 264; *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851; *Sponataski's Case*, 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; *Dennis v. White* [1917] A. C. 479, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 38 Times L.

R. 434, 61 Sol. Jo. 558, Ann. Cas. 1917E, 325, 10 B. W. C. C. 280, 15 N. C. C. A. 294.

Messrs. De Vine, Stine, & Gwilliam and J. D. Murphy, for respondents:

Plaintiff is not entitled to recover compensation for the death of her husband, George C. Chandler, who was bitten by a mad dog, since the injury did not arise out of, or in the course of, his employment.

*Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 58 Sol. Jo. 560, 2 B. W. C. C. 35; *Amys v. Barton* [1912] 1 K. B. 40, [1911] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29; *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 800, 6 B. W. C. C. 190; *McNicol's Case*, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Fumiciello's Case*, 219 Mass. 488, 107 N. E. 349; *Donahue's Case*, 226 Mass. 595, L.R.A.1918A, 215, 116 N. E. 226, 14 N. C. C. A. 491; *Re Hewitt*, 225 Mass. 1, L.R.A.1917B, 249, 113 N. E. 572; *Saenger v. Locke*, 220 N. Y. 556, L.R.A.1918F, 225, 116 N. E. 367; *Mann v. Glastonbury Knitting Co.* 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368, 12 N. C. C. A. 891; *De Voe v. New York State R. Co.* 218 N. Y. 318, L.R.A. 1917A, 250, 113 N. E. 256; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 248, 7 N. C. C. A. 409; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 648, L.R.A.1916A, 342, 152 N. W. 213; *Krout v. J. L. Hudson Co.* 200 Mich. 287, L.R.A.1918F, 860, 166 N. W. 848; *Clark v. Clark*, 189 Mich. 652, 155 N. W. 507; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, L.R.A.1916D, 968, 156 N. W. 143; *Griffith v. Cole Bros.* 183 Iowa, 415, L.R.A.1918F, 923, 165 N. W. 577, 15 N. C. C. A. 674; *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, L.R.A.1916F, 1164, 158 Pac.

212, 12 N. C. C. A. 789; Balboa Amusement Producing Co. v. Industrial Acci. Commission, 35 Cal. App. 793, 171 Pac. 108; Wiggins v. Industrial Acci. Bd. 54 Mont. 335, L.R.A.1918F, 982, 170 Pac. 9, Ann. Cas. 1918E, 1164.

Frick, J., delivered the opinion of the court:

The plaintiff made application to the Industrial Commission of this state under the Employers' Liability Act of this state to recover compensation for the death of her husband, which occurred as hereinafter stated. The Industrial Commission denied her application for the reasons hereinafter appearing, and, pursuant to the provisions of the act aforesaid, she commenced this proceeding in the district court of Weber county.

In her complaint, after stating the necessary jurisdictional facts and matters of inducement, she alleged:

"That on the 26th day of January, 1918, at Ogden, Utah, one George C. Chandler was engaged in the employ of A. M. Miller. That the said A. M. Miller was on said date conducting and operating a meat and grocery store in said city, doing business under the name and style of 'Washington Market.' That on said date, and at the said time and place, the said A. M. Miller, in the conduct and operation of said business, employed more than four persons, to wit, about forty persons, and had elected to become and was subject to the provisions of chapter 100 of the Laws of Utah of 1917, an act passed by the legislature of the state of Utah on March 8, 1917, creating the Industrial Commission of Utah, and among other things establishing rates of compensation for personal injuries or death sustained by employees in the course of employment, and providing methods of insuring the payment of such compensation.

"That the duties of the said George C. Chandler required him to deliver meat and groceries in the city of Ogden, Utah, with and without an automobile, and that he was,

on the date and at the time and place herein mentioned, furnished an automobile by his employer, the said A. M. Miller, for use in making such deliveries, which were made with an automobile, and that the hours of his said employment were from 7 o'clock A. M. until 6 o'clock P. M.; that is to say, he was required to commence his said employment at 7 o'clock A. M. and continue until 6 o'clock P. M. That the certain automobile which was furnished to him by his said employer for use in making such deliveries which were made with an automobile was kept in a garage at the rear of the residence of his said employer, A. M. Miller, at 764 Twenty-fifth street, Ogden, Utah. That the place of business of the said A. M. Miller was situated at 2472 Washington avenue, Ogden, Utah. That the place of residence of said George C. Chandler was in the rear of Twenty-seventh street, between Jefferson and Adams avenues, Ogden, Utah. That in the course of his said employment the duties of the said George C. Chandler required him to go from his family residence each morning to said garage, and get said automobile, and drive it down to the said place of business of the said A. M. Miller, and use it throughout the day in making such deliveries and to return it to the said garage at night after his day's work was finished. That when he was unable to make all the deliveries of the day he would bring with him to his home such undelivered packages and make deliveries of them the following morning on his way to his work.

"That on the morning of January 26, 1918, at about 7:20 o'clock, while the said George C. Chandler was on his way from his place of residence to the said garage to get said automobile and drive it down to his employer's said place of business to begin making the daily deliveries which he was required to make as hereinbefore alleged, and while making delivery of meat for his employer which was undelivered the evening before, and without fault on his

(— *Utah*, —, 184 Pac. 1020.)

part, he was attacked and bitten in his hand by a dog known as the Jefferson avenue dog. That after having his wound dressed he proceeded to his daily work, and worked steadily on each and every work day thereafter until on or about the 22d day of March, 1918, when he became violently sick, and was removed to a hospital, where he died on or about the 25th day of March, 1918, a violent death from hydrophobia, caused by the dog bite received on January 26, 1918, as hereinbefore alleged."

She also made the necessary allegations respecting the age, condition of health, etc., of the deceased and the dependency of herself and her three minor children, ranging in age from twelve to three years, etc., and prayed for judgment according to the provisions of the act.

The defendants demurred to the complaint upon several grounds. The only ground that is material here, however, is that the complaint does not state facts sufficient to constitute a cause of action. The district court sustained the demurrer upon that ground, and judgment dismissing the action was duly entered, from which the plaintiff appeals.

Plaintiff's counsel insist that the court erred in sustaining the demurrer. Our statute (Utah Comp. Laws 1917, § 3122) allows compensation to every employee coming within the provisions of the act who is "injured by accident arising out of and in the course of his employment." In view of the facts alleged in the complaint, all of which are admitted by the demurrer, the district court held that, while the deceased was injured by an accident occurring in the course of, yet he was not injured by an accident arising out of, his employment. Whether a particular injury is occasioned by an accident arising out of the employment may present a more or less perplexing question, and with respect to which reasonable men may well differ. Indeed, that is the difficult question in this case; and

we fully appreciate the fact that the decisions of the courts are not unanimous upon that question. As is well said by Mr. Van Doren in referring to the Workmen's Compensation Act in his *Workmen's Compensation*, p. 43: "The extremely liberal construction of the courts [of the act] has, as we have seen, made possible a recovery of compensation by the injured employee in a large proportion of the cases."

We are also reminded that our statute (Utah Comp. Laws 1917, § 5839) requires that the statutes of this state are to be "liberally construed with a view to effect the objects of the statutes and to promote justice."

Upon the question that the Employers' Liability Act should be liberally construed

and so as to effectuate its purposes, all courts agree. Statutes—  
construction—  
Workmen's Com-  
pensation Act.

Re *Ayers*, — Ind. App. —, 118 N. E. 386. That doctrine applies especially to the phrase "out of and in the course of the employment."

Notwithstanding the fact that the act must be given a liberal construction, the writer, nevertheless, entertains serious doubt whether, in view of the conceded

facts in this case, the injury arose "out of the employment." In view, however, that my Workmen's  
compensation  
—making  
delivery—dog  
bite—injury  
arising out of  
employment.

associates are of the opinion that a liberal construction requires us to hold that the injury in this case arose out of, as well as in the course of, the employment, I cheerfully yield to their judgment. I do so with less reluctance or hesitation for the reason that such a holding is manifestly in furtherance of justice, and tends to effectuate the beneficent purposes of the Compensation Act. In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death



supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of and in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in the case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purposes of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case

—resolving such doubt in favor of employee. there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be.

Counsel for the defendants Miller and the life insurance company have cited cases, however, wherein it is held that, where an employee has been injured from a cause or accident to which the public generally are exposed the same as the injured

employee, the injury does not arise out of the employment. To that effect are the following among other cases cited by counsel: *Re Employers' Liability Assur. Corp.* 215 Mass. 497, 102 N. E. 697; *Mann v. Glastonbury Knitting Co.* 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368, 12 N. C. C. A. 891; *De Voe v. New York State R. Co.* 218 N. Y. 318, L.R.A. 1917A, 250, 113 N. E. 256; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665.

In the case first cited, in referring to the test as to when it may be said that an accident or injury arises out of the employment, the court, in the course of the opinion, said: "It [the injury] 'arises out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, *if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment*, then it arises 'out of' the employment." (Italics mine.)

This, it seems to the writer, is too rigid a construction of the statute. Such a construction brings us right back to the old proposition that the employer would be liable upon the ground of negligence in a common-law action. If the injury or accident should "have been contemplated by a reasonable person," as is stated in the excerpt quoted from the opinion, then the employer should have foreseen it and protected the employee. If the employer contemplates or foresees an injury and does nothing to prevent it, he is necessarily guilty of negligence, and is thus liable to the injured employee unless the latter is guilty of contributory negligence which is the proximate cause of the injury. Such a construction, I think, is not

sustained by the weight of authority.

Nor is the doctrine, that if the public, or a portion of it, is exposed

to the same hazard as the employee, then he, for that

reason, may not recover, followed by the more recent decisions.

In the case of *Globe Indemnity Co. v. Industrial Acci. Commission*, 36 Cal. App. 280, 171 *Pac.* 1088, cited by

counsel for plaintiff, the court, in discussing that question in the

course of the opinion, said: "The petitioner contends that, because

Roberts was exposed only to the ordinary perils of the street to which

any other person on the street is exposed, he does not fall within the

rule which awards compensation for an injury arising out of the employment

of the injured man. When the logical result of the application

of the rule for which petitioner is contending is considered, the justice

of treating this case as one arising out of Roberts's employment

is apparent. Consider the case of a messenger boy. He is in

no greater peril on the street than any other person there. He carries

perhaps his message in his pocket, leaving his arms disengaged and

perfectly free to move about. But he is on the street constantly in the

course of his employment. To hold that Roberts is not entitled to compensation

would be to hold that this messenger boy would likewise not

be entitled to compensation for an injury caused to him by the perils

of the street. The illustration might be extended further to truck

drivers, teamsters, and numerous

other classes of employment whose followers use the streets in the

regular course of their duty, and whose peril on the streets is no greater

than that of any other person, but who would not be injured but for

the fact that their duty takes and keeps them on the street. It does

not seem to us that the legislature ever intended that these persons

should be excluded from the benefit of industrial accident compensation."

To the same effect are *Industrial Commission v. Aetna Life Ins. Co.*

— *Colo.* —, 8 A.L.R. 1336, 174 *Pac.* 589; *Milwaukee v. Althoff*, 156 *Wis.*

68, L.R.A.1916A, 327, 145 *N. W.* 238, 4 *N. C. C. A.* 110; *Baum v. Industrial*

*Commission*, 283 *Ill.* 516, 6 A.L.R. 1242, 123 *N. E.* 626.

Counsel for both sides have cited many other cases in support of their

respective contentions, but the foregoing are sufficient to illustrate the

principle upon which the courts proceed.

In view of the foregoing, it follows that the district court erred in

holding that under the facts stated in plaintiff's complaint, which are

conceded by the demurrer, she was not entitled to recover compensation

under the Compensation Act. The judgment is therefore reversed, and

the cause is remanded to the District Court of Weber county, with

directions to overrule the demurrer and to proceed to determine the

cause in accordance with the views herein expressed. Plaintiff to recover

costs on appeal.

Corfman, Ch. J., and Weber, Gideon, and Thurman, JJ., concur.

### ANNOTATION.

**Workmen's compensation: injury while making delivery as arising out of and in the course of employment.**

The work of one employed to make deliveries requires the employee to be almost continuously on the street, and it has been held that an injury sustained while making a delivery arises out of and in the course of the employ-

ment within the meaning of the Workmen's Compensation Acts, although the dangers of the street are common to persons thereon generally, since the work of a delivery man renders him peculiarly subject to these dan-

gers. *Globe Indemnity Co. v. Industrial Acci. Commission* (1918) 36 Cal. App. 280, 171 Pac. 1088; *Keaney's Case* (1919) 232 Mass. 532, 122 N. E. 739; *Hansen v. Northwestern Fuel Co.* (1919) — Minn. —, 174 N. W. 726; *Miller v. Taylor* (1916) 173 App. Div. 865, 159 N. Y. Supp. 999; *CHANDLER v. INDUSTRIAL COMMISSION* (reported herewith) ante, 930. See, however, *Newman v. Newman* (1915) 169 App. Div. 745, 155 N. Y. Supp. 665, set out infra.

It will be observed that in the reported case (*CHANDLER v. INDUSTRIAL COMMISSION*) an injury by a dog bite, while one employed to deliver packages was making a delayed delivery in the morning while on his way from his home to the place where the vehicle used by him was kept, to procure it for his day's work, was held to have arisen out of the employment within the meaning of the Workmen's Compensation Act. The court adopted the reasoning that an employee is not deprived of the right to compensation under the Workmen's Compensation Act because of the fact that the public is exposed to a similar hazard as that from which the employee's injury arises.

And it has been held that an employee suffered an injury by an accident arising out of the employment where it appeared that he was a driver of an express wagon, and that while crossing the street on his way from his truck to deliver an express package he was struck by an automobile and injured so that he died two days later. *Miller v. Taylor* (1916) 173 App. Div. 865, 159 N. Y. Supp. 999.

And there is a dictum in *Globe Indemnity Co. v. Industrial Acci. Commission* (1918) 36 Cal. App. 280, 171 Pac. 1088, that a messenger injured while carrying a message on the street receives an injury arising out of and in the course of his employment, although he is in no greater danger on the street than any other person on the street, since he is on the street constantly in the course of his employment.

And the injury to a teamster who, after having finished a delivery, was

struck by an automobile while attempting to recover papers which he was carrying in his hat and which had been blown out on the highway when his hat blew off, was held to have arisen out of his employment. *Keaney's Case* (1919) 232 Mass. 532, 122 N. E. 739. It was argued in this case that the act of the teamster in attempting to recover the papers was a mere isolated instance of danger peculiar to the whole public, but the court refused to adopt this reasoning.

And in *Hansen v. Northwestern Fuel Co.* (1919) — Minn. —, 174 N. W. 726, where a driver of a laundry wagon, after stabling his horse at noon, remembered that he had not collected laundry from a certain hotel, walked to the hotel, took the bag of laundry, and on his way back was struck by an automobile, it was held that the injury arose out of and in the course of his employment, the court stating that it was a street risk to which his work subjected him, and that, although he was not using his wagon as was customary, he was working in furtherance of his employer's interest.

And in *Employers' Indemnity Corp. v. Kirkpatrick* (1919) — Tex. Civ. App. —, 214 S. W. 956, a workman was held engaged in the performance of his duty as an employee within the Workmen's Compensation Act where, at the time he was killed, it appeared that he was employed to deliver and collect laundry and charges therefor, and that he had turned in his wagon used for delivering, and was on his way to the residence of a customer to collect a laundry bill when he was struck by an automobile.

And in *Beaudry v. Watkins* (1916) 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16, it was held that a delivery boy riding a bicycle, who was given permission to go to his home for lunch after making a delivery, and who, upon his return, caught onto the rear end of a truck, and was thrown and injured, so that he died, was held to have received such injuries from an accident arising out of and in the course of his employment.

And in *Burton Auto Transfer Co. v. Industrial Acci. Commission* (1918)

37 Cal. App. 657, 174 Pac. 72, the injury to a truckman, whose hours were irregular, was held to have happened in the course of, and to have arisen out of his employment, where it appeared that he had procured a load and driven his truck on the opposite side of the street in front of his employer's establishment about noon, and left it during the noon hour for the purpose of waiting until the depot where he was to deliver his load was open, and that at his employer's suggestion, shortly before 1 o'clock, the opening time of the depot, he started across the street to his truck and was struck by an automobile. The court here held that the workman had not left his employment, that he was in a place where he had a right to be, and that he had left his truck where he had a right to leave it.

And in *E. E. Walsh Teaming Co. v. Industrial Commission* (1919) 290 Ill. 536, 125 N. E. 331, a finding that the death of a workman arose out of and in the course of his employment was held justified where there was evidence that he was a truck driver and was killed by an elevator while endeavoring to get a receipt which was to be signed by one to whom he was to take the goods which had been loaded on his truck.

In *Siglin v. Armour & Co.* (1918) 261 Pa. 30, 103 Atl. 991, where a helper on a delivery motor truck on the way back from making an out of town delivery was thrown off by a jolt and killed while standing on the running board after having given up his seat to two girls who had been overtaken on the road, and given a ride, it was held that the injury occurred while he was acting in the course of his employment, the court holding that it was immaterial how he came to be where he was when jolted off.

In some cases, however, a recovery has been denied a deliveryman under the Workmen's Compensation Acts, on the ground that he had departed from his duties, and that his injury did not arise out of and in the course of his employment.

Thus in *State ex rel. Miller v. District Ct.* (1917) 138 Minn. 326, L.R.A.

1918F, 881, 164 N. W. 1012, it was held that a messenger boy who in performing his duties traversed the streets of a city, departed from the scope of his employment when he climbed upon a passing vehicle, not owned or controlled by his employer, for the purpose of expediting his work, and that an accident sustained by him when on the vehicle could not be said to have arisen out of the course of his employment, it being held that since he was furnished carfare when messages were to go beyond a certain distance he was to walk on all other occasions.

And a driver of a florist's delivery wagon, whose duties covered the driving of the wagon and assisting the man who accompanied him to make deliveries, was held not to have received an injury which arose out of and in the course of his employment, where he fell from a ladder while assisting in adjusting a window box in a house, at which a delivery of flowers had been made, the court holding that there was no connection between the driving of the wagon and the fall from the ladder. *Glatzl v. Stumpp* (1917) 220 N. Y. 71, 114 N. E. 1053.

And in *Carnahan v. Mailometer Co.* (1918) 201 Mich. 153, 167 N. W. 9, a truckman employed to carry the necessary materials to and from a factory was held not to have suffered an injury arising out of and in the course of his employment, where having carried a box of books for which the bill of lading had been given him by the shipping clerk, from a railroad station to the house of one of the stockholders of the company, and after placing the box in the front hall, he was injured while carrying it to the second floor at the request of the maid; the court holding that the injury occurred while he was carrying out a mere accommodation for the stockholder, and while he was accommodating the maid.

And a messenger who had been furnished by his employers with money to pay his fare and was injured while attempting to board a tramcar, moving about 5 miles an hour, without invitation and contrary to a notice on the car, was held not injured by an

accident arising out of and in the course of his employment. *Symon v. Wemyss Coal Co.* [1912] S. C. 1239, 49 Scot. L. R. 921, 6 B. W. C. C. 298.

In *Newman v. Newman* (1915) 169 App. Div. 745, 155 N. Y. Supp. 665, affirmed in (1916) 218 N. Y. 325, 113 N. E. 382, where one employed principally to drive a meat delivery wagon, after having put his horse up, was proceeding on foot to make a delivery near the market when he fell over a pail of broken glass and was injured, it was held that his injuries did not arise out of his employment in a hazardous occupation or incidental to it within the meaning of the Workmen's Compensation Act, but that it was a common risk to which anyone who chanced to travel the same way was equally exposed.

And in *Kettle v. M'Kay* (1916) 9 B. W. C. C. (Eng.) 544, it was held

that there was nothing in the nature of a workman's employment as a porter which exposed him to the peculiar risk of falling from a low coping at the top of the steps of a house, at which he was to deliver a bundle. Lord Cozens-Hardy said: "In circumstances like those the burden is, of course, undoubtedly on the applicant to show that the accident arose not merely in the course of the employment, but out of the employment. It is not at all enough for him to say: 'My business as a porter or messenger took me to this house or place, and I should never have gone to the street or the house if I had not been so employed.' He must go beyond that. He must show that the circumstances which led to the accident were of such a nature that they specially increased the risk beyond that of any other member of the public." J. T. W.

# I. W. BERNHEIM et al.

v.

ARTHUR M. WALLACE, Judge of the Jefferson Circuit Court.

*Kentucky Court of Appeals — January 16, 1920.*

(— Ky. —, 217 S. W. 916.)

## Dismissal — after appeal — representative of class.

1. A minority stockholder of a corporation, suing on behalf of himself and other minority stockholders, may dismiss the action without prejudice at any time while it is pending on appeal, before decision is handed down, both as to himself and all whom he represents.

[See note on this question beginning on page 950.]

— power to agree to.

2. The parties of record to a suit, laboring under no disability, and suing or defending for themselves alone, may agree to dismissal at any time, with or without prejudice.

Compromise — power to settle suit after judgment.

3. Parties to a suit may settle the matters at issue before or at any time after a final judgment by the trial court or court of appeal.

— agreement to judgment after appeal.

4. The parties to a litigation who are legally competent to act may disregard the mandate of the court of ap-

peal and ask the trial court to enter judgment according to any agreement which they may make.

[See 2 R. C. L. 289.]

Appeal — duty of trial court to protect rights under judgment.

5. The trial court to which the mandate of the appellate court is sent for execution in a suit by a minority stockholder of the corporation, on behalf of himself and other stockholders of the same class, must prevent a settlement by the party of record which will prejudice the rights of those whom he represents.

Dismissal — effect.

6. The dismissal of an action with-

out prejudice leaves it standing unaffected by the order of dismissal, or even a judgment which has been rendered in the case.

[See 9 R. C. L. 209.]

—after assignment protecting interests.

7. A conveyance by a corporation to a trustee of all its property of every description in trust, for distribution among its stockholders, includes a claim against its directors and another corporation for mismanagement and misappropriation of assets, and protects the rights of minority stockholders as well as would a judgment directing an accounting, so that one suing for himself and other minority stockholders may dismiss the action after such judgment if such an assignment has been made.

Corporation — right of one purchasing stock pending litigation.

8. One purchasing stock of a corporation after a motion has been made

to dismiss an action in which the stockholders are interested cannot prevent such dismissal if his rights will be as fully protected by the compromise under which the dismissal is affected as they would be by the continuance of the action and appointment of a receiver.

— right to control action of corporation.

9. One purchasing stock in a corporation after the corporation has dismissed a pending suit and conveyed all its property to a trustee for the purpose of winding up its affairs cannot undo what the corporation has rightfully done.

Mandamus — to compel entry of judgment.

10. Mandamus lies to compel a trial court to dismiss a pending action and enter a judgment which has been agreed upon by all the parties to the suit.

PETITION for a writ of mandamus to compel the respondent judge to enter an order dismissing a certain pending action and enter an agreed judgment. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. Helm Bruce, C. B. Blakey, M. M. Logan, Henry L. Stone, and E. S. Jouett, for petitioners:

The power and duty of the court to act are not confined to cases where the lower court is acting outside of its jurisdiction, but embrace cases where the court "is proceeding erroneously within its jurisdiction, and the party has no adequate remedy for the wrong he will suffer by reason of the erroneous proceeding through appeal."

Ohio River Contract Co. v. Gordon, 170 Ky. 412, 186 S. W. 178; Weaver v. Toney, 107 Ky. 419, 50 L.R.A. 105, 54 S. W. 732; Equitable Life Assur. Soc. v. Hardin, 166 Ky. 51, 178 S. W. 1155; Illinois C. R. Co. v. Rice, 154 Ky. 198, 156 S. W. 1075; Rush v. Denhardt, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199.

Messrs. Allen P. Dodd and Henry S. Barker for respondent.

Carroll, Ch. J., delivered the opinion of the court:

The petitioners, Bernheim and others, have filed their petition in this court, asking that we issue a writ, directing Arthur M. Wallace,

as judge of the Jefferson circuit court, chancery branch, first division, to enter an order tendered by them in his court, dismissing without prejudice the action of I. W. Bernheim against the Louisville Property Company et al.; and also commanding him to enter an agreed judgment tendered at the same time the order to dismiss was offered. We are further asked to direct Judge Wallace to discharge the rules issued by him against the petitioners, and to restrain him from appointing a receiver in the case.

Temporary orders were made in conformity to the prayer of the petition; and, the case having been prepared and submitted for final judgment, we will now hand down our decision.

The original proceeding instituted in this court grew out of the following state of facts: Some years ago a suit was filed in the court of Judge Wallace by I. W. Bernheim, a minority stockholder in the Louisville Property Company,

a Kentucky corporation, suing in his own right and in behalf of all other minority stockholders, seeking to oust the directors of the corporation, who had been elected by a majority of the stockholders; to annul the conveyance made of many parcels of real property by the Louisville Property Company to Thomas P. Cairns; to wind up the affairs of the Louisville Property Company, which were alleged to have been managed by its directors solely in the interest and for the benefit of the Louisville & Nashville Railroad Company in disregard of its own welfare, and to the prejudice of the minority stockholders; and to have an accounting for the Louisville Property Company against the directors of the company and against the railroad company.

When this cause came on to be heard by Judge Wallace he dismissed the petition of Bernheim, except as to one item about which there was no dispute.

Thereafter Bernheim, yet suing for himself and representing by permission of the lower court the other minority stockholders, brought the case here on appeal, and in an opinion delivered by this court in May, 1919, that may be found in 185 Ky. 63, 214 S. W. 801, the judgment rendered by Judge Wallace, except as to one item involving \$102,455.88, was reversed, and the case remanded to his court, with directions to cancel the deed made by the Louisville Property Company to Cairns; to appoint a receiver for the Louisville Property Company; to have an accounting made by its directors and the Louisville & Nashville Railroad Company; and to take such other steps as might be necessary to a final settlement of the affairs of the Louisville Property Company and the distribution of its assets among the persons entitled thereto.

In due time the mandate from this court issued, and on November 6, 1919, Bernheim, the Louisville Property Company, the Louisville & Nashville Railroad Company, the individuals sued, and the heirs of

Cairns, who had in the meantime died, through their respective attorneys, came into Judge Wallace's court, filed the mandate of this court, and tendered to Judge Wallace an order, "dismissing without prejudice so much of the above-styled suit as seeks the appointment of a receiver, a reference to the master, an accounting, the winding up of the corporation's business and the distribution of its assets, and so much thereof as seeks a recovery of any sum against the Louisville & Nashville Railroad Company and the defendants M. H. Smith, W. L. Mapother, W. W. Thompson, Charles Haydon, W. A. Northcutt, C. O. Bradford, and C. J. Weis, or any of them," with a request that it be entered; and at the same time tendered, with a motion that it be entered, the following judgment, which had been agreed to by Bernheim, yet representing all the minority stockholders, and the Louisville Property Company, the railroad company, and the individual defendants: "Thereupon, in pursuance of said mandate and the opinion of the court of appeals, delivered May 23, 1919, a copy of which is also filed and made a part of the record in this case, it is now adjudged by the court that the judgment entered herein on April 20, 1918, and from which plaintiff appealed, be and the same is hereby set aside and held for naught, except: (1) In so far as the said judgment adjudged the recovery on behalf of the defendant Louisville Property Company against the defendant Louisville & Nashville Railroad Company of \$39,542.11 on account of the purchase of certain property, situated in Knoxville, Tennessee, and (2) except in so far as said judgment adjudged that plaintiff's petition be dismissed as to the item of \$102,455.88, with interest thereon, which the plaintiff sought to recover for the use and benefit of the defendant Louisville Property Company, and which grew out of the transfer on May 31, 1908, to the defendant Louisville & Nashville Railroad

Company of \$102,455.88, said sum representing the surplus appearing on the books of the defendant Louisville Property Company as of March 1, 1908, in which two respects the said judgment of April 20, 1918, shall remain in full force and effect.

"It is further adjudged that the judgment entered herein on June 4, 1918, with respect to the matter of costs, be and the same is hereby set aside and held for naught.

"It is now further adjudged in pursuance of said mandate and opinion that each and all of the following deeds and instruments of writing be and the same are hereby canceled, set aside, and held for naught, to wit:

"(1) The several deeds dated October 16, 1911, made by the defendant Louisville Property Company to Thomas Cairns, since deceased, and whose widow, Flora D. Cairns, and children and heirs, have been made defendants and brought before the court herein, by which deeds the defendant Louisville Property Company undertook to sell and convey to said Thomas Cairns certain lands and mineral rights, therein fully described, situated in various counties in the state of Kentucky, which deeds are of record in the offices of the clerks of the county court of the below-named counties, respectively.

"It is further adjudged that the plaintiff, I. W. Bernheim, recover all his costs herein (to be taxed by the clerk) of the defendants Louisville & Nashville Railroad Company and the Louisville Property Company, for which execution may issue.

"Thereupon came the plaintiff by his counsel, Clayton B. Blakey, and on his motion this action as to all other claims asserted and all other relief sought not covered by the foregoing judgment is now dismissed without prejudice."

At the same time it was brought to the attention of Judge Wallace that on the preceding day the Louisville Property Company, acting

through its board of directors, with the consent of a majority of its stockholders, as well as Bernheim and all other parties of record in the suit, had executed to the United States Trust Company, a solvent and responsible corporation, having the authority to act as assignee and settle estates, a deed of assignment, conveying "all of its property of every description—real, personal, and mixed—and wheresoever located, to the assignee, its successors and assigns, absolutely and in fee simple, in trust for the payment of the debts of the assignor and the expenses of administration, and the distribution of the remainder, if any, of the proceeds of the sale of the assignor's property, to its stockholders ratably, according to their holdings at the time such distribution is made; the assignee, its successors and assigns, being hereby specifically authorized to sell all of the property herein conveyed at public or private sale, and in such parcels and upon such terms as it may deem most advantageous."

Judge Wallace took the matter under advisement, and on November 15 overruled Bernheim's motion to dismiss the case without prejudice, as well as his motion to enter the judgment before mentioned; and at the same time issued rules against I. W. Bernheim, certain officers and directors of the Louisville Property Company, and the president of the United States Trust Company, returnable November 18, "to show cause, if any they have or can, why they shall not be punished for contempt in wrongfully and unlawfully obstructing the court in its duty by conveying by deed of assignment the property of the Louisville Property Company to the United States Trust Company;" on November 17 he overruled a motion for an appeal made by the persons against whom rules were directed to issue; and at the same time overruled the motion of Bernheim to grant him an appeal to the court of appeals from the order entered on November 15, overruling his motion



to enter the agreed judgment and dismiss the action without prejudice.

In the course of the opinion handed down by Judge Wallace, setting forth the reasons why he refused to enter the agreed judgment and dismiss the action without prejudice, and ordered rules to issue against Bernheim and the directors of the Louisville Property Company, he said:

"The rule is elementary that the plaintiff may dismiss his case without prejudice at any time before a judgment or final submission; provided the interests of others have not accrued or become fixed; but whether, after a judgment below, followed by an appeal, a reversal with a mandate from the court of appeals, specifically adjudging plaintiff and those he represents certain specific rights and remedies for the matters complained of, the plaintiff, who not only sues for himself, but for a large number of unnamed and unknown persons, can, after all of the principals involved in the litigation have been determined by the court of appeals, dismiss the action as to them or dismiss it for himself even, is a different proposition. . . .

"The plaintiff, Bernheim, as a minority stockholder in the Louisville Property Company, instituted this action both for himself and all other stockholders in interest with him to oust the directors, to annul a conveyance of the property of the company in Kentucky to Thomas P. Cairns, and to wind up the affairs of the corporation, alleging that the directors have managed the property solely in the interest of the Louisville & Nashville Railroad Company, in disregard of the welfare of the company and to the injury of plaintiff and the other stockholders of the corporation.

"An accounting for the property company against its directors and against the Louisville & Nashville Railroad Company and its directors was also prayed for."

Then, after quoting certain portions of the opinion of this court, he further said: "It is apparent from

the foregoing excerpts that the court of appeals has settled all of the questions of law in this case and directed definitely the judgment to be entered and the procedure thereafter to be had. There are no judicial questions left open; all that remains to be done is either clerical or administrative, and this, in the court's opinion, is in legal effect a final judgment in the action, and precluded the plaintiff, by any sort of arrangement with the defendant, to set aside, annul, or evade the judgment of the court of appeals, nor has he the power to set aside or annul the rights of his coplaintiffs, therein established and fixed, and thus determined, whom he has brought into court, and who have gone with him through all the procedure of this case."

"Nor can this court submit to the high-handed and contemptuous treatment which it and the mandate of the court of appeals have received at the hands of these parties, plaintiff and defendant. This property is all in the hands of the court, and a specific and imperative mandate has been sent down by the court of appeals, directing in specific language and detail what the lower court shall do. The execution of this mandate is my plain duty, and yet I find myself obstructed in the performance of this duty by the unlawful acts of the parties hereto in conjunction with the United States Trust Company. . . .

"The plaintiff brought the minority stockholders into this court to help him bear the expense of the litigation and to give moral and legal influence to his litigation. After the original judgment below their rights were fully foreclosed by it. Not one of them could sue on his own behalf; the adverse judgment was *res judicata* as to them all; and, had that judgment been affirmed, their right to an accounting or to have the property sold for distribution of the proceeds would have been lost. The court of appeals reversed the judgment and crystallized their right to a sale and an

accounting, and this right cannot now be bargained away without their express consent by the plaintiff by any sort of arrangement with the defendants. When the property unlawfully taken from the jurisdiction of the court in part through the connivance of the plaintiff is restored by the guilty parties to its original status, the court will entertain a motion by the plaintiff to dismiss his own action."

Thereafter, and on November 18, Bernheim, the property company, and the persons against whom the rules were issued, filed their petition in this court.

In his answer to the petition filed in this court Judge Wallace, after denying certain material averments, further said that Bernheim, in his petition filed in the court of Judge Wallace, alleged:

"That the Louisville & Nashville Railroad Company was indebted to the Louisville Property Company in very large sums, and, to wit, more than \$450,000 for use of the property of the Louisville Property Company, and the said plaintiffs, in said action, asked, first, for an accounting to ascertain the amount due by the Louisville & Nashville Railroad Company to the Louisville Property Company, and after that amount had been ascertained, prayed judgment against the Louisville & Nashville Railroad Company or the said named individuals as directors of the Louisville Property Company for the amount found to be due on the accounting to the Louisville Property Company; . . . that if the court should sustain the motions of the attorneys for the plaintiffs, it would result in a dismissal without prejudice of the action, and sacrifice thereby the entire claims of all the stockholders of the Louisville Property Company as against the Louisville & Nashville Railroad Company for an accounting, and it further appeared to the court, from the record and from the verified petition of the plaintiff, that the Louisville & Nashville Railroad Company was justly due the property company

more than \$450,000, or was due the Louisville Property Company for the use of its property an enormous sum not yet ascertained, and would further sacrifice the rights of the stockholders as to a receiver and immediate liquidation of the said property, and as a result of all of which this court concluded that the rights of the stockholders of the property company were so material, and that the interest of the stockholders of the property company amounted to so much, that this defendant felt that the action should not be dismissed until and after all of the stockholders of the Louisville Property Company had the opportunity to be heard, and did not feel that it had the legal right to dismiss the action in accordance with the motions unless and except all of the stockholders of the Louisville Property Company, who were the interested plaintiffs, joined in the said motion, and accordingly overruled the motions so made and tendered on the 6th day of November, 1919, by his written opinion delivered on the 15th day of November, 1919. . . .

"Defendant further says that at the time the said conveyance was made the said property was in the custody of this defendant as judge, and that this defendant had jurisdiction of all the parties owning said property, as well as the property, and, it appearing to this defendant that the manifest purpose of said conveyance was an effort on the part of the said named attorneys and parties to place the property beyond the custody and control of the court without authority of law, and for that reason and in order to protect himself against the parties, and in order to protect the jurisdiction of this defendant as judge over the property, this defendant issued the rules against the individuals referred to in the petition, and on the 15th day of November, making said rules returnable the 18th day of November. . . .

"Thereafter, and on December 2, W. M. Duffy, who had not theretofore had any connection with the

case either in the lower court or this as a party of record, or otherwise, filed in the case pending in this court his intervening petition, answer, counterclaim, and cross petition, in which he set out that he was one of the stockholders of the Louisville Property Company for whom the action was brought and prosecuted by Bernheim; that if the agreed judgment tendered in Judge Wallace's court on November 6 was entered, this petitioner's valid, adjudicated, and vested rights will be destroyed, in that large claims against the Louisville & Nashville Railroad Company and the officers and directors of the Louisville Property Company will be thereby sacrificed."

He further said that it was his purpose to tender and file in Judge Wallace's court on November 29 an intervening petition, and pray the court "for an order allowing this petitioner, as a stockholder, to prosecute the said action for and in his own behalf, and for and in behalf of all the stockholders of the Louisville Property Company not appearing of record by counsel, and that if this petitioner is permitted to intervene and prosecute the said action, he will do so in good faith, and for the sole purpose of protecting the rights of the stockholders of the Louisville Property Company, and for the purpose of carrying into execution the mandate of this court in the said action in the Jefferson circuit court."

The petitioners Bernheim and others, for reply to the answer and counterclaim of Duffy, after denying certain material allegations thereof, averred that Duffy was not, on November 6, 1919, when the agreed judgment was tendered in Judge Wallace's court, a stockholder in the Louisville Property Company, nor did the company or any of its officers have any notice that he claimed to be a stockholder until November 26, 1919.

They further averred: "That if the said Duffy owns any stock in the Louisville Property Company, he

has acquired same since November 6, 1919, when the motion to enter an agreed judgment as to certain matters in the said case of Bernheim v. Louisville Property Company, and to dismiss the action so far as not covered by that judgment, was made; and that, if said intervenor has acquired such stock, he was procured to acquire it solely for the purpose, and did acquire it solely for the purpose, of seeking to intervene in this action and in the said action of Bernheim v. Louisville Property Company, etc., in the Jefferson circuit court, for the purpose of preventing the entry of the said agreed judgment and the dismissal of said action of Bernheim v. Louisville Property Company, and of securing the appointment of a particular person as receiver of the Louisville Property Company who had been theretofore selected for that position. And petitioners believe, and have good ground to believe, and on such belief allege, that said intervenor, if he is now the owner of any stock of the Louisville Property Company, has simply attempted to buy his way into this litigation for the purpose of controlling same, and especially for the purpose of endeavoring to secure the appointment of a particular person as receiver of the Louisville Property Company, and his attempt to intervene in this cause and in the said cause of Bernheim v. Louisville Property Company in the Jefferson circuit court is not in good faith, and is not for the purpose of protecting the rights of any stockholders in the Louisville Property Company."

It further appears from the record that the holders of about 78 per cent of the total outstanding stock of the Louisville Property Company have consented to the action of its directors in executing the deed of assignment to the United States Trust Company, and also to the order of dismissal, agreed judgment, and motions made in connection therewith, that were tendered in Judge Wallace's court, as before stated.

It further appears that the Louisville Property Company was really organized and created by the Louisville & Nashville Railroad Company, and that its stock was distributed to stockholders in the Louisville & Nashville Railroad Company at the time of the organization of the property company, and that these stockholders are scattered all over the country, many of them owning only one share of the stock in the Louisville Property Company; and we may further assume that many of them, at least 20 per cent, never heard of or knew anything about this suit of Bernheim's.

It will thus be seen that Bernheim may be said to have represented in the suit brought, and to have sued for the use and benefit of, about 20 per cent of the stockholders of the property company, which he was permitted to do under authority of § 25 of the Civil Code of Practice, providing that "if the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

It further appears from the opinion and answer of Judge Wallace that he was influenced to refuse to permit the agreed judgment and order dismissing the suit to be entered by the apprehension that, if the matter was taken out of his court, as the parties proposed to do by the judgment and deed of assignment, the rights of the minority stockholders represented by Bernheim would not be properly protected; and by the further fact that he conceived it to be his right and duty to follow the directions of this court announced in its opinion in the Bernheim Case, in conformity to which its mandate was issued.

That a plaintiff or defendant who is a party of record and who sues or defends under § 25 of the Code for the use and benefit of numerous other parties, who are not represented except by him, may at any time be-

fore the rights of the class for whom he sues or defends have been adjudicated by the court in which the action is pending, or by the court to which an appeal may be prosecuted, dismiss without prejudice the suit or defense, we have no serious doubt. The party so suing or defending for a class unrepresented except by him brings the class into court, and may take them out when he goes, if he goes out before there has been an adjudication of the rights of the class. Until there has been some adjudication of their rights, it cannot be said that they have any standing in court, except through the party of record, and are subject to his control. Cook, Stockholders, § 748; Innes v. Lansing, 7 Paige, 583; Brinkerhoff v. Bostwick, 99 N. Y. 194, 1 N. E. 663; 15 Enc. Pl. & Pr. 628; Atlas Bank v. Nahant Bank, 23 Pick. 492; Belmont Nail Co. v. Columbia Iron & Steel Co. (C. C.) 46 Fed. 336; Thompson v. Fisler, 33 N. J. Eq. 480; Derby v. Yale, 13 Hun, 273. In Daniell's Chancery, Pleading & Practice, vol. 1, p. 794, the rule is thus announced: "Where a plaintiff sues on behalf of himself and all other persons of the same class, although he acts upon his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet, after a decree, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it."

In Hirshfeld v. Fitzgerald, 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997, a leading case on this subject, the court quoted with approval the following from the Brinkerhoff Case, 99 N. Y. 194, 1 N. E. 663: "It is true that at any time before judgment the original plaintiff, before the others were made parties, could have discontinued the suit or could have settled his individual damages with the defendants, and have executed a release which would have been effectual as to him. But if he had prosecuted the action to judgment, then the judgment would

have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached thereto. The bringing of the action by the original plaintiff did not prevent the other stockholders from bringing similar actions. But the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed."

And so in this case, Bernheim, against whom no claim was asserted by any defendant, might have dismissed without prejudice the action at any time after he brought it, and at any time while it was pending on appeal in this court, before the opinion was handed down by this court; and it would necessarily follow that its dismissal would carry with it the dismissal of the action as to the entire class for whose benefit he sued.

Furthermore, until the opinion was handed down Bernheim and the defendants were the only parties of record, and there could, of course, be no obstacle in the way of parties of record to a suit, laboring under no disability, and suing or defending for themselves alone, agreeing at any time to the dismissal of the action or defense, with or without prejudice; because the absolute control and disposition of litigation at every stage of the proceedings, from its inception to and after the final judgment, is in the power of the parties to the record.

Courts were established, at least in part, for the purpose of settling disputes that people could not settle for themselves; and, although parties unable to agree about matters in controversy may go into court to have their rights adjudicated, they still retain unimpaired their right to do as they please

about the litigation. They may settle the matters at issue before or at any time after a final judgment has been rendered, in any way they choose, and the court has no right or power to interfere. And this right exists although the litigation has been brought to the court of appeals and there has been a final judgment by that court, determining the rights of the parties, accompanied by directions to the lower court.

In other words, although the court of appeals may specifically direct what proceedings shall be taken in the lower court to which the case is remanded, or the character of the judgment that shall be entered, the parties to the litigation, if they are legally competent to act, and sue for themselves alone, may disregard in whole or in part the directions of the court of appeals, and settle the litigation in any manner they may agree to, and ask the court to enter as its judgment the agreements they make. *Karnes v. Black*, 185 Ky. 410, 215 S. W. 191. But, of course, in the absence of such an agreement, the lower court must obey the directions contained in the opinion of this court. As said in *McLean v. Nixon*, 18 B. Mon. 769: "The mandate of this court is imperative on the court below. It has no option to obey or disobey it. . . . It must be carried into effect by the inferior court according to its true intent and meaning."

So that, if Bernheim had been suing for himself alone, we may well assume that Judge Wallace would readily have consented that any judgments or orders that the parties of record had agreed to might be entered, although the entry of such orders or judgments might have taken the case finally out of his court and entirely dispensed with the necessity of taking the further steps in the case he was directed to take by the opinion of this court and its mandate.

Compromise—  
power to settle  
suit after  
judgment.

Dismissal—  
after appeal—  
representative  
of class.

—agreement to  
judgment after  
appeal.

—power to  
agree to.

Having thus adjudged the questions of procedure according to our understanding of the applicable law, the only remaining question, aside from that presented by the intervening petition of Duffy, relates to the right and duty of Judge Wallace in respect to the claims of the minority stockholders, who had not appeared in the case except through Bernheim, and whose rights were definitely fixed by the opinion of this court.

It was, as we think, the duty of Judge Wallace to protect in his court the rights of the minority stockholders represented by Bernheim, and to deny Bernheim or the other parties of record, or any of them, the right to enter any orders or judgments, or make any settlements

**Appeal—duty of trial court to protect rights under judgment.**

that would be prejudicial to the interests of these minority stockholders, or that would take from them any of the rights to which they had been adjudged entitled by the opinion of this court. Accordingly, if the agreed judgment, the order of dismissal, and the deed of assignment deprived the minority stockholders of any substantial benefits or advantages adjudged to them by this court, Judge Wallace properly refused to permit the entry of the agreed judgment and the order of dismissal, or to recognize the validity of the deed of assignment. But, on the other hand, if the rights of the minority stockholders will be as fully protected by the agreement made between Bernheim and the other parties and the proceedings taken thereunder as they would be if the matter remained in Judge Wallace's court and under his control, he committed error in refusing to permit the order of dismissal and the agreed judgment to be entered, and in issuing rules for contempt.

Let us see, now, how this matter stands. The agreed judgment expressly preserved all the rights to which the minority stockholders were adjudged by this court, except that it did not make any mention of

the claim of some \$450,000 asserted on behalf of the Louisville Property Company through Bernheim against the directors of the property company and the Louisville & Nashville Railroad Company, and which was attempted to be dismissed without prejudice, or in terms direct that the assignee should make the accounting concerning this claim that was directed in the opinion of this court. But it was not, as we will later show, necessary that any specific mention should have been made of this claim, or any directions concerning it be given the assignee, as the dismissal of the action without prejudice left it standing unaffected by the order of dismissal or the judgment.

**Dismissal—effect.**

Repeating now the clause in the deed of assignment reciting that the Louisville Property Company "sells, assigns, aliens, conveys, and transfers" to the United States Trust Company "all of its property of every description—real, personal, and mixed—and wheresoever located, to the assignee, its successors and assigns, absolutely and in fee simple, in trust for the payment of the debts of the assignor and the expenses of administration and the distribution of the remainder, if any, of the proceeds of the sale of the assignor's property to its stockholders ratably according to their holdings at the time such distribution is made."

It will be seen that the Louisville Property Company conveyed everything that it owned or had an interest in to the assignee, and clearly the words of conveyance are broad enough to include any claim or demand the property company had against its directors or the Louisville & Nashville Railroad Company, growing out of the mismanagement of its affairs, or the wrongful diversion or appropriation of its property or assets of any kind by these parties; or, in other words, broad enough to transfer to the assignee the claim asserted against the directors of the Louisville Property

Company and the Louisville & Nashville Railroad Company by Bernheim.

In short, the assignee has the same right and power to assert and recover these claim or demands, and to take all steps that may be necessary to do so, that

—after assignment protecting interests.

Bernheim would have had, or that a receiver appointed by the court would have, and it will be held to the same strict accountability in the execution of the trust as would a receiver acting under the orders of the court. In *Cartmell v. Commercial Bank & T. Co.* 153 Ky. 798, 156 S. W. 1048, concerning the appointment of a receiver for an insolvent bank, this court pertinently said: "The object and aim of the law, in the appointment of a receiver, is to see that the assets of the institution, in charge of which he is placed, are properly, honestly, and economically administered. The ends of the law are satisfied if the estate is administered in this way, whether the person charged with its administration be termed a banking commissioner, a trustee, or an assignee. The duties are the same. If any difference is to be found, it is in favor of the liquidation of banks, through and under the direction of the banking commissioner, rather than under a receiver appointed by the court, for the former plan is not only more expeditious and less cumbersome, but is undoubtedly less expensive."

Accordingly it will be the duty of the assignee to diligently, faithfully, and carefully inquire into the nature and condition of these claims or demands, if any there be, and take such action as may be necessary and proper to recover them for the use and benefit of the stockholders of the property company, and consequently the stockholders will not suffer any loss on account of the failure to preserve in the agreed judgment their right to prosecute the claim asserted by Bernheim against the directors of the company or the Louisville &

Nashville Railroad Company, or by the fact that no express mention was made of this claim in the deed of assignment.

It is also clearly shown by the record that putting the property in the hands of the assignee for the purpose of winding up the affairs of the Louisville Property Company and distributing the proceeds among the persons entitled thereto in place of turning it over to a receiver would result in saving to the stockholders a sum variously estimated at from \$100,000 to \$300,000; that, aside from this large saving, the assignee can dispose of more advantageously and with much less cost and expense than a receiver the great amount of valuable and widely scattered real estate conveyed to it by the property company, and in this connection it might also be said that all parties agree that the assignee is a solvent, responsible institution, fully competent and equipped to discharge in a satisfactory way the trust reposed in it by the deed of assignment.

In regard to the intervening petition of W. M. Duffy little need be said. He was not the owner of any stock in the Louisville Property Company at any time before the motion to dismiss it was made in the court of Judge Wallace, as he did not become the owner of any stock until November 11, 1919, at which time he purchased two shares.

Testifying very frankly as to why he became the owner of these shares, he said:

Well, this stock was on the market, and I bought it because I believed that if I got hold of this stock I could control the suit.

Q. Why did you want to control this suit?

A. Because I just thought it was a good thing, and that is all.

Q. Why did you think it was a good thing?

A. To get in control of the minority stockholders; that was my purpose in buying. I did not think that the suit should have been dismissed.

Q. So you bought the stock with

the idea that by acquiring two shares of stock you could get into the case which the parties were seeking to dismiss and settle amicably, and that you could thereby get control of the litigation?

A. Yes; after that day when Mr. Bernheim and his counsel asked that the suit be dismissed, after he had fought it through the court of appeals successfully, and after the court of appeals had rendered its opinion, and it looked as if Mr. Bernheim was going to get out of the case, I thought it would be to my advantage and my interest if I could secure some stock and take Mr. Bernheim's place.

W. M. Duffy, as a stockholder in the Louisville Property Company, had, of course, the right to take such steps as he thought necessary to protect his interest without reference to when he became the owner of the stock, but his interest will be as fully protected and his rights as carefully saved by the arrangements made through which the suit was dismissed and the conveyance made to the assignee as they would have been if a receiver had been appointed.

Aside from this, we do not think a party who purchases stock in a corporation after the corporation has rightfully dismissed a pending suit, and conveyed all of its property to an assignee for the purpose of winding up its affairs, is in a position to undo what the corporation has lawfully done. He occupies no better position than any other minority stockholder. It is true that he succeeded by his purchase to all the rights and privileges of his vendor, but his vendor was one of the class represented by Bernheim, and when the disposition that we have set out was made of the case, the rights of his vendor were determined, and Duffy, as a

purchaser after this, is bound by what was done.

The only remaining question is the relief to which the petitioners are entitled, and as to this there is no difficulty. The power of this court to issue a writ of mandamus, directing the judge of a circuit court to dismiss a suit pending in his court, when the order of dismissal has been approved by the parties, and to enter therein a judgment that has been agreed upon by all the parties to the suit, they being competent to enter into agreements, is not only authorized by § 110 of the Constitution, but sustained by many opinions of this court. *Mandamus—to compel entry of judgment.*

*Louisville & N. R. Co. v. Miller*, 112 Ky. 464, 66 S. W. 5; *Kelley v. Toney*, 95 Ky. 338, 25 S. W. 264; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006; *Weaver v. Toney*, 107 Ky. 419, 50 L.R.A. 105, 54 S. W. 782; *Shoemaker v. Hodge*, 111 Ky. 436, 63 S. W. 979; *Com. v. Tarvin*, 114 Ky. 877, 72 S. W. 13; *Davidson v. Lewis*, 159 Ky. 798, 169 S. W. 538; *Ohio River Contract Co. v. Gordon*, 170 Ky. 412, 186 S. W. 178; *Casebolt v. Butler*, 175 Ky. 381, 194 S. W. 305.

The petitioners have also asked a writ of prohibition, but we do not think it necessary to make any directions prohibiting Judge Wallace from appointing a receiver or making absolute the contempt rules issued, because the entry of the order dismissing the suit and the agreed judgment, which we have said the parties had a right to have entered, necessarily takes from Judge Wallace the right to appoint a receiver, and absolves from contempt the parties ruled.

Wherefore, the whole court except Judge Quinn sitting, Judge Wallace, as judge of the chancery branch, Louisville Jefferson Circuit Court, First Division, is directed to have entered on the order books of his court the orders and judgments tendered on November 6.

Corporation—  
right of one  
purchasing  
stock pending  
litigation.

—right to control  
action of  
corporation.



## ANNOTATION.

### Right of plaintiff to dismiss an action brought in behalf of himself and other persons.

- I. Introduction, 950.
- II. Before order or decree, 952.
- III. After order or decree:
  - a. In general, 954.
  - b. Illustrations, 956.
- IV. Miscellaneous, 957.

#### I. Introduction.

This annotation does not cover the question of the right of the original plaintiff to dismiss the action after others have been permitted to intervene and become parties. See, for instance, *Lee v. Casey* (1915) 269 Ill. 604, 109 N. E. 1062. It purports rather to include only those cases where the person seeking to prevent the dismissal was not a party of record.

A party, of course, usually has the right to discontinue an action or proceeding instituted by him, unless substantial rights of other parties have accrued and injustice will be done them by permitting the discontinuance. *Andrews v. French* (1913) 17 N. M. 615, 131 Pac. 996.

But it is well settled, it was said in *School Dist. v. Clifcorn* (1907) 133 Wis. 465, 112 N. W. 1099, that a plaintiff has no such complete control over his action as will entitle him to discontinue it at will without action by the court, and that the court may, in its discretion, deny the application for leave to discontinue, if the rights of the defendant or of third parties or the public will be substantially prejudiced thereby.

It was said in *State ex rel. Milwaukee v. Ludwig* (1900) 106 Wis. 226, 82 N. W. 158, that "when a plaintiff attempts to exercise his so-called absolute right to discontinue an action prosecuted by him, varied and numerous considerations may need to be weighed by the court before reaching its conclusion whether to allow or deny effect to such attempt. The effect of a termination of the suit upon others, either the defendant or third parties, or sometimes the public, is to be considered, and, if any prejudice to such

persons is discoverable, whether it is such as to warrant retention of the suit."

A distinction should be observed as to the right to dismiss the action between the class of cases under consideration, where one brings an action for himself and others similarly situated, and that class of cases, not within the scope of the note where the one bringing the action is merely nominal party or trustee, the beneficial interest being in another. Because the rule is sometimes stated so broadly as to cover both classes of cases, as, for instance, that a plaintiff will not be permitted to dismiss the action where the interest of third parties would thereby be prejudiced, if the latter will indemnify the plaintiff for costs incurred in the further prosecution of the case, attention should be called to the fact that those cases in which dismissal by the plaintiff has been denied, even before judgment, because of the interest of third persons, not parties of record, have usually been cases in which the one bringing the action was a merely nominal plaintiff or trustee. It seems to be well settled that such a plaintiff cannot dismiss the action as against the objection of the person having the beneficial interest; at least, if the latter will indemnify the plaintiff against the costs to which he may be subjected. Among other cases supporting this rule are the following:

**United States.**—*Farmers' & M. Bank v. Gaither* (1828) 3 Cranch, 347, Fed. Cas. No. 4,654, reversed on other grounds in (1828) 1 Pet. 37, 7 L. ed. 43.

**Alabama.**—*Cunningham v. Carpenter* (1846) 10 Ala. 109; *White v. Nance* (1849) 16 Ala. 345 (rule recognized); *Jennings v. Pearce* (1893) 99 Ala. 303, 13 So. 605 (where plaintiff had assigned his claim).

**Illinois.**—*Hanchett v. Ives* (1890) 133 Ill. 332, 24 N. E. 396, affirming on

this point (1889) 33 Ill. App. 471; *Lyon v. Worcester* (1893) 49 Ill. App. 639.

**Indiana.** — *Steeple v. Downing* (1878) 60 Ind. 478.

**Kentucky.** — *Thomas v. Thomas* (1823) 3 Litt. 8.

**Maine.**—*Penobscot R. Co. v. Mayo* (1872) 60 Me. 306.

**Massachusetts.**—*Burroughs v. Wellington* (1912) 211 Mass. 494, 98 N. E. 596.

**Minnesota.**—*National Power & Paper Co. v. Rossman* (1913) 122 Minn. 355, 142 N. W. 818, Ann. Cas. 1914D, 830.

**North Dakota.**—*Van Gordon v. Goldamer* (1907) 16 N. D. 323, 113 N. W. 609.

**Oklahoma.**—*Berry v. Second Baptist Church* (1913) 37 Okla. 117, 130 Pac. 585.

**Pennsylvania.** — *M'Cullum v. Cox* (1785; Pa. Sup. Ct) 1 Dall. 189, 1 L. ed. 70; *Bentley v. Reading* (1887) 22 W. N. C. 60.

**South Carolina.** — *Morris v. Peay* (1832) 19 S. C. L. (1 Hill) 35.

**Wisconsin.** — *Selleck v. Phelps* (1860) 11 Wis. 380.

While ordinarily a plaintiff has the absolute right to dismiss the action, this is not true where he acts in a fiduciary capacity; and if such a plaintiff fails to act in good faith toward those whom he serves, and acts in collusion with the defendant, the dismissal may be set aside. *National Power & Paper Co. v. Rossman* (1913) 122 Minn. 355, 142 N. W. 818, Ann. Cas. 1914D, 830. And so it was held that while ordinarily the directors of a corporation might control an action brought by it, and dismiss the action without consulting the stockholders, they had no right to dismiss such an action through collusion with the defendant; and, if they did so, the dismissal, it was held, would be set aside at the instance of stockholders, the action reinstated, and the stockholders permitted to become parties and continue the action, when such course was necessary to protect their substantial rights. See, also, as illustrative of this class of cases, *Bangs v. Sullivan* (1903) 33 Tex. Civ. App. 30, 73 S. W.

74, holding that if a reorganization committee of an insolvent corporation, having brought a suit, fraudulently colludes with the defendant and dismisses the suit, the dismissal may be set aside at the instance of a stockholder.

And the rule that a nominal party, who is acting merely in a representative capacity, has no right to dismiss an action to the prejudice of the real party in interest without his consent, was applied in *Berry v. Second Baptist Church* (1913) 37 Okla. 117, 130 Pac. 585, to a case where the majority of the trustees of a church, acting for their private interests, attempted to dismiss an action brought for the church.

The person having the beneficial interest is considered as the substantial plaintiff, although his name does not appear in the record. See, among possibly other cases to this effect, *Canby v. Ridgway* (1808) 1 Binn. (Pa.) 496; *Bury v. Hartman* (1818) 4 Serg. & R. (Pa.) 175; and *Bentley v. Reading* (1887) 22 W. N. C. (Pa.) 60.

But where the plaintiff is a real party in interest, he has the right to control or to dismiss the action, though it is brought in terms for the use of another, who might incidentally benefit in case of recovery. *Moore v. Bres* (1867) 19 La. Ann. 532.

It will be observed that the rule supported by the above cases, that a merely nominal or legal plaintiff does not ordinarily have a right to control or to dismiss the action where the rights of third parties having the beneficial interest will be prejudiced, is the reverse, in result, of the equitable rule which permits a complainant suing for himself and others similarly situated to dismiss the suit before any order or decree has been made affecting the rights of such other persons who have an interest similar to complainant, but have not been made parties. The two classes of cases are, of course, dissimilar, though sometimes confused in the authorities. And the above cases are cited merely for the purpose of clearly making the distinction between them and the decisions which present the precise question under annotation.

*II. Before order or decree.*

The rule appears to be well settled that ordinarily one suing for himself and others similarly situated, as a creditor who brings suit against the debtor, for himself and other creditors, has the right to dismiss the suit before others interested have taken steps to become parties, and before the court has made any order or decree affecting their rights.

**District of Columbia.**—*La Tourette v. Fletcher* (1895) 6 App. D. C. 324 (recognizing rule).

**Georgia.**—*McDougald v. Dougherty* (1852) 11 Ga. 570.

**Illinois.**—*Lee v. Casey* (1915) 269 Ill. 604, 109 N. E. 1062 (rule recognized).

**Kentucky.**—*BERNHEIM v. WALLACE* (reported herewith), ante, 938.

**New Jersey.**—*Thompson v. Fisler* (1881) 33 N. J. Eq. 480 (rule approved); *Schlagenhauf v. Craven* (1901) 61 N. J. Eq. 232, 47 Atl. 804.

**New York.**—*Innes v. Lansing* (1839) 7 Paige, 583; *Brinckerhoff v. Bostwick* (1885) 99 N. Y. 185, 1 N. E. 663 (rule approved); *Hirshfeld v. Fitzgerald* (1899) 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997; *Mattison v. Demarest* (1863) 1 Robt. 717, 19 Abb. Pr. 356; *O'Brien v. Browning* (1875) 49 How. Pr. 109 (rule approved); *Tremain v. Guardian Mut. L. Ins. Co.* (1877) 11 Hun, 286; *Beadleston v. Alley* (1889) 55 Hun, 605, 28 N. Y. S. R. 89, 7 N. Y. Supp. 747; *Salisbury v. Binghamton Pub. Co.* (1895) 85 Hun, 99, 32 N. Y. Supp. 652. See also, as approving rule, *Lewisohn Bros. v. Anacanda Copper Min. Co.* (1899) 26 Misc. 613, 56 N. Y. Supp. 807; *Mills v. Ross* (1899) 39 App. Div. 563, 57 N. Y. Supp. 680, affirmed without opinion in (1901) 168 N. Y. 673, 61 N. E. 1131; and *Manning v. Mercantile Trust Co.* (1902) 37 Misc. 215, 75 N. Y. Supp. 168.

**Virginia.**—*Duerson v. Alsop* (1876) 27 Gratt. 229 (recognizing rule that, at least until decree, a creditors' bill is under control of complainant); *Piedmont & A. L. Ins. Co. v. Maury* (1881) 75 Va. 508.

**England.**—*Handford v. Storie* (1825) 2 Sim. & Stu. 196, 57 Eng. Re-

print, 320, 3 L. J. Ch. 110; *Wood v. Westfall* (1831) *Younge, Exch.* 305, 159 Eng. Reprint, 1008; *Pemberton v. Topham* (1838) 1 Beav. 316, 48 Eng. Reprint, 962, 2 Jur. 1009; *Scarth v. Chadwick* (1850) 14 Jur. 300.

**Canada.**—*Drifill v. Oeugh* (1906) 8 Ont. Week. Rep. 496 (recognizing rule that before judgment the plaintiff in a creditors' suit is dominus litis); *Service v. Milne* (1916) 22 B. C. 469, 27 D. L. R. 725 (rule recognized).

It was held in *Hirshfeld v. Fitzgerald* (1899) 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997, that one who brings an action on behalf of himself and others similarly situated, who may come in and share in the expenses, has the right to control the action, and may continue, compromise, abandon, or discontinue it at pleasure, until a creditor similarly situated has procured an order to be made a party to the action, or has served a notice of a motion to be brought in, or until interlocutory judgment is entered. This rule is approved also in *Manning v. Mercantile Trust Co.* (N. Y.) supra.

And the rule that a complainant suing for himself and other creditors similarly situated has the right to dismiss the suit before judgment, without the consent of the other creditors, was held in *Mattison v. Demarest* (1863) 1 Robt. (N. Y.) 717, 19 Abb. Pr. 356, not changed by the Code provision that when the question is one of common or general interest of many persons, one or more may sue for the benefit of all. The court said that the statute was probably a mere enactment of the chancery rule, and that there was nothing therein which deprived a complainant, suing for a common benefit, of the right of control over the suit.

In *McDougald v. Dougherty* (1852) 11 Ga. 570, it was said that while it is true that one creditor cannot sue alone to enforce payment of his demand out of a common trust fund which has been set apart for himself and others, but must allow others to come in under the decree and share in the proceeds, this does not at all interfere with another equally well-established doctrine that, up to the time of

the decree, the suit is only between the parties, and the plaintiff is dominus litis, or master of his own case, and may dismiss or compromise it, or make any other disposition of it which he sees fit.

And it is said in *La Tourette v. Fletcher* (1895) 6 App. D. C. 324, that it is generally held that a creditors' bill is subject to the control of the complainants therein, and may be discontinued by them at any time, upon satisfaction of their demand, before a decretal order has been made in the proceeding.

It was held in *Schlagenhauf v. Cra-ven* (1901) 61 N. J. Eq. 232, 47 Atl. 804, that if an open creditors' bill is filed by one creditor having a judgment, and the defendants, before any other creditor enters judgment or becomes a party to the suit, satisfies the complainant's claim and costs, and gives notice of motion to dismiss the bill, they are entitled to dismiss, although, after the giving of such notice, other creditors may have entered judgment, and been admitted as complainants.

The remark in *Sterndale v. Hankinson* (1827) 1 Sim. 393, 57 Eng. Reprint, 625, 27 Revised Rep. 210, that on the filing of a creditors' bill every creditor has an inchoate right in the suit, is explained in *Woodgate v. Field* (1842) 2 Hare, 211, 67 Eng. Reprint, 88, 11 L. J. Ch. N. S. 321, 6 Jur. 871, to mean simply that a right then commences which may fail, but which may also be perfected by decree. That, after an order or decree affecting the rights of the other creditors, they are regarded as in some sense, at least, parties to the suit, see III. a, *infra*.

The mere filing of a petition asking to be admitted as a party to the suit does not make the petitioner a party, and put it beyond the power of the original plaintiff to dismiss the suit; to have this effect an order of the court is necessary unless by acquiescence in permitting the petition to be filed without objection and the cause subsequently to proceed as if the petitioner had been duly admitted a party, without an order to this effect, the complainant loses his right to dis-

miss at a subsequent time. *Piedmont & A. L. Ins. Co. v. Maury* (1881) 75 Va. 508. The court intimated that by such acquiescence the right to dismiss might be lost, but stated that the mere filing of the petition did not operate *proprio vigore* to make the petitioners parties.

However, the right of a creditor of an insolvent debtor to dismiss his suit even before summons had been served or bill filed, against the will of the other creditors, was denied in *Honedale Shoe Co. v. Montgomery* (1904) 56 W. Va. 397, 49 S. E. 434, it being held that a suit by a single creditor of an insolvent debtor, whether in his own name only or for himself and other creditors, was, from the date of the summons, which brought the suit into being, a suit for all the creditors, under a statute expressly providing that every such suit should be deemed to be brought in behalf of the plaintiff and all other creditors of the insolvent debtor. And it was held that if a creditor, after bringing such a suit, but before service of summons or filing of a bill, settled his own claim and dismissed the suit, other creditors at the next term of court could have it reinstated, if the dismissal was at rules, the Code giving the court power at the next term to reinstate a cause dismissed in the preceding vacation. The court said: "From the start it was a general creditors' suit. . . . Our cases show that when a suit bears that character it is for the benefit of all creditors, and not under the unlimited control of the nominal plaintiff, properly so called. Whether brought by a plaintiff in his own name only or for himself and other creditors, when a reference is made to convene creditors, it is then surely a suit for the benefit of all, because the reference is for all, and gives the character of the creditors' suit. . . . Without statute the reference makes the suit a general creditors' suit, but the statute in this case makes it such *ab initio*. . . . Being a creditors' suit, the nominal plaintiff cannot dismiss it at will, to the prejudice of other creditors, as it is their suit no less than his. He can dismiss it as to him-

self, but others can become plaintiffs by order of the court. . . . To give the nominal plaintiff absolute right of dismissal would . . . allow the defendant debtor to collude with the nominal plaintiff in controlling the litigation, and in this manner often greatly delay, hinder, and defraud other lien creditors. . . . One creditor, as in this case, brings a suit, and, after it is too late for others to sue, wants to dismiss it. Can it be that he can thus end it, and destroy other creditors, in the face of a statute which plainly intends that one suit shall go for the relief of all, and thus avoid multiplicity of suits, with consequent costs? That would be a misapplication of the statute; would defeat its object and remedial utility."

### III. After order or decree.

#### a. In general.

After an order or decree affecting the rights of the other interested parties for whom the suit is brought, it is well settled that the complainant cannot, as matter of right, dismiss the suit. While in some cases the rule is stated simply that the complainant cannot dismiss after a decree, it appears well established that an interlocutory decree or order, such as the granting of an injunction, appointment of a receiver, order of reference, etc., may have the effect of enabling the other interested persons to prevent an absolute dismissal of the suit by the complainant, although, of course, the court may permit the latter to withdraw from the suit, and one of the other persons in whose behalf the suit has been brought to be substituted in his place. The following cases, which, for the most part, involve merely interlocutory decrees or orders, support the rule that after a decree or order in a suit brought by one of a class, on behalf of himself and others similarly situated, the complainant cannot, as matter of right, dismiss the suit, over the objection of the other interested persons for whose benefit also the suit has been brought, even though they have not become parties of record.

**United States.**—Belmont Nail Co. v. Columbia Iron & Steel Co. (1891) 46

Fed. 336 (after appointment of receiver and filing by another creditor of petition to become a party; plaintiff has no right to dismiss); Johnson v. Miller (1899) 37 C. C. A. 471, 96 Fed. 271.

**Massachusetts.**—Atlas Bank v. Nahant Bank (1840) 23 Pick. 480.

**Michigan.**—Fay v. Erie & K. R. Bank (1836) Harr. Ch. 194; Deane v. Kent Circuit Judge (1909) 155 Mich. 644, 119 N. W. 1098.

**New York.**—Brinckerhoff v. Bostwick (1885) 99 N. Y. 185, 1 N. E. 663; Prouty v. Michigan, S. & N. I. R. Co. (1874) 1 Hun, 655 (rule implied); Lewis v. Hake (1886) 42 Hun, 542 (same); Salisbury v. Binghamton Pub. Co. (1895) 85 Hun, 99, 32 N. Y. Supp. 652; Salisbury v. Strong (1895) 85 Hun, 615, 66 N. Y. S. R. 39, 32 N. Y. Supp. 656. See also, as implying rule, Hirshfeld v. Fitzgerald (1899) 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997, cited under II. *supra*.

**Rhode Island.**—Updike v. Doyle (1863) 7 R. I. 446.

**Virginia.**—Piedmont & A. L. Ins. Co. v. Maury (1881) 75 Va. 508; Catron v. Bostic (1918) 123 Va. 355, 96 S. E. 845.

**West Virginia.**—Billmyer v. Sherman (1884) 23 W. Va. 656; Lewis v. Laidley (1894) 39 W. Va. 422, 19 S. E. 378; Shumate v. Crockett (1897) 43 W. Va. 491, 27 S. E. 240; see also Lindsey v. McGannon (1876) 9 W. Va. 154 (others being admitted as parties).

**Wisconsin.**—State ex rel. Milwaukee v. Ludwig (1900) 106 Wis. 226, 82 N. W. 158.

**England.**—Handford v. Storie (1825) 2 Sim. & Stu. 196, 57 Eng. Reprint, 320, 3 L. J. Ch. 110.

It will be observed that some of the statements in the reported case (BERNHEIM v. WALLACE, ante, 938) do not appear to be in harmony with the above rule. For instance, it is said in that case that the plaintiff, who was suing for himself and other minority stockholders, might have dismissed the action without prejudice at any time while it was pending on appeal, before the opinion was handed down by the appellate court, and that it would necessarily follow that the dismissal would carry with it the dismissal of

the action as to the entire class for whose benefit he sued. But this statement appears unnecessary to the decision, which appears to be based on the fact that the agreed judgment, which it was sought to have entered upon the dismissal, as fully protected the rights of the other stockholders as the judgment rendered by the court. This case illustrates the point, suggested in the statement of the rule, that while the plaintiff, suing for himself and others similarly situated, cannot, as matter of right, dismiss the suit after judgment, he may be permitted to do so where it is clear, as it was in the *BERNHEIM CASE*, that the rights of other interested parties are fully protected.

It was said in *Handford v. Storie* (Eng.) *supra*, that a plaintiff who sues on behalf of himself and all other persons of the same class, since he acts upon his own motion and at his own expense, retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure; but that after a decree he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it; and that the reason for the distinction is that, before the decree, no other person of the class is bound to rely upon the diligence of him who first instituted the suit, but may file a bill of his own; whereas, after a decree, a second suit is not permissible. To a similar effect is *Brinkerhoff v. Bostwick* (1885) 99 N. Y. 185, 1 N. E. 663.

The clear implication of such cases as *Mattison v. Demarest* (1863) 1 Robt. (N. Y.) 717, 19 Abb. Pr. 356, appears to be that after judgment or decree the complainant who sues on behalf of himself and others similarly situated cannot discontinue the suit against the objection of the other creditors, it being said that the reason for the rule that before decree the complainant may dismiss the suit is that each creditor whose execution has been returned unsatisfied may file his bill; but that the moment a decree is entered in the suit, the rights of the other creditors attach to it, and the

proceedings in all the other suits are or may be stayed.

It was said of a creditors' bill in *Johnson v. Hammersley* (1857) 24 Beav. 498, 53 Eng. Reprint, 450, that, after a decree, all creditors are as plaintiffs.

Also in *Piedmont & A. L. Ins. Co. v. Maury* (1881) 75 Va. 508, it was said that the sole dominion of the suit by the original plaintiff ceases as soon as the creditors become parties; and that they become parties in a general sense as soon as a decree or order for a general account is entered under which they may come in and prove their demands.

And in *Simmons v. Lyles* (1876) 27 Gratt. (Va.) 922, the court said that after a decree for a general account, even at the suit of a single creditor, all the other creditors may come in under the decree and prove their debts before the master to whom the cause is referred, and obtain satisfaction of their demands; and that, under such circumstances, they are all treated as parties to the suit.

All persons interested in a decree entered in a cause in chancery have a right to insist upon its execution; the decree is a decree of the other interested persons as well as of the parties to the suit. *Updike v. Doyle* (1863) 7 R. I. 446.

It was said in *Maxwell v. Northern Trust Co.* (1897) 70 Minn. 334, 73 N. W. 173, that a creditors' suit is no more that of the creditor who instituted it than of any other creditor who appears and files his claim; and that it does not give the former any exclusive management, except so far as it may thereafter be necessary that one creditor shall, to some extent, be a sort of leader or general manager for all the creditors; also that the court may, in its discretion, at any time take from the creditor who filed the complaint such general management as may thereafter be necessary, and give it to some other creditor.

The language of the court in *Atlas Bank v. Nahant Bank* (1839) 23 Pick. (Mass.) 480, is broad enough to deny the right of a creditor suing on behalf of himself and other creditors to dis-

miss the suit at any stage of the proceedings, it being said that the plaintiffs, having instituted the proceeding as a statutory remedy for themselves and others, continued for the benefit of all parties concerned, and had no more power to discontinue the suit than a petitioning creditor to discontinue proceedings under a bankruptcy commission. But in this case an interlocutory injunction had been granted. The statement in this case is referred to with approval in *Belmont Nail Co. v. Columbia Iron & Steel Co.* (1891) 46 Fed. 336; but in this case a receiver had been appointed, and the petition of another creditor to become a party was pending at the time of the attempt to dismiss the suit.

*b. Illustrations.*

A creditor suing on behalf of himself and such other creditors as may become parties to the proceeding is not entitled, as matter of right, to discontinue the suit after procuring an injunction and the appointment of a receiver, and after other creditors have filed claims. *Deane v. Kent Circuit Judge* (1909) 155 Mich. 644, 119 N. W. 1093.

After an order of reference, the plaintiff in a creditors' suit ceases to have the absolute control of it, and it cannot be dismissed by him without the consent of the other creditors. *Billmyer v. Sherman* (1884) 33 W. Va. 656; *Lewis v. Laidley* (1894) 39 W. Va. 422, 19 S. E. 378. These cases hold that after creditors have filed their claims in such a suit, the nominal plaintiff, on satisfaction of his claim, may have the suit dismissed as to himself, but such other creditors have the right to continue it for their own benefit and at their own expense. A statute is cited providing that one filing a claim in such a suit should be deemed a party plaintiff.

A suit to enforce liens, under statute, by one judgment creditor suing for himself and other lienors, will not be suspended by payment of the plaintiff after an order of reference; but it may and will proceed in the name of the plaintiff, unless an order is made substituting another person as plain-

tiff. *Shumate v. Crockett* (1897) 43 W. Va. 491, 27 S. E. 240.

After an account of debts is ordered and taken in a suit brought by a creditor suing on his own behalf only, it was held in *Catron v. Bostic* (1918) 123 Va. 355, 96 S. E. 845, that the suit, upon the entry of the order, becomes one for general creditors, and the complainant loses dominion over it, even if it was his individual suit before that time.

And the rule that when a general account is ordered in a creditors' suit, the suit is for the benefit of all the creditors, and thereupon ceases to be under the control of the party who instituted it, is approved in *Karn v. Rorer Iron Co.* (1890) 86 Va. 754, 11 S. E. 481.

It was held in *Fay v. Erie & K. R. Bank* (1886) *Harr. Ch. (Mich.)* 194, that a creditor of a corporation who had begun proceedings under statute against it, and obtained an injunction and the appointment of a receiver, cannot, as a matter of right, upon being paid his particular claim, obtain dissolution of the injunction, the dismissal of the bill, and discharge of the receiver, without any right or duty on the part of the court to protect other creditors who may have filed their claims with the complainant, or to protect and save harmless the receiver.

And it was held in *Johnson v. Miller* (1899) 37 C. C. A. 471, 96 Fed. 271, that after the court had assumed charge of the affairs of a corporation, upon a bill by a creditor in behalf of himself and all other creditors and stockholders, and had appointed a receiver, issued an injunction to restrain the creditors from pursuing other remedies, and required them to prove their claims, the parties to the record cannot terminate the suit by agreement without the consent of the other creditors; and that an application to dismiss under such circumstances is addressed to the discretion of the court, which will take the interest of the other creditors into consideration.

The view that, even under such circumstances, the court has the power, upon proper cause being shown, and upon being satisfied that the interests

of all parties, including creditors, would be advanced by the dismissal of the bill, to permit the dismissal, even against the objection of one or more of the creditors, but that the matter rests in its discretion, is supported by *Fay v. Erie & K. R. Bank* (Mich.) *supra*, and *Belmont Nail Co. v. Columbia Iron & Steel Co.* (1891) 46 Fed. 336.

Where, after decree for an account in a suit for the administration of an estate of a testator, brought by a legatee, it appeared that the assets were insufficient even for payment of debts, and an order was obtained by consent that the bill should be dismissed, it was held in *O'Donnell v. Young* (1835) 5 L. J. Ch. N. S. (Eng.) 30, that at the instance of a creditor who was prejudiced by the decree of dismissal, it might be set aside and such creditor be given the conduct of the suit.

The doctrine that after an interlocutory decree establishing rights of legatees, one of whom has filed a bill to establish the will, the complainant cannot, on satisfaction of his demand, dismiss the suit to the prejudice of the other legatees whose rights have been established by the decree, is supported by the case of *Collins v. Taylor* (1842) 4 N. J. Eq. 163. But in this case the other legatees were parties defendants. The court held that they were entitled to the benefit of the interlocutory decree, and to file a supplemental bill to obtain its benefit, without prejudice from the order of dismissal, which should be set aside. But it was held that they could not proceed in the name of the complainant, and that the further proceedings must be at their own expense, without any liability on the part of the complainant therefor.

Where a suit was brought by an abutting landowner for himself and others similarly situated, to restrain a street railway company from accepting a franchise, and, after an injunction pendente lite was granted, the plaintiff moved to dismiss the suit under circumstances calculated to arouse the suspicion of the court that he acted in collusion with the defendant, it

was held in *State ex rel. Milwaukee v. Ludwig* (1900) 106 Wis. 227, 82 N. W. 158, that mandamus would not lie to compel the court to dismiss the action and to vacate an order substituting another abutting landowner as plaintiff.

But that a minority stockholder suing the corporation in his own right and on behalf of the other minority stockholders may be entitled, even after the rights of the stockholders have been determined in the court of appeals, to the entry of an order of dismissal and an agreed judgment, if the rights of those thus represented by the complainant are as fully protected by the proposed settlement as they would be otherwise if the matter remained under the control of the court and its judgment were executed, see the reported case (*BERNHEIM v. WALLACE*, ante, 988).

In *Beadleston v. Alley* (1889) 55 Hun, 605, 28 N. Y. S. R. 89, 7 N. Y. Supp. 747, a stockholder suing on behalf of herself and other stockholders was held entitled to dismiss a suit after an interlocutory decree was directed, but before it was entered. The court said there had been no judgment, and that all that could be said was that there might have been a judgment if plaintiff had chosen to enter it; but that the plaintiff owed no duty to anyone to enter the judgment. The court said also that it by no means conceded that this judgment was such a judgment as would have terminated the plaintiff's control over the action, and it was inclined to think it was not such a judgment; but that it held simply that until the judgment was entered, there was no ground for the contention that the plaintiff's control was terminated.

#### IV. Miscellaneous.

In *Merchants' Nat. Bank v. United States* (1914) 130 C. C. A. 548, 214 Fed. 200, it was held that a creditor who brings an action under the Act of Congress of 1905, authorizing one who has supplied with labor and material a contractor with the United States, in case the latter does not bring suit within six months from the completion of the contract, to sue in the name of



the United States on the contractor's bond, but providing that only one such action shall be brought, and that any creditor may file his claim in the action and be made a party thereto within a year after the completion of the work, will not be permitted to settle his claim and dismiss the action to the prejudice of other creditors; but that discontinuance would be sanctioned only if it appeared that no intervener stood ready to prosecute the action.

And it was held in *Heidrich v. Silva* (1890) 89 Ky. 422, 12 S. W. 770, that an action brought by a creditor inured to the benefit of all the other creditors, and he could not, by dismissal of his petition after other creditors had filed claims, destroy this right. In this case the court referred to a statute expressly declaring that a creditor, by proving his claim before the master, becomes a party to the action.

And on order of dismissal, it was held in *Schoniger v. Logan* (1918) 40 S. D. 30, 166 N. W. 226, should be vacated, where it was obtained after service on the plaintiff's attorney of a notice of motion for leave to intervene and petition of intervention, even though the dismissal was in good faith and did not prejudice the cause of action as disclosed by such petition. It was said that the fact that the attorney who moved the dismissal and obtained the order did not advise the court of the service of the notice and petition in intervention amounted to a concealment from the court of a fact which necessarily would have controlled its action, and that the good faith of counsel was immaterial, since the court would not have dismissed the action had it been advised of the pendency of the intervention proceedings; also, that the right to litigate in a pending action a claim for affirmative relief set up in a complaint of intervention was conferred by statute, and that a judgment of dismissal which deprived the intervener of that right

was prejudicial, even though it was not an adjudication of the matters alleged in the complaint.

It was said in *Com. use of Beckingham v. Magee* (1909) 224 Pa. 166, 73 Atl. 346, that since, under statute, only one action was permitted, which was for the use of all parties interested, it followed that ordinarily the use plaintiff in an action on an administrator's bond could not discontinue the action. But it was held that where the action was prematurely brought, the plaintiff should be permitted to correct the error by discontinuing it and beginning *de novo*.

Where a statute provided a penalty in case of the fraudulent transfer of shares of stock for the purpose of avoiding taxation, to be recovered by the treasurer of the city or town in which the shareholder resided, one half of the sum recovered being for the use of the town and the other half for the use of the person furnishing the necessary evidence, it was held that a city treasurer who began such a suit could dismiss it before judgment, over the objection of the person furnishing the evidence. *Wheeler v. Goulding* (1859) 13 Gray (Mass.) 539.

Generally, as to the right of a creditor to control a suit brought for himself and other creditors, see also *Bookleff v. Crummack* (1837) 1 Cooper, Fr. Cas. 125, 47 Eng. Reprint, 430, holding that the fact that, until the interlocutory decree, a creditors' suit was controlled by the defendant's solicitor, with the view of obtaining an injunction against a creditor proceeding in law, was not a sufficient ground for depriving the original plaintiff of the conduct of the suit; and *Smith v. Guy* (1846) 2 Phill. Ch. 159, 41 Eng. Reprint, 902, holding that the fact that there was an irregularity in the interlocutory decree was not a sufficient ground for depriving the original plaintiff of the conduct of a creditors' suit.

R. E. H.

OLIVER CASTLE, Respt.,  
v.  
SOUTHERN RAILWAY COMPANY, Appt.

*South Carolina Supreme Court — July 15, 1919.*

(— S. C. —, 99 S. E. 846.)

**Carrier — action against Director General.**

The provision of the act of Congress authorizing the President of the United States to take possession of the railroads as a war measure, which declared that carriers shall be subject to all liabilities of common carriers except in so far as inconsistent with any order of the President, justifies the order of the Director General, as sanctioned by that of the President, requiring all actions for injuries to passengers to be brought against the Director General, and not against the carrier.

[See note on this question beginning on page 969.]

(Watts and Gage, JJ., dissent.)

**APPEAL** by defendant from an order of the Common Pleas Circuit Court for York County (Moore, J.) refusing to set aside the service of the summons and complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. McDonald & McDonald, for appellant:

The orders of the Director General of Railroads, made in pursuance of the act of Congress and the proclamations of the President, have the full force and effect of law, and are of the same binding force and effect as an act of Congress.

Muir v. Louisville & N. R. Co. 247 Fed. 888; Cocker v. New York, O. & W. R. Co. 253 Fed. 676; Harnick v. Pennsylvania R. Co. 254 Fed. 748; Rutherford v. Union P. R. Co. 254 Fed. 880.

Mr. S. R. Prince also for appellant.  
Mr. Thomas F. McDow, for respondent:

P. W. Patrick, who was admittedly the agent and selling tickets and attending to freight business at the Southern Railway station, was the proper party upon whom to make the service.

Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co. 106 Misc. 58, 174 N. Y. Supp. 60.

Gary, Ch. J., delivered the opinion of the court:

This is an appeal from an order refusing to set aside the service of the summons and complaint.

The defendant gave notice of a motion to set aside the service of the summons and complaint, on the grounds that the said corporation is not liable to be sued in this action, and that the alleged agent upon whom the service was made is not an agent of the defendant, but was an agent of the United States government at the time of the alleged service.

His Honor, the circuit judge, ruled that the plaintiff had the right to bring his action, under § 10 of the act entitled, "An Act to Provide for the Operation of Transportation Systems While under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes," approved the 21st of March, 1918 (chapter 25, 40 Stat. at L. 456, Comp. Stat. § 3115½, Fed. Stat. Anno. Supp. 1918, p. 757); and that the President of the United States did not have the power to delegate any of the powers, with reference to actions at law and suits in equity, to the Director General of Railroads.

The complaint alleges that the plaintiff was injured, through the negligence of the defendant, while riding on its line as a passenger from Washington, District of Columbia, to Salisbury, North Carolina, near Lynchburg, in the state of Virginia. The appeal assigns error in the said rulings.

On the 29th of August, 1916, Congress enacted a statute entitled, "An Act Making Appropriations for the Support of the Army, for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seventeen." Chapter 418, 39 Stat. at L. 619. Section 1 thereof (Comp. Stat. § 1974a) is as follows: "The President, in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. . . ."

This statute not only empowered the President of the United States to take possession and control of the systems of transportation for the transfer of troops and war material, but also for such other purposes, connected with the emergency, as might be necessary, in the exercise of his discretion. War was afterwards declared; and the powers thus conferred upon the President fully authorized him to issue his proclamation, on the 26th of December, 1917, which, among other provisions, contains the following:

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the

boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the *boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.*

"Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such. . . .

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but *suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine.*" 40 Stat. at L. 1784, Comp. Stat. § 1974a, note.

When Congress passed the act approved the 29th of August, 1916, it knew that, if war was declared, the President would have a tremendous responsibility upon his shoulders and very many delicate duties to perform, which in large measure necessarily would have to be intrusted to other officials. It also knew that it would be necessary to resort to extraordinary methods during the emergency. The President's proclamation on the 26th of December, 1917, embodied his policy in regard to the control and opera-

tion of the systems of transportation at that time, as shown by the words which we have italicized. But realizing that it might become necessary to change that policy, he expressly ordered that it should only remain of force "until and except so far as said Director shall from time to time otherwise by general or special orders determine."

This was the situation on the 21st of March, 1918, when Congress passed the act hereinbefore mentioned, of which §§ 8 and 9 (Comp. Stat. §§ 3115½h, 3115½i) are as follows:

"Sec. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control, through such agencies as he may determine.

"Sec. 9. That the provisions of the act entitled 'An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seventeen, and for Other Purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Congress knew, as we have already stated, the manner in which the provisions of the Act of 1916 had been construed by the President; therefore the only reasonable inference is that it was the intention, not only to approve the policy which he had temporarily adopted, as indicated by his proclamation, but to use such agencies as he might determine, and that he should have such additional powers as might be necessary or appropriate to give effect to the powers therein or theretofore conferred.

"Sec. 10. *That carriers while under Federal control shall be subject to all laws and liabilities, as com-*

*mon carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.* Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control." Comp. Stat. § 3115½j.

If the words, "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," stood alone, it might well be contended that Congress intended to adopt a permanent policy, different from that outlined by the President in his proclamation. It, however, qualified such right, and made it conform to the policy of the President, by the insertion of the words which we have italicized in that section, and thereby gave it the force and effect only of a temporary expedient until a further order of the President.

"Sec. 16. *That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy*

of the Federal government concerning the ownership, control, or regulation of carriers or the methods or basis of the capitalization thereof." Comp. Stat. § 3115 $\frac{1}{2}$ p.

The words which we have italicized show why Congress intrusted the exercise of so much power to the discretion of the President, and the agencies selected by him.

On the 29th of March, the President issued another proclamation, which, omitting the preamble, provides:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President . . . to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform." 40 Stat. at L. 1764, Comp. Stat. § 3115 $\frac{1}{2}$ h, note.

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but *suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Di-*

*rector may, by general or special orders, otherwise determine.*" Proclamation of December 26, 1917 (40 Stat. at L. 1735, Comp. Stat. § 1974a, note).

On the 11th of April, 1918, the President made another proclamation, which, after the preamble, contains the following provisions:

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who has been duly appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, officers, and employees of said systems of transportation. Until and except so far as said Director General shall from time to time by general or special orders otherwise provide, the boards of directors, officers, and employees of said transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies.

"*Until and except so far as said Director General shall from time to time otherwise by general or special orders determine*, such systems of transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. *But any orders, general or special, hereafter made by said Director General, shall have paramount authority and be obeyed as such.*" 40 Stat. at L. 1770, Comp. Stat. § 1974a, note.

These proclamations were issued after the Act of March 21, 1918, was approved. The words which we have italicized clearly show that the provision therein, as to actions at law and suits in equity against the carriers, was construed by the

President to be temporary in its effect and subject to change by order of the Director General, whenever he deemed it advisable to inaugurate a different policy.

General Order No. 8, § 5, provides that "the government now being in control of the railroads, the officers and employees of the various companies no longer serve a private interest. All now serve the government and the public interest only."

General Order No. 50, made on the 28th of October, 1918, by William G. McAdoo as Director General, is as follows:

"Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that 'until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes . . . but any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such;' and

"Whereas the act of Congress, called the Federal Control Act, approved March 21, 1918, § 10 (Comp. Stat. § 3115½j), provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President;' and

"Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corpora-

tions on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control, should be brought directly against the said Director General of Railroads and not against said corporations:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

"Subject to the provisions of General Orders numbered 18, 18A, and 26 heretofore issued by the Director General of Railroads, service of process in any such action, suit, or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other

carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

"The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding."

General Order No. 50A, which is in all material respects similar to General Order No. 50, was issued on the 11th of January, 1919, by Walker D. Hines, Director General.

Our conclusion that William G. McAdoo, Director General, and

Walker D. Hines, Director General, were vested with full power to make General Orders No. 50 and No. 50 A, <sup>Carrier—action against Director General.</sup> is sustained by the recent decision rendered by the United States Supreme Court, in the case of Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502.

Reversed.

Hydrick and Fraser, JJ., concur.

Watts and Gage, JJ., dissent.

#### NOTE.

"Federal Control of Public Utilities" is the subject of annotation following the case of L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 4 A.L.R. 1669, which is supplemented by the annotation following the case of Peacock v. Detroit, G. H. & M. R. Co. post, 969. The reported case (CASTLE v. SOUTHERN R. Co. ante, 959) is considered in its proper connection at page 1697 of the earlier note.

FRANK A. PEACOCK et al.

v.

DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY COMPANY,  
Plff. in Err.

*Michigan Supreme Court — December 23, 1919.*

(— Mich. —, 175 N. W. 580.)

#### Railroads — relation to Director General.

1. The relations between the railroad and the government, after the roads had been placed under the control of the Director General, were either technically those of landlord and tenant or analogous thereto.

[See note on this question beginning on page 969.]

— lease — liability for acts of lessee.

2. A railroad company which has leased its property to another is not liable for the negligent acts of such other.

[See 22 R. C. L. 1083.]

Pleading — affirmative defense — absence of negligence.

3. The defense in an action against

a railroad company for negligently setting fire to property along its right of way, that it committed no negligent acts, but the acts which caused the injury were those of the agents of the Director General of Railroads, is not an affirmative one.

Evidence — judicial notice — acts of Congress.

4. The courts of a state take judicial

notice of the acts of Congress and the proclamations of the President.

[See 15 R. C. L. 1064.]

**Appeal — substitution of Director General for railroad.**

5. An action against a railroad company to recover damages for injury by fire to property adjoining its right of

way after the road had gone into the possession of the Director General of Railroads may be amended on appeal, after the suggestion of the counsel for the railroad company and the Director General that such amendment be made at the trial had been refused, so as to substitute the Director General for the railroad company as defendant.

**ERROR** to the Circuit Court for Shiawassee County to review a judgment in favor of plaintiffs in an action brought to recover damages for injury to their property by fire alleged to have been negligently set out by defendant. *Affirmed as amended.*

The facts are stated in the opinion of the court.

Messrs. Harrison Geer and W. K. Williams, for plaintiff in error:

The possession and control of the railroads taken under the acts of Congress and by proclamation of the President were complete and for all purposes. The authority so to do arose under the undivided character of the war power of the United States.

Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P.U.R. 1919D, 705, 39 Sup. Ct. Rep. 502; Rutherford v. Union P. R. Co. 254 Fed. 880.

Had the defendant leased its railroad to the Federal government, it would not, under the law of this state, have been liable to respond in damages for the torts of the lessee.

Ackerman v. Cincinnati, S. & M. R. Co. 143 Mich. 58, 114 Am. St. Rep. 640, 106 N. W. 558, 8 Ann. Cas. 118.

The word "carriers," as used in the act of Congress, means nothing more or less than the Director General.

Rutherford v. Union P. R. Co. 254 Fed. 880; United States v. Nixon, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; Schumacher v. Pennsylvania R. Co. 106 Misc. 564, 175 N. Y. Supp. 84.

The plea of the defendant was the general issue, which, under the practice as previously existing, was certainly broad enough to admit of the defense proffered.

Ackerman v. Cincinnati, S. & M. R. Co. 143 Mich. 58, 114 Am. St. Rep. 640, 106 N. W. 558, 8 Ann. Cas. 118.

Persons must, in contemplation of law, have knowledge of the acts of Congress and proclamations of the President, and courts and officers thereof will take judicial notice of the fact that defendant was taken over by the United States Railroad Administration.

Jenkins v. Collard, 145 U. S. 546, 36

L. ed. 812, 12 Sup. Ct. Rep. 868; McMorrin Mill. Co. v. C. H. Little Co. 201 Mich. 301, 167 N. W. 990.

Messrs. Miner & Miner for defendants in error.

Fellows, J., delivered the opinion of the court:

By the Act of August 29, 1916, entitled "An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seventeen, and for Other Purposes," the Congress of the United States, among other things, enacted (39 Stat. at L. p. 645, chap. 418, Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095): "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, this country was at war with Germany and with Austria. On that date the President issued a proclamation (40 Stat. at L. 1734, Comp. Stat. § 1974a, note). It is not necessary to quote it in full; but in it the President did "take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transpor-



tation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power. . . ."

And by the proclamation the President directed that the possession, control, operation, and utilization of such transportation systems should be exercised by and through William G. McAdoo, therein appointed and designated as "Director General of Railroads;" and such Director General of Railroads was authorized to control and operate such systems through the officers and employees thereof.

On March 21, 1918, the Congress, by an act entitled "An Act to Provide for the Operation of Transportation Systems While under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes" (40 Stat. at L. 451 et seq., chap. 25, Comp Stat. §§ 3115½a-3115½p, Fed. Stat. Anno. Supp. 1918, p. 757), after reciting that the President had in time of war taken possession, use, control, and operation of the transportation systems, made quite comprehensive provisions with reference to such Federal control. So far as important here, the act provided for the execution of agreements for compensation to the owners while under Federal control, provided for control and compensation in the absence of agreements, declared the money and property derived from operating the systems to be the property of the United States, appropriated the sum of \$500,000,000 for a revolving fund for the purpose of paying the expenses of Federal control. Among the provisions in § 10 of the act (§ 3115½j) is the following: "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made

thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. . . . But no process, mesne or final, shall be levied against any property under such Federal control."

Considering the Federal control over the transportation systems of the country, the Supreme Court of the United States, speaking through the Chief Justice in the case of *Northern P. R. Co. v. North Dakota*, 250 U. S. 135, 63 L. ed. 897, P.U.R. 1919D, 705, 39 Sup. Ct. Rep. 502, said: "No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

On October 28, 1918, the then Director General of Railroads promulgated what is known as "General Order No. 50." In it we find the following:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter

brought in any court, based on contracts binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise. . . .

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The plaintiffs own land adjoining the right of way of the Detroit, Grand Haven, & Milwaukee Railway Company. Upon this land they had a considerable number of fruit trees. On March 22, 1918, and while said railroad property was under Federal control, sparks from a passing locomotive set fire to the grass either on the right of way or on plaintiffs' land. The fire spread, killing a large number of fruit trees and damaging others. On June 1st, this action was commenced by declaration against the railway company to recover for such damages. To the declaration the defendant pleaded the general issue. At the opening of the trial counsel for the defendant offered that the proceedings might be amended by making the Director General of Railroads defendant, stating that he would not ask for a continuance if the amendment was made, but did object to proceeding further against the railway company, and insisted that the wrong defendant was

named. By appropriate motions and requests the objection to a recovery against the railway company was properly raised. Considering the act itself, what is disclosed by this record, and what occurred at the argument, it substantially appears that the attorney who tried the case was the attorney for both the railway company and the Director General of Railroads. No claim is made that the service of the declaration was defective, or that it was not made on the proper agent of the Director General of Railroads. The objections made were overruled, and the case proceeded as instituted, resulting in a verdict and judgment against the railway company.

The arguments revolve around the construction and validity of the act of Congress. On the part of the plaintiff, it is urged that the term "such carriers," found in § 10 of the Act of March 21, 1918, has reference to the corporation owning the railroad, while defendant's counsel insists that it has reference to the Director General of Railroads. The statute has been considered by several courts, and a comparison of the decisions and the various constructions urged as the proper one are of interest. Among the cases are *Johnson v. McAdoo*, (D. C.) 257 Fed. 757; *Jensen v. Lehigh Valley R. Co.* (D. C.) 255 Fed. 795; *Postal Teleg. & Cable Co. v. Call*, — C. C. A. —, 255 Fed. 850; *Bryant v. Pullman Co.* 188 App. Div. 311, 177 N. Y. Supp. 488; *McGregor v. Great Northern R. Co.* — N. D. —, 4 A.L.R. 1635, 172 N. W. 841; *Lavalle v. Northern P. R. Co.* — Minn. —, 4 A.L.R. 1659, 172 N. W. 918; *Gowan v. McAdoo*, — Minn. —, 173 N. W. 440; *Rutherford v. Union P. R. Co.* (D. C.) 254 Fed. 880; *Schumacher v. Pennsylvania R. Co.* 106 Misc. 564, 175 N. Y. Supp. 84; *Hatcher v. Atchison, T. & S. F. R. Co.* (D. C.) 258 Fed. 952; *Mardis v. Hines* (D. C.) 258 Fed. 945; *Castle v. Southern R. Co.* — S. C. — ante, 959, 99 S. E. 846; *Vaughn v. State*, — Ala. App. —, 81 So. 417;

**Haubert v. Baltimore & O. R. Co.** (D. C.) 259 Fed. 361. Other constructions than those suggested by counsel in the instant case have been suggested or may be indulged in. It is possible that Congress thought to preserve to persons having causes of action antedating government control the right to proceed against the corporation during government control, or to expressly preserve the right to proceed against the corporation for its own acts which occurred or accrued during government control, and at the same time preserve the railroad property from seizure or process. But in the disposition we propose to make of the case we find it unnecessary to devote time or space to a consideration or discussion of the legislative intent.

Whatever the holding elsewhere, it is the settled law of this jurisdiction that a railroad company

**Railroads—  
lease—liability  
for acts of  
lessee.**

which has leased its property to another is not liable for the negligent acts of such other; that the recovery should be had against the company by whose negligent acts the damage was done. **Ackerman v. Cincinnati, S. & M. R. Co.** 143 Mich. 58, 114 Am. St. Rep. 640, 106 N. W. 558, 8 Ann. Cas. 118. While this record does not disclose whether or not a lease was entered into between the company and the government, it is unimportant so far as the rights of the parties to this litigation are concerned. By the act of Congress compensation was to be paid by the government to the railroad company, whether a lease was executed or not.

The relations were either technically those of lessor and lessee or analogous thereto.

The defense of the railroad company that it had committed no negligent act resulting

**Pleading—  
affirmative  
defense—  
absence of  
negligence.**

in damage to the plaintiff, that any negligent acts proven were the negligent acts of the

Director General of Railroads, was not an affirmative defense under § 2 of circuit court rule 23, nor would such defense be likely to take the plaintiff by surprise. The courts of this state take judicial notice of the acts of Congress (**McMorran Mill Co. v. C. H. Little Co.** 201 Mich. 301, 167 N. W. 990) and of the proclamations of the President (**Jenkins v. Collard**, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868).

But the Director General of Railroads by General Order No. 50 has ordered that "actions at law . . . for loss and dam-

age to property arising since December 31, 1917, . . . shall be brought

**Evidence—  
judicial notice—  
acts of  
Congress.**

against William G. McAdoo, Director General of Railroads, and not otherwise," and by the same order has given his consent to amendments substituting the Director General for the company and dismissing the railroad company from the action. We do not determine the validity or the propriety of an administrative order directing the method of procedure in the courts of the various states. What we do determine is that the Director General of Railroads cannot be heard to complain if this court, under the broad power conferred upon it by the Statute of Amendments, permits such amendment here. It is not pointed out that any defense was or

**Appeal—  
substitution of  
Director  
General for  
Railroads.**

is available to the Director General of Railroads upon the merits that was not permitted in the trial court. Indeed, there appears to have been no defense made on the question of negligence; that the locomotive set the fire resulting in the destruction of some of plaintiffs' fruit trees appears not to have been disputed; the amount of such damage was in dispute. The case was tried by the attorney for the Director General of Railroads. When the trial began he suggested that the amendment be then made as provided by General Order No. 50, and stated that it

might be made without a continuance. Section 12,478, Comp. Laws 1915, provides: "The court in which any action or proceeding shall be pending, shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the

action or proceeding shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties."

An order will be here entered, substituting the Director General of Railroads for the railway company dismissing the case as to the railway company. Upon the entry of such order the judgment will be affirmed. The railway company will recover its costs to be taxed.

## ANNOTATION.

### Federal control of public utilities.

- I. Introductory, 969.
- II. Validity of measures for Federal control:
  - a. Acts of Congress, 969.
  - b. Joint Resolution of Congress, 971.
  - c. Presidential proclamation of July 22, 1918, 971.
  - d. Orders of Director General of Railroads:
    - 1. Orders Nos. 18 and 18a, 971.
    - 2. Order No. 26, 972.
    - 3. Order No. 50, 973.

- III. Extent of Federal control, 978.
- IV. Right of action against public utility, 983.
- V. Jurisdiction of action by or against public utility, 987.
- VI. Service of process, 987.
- VII. Removal of cause to Federal court, 988.
- VIII. Execution of process against public utility, 988.
- IX. New construction of § 11 of Act of March 21, 1918, 989.
- X. Effect of return of railroads to their owners, 990.

#### I. Introductory.

In the present annotation it is proposed to review the recent cases dealing with the Federal control of public utilities, including a discussion of the validity, construction, and effect of the acts of Congress, proclamations of the President, and orders of the Director General relating to that control, in so far as they have been considered in these cases. The earlier cases are collected in the annotation in 4 A.L.R. beginning at page 1680.

#### II. Validity of measures for Federal control.

##### a. Acts of Congress.

The only provision of the Act of March 21, 1918, whose validity has been discussed in recent cases is the clause of § 10, authorizing suits against carriers under Federal control. In *Missouri P. R. Co. v. Ault* (1919) — Ark. —, 216 S. W. 3, the court, in sustaining that provision, said: "It may be contended that the

statute in question is unconstitutional because, if the claim is reduced to a judgment and enforced against the property of the corporation, it would amount to a taking of private property without due process of law, from the corporation, to pay a liability incurred by the act of the Federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the government. Act March 21, 1918, chap. 25, 40 Stat. at L. 451, Comp. Stat. § 3115½a, Fed. Stat. Anno. Supp. 1918, p. 757. Under such a guaranty, the enforcement of judgments against the property of the railroad corporations during the control by Federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgment would be the taking of private prop-

erty without due process of law, or the taking of private property for public purposes without just compensation. We think the act constitutional."

In *Fitzhugh v. Grand Trunk R. Co.* (1920) — N. H. —, 109 Atl. 562, an action in which the plaintiffs attempted to summon the Director as trustee, it was held that § 10 of the Federal Control Act did not authorize an action against the Director General, but the only authority for suing him was to be found in General Order No. 50.

Other recent decisions apparently proceed on the theory that the provision in question is invalid because imposing a liability for acts in which the carrier is not a free agent. See *Hatcher v. Atchison, T. & S. F. R. Co.* (1919) 258 Fed. 952, and *Haubert v. Baltimore & O. R. Co.* (1919) 259 Fed. 361, stated at length *infra*, II. d, 3; and see generally the cases discussed in that subdivision.

The case of *Schumacher v. Pennsylvania R. Co.* (1919) 106 Misc. 564, 175 N. Y. Supp. 84 (set out in full in the original annotation), was followed in *McGrath v. Northern P. R. Co.* (1920) — N. D. —, 177 N. W. 383. In that case action was instituted and prosecuted against the railroad company alone, and no motion or proceedings were had, either by the plaintiff or defendant, to substitute the Director General as party defendant under his General Order No. 50. Judgment was rendered against the railroad company in the lowest court, but on appeal this judgment was reversed, and the case dismissed. The court said: "The verdict is well sustained by the evidence except on one point, which is that the defendant had nothing to do with the conversion. It did not operate or control its railway at the time of the conversion. The road was then operated by the United States government, and not by the Northern Pacific Railway Company. That point, like Aaron's rod, swallows up all the other points. Pursuant to the act of Congress and the order of the President, in November, 1918, and during all that year, under a Director General, all the railroads of the country were controlled and operated by

the government. It matters not whether the government control was rightful or wrongful, the facts are that it did have the actual control, and the Northern Pacific Railway Company had no control over its road, and nothing to do with its operation. It did not receive the cattle from the plaintiff or from any other person. It did not carry away or convert the cattle. It did the plaintiff no wrong. But the contention is that under an act of Congress the road became liable for the wrongs of the government and the Director General. Section 10 of the Federal Control Act (Comp. Stat. § 3115j, Fed. Stat. Anno. Supp. 1918, p. 762) is as follows: 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government.' Now, if the purpose of that section was to make the railway company liable for the wrongs or contract of the government in the control and operation of the railway, then the effect would be to deprive the company of its property without due process of law, and to take the property for public purposes without compensation, and of course that is contrary to the plain words of the Constitution." Referring to the *Schumacher Case*, the court said: "That is a well-considered case, and the reasoning of the court is entirely satisfactory, if not conclusive. We have not come to the pass when the government can make a corporation or an individual liable for the government's own wrongs or its own contracts. The decision concludes that the Federal Control Act of March, 1918, so far as it authorizes judgment

against carrier corporations for the defaults or liabilities of the government, violates the Federal Constitution, providing against the taking of private property without due process of law."

*b. Joint Resolution of Congress.*

In *State ex rel. Smith v. Burleson* (1919) — Ala. —, P.U.R.1919F, 1, 82 So. 458, in a per curiam opinion, the case of *Dakota Cent. Teleph. Co. v. South Dakota* (1919) 250 U. S. 163, 63 L. ed. 910, 4 A.L.R. 1623, P.U.R.1919D, 717, 36 Sup. Ct. Rep. 507, was cited and followed. In a separate opinion, Anderson, Ch. J., expressing his individual views, said: "While this case is decided upon the authority cited, and which is conclusive upon this court, and an opinion by this court or any member thereof would be superfluous under ordinary circumstances, yet I feel impelled, under existing conditions, to give expression to my individual views, upon the questions involved in this appeal, and which are set forth in an opinion heretofore prepared by me upon an interlocutory order prior to the decision of this question by our highest court. A comparison of this opinion with the one in the *North Dakota* case, supra, will disclose the same general result and the identical treatment of the questions respectively discussed, except as to the right or authority under which these lines were taken over by the government. My opinion in effect concedes that they could have been taken over under the war emergency powers, but preferred justifying the same under the postal authority reserved to Congress by the Constitution. Our highest court did not hold that they could not have been so taken over, but preferred justifying the resolutions taking over the railroads and wires as a war emergency measure, and which was no doubt the most practical treatment of the question, as the railroad and wire cases were treated as companion cases, the railroad case being first decided, and as to which the postal clause of the Constitution did not apply, and the resolution with reference to railroads was not involved in my opinion."

So, in *State v. Tri-State Teleph. & Teleg. Co.* (1919) — Minn. —, 173 N. W. 856, wherein the state sought to enjoin two telephone companies from putting into effect the intrastate telephone rates fixed by the Postmaster General, a temporary injunction was granted, but on appeal the orders were reversed on authority of *Dakota Cent. Teleph. Co. v. South Dakota* (U. S.) supra, the court saying: The holding of the Supreme Court definitely determines that the Postmaster General acted under authority properly delegated to him by the President by virtue of the joint resolution; that the specific exception in the joint resolution of lawful police regulations did not prohibit the fixing of intrastate rates, the exercise of the police power in a narrower sense being intended; and that the Postmaster General, in his exercise, through the President, of the control of the telephone systems, could fix intrastate rates."

*c. Presidential proclamation of July 22, 1918.*

In *State ex rel. Smith v. Burleson* (1919) — Ala. —, P.U.R.1919F, 82 So. 458, the court affirmed a decree of the lower court dismissing a bill by the state seeking to enjoin the Postmaster General from increasing the rates on intrastate business, citing in support of its ruling the case of *Dakota Cent. Teleph. Co. v. South Dakota* (1919) 250 U. S. 163, 63 L. ed. 910, 4 A.L.R. 1623, P.U.R.1919D, 717, 36 Sup. Ct. Rep. 507, which held the proclamation of July 22, 1918, and the order affecting rates pursuant thereto, to be within the power granted by the joint resolution of Congress.

*d. Orders of Director General of Railroads.*

*1. Orders Nos. 18 and 18a.*

The validity of General Orders Nos. 18 and 18a, fully set out in the original annotation, was sustained, in *Johnson v. McAdoo* (1919) 257 Fed. 757, the court saying in this connection: "I think it competent for the Director General to stipulate in what jurisdictions he might be sued, but his authority to make rules and regulations would not authorize the setting aside

of the plain provisions of the statute as to the companies."

So, in *Russ v. New York C. R. Co.* (1919) 190 App. Div. 37, 179 N. Y. Supp. 310, the validity of the order of April 18, 1918 (No. 18a) was sustained, the court saying: "Director General Hines declared by general order, bearing date April 18, 1918, 'that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.' The courts will recognize the policy of the government to interfere as little as possible with the convenience of parties and witnesses in suits brought against railroads while under government control. This order required the action to be brought in Montgomery county. Not only that, but the plaintiff resided in Montgomery county. The accident took place there. All the witnesses resided there. The expense of getting the witnesses to Albany county and maintaining them there will be much greater than in Montgomery county. The plaintiff's attorney, in violation of the order, brought the action in Albany county, and seeks to maintain it there solely upon the ground of laches in asking that it be changed to the proper county. The laches are not sufficient to defeat the motion. Compelling the plaintiff to go to trial on October 18th in cases of such importance, and without more time of defendants' attorneys for preparation, strikes us as an unwise exercise of discretion. The motion should be granted without conditions, and the plaintiffs allowed to try the case where the cause of action arose."

But in *Haubert v. Baltimore & O. R. Co.* (1919) 259 Fed. 361, it was held that the second sentence of § 10 of the Federal Control Act of March 21, 1918, permitting actions at law or suits in equity to be brought and judgments rendered, "as is now provided by law," could not be modified or limited by orders of the Director General, as was attempted by General Orders 18, 18a, and 26.

## 2. Order No. 26.

General Order No. 26 was disregarded by the court in *El Paso & S. W. R. Co. v. Havens* (1919) — Tex. Civ. App. —, 216 S. W. 444, following the ruling made in *El Paso & S. W. R. Co. v. Lovick* (1919) — Tex. Civ. App. —, 210 S. W. 283, wherein the court refused to continue the case during the Federal control of the railroad company, on the ground that General Order No. 26 could not deprive the courts of Texas of jurisdiction to try causes of action pending at the date of the issuance of the order, where the cause of action arose in another state.

So, in *Illinois C. R. Co. v. Ryan* (1919) — Tex. Civ. App. —, 214 S. W. 642, an action instituted in Texas to recover damages from a railroad company for personal injuries received in Illinois, application was made for a postponement of the trial during the period of Federal control in accordance with General Order No. 26. This application was refused by the trial court, and on appeal it was held that the granting or refusal of the continuance was within the discretion of the trial court. The court said: "We have examined the orders issued by the Director General, and there is nothing there to indicate he contemplated or intended to interfere with the jurisdiction and orderly procedure of courts of competent jurisdiction or the rights of litigants to have their day in court. Of course no judgment may be executed against or the possession of the government in any manner be disturbed. This is true in every case where property is in custodia legis. This suit was instituted prior to the possession and control by the government of the railroads, through the Director General of the United States, to which he has not become or been made a party. It therefore in no manner disturbs him or requires him to take notice thereof or concern himself with respect thereto in any manner whatever, unless an effort should be made to disturb the possession. But we fail to see how the court in this issue did anything contrary to the wishes and directions of the Director General. It could not at that

time, by forcing the trial, cause serious interference with the physical operation of railroads under the control of the government."

The same view was taken in *Haubert v. Baltimore & O. R. Co.* (1919) 259 Fed. 361, the court holding that Order No. 26 merely appealed to the discretion of the trial judge as to whether an action should be stayed or continued.

### 3. Order No. 50.

The recent cases are in conflict as to the validity of General Order No. 50 of the Director General, which is fully set out in the original annotation.

In *Nash v. Southern P. Co.* (1919) 260 Fed. 280, a motion was made by the Director General of Railroads, joined in by the defendant, that he be substituted as defendant and that the action be dismissed as to the railroad company, the motion referring to General Order No. 50 and proceeding on the theory that the substitution sought was warranted by the terms of that order. The court, in granting the motion, expressly held that General Order No. 50 was within the power of the Director General as the representative of the President, and was within the authority conferred on the President by the Act of March 21, 1918, and did not contravene in any respect the provisions of § 10 of the Act of March 21, 1918.

The validity of General Order No. 50 was likewise sustained in *Mardis v. Hines* (1919) 258 Fed. 945, wherein it was said: "On October 28, 1918, by General Order No. 50, the Director General ordered 'that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court, based on contract binding on the Director General of Railroads, claim for death or injury to persons, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against William G. McAdoo,

Director General of Railroads, and not otherwise.' In this case it is alleged that the injury was sustained on the 26th of January, 1918. That was after the Director General assumed control. This suit was brought in the Johnson county circuit court on January 21, 1919. This was after the date of General Order No. 50. The order of the Director General does not contravene the acts of Congress. It is authorized by the proclamation of the President, and directs a procedure that is in strict accordance with the actual facts and the rules of legal liability."

So, *Hatcher v. Atchison, T. & S. F. R. Co.* (1919) 258 Fed. 952, the railroad company moved to substitute the Director General of Railroads in its stead, in accordance with General Orders Nos. 50 and 50a. The plaintiff resisted the motion, basing its argument on § 10 of the Act of March 21, 1918. It was held that in view of the Act of August 29, 1916, and the other provisions of the Act of March 21, 1918, liability could not be imposed on the railroad company by § 10 of Act of March 21 1918. The court, referring to the case of *Vaughn v. State* (1919) — Ala. App. —, 81 So. 417, said: "That court, however, appears to have taken the view that the congressional acts only authorized a superintending control and management by the government of the companies and their roads, and expressly said that there was no evidence in the case before them, showing that the companies had been excluded 'from the exercise of their functions in the operation of their respective systems,' which is not in accord either with the construction of the acts given in the North Dakota case nor with the actual facts, now of common knowledge. Certainly there is no power in Congress to make A liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of constitutional guaranties. Nonliability of the company was sustained at nisi prius in *Schumacher v. Pennsylvania R. Co.* (1919) 106 Misc. 564, 175 N. Y. Supp. 84. The construction of the act there given is in accord with that in



the Dakota case, and the reasoning on which the conclusion was reached appears to me sound. However, plaintiffs have a right to prosecute their case to final judgment against the railroad company, and in a sense the views above expressed may be premature. Indeed, they may be greatly modified at the final hearing. They are given now only that parties may be advised as to the present attitude of the court on the question raised when the motion was up. Further, a consideration of the effect of the answer may render wholly inapplicable to this case the views above expressed."

Similarly, in *Haubert v. Baltimore & O. R. Co.* (1919) 259 Fed. 361, an action against the railroad company and the Director General of Railroads, the court, in sustaining a demurrer as to the defendant railroad company, said: "My conclusion is that liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing Federal control are not liabilities of the railroad companies that have been ousted from such possession and control, that suits cannot be brought against such companies and prosecuted to judgment against them, and that such claimants are limited to a right of action against the Federal control agency and to such sources of payment as are provided by the Federal Control Act. In this conclusion I am supported by District Judge Munger, in *Rutherford v. Union P. R. Co.* (1919) 254 Fed. 880, and Judge Benedict of the New York supreme court, in *Sagona v. Pullman Co.* (1919) 174 N. Y. Supp. 536, and *Oyler v. C. C. C. & St. L. R. Co.* (Cin. Super. Ct.) 17 Ohio L. Rep. 356. Such holdings to the contrary as I have seen do not seem to me to be based on sound reasoning, and should not be followed. This conclusion, it has been suggested, may leave injured persons without adequate redress when Federal control is terminated. It will not be assumed that the United States will terminate Federal control and cover into the United States treasury the residue of the revolving fund and excess income, if any, without providing for debts and liabilities

incurred during Federal control. Yet if such a contingency happens the remedy must be sought otherwise than through judicial legislation."

In *PEACOCK v. DETROIT, G. H. & M. R. Co.* (reported herewith) ante, 964, the appellate court substituted the Director General of Railroads for the railroad company, "under the broad power conferred upon it by the Statute of Amendments," without passing on the validity of the order so far as it attempts to control procedure in state courts.

In *Cravens v. Hines* (1920) — Mo. App. —, 218 S. W. 912, a judgment in favor of the plaintiffs, in an action brought against the railroad company and the Director General of Railroads, was reversed as to the railroad company, and affirmed as against the Director General of Railroads, the court saying: "We think that the trial court should not have rendered judgment against the railroad company; but, on the other hand, we do not think the fact that the railroad company was considered throughout the trial as a party, and the instructions so framed as to permit a recovery against it, and the giving judgment against it, will require a reversal as to both defendants. We cannot see how the substantial rights of the Director General as a common carrier were in any wise prejudiced by joining the railroad company as a party defendant. Such does not require reversal of the whole judgment."

The court held in *Houston & T. C. R. Co. v. Long* (1920) — Tex. Civ. App. —, 219 S. W. 212, that in view of the fact that the judgment rendered by the lower court against the defendant railroad company provided that "no execution shall issue herein, but such judgment is payable by the United States," the company was completely protected from any personal liability, and had not been in any wise prejudiced by the refusal of a peremptory instruction in its favor. "Under this view," the court said, "it becomes unnecessary to pass upon the validity of General Order No. 50, which has been upheld by some

courts." The court said, however, that its validity was debatable.

In *Baker v. Bell* (1920) — Tex. Civ. App. —, 219 S. W. 245, an action was brought against the receiver of a railroad and the Director General of Railroads jointly, to recover damages for personal injuries sustained by the plaintiff. The receiver filed a motion to be dismissed from the suit, by virtue of the fact that the railroad, of which he was receiver, was at the time of the accident in the hands of the Director General of Railroads by virtue of General Order No. 50, promulgated by the Director General under and by virtue of the Federal Control Act. The motion was overruled and a judgment was rendered against the receiver and the Director General jointly. On appeal it was held that it was error to deny the motion to dismiss the suit against the receiver. "It will be observed," the court said, "that neither the railroad nor its receiver occupied with the appellee, at the time of the injury, the relation of master and servant, and it will be observed the maxim 'respondeat superior' has no place here. It was not the negligence of the railway or of its receiver at all, for surely it cannot be said they are to be held liable for acts of the government in operating the road independently of them. Under the provisions of the law the Director General has the very broadest possible powers conferred on him to manage and operate railroads. He may sue or be sued, or make himself party to any suit, direct and prescribe modes of procedure as to how he may be sued. This is made very clear by the acts of Congress, and especially by General Order No. 50, dated October 28, 1918."

The validity of General Order No. 50 was likewise sustained in *Galveston, H. & S. A. R. Co. v. Wurzbach* (1920) — Tex. Civ. App. —, 219 S. W. 252. In that case action was brought by the plaintiff against the railroad company, and the Director General of Railroads made himself a party to the suit. Subsequently, the Director General moved that he be substituted as party defendant, pursuant to General Order No. 50, and that the defendant

railroad company be dismissed from the suit. The motion to dismiss was overruled, and the Director General was permitted to remain in the case, and the cause was prosecuted to judgment against both the railroad company and the Director General. It was held, on appeal, that the action of the lower court in refusing to dismiss the railroad company from the suit, in accordance with the motion, was error.

But it seems that an order attempting to make the Director General of Railroads a party, without notice to him and without his consent, is erroneous.

Thus, in *Grant v. Director General* (1920) — S. C. —, 102 S. E. 854, action was brought against the Atlantic Coast Line Railroad Company and a section foreman, to recover damages for personal injuries. The defendants pleaded that at the time of the injury the railroad was being operated by the Federal government. The plaintiff then moved to dismiss the action against the defendant railroad company, and to substitute in lieu thereof the Director General of Railroads as the defendant. The defendants' attorneys objected, on the grounds that they had received no notice of the motion, and that they were without authority to represent the Director General. The amendment was allowed, however, and the attorneys for the defendants were offered the opportunity to answer in behalf of the Director General at once. This they declined to do, and the court declared the Director General to be in default, and the trial proceeded to judgment against the Director General and the section foreman. It was held that the order attempting to make the Director General a party without his consent, and without notice, was error.

In an official syllabus in the case of *Robinson v. Central of Georgia R. Co.* (1920) — Ga. —, 102 S. E. 532, the following appears: "Where an injury occurred between the dates of the President's proclamation and the act approved March 21, 1918, and a suit based thereon was instituted subsequently to the date of the act, but prior to the assent of General Order

No. 50, promulgated by the Director General of Railroads, which in effect gave directions that suits for injuries resulting from operation of railroads while under Federal control should be brought against the Director General, under proper construction of the Act of 1916, and the proclamation of the President, and the Act of 1918, such suit (of the character involved in this case) was maintainable against the government, without the aid of General Order No. 50 by the Director General of Railroads."

And in ¶ 3 of the syllabus in the same case it was said: "Where a suit of the character just indicated was instituted subsequently to the Act of March 21, 1918, and the name of the defendant was alleged as the railroad company, and the petition and process were served upon the agents engaged in operating the railroad company, inasmuch as the railroad was being operated by the government, and the government would be suable for any injuries caused by its agents and servants, the suit was in effect against the government. *Westbrook v. Director General* (D. C.) 263 Fed. 211. Accordingly, the petition could be amended by substituting the Director General of Railroads in his representative capacity, as defendant in lieu of the railroad company."

In *Hines v. Zellner* (1920) — Ga. App. —, 103 S. E. 97, action was brought by the plaintiff against the Director General of Railroads to recover damages for the death of her husband. The defendant demurred to the petition on the theory that such a suit was not maintainable against the Director General of Railroads for the reason that, at the time of the accident in question, there was no authority given by Congress authorizing the maintenance of a suit against the Director General of Railroads. This contention was overruled on authority of *Robinson v. Central of Georgia R. Co.* (Ga.) *supra*.

Other recent decisions, however, have held General Order No. 50 to be invalid. Thus, in *Palyo v. Northern P. R. Co.* (1920) — Minn. —, 175 N. W. 687, an action to recover damages for

the death of the plaintiff's intestate, the action was originally brought against the railroad company alone, but the company moved to substitute in its place the Director General of Railroads, and to dismiss as to it. The court granted the motion to the extent of making the Director General a party defendant, but refused to dismiss as to the company, and both defendants challenged the order. On appeal the court said: "We adhere to the decision in *Lavalle v. Northern P. R. Co.* (1919) — Minn. —, 4 A.L.R. 1659, 172 N. W. 918, until the question is set at rest by the Supreme Court of the United States. Hence the order refusing to dismiss the railway company must be sustained. As to the Director General, he apparently was willing to become a defendant, and the refusal to dismiss the company cannot prejudice him."

So, in *Franke v. Chicago & N. W. R. Co.* (1919) — Wis. —, 173 N. W. 701, General Order No. 50 was declared to be invalid. The court said: "The power and authority of Mr. McAdoo as Director General of Railroads cannot exceed that which can be lawfully vested in him by proclamation or order of the President, and he in turn receives his power and authority over the subject-matter here concerned, by and through the legislative declaration embodied in the Federal Control Act of March 21, 1918. Whatever general language is used in this act conferring power on the President must be construed to be given for the purpose of enabling him to carry out the provisions of the act, and not to enable him, either by himself or by any appointee of his, to set aside any provisions of the legislative will, or to take away any rights or privileges granted to or recognized as validly existing in third persons by such legislation. When Congress in § 10 of that act used the following language: 'Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an

instrumentality or agency of the Federal government,'—it either granted or recognized as then lawfully existing the right to or of any person situated as was the plaintiff herein, to bring just such a cause of action against a defendant such as the Chicago & Northwestern Railway Company. Such rights so granted or recognized cannot be taken away or destroyed except by Congress. We find no language in the act itself which warrants the conclusion that what was so expressly given or recognized by the quoted language above as a substantial right was to be destroyed or taken away by implication. This provision of § 10 of the Federal act, and provisions of General Order No. 50 issued by the Director General of Railroads and upon which the court below based its order, cannot both stand. The legislative declaration is the paramount authority and must control."

In *Missouri P. R. Co. v. Ault* (1919) — Ark. —, 216 S. W. 3, the action was brought against the railroad company by an employee to recover wages and a statutory penalty for nonpayment. On appeal from a judgment in favor of the plaintiff the railroad company insisted that it was erroneous to render any judgment against it, for the reason that the evidence showed that at the time of the employment and discharge of the plaintiff the railroad was being operated by the Director General, and not by the railroad company. Answering this contention, the court said: "If the word 'carriers' used in this act [Act March 21, 1918, chap. 25, § 10, 40 Stat. at L. 456, Comp. Stat. § 3115½j, Fed. Stat. Anno. Supp. 1918, p. 762] had reference to the Director General, who was operating said railroad, then it was improper to render a judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used that indicates that the word 'carriers' refers to the Director General. On the contrary, the plain meaning is that, so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the government as before. The 8 A.L.R.—62.

case of *Rutherford v. Union P. R. Co.* (1919; D. C.) 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of creditors. The attitude of the Director General is that of an agent of the government taking over the railroads as a necessity of war, under congressional and Presidential authority. A receivership implies insolvency; the operation of the railroad under a Director General does not carry such an implication. We think the later case of *Jensen v. Lehigh Valley R. Co.* (1919; D. C.) 255 Fed. 795, is the better-reasoned case."

Similarly, in *Johnson v. McAdoo* (1919) 257 Fed. 757, the plaintiff brought an action for damages against the Director General of Railroads and the railroad company. An exception to the venue as to the Director General was maintained, and thereupon the plaintiff dismissed the suit as to him. A similar exception of the railroad company was overruled, and the railroad company filed an exception to the petition, contending that no action would lie against the railroad company while it was under the control of the Director General of Railroads; that the word "carriers," in § 10 of the Act of March 21, 1918, did not mean the railroad companies, but referred to the Federal administration. The court said: "I do not agree with this contention. I think it was the purpose of Congress in adopting the act to allow litigants to sue the railroad companies, just as they had theretofore been able to do, and in such courts as have jurisdiction under the general law."

Three recent cases have discussed the proviso in Order No. 50, excepting actions for penalties and the like. In *Smith v. Atlantic Coast Line R. Co.* (1919) — S. C. —, 100 S. E. 148, an

action brought against a railroad company by a consignee of goods to recover the value of the goods and a penalty of \$44, judgment was rendered for the plaintiff, and the defendant appealed, claiming that as the railroad was being operated by the United States government, and had been so operated for some time prior to the shipment referred to in the complaint, no penalty could be awarded against the defendant, as this would be in effect an award of a penalty against the United States. "In deciding this question," the court said, "it will not be necessary to consider whether the action should have been brought against the defendant, or against the Director General of Railroads. The record shows that the case was tried before the magistrate on the 27th of September, 1918. Therefore it was commenced, and the cause of action arose, before the issuance of General Order No. 50, on the 28th of October, 1918, which contains the proviso that 'this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.'" In *Owens v. Hines* (1919) — N. C. —, 100 S. E. 617, action was brought in justice's court to recover a penalty of \$40 for delay in the delivery of two bags of corn, and the value of one bag of corn lost in transit. On an appeal from the justice of the peace to the superior court, the plaintiff was allowed to make the Director General of Railroads a party defendant, the action originally having been brought against the railroad company. In affirming a judgment of the superior court for \$20 as a penalty, the court held that the statute (Revisal, § 2632) providing that in shipments of less than a carload there should be a penalty of \$10 for the first day's delay, and a dollar per day for each succeeding day, was not impaired by the Federal Control of Railroads Act, in view of § 15 of the Act of March 21, 1918, declaring that nothing in that act should be construed to impair lawful police regulations of the state, and in view of General Order No. 50, providing that "this order shall not apply to actions, suits, or proceedings for the

recovery of fines, penalties, and forfeitures."

A state statute, permitting the recovery of double damages for the killing of stock by railroads, is not applicable to an action against the Director General, but a statute allowing the recovery of attorney's fees as part of the costs is applicable. *Hines v. Taylor* (1920) — Fla. —, 84 So. 381.

### III. *Extent of Federal control.*

The control assumed by the Federal government over the railroads is said in *PEACOCK v. DETROIT, G. H. & M. R. Co.* (reported herewith) ante, 964, to have been that of a lessee, or analogous thereto, and the same comparison was made in *Bryant v. Pullman Co.* (1919) 188 App. Div. 311, 177 N. Y. Supp. 488. The cases seem to agree that it was not a mere superintendence, but was complete, ousting the control of the railroad companies and giving an undivided authority to the representatives of the government.

See to the same effect, *Clements v. Southern R. Co.* (1920) — N. C. —, 102 S. E. 399.

In *Gilliam v. Atlantic Coast Line R. Co.* (1920) — N. C. —, 103 S. E. 10, it was held that by virtue of the lease between the government and the Atlantic Coast Line Railroad Company, authorized by act of Congress, August 29, 1916, chap. 718 (Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095), the relation of lessor and lessee existed, and the company was liable for damages sustained in the transportation of freight or passengers.

Thus, in *Mardis v. Hines* (1919) 258 Fed. 945, an action to recover damages for personal injuries brought against a railroad and the Director General of Railroads, wherein the railroad company filed a separate demurrer, the court, in sustaining the demurrer, said: "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The railroad company

has nothing to do with such operation. When the Director General assumed control all the employees on the railroad ceased to be employees of the railroad company, and became employees of the Director General. At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company. That relation then began and still exists between such employees and the Director General. . . . The railroad, therefore, cannot be held for the negligence of the employees of the Director General, unless liability is imposed by § 10 of the Act of Congress of March 21, 1918 (40 Stat. at L. 456, chap. 25, Comp. Stat. § 3115j, Fed. Stat. Anno. Supp. 1918, p. 762). That section provides 'that carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.' Is the liability sought to be fastened on the railroad company, under the facts alleged in the complaint in this case, inconsistent with the provisions of the acts of Congress referred to, or with the order of the President? In the proclamation of the President assuming control of the railroads it was provided that 'suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director General may, by general or special orders, otherwise determine.' 40 Stat. at L. 1735, Comp. Stat. § 1974a, note. That proclamation, as indicated by the foregoing quotation, authorized the Director General to modify or change the permission given in the proclamation to bring suits against carriers. The Act of March 21, 1918, did not modify any of the provisions of the proclamation of the President."

So, in *Haubert v. Baltimore & O. R. Co.* (1919) 259 Fed. 361, the court said: "It is now conclusively settled that complete possession and control of all such railway lines as are under

Federal control, and not a divided possession and control, have been transferred to the United States by virtue of the Act of August 29, 1916 (Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095), the proclamation of the President of December 26, 1917 (Comp. Stat. § 1974a, note), the Act of March 21, 1918 (Comp. Stat. § 3115j, and following sections, Fed. Stat. Anno. Supp. 1918, p. 757) and the President's proclamation of March 29, 1918. It seems equally clear that all liability for all actions of the Director General of Railroads during Federal control is imposed upon the United States, and does not remain upon the railroad company, which has thus been entirely ousted from the possession, control, and operation of its property. All moneys and other property derived from the operation of railway lines under Federal control are the property of the United States. A revolving fund of \$500,000,000 is appropriated, which, together with any funds available from operating income, is to be used to pay the expenses and liabilities of the railway lines while under Federal control. All obligations and liabilities incurred or created during Federal control are to be paid therefrom by the Director General, and not by the railway company, excepting only such taxes as are excluded by § 1 of the Act of March 21, 1918, and certain other previously existing obligations of the railway company not necessary to be mentioned specifically. Section 1 also authorizes the making of agreements with the railway companies whereby they are insured compensation for the use of their property during Federal control, not exceeding a sum equivalent as nearly as possible to the average annual railway operating income for the three years ending June 30, 1917. Provision is also made for ascertaining and adjusting this compensation during the period, or in the event such agreements are not made. Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under Federal control, and that no judgment can be rendered

therefor which will become a lien upon the corpus of its property, or payment compelled therefrom. If this were done, the result would be that one person's property would be taken, without his consent and without compensation, to pay the debt of another. Liabilities thus arising during Federal control, it must be conceded, are in substance debts of the United States, notwithstanding, for purposes of administration, the control and operation of the railroads have been vested in an official called the Director General of Railroads. An action against the Director General, based upon any contract or act of his, it may be admitted, is in effect a suit against the United States. . . . An action cannot, of course, be maintained against the United States, except by its consent. This consent and authority to sue are conferred by Federal Control Act March 21, 1918, § 10 (Comp. Stat. § 3115*½*j, Fed. Stat. Anno. Supp. 1918, p. 762). No difficulty is perceived why the remedy thus conferred is not adequate; but if inadequate, and further remedies, both in suing and obtaining payment, are needed to give full relief, they must be sought from that authority which confers the right to sue the United States. Section 10, it is true, subjects carriers, while under Federal control, to all laws and liabilities as common carriers, whether arising under state or Federal law or common law, except so far as may be inconsistent with the provisions of that act or any other act applicable to such Federal control, or with any order of the President. The second sentence of this section permits actions at law or suits in equity to be brought and judgments rendered as is now provided by law. The first sentence relates to liabilities, and the second to the manner in which they may be enforced. If the words 'common carriers' mean the railway companies themselves, as distinguished from the agency provided by the act for operating the railway lines, it is none the less true that they are made subject only to such liabilities as are not inconsistent with the provisions of the act itself. It may be consistent to subject the railway

companies to liabilities created by themselves or existing before being ousted from the possession and control of the property; it would be inconsistent with all the provisions of the act to subject them to liabilities for the acts and conduct of public agents operating their property under Federal control. It follows that the provisions of this section do not impose a liability upon the railway companies for acts of the Director General of Railroads and his agents, because so to do would be inconsistent with the provisions of this act."

Similarly, in *Hatcher v. Atchison, T. & S. F. R. Co.* (1919) 258 Fed. 952, an action against the railroad company to recover damages for negligence in a shipment of goods, in passing on a motion to substitute the Director General for the railroad company, the court said: "At that time the construction of the applicable acts of Congress (Act August 29, 1916, chap. 418, 39 Stat. at L. 619, 9 Fed. Stat. Anno. 2d ed. p. 1095, and Act March 21, 1918, chap. 25, 40 Stat. at L. 451, Comp. Stat. § 3115*½*a, Fed. Stat. Anno. Supp. 1918, p. 757) by the Supreme Court in *Northern P. R. Co. v. North Dakota* (1919) 250 U. S. 135, P.U.R.1919D, 705, 63 L. ed. 897, 39 Sup. Ct. Rep. 502, was not at hand. Court and counsel were in agreement that if the congressional acts only gave the right and power of a superintending unification and control to the President, over railway companies and their properties, and if the President and the Director General went no further, and left the operation of the roads to the companies that owned them, there could be no doubt of liability in such a case as this. But if the acts contemplated more, and gave to the President and through him to the Director General, either expressly or by necessary implication, the right to take exclusive possession of the roads and operate them for the time being as a governmental agency, or if such exclusive possession and operation had been taken even without congressional authority, liability would be seriously doubted. But since the opinion in the North Dakota case there is no further

doubt as to the extent of the power given the President by the congressional acts. . . . And we know, as a matter of public information, that the construction there given as to what was intended by Congress should be done, has in fact been done. The railroad companies have been entirely excluded from participation in the operation of their properties. They receive none of the income from them. It goes to the government. They have no voice in the employment and discharge of men engaged in the upkeep and repair of their roads and rolling stock, and the operation of trains. All of their properties, of every kind needful for transportation purposes, have been taken over by the government, and their possession and operation rest in the exclusive control of the Director General."

And in *Houston & T. C. R. Co. v. Long* (1920) — Tex. Civ. App. —, 219 S. W. 212, it was said: "Under the acts of Congress commonly called the Federal Control Act the possession, control, and management of the railroad were completely and exclusively vested in the Director General. The relation of master and servant did not exist between the company and appellee during the period of government control. The appellee's cause of action having accrued during that period, the company is not liable therefor, and a personal judgment cannot be rendered against it for the damages sustained by Long."

In a syllabus by the court in the case of *Robinson v. Central of Georgia R. Co.* (1920) — Ga. —, 102 S. E. 532, the following appears: "In virtue of the Act of 1916 (Act August 29, 1916, chap. 418), and the proclamation of the President (Comp. Stat. § 1974a, note), which by its terms went into effect at 12 o'clock on the 28th day of December, 1917, the railroads contemplated in the act and proclamation passed into the possession and control of the Director General. . . . Section 10 of the Act of March 21, 1918 (Comp. Stat. § 3115½j, Fed. Stat. Anno. Supp. 1918, p. 762), properly construed, recognizes liability of the government to suit, among other things,

for injuries received on account of negligence of the agents and servants engaged in operating the railroad 'while under Federal control,' which, as above ruled, became operative immediately upon the President's proclamation becoming effective, and was a declaration of the assent of the government to the institution of a suit of such character against it."

This view has been applied in sustaining the power of the Director General to increase rates. *Kneeland-Bigelow Co. v. Michigan C. R. Co.* (1919) 207 Mich. 546, 174 N. W. 606, wherein the court said: "The basic rate upon which this 25 per cent increase was authorized by Order No. 28 was the filed and published tariff rate then in effect and applicable to the public generally. The rates established and put in force by General Order No. 28 were initiated and authorized by proclamation of the President under and by authority of congressional legislation enacted as a war measure, in the exercise of a recognized paramount governmental power when a state of war exists. That the governmental power is ample in such emergency, and Federal authority plenary under the exigencies shown by the Presidential findings and proclamations, is not open to controversy. *United States v. Russell* (1872) 13 Wall. (U. S.) 623, 20 L. ed. 474. Judicial notice may be taken by the courts of such extraordinary conditions."

So, in *State ex rel. Seattle v. Public Service Commission* (1920) — Wash. —, 188 Pac. 7, it was held that during the period of possession, control, and supervision of the telephone and telegraph by the Postmaster General, in the exercise of the war power, the state Public Service Commission had no jurisdiction whatever over the subject-matter that would enable it to lawfully make any orders approving or making effective any tariff rate to be charged for services rendered by any such systems. "Of course," the court said, "the Postmaster General, as director of such systems for the government, was privileged to avail himself of the personal services of the members of our Public Service Com-



mission, with a view to determining what the charges for such services to our citizens should be, and had our Public Service Commission, in making disposition of the matter for the Postmaster General, not assumed to do anything more than that, we would have no occasion to review its orders here."

On the same principle, the property in goods stolen from an interstate shipment during the period of Federal control need not be laid, the status of the government as bailee being judicially noticed. *Block v. United States* (1919) 261 Fed. 321. And the United States has a special property in goods being transported for hire by an express company operated under the Federal Control Act, which will sustain a prosecution for larceny of such property under § 47 of the Criminal Code (7 Fed. Stat. Anno. 2d ed. p. 612), making it an offense to steal any "property or valuable thing whatever of the goods, chattels, or property of the United States." *United States v. Kambeitz* (1919) 256 Fed. 247. Goods privately shipped on a railroad under Federal control are not, however, government property to such an extent as to preclude replevin by the consignee to recover the shipment. *Salant v. Pennsylvania R. Co.* (1919) 188 App. Div. 851, 177 N. Y. Supp. 475.

In *Christian v. Great Northern R. Co.* (1920) — Wis. —, 177 N. W. 29, it was said: "While the President took absolute and undivided control of the carriers of the country, and while, during the period of Federal control, they were wholly and absolutely within the jurisdiction of the Federal government, acting through the proper executive agencies, the purpose of the proclamation, as well as the clear intent and purpose of the law, was that the President should take possession of the carrier systems as systems. The President did not take control, and neither the language of the act nor the proclamation indicates that he undertook to take control, merely of the physical properties of the carriers, but he took over the complete system—that is, the entire organization, including the officers, directors, and em-

ployees who transacted the business in the name of the company. Men were hired and discharged, and their duties prescribed, and compensation paid, by the same organization which, prior to the time of Federal control, had performed the like offices. The power of the President was exerted not immediately and directly upon the employees, but through the organizations which theretofore had handled the various properties."

In *Public Utilities Commission v. Springfield Terminal R. Co.* (1920) — Ill. —, 127 N. E. 128, the issue raised was whether the United States government, in taking over the railroads from private ownership, assumed authority to regulate rates to the exclusion of the authority of the several states. The question arose from the judgment of the circuit court, confirming the decision of the Public Utilities Commission, permitting the Springfield Terminal Railway Company to increase its switching charge. The court affirmed an order of the Commission fixing the rates, and, after quoting the Act of March 21, 1918, and § 10 thereof (Comp. Stat. § 3115½j, Fed. Stat. Anno. Supp. 1918, p. 762), which gave to the President the right to initiate rates, charges, etc., whenever in his opinion it became necessary, and § 15, which provided that nothing in the act should "be construed to amend, repeal, impair, or affect . . . the lawful police regulations of the several states, except wherein such laws, powers, or regulations [might] affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds," said: "No argument is necessary to make it clear that by these acts and proclamations the United States was given complete possession and control of all railroads for all purposes. . . . On the other hand, it will be noted the Act of 1916 was permissive, not mandatory. The intention of Congress was to empower the President to take possession and assume control and operation of any system or systems of transportation that in his discretion were needful for war purposes. By his proclamation of December 26, the President determined

that it had become necessary in the national defense to take over and assume control of 'certain systems of transportation,' and to use them for needful and desirable purposes connected with the prosecution of the war. To provide the government with all means of transportation that might become necessary, the President made his proclamation broad enough to include 'each and every system of transportation,' but we do not think it was intended by that proclamation to assume control of every 'tap line,' or other short line of railroad, unless its use became necessary for the purposes for which the government assumed control and operation of railroads. By the Act of March 21, 1918, it will be seen that Congress did not understand that the President had taken over the control and operation of all railroad systems in the United States, because it provides for compensation to 'certain railroads and systems of transportation' of which the President had assumed control. It is conceded that the Director General of Railroads did not exercise jurisdiction over the Springfield Terminal Railway Company, and that of the hundreds of orders issued by the Director General from time to time, directing the affairs and operations of transportation systems under Federal control, no order was ever given concerning the operation of the appellee. The authority of the state to regulate rates to be charged by railroads is derived from its police powers."

*Krichman v. United States* (1920) 263 Fed. 538, was an appeal from a conviction for bribery of a railway porter. The indictment was brought under § 39 of the Criminal Code (Comp. Stat. § 10,203, 7 Fed. Stat. Anno. 2d ed. p. 602), which makes the offering or giving of money or anything of value to any person acting for or on behalf of the United States in any "official function" a crime. It was held that the indictment was sufficient, as at the time named the Director General was in control of the railroads, and in operating them he was in the performance of an official duty; and therefore, all persons assisting him,

whether officers or mere employees, were, in so doing, persons acting for and on behalf of the United States in an official function. It was further held that the railroads were not taken over in pursuance of contracts made by the Director General of Railroads with the carriers, but that these contracts were merely agreements for compensation made under the Federal Control Act of March 21, 1918 (40 Stat. at L. 451, chap. 25, Comp. Stat. § 3115½a, Fed. Stat. Anno. Supp. 1918, p. 757).

#### *IV. Right of action against public utility.*

The recent cases tend to support the rule laid down in the original annotation, that whatever uncertainty may exist as to the interpretation of the orders of the Director General imposing restrictions on litigation the right of action against railroads under Federal control remains unimpaired.

Thus, in *Smith v. Babcock & W. Co.* (1919) 260 Fed. 679, the court, in construing § 10 of the Federal Control Act, said: "The first sentence of the section makes all carriers, while in Federal control, subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or common law, except so far as inconsistent with the provisions of that act, or any other act applicable to Federal control, or with any order of the President. This means that lines of railway, while being operated under Federal control and by a Director General of Railroads, are subject to liability for injury due to a third person precisely to the same extent as if they were not under such Federal control or operation."

So in *McAdoo v. Martin* (1919) — Ga. App. —, 101 S. E. 312, an action to recover damages for the killing of a bird dog belonging to the plaintiff, the defendant contended that § 2780 of the Georgia Civil Code of 1910 which provided that a railroad company should be liable "for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such

company unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company," was inapplicable because the suit was brought against the Director General of Railroads. The court held, however, that there was no merit in this contention, in view of § 10 of the Act of March 21, 1918.

*Fitzhugh v. Grand Trunk R. Co.* (1920) — N. H. —, 109 Atl. 562, was an action for conspiracy against the defendant railway and another, begun by trustee process. The question to be determined was whether the Director General of Railroads could be summoned as trustee. It was held that (1) there is nothing in the act of Congress under which the Director General operates the railroads, nor in Pub. Stat. chap. 245, which provides either in terms or by reasonable implication that the money rights and credits of a third person in the possession of a railroad operated by the Director General may be attached by summoning him as trustee; and this was held to be true in respect to attaching the share or interest of the individual defendants in the defendant corporation. (2) If the defendants or any of them had a claim which they could enforce against the Director General in the state courts, and which could be adjudicated so that the trustee might be charged upon disclosure, the Director General might be summoned as trustee. (3) In order to summon the Director General as trustee, the claim of the defendants against the Director General must be one growing out of "the possession, use, control, or operation" of a railroad by him.

In *Hines v. Zellner* (1920) — Ga. App. —, 103 S. E. 97, which was an action brought against the Director General of Railroads to recover damages for the death of a person not a passenger or an employee, the defendant demurred to the petition on the ground that the liability alleged in the case was not the liability of a common carrier, which included only a breach of its duty safely to transport

freight and passengers. The demurrer was overruled by the lower court, however, and its action was sustained on appeal. In an official syllabus the following appears: "The Act of Congress of March 21, 1918 (Comp. Stat. §§ 8115½a-8115½p, Fed. Stat. Anno. Supp. p. 757), and the rules promulgated by Federal authority in pursuance thereof, while limiting the interference of government control of railroads by prohibiting the enforcement of judgments and decrees through attachment or levy, did not intend either to extinguish or impair, but, on the contrary, expressly preserved, the rights of parties to prosecute to judgment, in the name of the Director General of Railroads, any cause of action against the railroad companies to which they as parties were entitled under the Federal, state, or common law. See *Dantzler Lumber Co. v. Texas & P. R. Co.* 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669, 1710, note; *McAdoo v. Martin*, 24 Ga. App. 485, 101 S. E. 312. Under the power thus given the liability of the Director General is not limited to claims growing out of a breach of duty to safely transport freight and passengers."

But in *Kneeland-Bigelow Co. v. Michigan C. R. Co.* (1919) 207 Mich. 546, 174 N. W. 605, an action by a shipper to compel the railroad company to perform specifically a contract entered into before the railroads were placed under Federal control, the court, in affirming a decree dismissing the plaintiff's bill, said: "Since this contract was entered into in 1911, a grave change of conditions, for which neither contracting party is responsible and neither anticipated, has imposed upon the defendant company impossibility of further performance on its part, whether temporary or permanent we need not inquire; while on plaintiffs' part the existence of a state of war, with resultant governmental interference in taking possession and control of defendant's transportation system, has only affected them by advanced traffic rates. This they seek relief from in a court of chancery, under a bill for specific performance, against a defendant deprived of power

to perform by the Federal government, which is in absolute control of the transportation system essential to performance and with it fulfilling the contract, except as to the matter of rates, while none of its officials in control and imposing the conditions complained of are parties to the suit. Under such conditions, a decree of specific performance against the party ousted and incapable of performance would seem to be a vain thing. For disposition of the issue directly involved, we deem it sufficient to find and hold that, by a war-measure interposition of the sovereign governmental power, this contract was rendered unenforceable, for the time being at least, and so long as such interposition is maintained by *vis major*."

In affirming an award of compensation by the State Industrial Commission against the railroad company, the court in *Fish v. Rutland R. Co.* (1919) 189 App. Div. 352, 178 N. Y. Supp. 439, said: As to the claim that the award should have been made against the Director General, as the Rutland Railroad was then being operated by him, the matter was passed on adversely by this court in *Bryant v. Pullman Co.* (1919) 188 App. Div. 311, 177 N. Y. Supp. 488. Furthermore the Rutland Railroad Company describes itself as the employer in the report of this injury, which is filed with the Commission." In *Bryant v. Pullman Co.* (N. Y.) cited in the foregoing case, a proceeding instituted under the Workmen's Compensation Law for compensation for injuries received by a porter on the defendant company's sleeping car, which was, at the time of the accident, being operated under Federal control, an award in favor of the claimant was upheld, on the ground that § 10 of the Act of March 21, 1918, contemplated a continuing liability of the companies, and actions against them were not inconsistent with the act or the proclamation of the President. Kellogg, P. J., said: "The appellant raised no question with the government as to the effect or validity of the act of Congress or the proclamation of the President, but acquiesced in them and operated its cars as

contemplated by the act. If, instead of so doing, it had contested the question with the government, a different situation might have arisen. But, having operated its cars under the act, it cannot now raise the question that the government could not compel it to do so. That question is in the past. It did operate its cars, and the claimant was its employee in that service. It was carrying on the express business by and under the direction of the Director General. In effect the government was the lessee of the cars, the company the lessor, and by the terms of the lease the business was carried on by it under government control. The question is not one of substance. If the lessee was carrying on its business through the lessor, and the latter is required to pay compensation under this award, it has ample recourse against the lessee, and undoubtedly any liability imposed upon it will be met in the adjustment of the rentals. We consider the question more one of technicality than of substance, and are prepared to hold that for the purposes of the protection of the claimant under the Workmen's Compensation Law (Consol. Laws, chap. 67) the appellant was his employer and that the award may stand."

While no provision similar to that of § 10 of the Federal Control Act was made in respect to telegraph and cable companies, the rule heretofore stated was applied in *Witherspoon v. Postal Teleg. & Cable Co.* (1919) 257 Fed. 758, an action for damages alleged to have been caused by delay in delivering a cable, at a time when its lines were being operated by the Postmaster General on behalf of the United States. The court said: "Neither in the joint resolution nor the proclamation of the President is there a provision similar to § 10 of the Act of March 21, 1918, chap. 25, 40 Stat. at L. 456, Comp. Stat. § 3115½j, Fed. Stat. Anno. Supp. 1918, p. 762, taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore.

This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. . . . The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the government. If the companies are held for damages occasioned while under government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side."

But in *Western U. Teleg. Co. v. Davis* (1920) — Ark. —, 218 S. W. 833, an action brought under statute against a telegraph company, to recover damages for mental anguish caused by the negligence of the company in transmitting a message, was dismissed on the ground that at the time of the negligent act complained of the telegraph lines were under control of the United States government. The court said: "The assumption of control by the Postmaster General was complete, and constituted a substitution of the government for the owners of the telegraph lines in the operation of the same. The possession and control of the owners was entirely displaced, and the act of negligence complained of was committed not by the servants and employees of the telegraph company, but by the servants and agents of the government. There was no liability resting upon the telegraph company for the act of the government, and no such liability was created by statute. . . . The statute, or rather the joint resolution, now under consideration, does not contain a word which would justify us in holding that it preserved the liability of the telegraph companies, nor does it authorize a suit against the tele-

graph companies. Compensation is to be paid by the government for the use of the property, but no authority is conferred to hold the owners of the respective lines responsible for injuries which occur under government control. We see no escape from the conclusion that there is no liability in this case for the injury complained of."

And in *Foster v. Western U. Teleg. Co.* (1920) — Mo. App. —, 219 S. W. 107, the court reversed a judgment for the plaintiff, in an action brought against the telegraph company and the Postmaster General to recover a penalty provided for by statute for failure to promptly transmit and deliver a telegraphic message. The court said: "No suit could possibly be instituted against the Western Union Telegraph Company, because it has been expressly held by the highest authority that when the President, acting under the power given him by Congress, took charge of the telegraph lines of the United States, such lines were then operated as a government agency. . . . It appears that no order was ever made with reference to telegraph lines, such as was made concerning the operation of railroads; that is, to permit litigants who based causes of action arising out of the operation of the railroads or carriers to substitute the Director General of Railroads in place of the carriers. Under the Supreme Court authorities . . . and under the recent case of *Rochel Candidate v. Western Union Telegraph Co.* — Ala. —, 83 So. —, decided by the supreme court of Alabama, at the October term, 1919, in an opinion by McClellan, J., we must hold that this penalty provision could not be enforced against the United States government while it was operating the telegraph lines."

Similar rulings have been made with respect to express companies. Thus, in *Edwards v. American R. Exp. Co.* (1919) — Mo. App. —, 216 S. W. 781, an action against an express company operated and controlled by the government under the Federal Control Act, for damages caused by delay in transporting a shipment of eggs, it was held

that the express company was under the duty to give precedence to shipments of the United States government; and if, in so doing, it became impossible to deliver the shipment to the consignee at an earlier date than it did, the defendant was not liable. However, it was held that the evidence did not show any such volume of government business as to excuse the delay. And in *Clapp v. American Exp. Co.* (1919) — Mass. —, 125 N. E. 162, an action against an express company to recover damages for the loss and depreciation in value in a shipment of horses, it was held that the fact that the company was under government control was no defense to the action.

*V. Jurisdiction of action by or against public utility.*

In *Smith v. Babcock & W. Co.* (1919) 260 Fed. 679, it was held that the citizenship of the railroad, and not of the Director General, determined the jurisdiction of the Federal court in an action against a railroad under Federal control, so that such an action might be brought in such courts only as would have had jurisdiction in the absence of Federal control. The court said: "This section [§ 10] further provides that no defense shall be made in any actions at law or in equity to enforce any liability on the ground that the carrier is an instrumentality or agency of the Federal government, and that no such carrier shall be entitled to transfer any action brought by or against it to any Federal court. Obviously, this means that right to sue in or remove to the Federal court is not restricted or enlarged in consequence of Federal control. Construing these provisions together with the entire act, it seems obvious that Congress intended to interfere as little as could be avoided with the situation existing at the time the railroads were taken over, and that the rights and remedies of all persons should be preserved and might be enforced with a minimum of interference with pre-existing rights and remedies. Assuming the existence of a liability, it seems evident that it was intended parties should have the right to assert the same in any court, and in the same

manner as it might previously have been asserted. This intent extends not merely to the method of bringing the parties into court, but to the jurisdiction of the court." See also *Hill v. Director General of Railroads* (1919) — N. C. —, 101 S. E. 376, set out in the following subdivision.

*VI. Service of process.*

*Christian v. Great Northern R. Co.* (1920) — Wis. —, 177 N. W. 29, was an appeal from an order vacating the service of the summons and complaint in a personal injury action against a railroad company. The lower court sustained a motion to set aside the service of the summons and complaint, the motion being based on the fact that the freight agent on whom the service was made was not, at the time, in the employ of the defendant company, but was an agent and employee of the United States government, serving the Director General of Railroads, and therefore the service did not comply with subd. 6 of § 2637, Wis. Stat. 1917, which provided that "service may be had against a railroad company upon the station, freight, or ticket agent of the company who shall reside within the county." It was held on appeal that the trial court erred in vacating the service of the summons and complaint, as the agent was an agent of the defendant company, and a proper person upon whom service might be made.

The foregoing case was followed in *Gilliam v. Atlantic Coast Line R. Co.* (1920) — N. C. —, 103 S. E. 10, wherein it was held that service of process upon the local agent of a railroad company was service upon the Director General, and also upon the companies represented by him.

In *Clements v. Southern R. Co.* (1920) — N. C. —, 102 S. E. 399, it was held that, although the defendant railroad was being operated by the Director General as representative of the lessee, the railroad was a proper party to an action for damages brought by an employee, and that service upon the local agent of the company was equally service upon the corporation and on the Director General.

In *State ex rel. Hines v. Calhoun*

(1920) — *Mo.* —, 220 S. W. 6, General Orders 50 and 50a were said to be enabling orders, giving the courts jurisdiction over the Director General by proper service of process, but not warranting service in a district where no provision of law gives jurisdiction. Accordingly a court of a county where the railroad maintained no office for "its usual and customary business" was held to have no jurisdiction.

*VII. Removal of cause to Federal court.*

In *Hill v. Director General of Railroads* (1919) — *N. C.* —, 101 S. E. 376, action was brought against a domestic railroad corporation and the Director General of Railroads to recover damages for personal injuries suffered by the plaintiff from the negligent operation of the defendant's road in North Carolina, by its lessee, the Southern Railway Company, a foreign corporation. The Director General appeared and obtained a stay of the action as to the defendant road on the ground that under and by virtue of his own order (No. 50a) such suits might be prosecuted only against him. Thereupon the Director General filed a bond and petition for removal of the cause to the United States district court, on the ground that the controversy was wholly between a citizen of North Carolina and the defendant, "a citizen of New York, operating and controlling a corporation originally created, organized, and existing under and by virtue of the laws of Virginia, and not a citizen or resident of the state of North Carolina." It was held that as the plaintiff, in his complaint, had stated a cause of action only against a domestic corporation, the application for removal was properly denied in view of § 10 of the Act of March 21, 1918, providing as follows: "Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier." The court furthermore held that the Director General, "having become a party and accepted the position of defending the suit as being in the management and control of defendant,

obtained a stay of proceedings against the corporation under an order that such suits are to be conducted in his official capacity, he should not be allowed to change his attitude and undertake a resistance as being in charge of the Virginia company."

*VIII. Execution of process against public utility.*

By the express provision of the Federal Control Act no execution may be levied on railroad property under Federal control. Discussing the payment of judgments against the Director General in *Johnson v. McAdoo* (1919) 257 Fed. 757, the court said: "It will be incumbent upon the Director General to defend the suit, and to make payment, in the event of a recovery, out of his receipts. Section 12 of the act provides that the moneys received by the Director General shall not be covered into the Treasury of the United States, but shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner, as before Federal control. Under the orders of the Interstate Commerce Commission judgments for damages are chargeable to the operation of the roads, and are payable out of the general receipts. There is no doubt that the same action will follow in the event of recovery in this case as if the roads were not under government control, and the question of an adjustment as between the government and the railroad is one that will be settled when the roads are turned back to their owners, or other disposition made of them. In the meantime, should a recovery be had, no execution can issue against the physical property of the road under the plain terms of the act."

But the recovery of a shipment by replevin against the carrier is not inhibited. *Salant v. Pennsylvania R. Co.* (1919) 188 App. Div. 851, 177 N. Y. Supp. 475. In that case it appeared that the owner of shirt material delivered it to a bailee under the contract by which the bailee was to make the material into shirts, receiving payment for his work one week after the completed shirts were delivered. The bailee sent a shipment of shirts by the

defendant railroad to the bailor, on an order bill of lading to which was attached a draft for the amount of a claim which was not a just lien on the goods. The bailor thereupon brought an action of replevin against the railroad company, which relied on General Order No. 43 of the Director General, providing as follows: "It is therefore ordered that no moneys or other property under Federal control or derived from the operation of carriers while under Federal control shall be subject to garnishment or like process in the hands of such carriers or any of them, or in the hands of any employee or officer of the United States Railroad Administration." The court did not agree with this contention, however, saying: "In my opinion, such construction does violence to the intent and meaning of the order, and, furthermore, that if it was intended to be so applied it would be void, being beyond the powers of the Federal administrator as conferred by the act of Congress. Act March 21, 1918, chap. 25, 40 Stat. at L. 451, Comp. Stat. § 8115½a, Fed. Stat. Anno. Supp. 1918, p. 757. The recitals contained in and preceding the order show that the purpose was to safeguard the wages of employees from garnishee process while in the possession of the Federal administrator, as such practice was prejudicial to the operation of the lines and systems of transportation.

*IX. New construction of § 11 of Act of March 21, 1918.*

Section 11 of the Act of March 21, 1918, which provides that "every person . . . or persons acting for or employed by a carrier, . . . or other person, . . . who . . . shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President . . . shall be guilty of a misdemeanor, and shall be punished," etc., was under consideration in the case of *United States v. Kambeitz* (1919) 256 Fed. 247, wherein it was held that the conviction of an express employee, who stole express matter being carried

by the express company for hire while under Federal control, could be sustained under the act. In overruling a demurrer to the indictment, the court said: "The possession, use, and operation of the system includes the right to carry and transport the goods entrusted to the carrier without unlawful obstruction or interference, and he who unlawfully interferes with and impedes the exercise of this right interferes with and impedes such possession, use, and operation of the system itself. If the goods being transported by the operation of the system are unlawfully taken and carried away, the system ceases to operate. The instrumentalities used in operating the system may still move, but the 'transportation system' does not operate."

Section 11 of the act of March 21, 1918, further provides as follows: "For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various states where applicable, shall apply to all officers, agents and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States." The question also arose in *United States v. Kambeitz* (Fed.) supra, whether express matter, stolen by an employee from an express company which was being operated by the government, was "properly derived from" the "operation" of the transportation system. In answering this question in the affirmative, the court said: "The operation of this transportation system consisted and consists in drawing or obtaining or receiving from other goods, chattels, or other property for transportation for a compensation, and the transportation of such property. This is the main thing the transportation system does when in operation. It does not operate unless it does this, and only operates when it does this. Hence this property and its possession were de-



rived from the operation of this transportation system. 'Derive' means (see Century Dict.): '(3) To draw or receive, as from a source or origin, or by regular transmission; as to derive ideas from the senses; to derive instruction from a book; his estate is derived from his ancestors.' Clearly the property stolen by defendants was derived from the operation of the transportation system; that is, by means of and because of the operation and use of the system. It was by operating this transportation system that the United States obtained and came into possession of such property. But for such operation of the system the United States would not have had it. So this property so stolen was derived from the possession and use of such transportation system. In operating such a transportation system, the one in possession and operating it holds himself or itself out as a common carrier for hire and invites custom—the delivery to it of property for transportation. This is a necessary part of the use and operation of the system of transportation. The words 'derived from' do not imply that the property stolen or converted by the employee must have been purchased with money earned in carrying on or operating or using the system, or that such property must be a part

of that which came to the possession of the government when the transportation system was taken over." This case was affirmed in (1919) 262 Fed. 378, a majority of the court being of the opinion that the goods stolen were not "property derived from or used in connection with the possession, use or operation" of the New York Central Railroad, and that the act contemplated instrumentalities of transportation rather than merchandise carried for freight. However, the court was unanimous in holding that the stealing of the goods did not interfere with and impede the possession, operation, and control of the American Railway Express Company as charged in the third count.

*X. Effect of return of railroads to their owners.*

The liability of railroads for acts of negligence occurring during the period of Federal control, and the recovery against them in such cases, will not be affected by the return of these corporations to their owners, or rather the abandonment of supervision by the government, which took place on March 1, 1920. *Gilliam v. Atlantic Coast Line R. Co.* (1920) — N. C. —, 103 S. E. 10; *Clements v. Southern R. Co.* (1920) — N. C. —, 102 S. E. 399. W. F. F.

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FRANK L. BALLAINE, Plff. in Err.,  
v.  
ALASKA NORTHERN RAILWAY COMPANY.  
UNITED STATES, Intervener.

*United States Circuit Court of Appeals, Ninth Circuit — July 7, 1919.*

(259 Fed. 183.)

**Railroads — property of United States — liability for tort.**

1. No action can be maintained against a railroad company the stock, bonds, and property of which have been purchased by the United States under authority of Congress for public purposes, for a tort committed by the railroad officials, such as the institution of a malicious prosecution.

[See note on this question beginning on page 995.]

**United States — liability for tort.**

2. The United States cannot be sued for a tort, even though committed by

its officers in the discharge of their official duties.

[See 26 R. C. L. 1460, 1461.]

ERROR to the District Court of the United States for the Third Division of the Territory of Alaska (Brown, Dist. J.) dismissing the complaint against the defendant in an action in which the United States intervened, brought to recover damages for alleged malicious prosecution. *Affirmed.*

Statement by Hunt, Circuit Judge:

On April 29, 1915, in the district court for the territory of Alaska, third division, the Alaska Northern Railway Company sued the Alaska Central Railway Company and Frank L. Ballaine to declare a trust for the use of the Alaska Northern Railway Company in and to certain real estate at Seward, Alaska, the legal title to which was in Frank L. Ballaine. In November, 1915, after trial, the court dismissed the action, with costs to the defendant therein. Thereafter, on June 24, 1916, Ballaine brought the present action against the Alaska Northern Railway Company to recover damages, on the ground that the suit heretofore mentioned was maliciously instituted without probable cause. The railway company pleaded that the property of the corporation, at the time the action was brought, was owned by the United States, and that in the former suit the company had acted in good faith on the advice of counsel. Ballaine by reply put in issue the defense of advice by counsel.

Thereafter on October 23, 1916, the United States, by leave of court, intervened and set up that on April 6, 1915, under the Alaska Railroad Act, approved March 12, 1914, the United States had contracted in writing with certain proper parties for the purchase of the railway and the real and personal property of the Alaska Northern Railway Company, and all the stocks and bonds of that corporation; that such agreement "expressly excluded from the purchase made by the United States of America from the Alaska Northern Railway Company any claims of the Alaska Northern Railway Company or of the vendors in said agreement against any person or persons whomsoever, with reference to the title of the Seward town site, otherwise known as United States surveys 726 north

and south, of all of which facts plaintiff had due notice;" that the United States has paid in full all moneys agreed by it to be paid under the agreement, and was a bona fide purchaser, owner, and holder of the stocks, assets, and bonds of the railway company, and has taken charge and controlled the road in behalf of the United States, and that the United States never has had any interest in the litigation commenced by the Alaska corporation on April 29, 1915, against Ballaine and others; and that that suit was commenced and prosecuted solely for and in behalf of the former trustees and owners of the Alaska Northern Railway Company. In due course Ballaine answered, and set up that the Alaska Northern Railway Company was operating and maintaining the railroad and that a corporate organization was then in existence; that the United States, through the Secretary of the Interior, knew of the claim of Ballaine against the railway company for damages for alleged malicious prosecution prior to the final payment by the United States for the stocks and bonds of the defendant corporation; that the United States has not exercised any of the rights of sovereignty in the conduct, operation, and maintenance of the railway company, but is engaged in a commercial business in the operation and conduct of the railway, and acquired the assets of the corporation subject to the unliquidated claim of Ballaine for damages sustained by reason of the acts of the former board of directors of the railway company.

The United States demurred to this answer to the complaint in intervention, and on December 3, 1917, the district court dismissed the complaint of Ballaine against the Alaska Northern Railway Company, upon the ground that Ballaine's action was one sounding in

tort, and that the real party defendant is the United States, and that there was no jurisdiction to proceed with the cause. Ballaine then sued out a writ of error.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Mr. L. V. Ray, for plaintiff in error:

The demurrer of plaintiff to complaint in intervention should have been sustained.

*Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210.

The plaintiff is entitled to have determined upon testimony submitted, relevant thereto, whether, in the conduct, operation, and maintenance of the Alaska Northern Railway Company, the United States government has abandoned its sovereign capacity and has entered upon a commercial business.

*Salas v. United States*, 148 C. C. A. 440, 234 Fed. 842; *Louisiana v. Garfield*, 211 U. S. 70, 53 L. ed. 93, 29 Sup. Ct. Rep. 31; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Wells v. Nickles*, 104 U. S. 444, 26 L. ed. 825; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

The dismissal of plaintiff's complaint by the lower court, upon the ground that said court was without jurisdiction of the subject-matter of the action, precludes plaintiff from submitting to a competent tribunal the question of fact as to damage sustained by him, and deprives him of any remedy.

*Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

Mr. William A. Munly, for defendant in error intervener:

The United States of America had the right to intervene in said action.

*Spanagel v. Reay*, 47 Cal. 608; *Kimball v. Richardson-Kimball Co.* 111 Cal. 396, 43 Pac. 1111; 3 Cyc. 523; *Robinson v. Crescent City Mill & Transp. Co.* 93 Cal. 316, 28 Pac. 950; *McAllen v. Hodge*, 92 Minn. 68, 99 N. W. 424; *Wohlwend v. J. I. Case Threshing Mach. Co.* 42 Minn. 500, 44 N. W. 517; *Coffey v. Greenfield*, 55 Cal. 382; *Morrey v. Lett*, 18 Colo. 128, 31 Pac. 857; *Rosenberg v. Salomon*, 144 N. Y. 92, 38 N. E. 982; *The Exchange v. McFaddon*, 7 Cranch, 116, 2 L. ed. 287; *Stanley v. Schwalby*, 147 U. S. 518, 87 L. ed. 261, 13 Sup. Ct. Rep. 418;

*Percy Summer Club v. Astle*, 110 Fed. 486.

Where a complaint states substantial facts which constitute a cause of action, or if it can be inferred by reasonable intentment from the matter set forth, it will be sufficient, in the absence of a motion to make more definite and certain, notwithstanding imperfections of form or the omission of specific allegations.

*Shea v. Nilima*, 66 C. C. A. 263, 133 Fed. 209.

The United States is the real party defendant and cannot be subjected to an action of this character, as it has not given congressional authority to do so.

*Hagood v. Souther*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Murray v. Wilson Distilling Co.* 213 U. S. 169, 53 L. ed. 750, 29 Sup. Ct. Rep. 458; *Smith v. Reeves*, 178 U. S. 438, 44 L. ed. 1142, 20 Sup. Ct. Rep. 919.

The immunity of a state from suit or action, except when consented to by the state, is the same as that of the United States, the immunity in each case being founded on sovereignty; and the cases holding a state to be immune have therefore like application to the United States.

*Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Hans v. Louisiana*, 134 U. S. 17, 33 L. ed. 848, 10 Sup. Ct. Rep. 504; *Kawanakoa v. Polyblank*, 205 U. S. 353, 51 L. ed. 836, 27 Sup. Ct. Rep. 526.

The United States has not permitted or given consent to be sued in any matter sounding in tort.

*Schillinger v. United States*, 155 U. S. 167, 39 L. ed. 110, 15 Sup. Ct. Rep. 85; *Peabody v. United States*, 231 U. S. 539, 58 L. ed. 353, 34 Sup. Ct. Rep. 159; *Harley v. United States*, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634; *Russell v. United States*, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899; *Bigby v. United States*, 188 U. S. 406, 47 L. ed. 523, 23 Sup. Ct. Rep. 468; *Gibbons v. United States*, 8 Wall. 269, 275, 19 L. ed. 453, 454, 39 Cyc. 748.

A state or the United States cannot be sued in regard to its property, even if it goes into a private undertaking.

*Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 293, 609; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Murray v. Wilson Distilling Co.* 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

The United States, as the owner in possession of property, cannot be interfered with behind its back.

United States ex rel. Goldberg v. Daniels, 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. Rep. 84; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1184, 24 Sup. Ct. Rep. 820; Oregon v. Hitchcock, 202 U. S. 69, 50 L. ed. 938, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

Suing for the property of the United States is suing the United States.

Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; Belknap v. Schild, 161 U. S. 17, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; United States v. Clarke, 8 Pet. 436, 3 L. ed. 1001.

An action to recover a money judgment is the same as a suit against its property, where a state or the United States would be obliged to pay it.

Smith v. Reeves, 178 U. S. 438, 44 L. ed. 1142, 20 Sup. Ct. Rep. 919; Kawanakoa v. Polyblank, 205 U. S. 353, 51 L. ed. 836, 27 Sup. Ct. Rep. 526.

Suits may be maintained by the government in its own courts when it has a proprietary and pecuniary interest in the result, and also when it is necessary in order to enable it to discharge its obligations to the public.

United States v. American Bell Teleph. Co. 167 U. S. 265, 42 L. ed. 163, 17 Sup. Ct. Rep. 809; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

All the property of the United States is held for public purposes, and the property held by its agency in this case is for a public purpose, and entitled to the immunities secured to the sovereign authority.

United States v. Insley, 130 U. S. 265, 32 L. ed. 969, 9 Sup. Ct. Rep. 485; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

Miss Annette Abbott Adams also for defendant in error and intervenor.

Hunt, Circuit Judge, delivered the opinion of the court:

The authority of the United States to acquire the railroad came from the act of Congress approved March 12, 1914, chap. 37, 38 Stat. at L. 305, Comp. Stat. §§ 3593a-3593d, 1 Fed. Stat. Anno. 2d ed. pp. 8 A.L.R.—63.

336-388, entitled "An Act to Authorize the President of the United States to Locate, Construct, and Operate Railroads in the Territory of Alaska, and for Other Purposes."

The Secretary of the Interior, acting by authority of the President, made the written agreement of April 6, 1915, and one of later date for the purchase of the real and personal property of the railway company and of all the stocks and bonds of the corporation. The purpose of the agreement was to secure to the United States entire control and ownership, excluding, however, from the property purchased, any claims of the railway company or the vendors against persons with reference to title to the Seward town site.

Thus while, as between the United States and the railway corporation and its vendors, the United States became the owner of the railroad and stock, it did not purchase any claim that the railroad company had against Ballaine for any matter pertaining to the title to the Seward town site; and Ballaine knew of this agreement. If, under the situation, Ballaine can proceed with this action, and should recover a judgment against the railroad company, he would look for satisfaction to the property held in the name of the corporation. That property, however, is now owned by the United States. It is really the property of the United States; hence, if seized on execution, we would have a judgment creditor in an action in tort interfering with the property owned by the United States, held, it is true, in the name of the railroad company, yet so held for account of the United States by and through an agency in the form of a corporation. That the United States cannot be sued for a tort, even though committed by its officers in the

United States—  
liability for  
tort.

discharge of their official duties, is thoroughly well settled. Peabody v. United States, 231 U. S. 580, 58 L. ed. 351, 34 Sup. Ct. Rep. 159; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Occi-

dental Constr. Co. v. United States, 158 C. C. A. 157, 245 Fed. 817; Smith v. Rackliffe, 31 C. C. A. 328, 59 U. S. App. 427, 87 Fed. 964.

To overcome the application of the rule, plaintiff in error argues that in the operation and maintenance of the railroad the United States is carrying on a commercial business, and in such business has, to an extent, abandoned its sovereign capacity. We cannot uphold that view. Congress, in its power to

**Railroads—  
property of  
United States—  
liability for  
tort.**

regulate commerce, could construct, or could authorize a corporation or individuals to construct, a railroad, or to buy a railroad, and clearly, in the territories, has a plenary power to grant franchises, to create a railroad system, and to employ the agency of a corporation as a means of accomplishing such object. *California v. Central P. R. Co.* 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073. In *Luxton v. North River Bridge Co.* 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891, the court held that Congress could create corporations as appropriate means of executing the powers of government, as, for instance, a railroad corporation, for the purpose of promoting commerce among the states. *Indiana v. United States*, 148 U. S. 148, 37 L. ed. 401, 13 Sup. Ct. Rep. 564. The Act of March 12, 1914, chap. 37, heretofore cited, which authorizes the President to locate, construct, and operate railroads in Alaska, expressly provides that the Alaska railroad is for the settlement of public lands and for transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails, and for "other governmental and public uses," and to transport passengers and property. The act (§ 4) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable

him to accomplish the purposes of the act. By § 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and, in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.

Instances of where a state government was carrying on a private enterprise, but where it was held that a suit could not be maintained against the objection of the state, are found in *Murray v. Wilson Distilling Co.* 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, and *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609. *Salas v. United States*, 148 C. C. A. 440, 234 Fed. 842, cited by the plaintiff in error, is to be distinguished. There Burke and Salas were indicted for conspiring to defraud the United States. The United States owned all of the stock of the Panama Railroad Company, and, through the Isthmian Canal Commission and its subsistence department, food supplies were furnished to the employees on the Isthmus and to the commissary department of the railroad company, which bought and furnished all other supplies. Burke was manager of the commissary department of the railroad. The court of appeals was of opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation, and that the combination proved on the trial was not one intended to defraud the United States. Here, however, the United States holds the railroad and stock for pub-

lic purposes under clear statutory authority, and it operates the road in the necessary discharge of its duty to the public, and in our judgment, in this, a civil action, can claim the privileges and immunities of a sovereign. See authorities heretofore cited: *Murray v. Wilson*

*Distilling Co.* 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

Our opinion is that the United States has, by the pleadings, shown itself to be the real party in interest, and can claim the immunity set up in the complaint in intervention.

The judgment is affirmed.

## ANNOTATION.

### Suit against railroad owned by or in which interest is held by United States or state.

#### I. Introductory, 995.

#### II. In absence of legislative permission, 995.

#### III. By legislative permission, 998.

##### 1. Introductory.

This annotation is confined to a discussion of the right of action against a railroad owned in whole or in part by a state or by the United States, or in which a state or the Federal government has an interest. Cases arising during the period of Federal control of railroads are not included, such cases being collected and considered in the annotation to *L. N. Dantzler Lumber Co. v. Texas & P. R. Co.* 4 A.L.R. 1680.

##### II. In absence of legislative permission.

Immunity from suit is an attribute of every sovereign, and it is well settled that neither the United States nor a state can be sued without its consent. Consequently a railroad owned or controlled by the United States or by a state is, as a general proposition, not subject to suit; and it seems that a suit will be dismissed if the United States or a state is an indispensable party, by reason of an interest which it holds in the corporation. *Cunningham v. Macon & B. R. Co.* (1883) 109 U. S. 446, 27 L. ed. 992, 8 Sup. Ct. Rep. 292, 609; *Christian v. Atlantic & N. C. R. Co.* (1889) 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Swasey v. North Carolina R. Co.* (1874) 1 Hughes, 17, 71 N. C. 571, Fed. Cas. No. 13,679; *Meier v. Kansas P. R. Co.* (1877) 4 Dill. 378, Fed. Cas. No. 9,394; *Western U. Teleg. Co. v. Western & A. R. Co.* (1914) 142 Ga. 532, 83 S. E.

185; *Troy & G. R. Co. v. Com.* (1879) 127 Mass. 43. And see the reported case (*BALLAINE v. ALASKA NORTHERN R. Co.* ante, 990). Compare *Salas v. United States* (1916) 148 C. C. A. 440, 234 Fed. 842; *Panama R. Co. v. Curran* (1919) 168 C. C. A. 114, 256 Fed. 768; *Panama R. Co. v. Robert* (1919) 168 C. C. A. 119, 256 Fed. 773.

The rule just stated has been applied in the case of a railroad in the possession of a state as mortgagor after default. Thus, in *Cunningham v. Macon & B. R. Co.* (U. S.) supra, it appeared that the state assembly of Georgia passed an act authorizing the governor to indorse bonds of a railroad company. The governor indorsed the bonds, which were afterwards negotiated by the company. The statute under which this was done made the indorsement of these bonds operate as a prior mortgage on all the property of the company, which could be enforced by a sale by the governor, on default in payment of the bonds so indorsed, or of interest falling due on them. In addition to this the company executed and delivered to the governor a written mortgage, confirming the lien created by the statute, which was duly acknowledged and recorded. The company failed to pay the interest coupons on the bonds, and the governor of the state, under the power vested in him, took possession of the road, putting it into the hands of a receiver, who sold and conveyed it to the state. Thereupon the state, by its officers, took possession of and operated the road. Subsequently the holders of a second mortgage on the same property filed a bill to foreclose their mortgage

and to set aside the sale made by the receiver as invalid, and to have priority of lien for reasons stated in the bill. The governor, the state treasurer, and the state directors of the road were made parties defendant. The Supreme Court of the United States held that as the state was an indispensable party the bill would not lie, saying: "In the case now under consideration, the state of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked. No foreclosure suit can be sustained without the state, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the state. The state is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the state of Georgia in the property, of which she has both the title and possession." So, in *Troy & G. R. Co. v. Com.* (1879) 127 Mass. 43, a bill in equity was filed, the object of which was to redeem the entire railroad franchise and property of the Troy & Greenfield Railroad Company, mortgaged by that corporation to the commonwealth, and surrendered to the commonwealth under a statute which provided that "the right of redemption shall not be barred until ten years have elapsed after said railroad and tunnel are completed and the same open for use." The statute in question made no provision as to the manner of asserting this right of redemption. A demurrer to the bill was sustained and the bill was dismissed, the court holding that it had no jurisdiction to entertain the suit. The court said: "It is a fundamental principle of our jurisprudence that the commonwealth cannot be impleaded in its own courts, except by its own consent, clearly manifested by act of the legislature; and this principle is applicable to actions to recover real estate, and to bills in equity to enforce trusts, or to foreclose or redeem mortgages."

In like manner the ownership of railroad stock by a state has been held to make it improper to adjudicate a lien on the railroad property, since the state, a necessary party, was immune from suit. *Christian v. Atlantic & N. C. R. Co.* (1889) 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260. In that case the evidence showed that the state of North Carolina, under power conferred by statute, subscribed for stock in a railroad company, paying for it with the proceeds of state bonds issued for that purpose. It was provided in the act that all the stock held by the state should be pledged as security for the redemption of the bonds, and that any dividends which might from time to time be declared on the stock held by the state should be applied to the payment of the interest accruing on the bonds. The state being in default in the payment of interest, action was brought by a bondholder against the railroad company, its president and directors, the proxy representing the stock owned by the state, and the state treasurer, to obtain on behalf of the complainant and other bondholders, the adjudication of a lien on the stock held by the state and on the dividends on the stock, and the enforcement of that lien by requiring the dividends to be paid to the bondholders in satisfaction of the amount due on their bonds; and, if those were insufficient, by a sale of the stock, or so much as might be necessary, aided by the appointment of a receiver to take possession of the dividends, and an injunction to restrain the railroad company and its officers from paying to the state treasurer, or to any other person on behalf of the state, and to restrain the state treasurer from receiving, any moneys accruing and payable as dividends on the stock. It was contended for the complainant that the proceeding was in rem against the stock, to enforce a right in and to it, resulting from an alleged contract by which the stock was pledged for the benefit of the complainant, although the stock was not actually delivered to the alleged pledgee; and that in consequence it was not necessary to make the state a party. It was held that the

mere declaration by the state, in a statute, that stock held by it was pledged, did not technically operate to create a pledge, but that this was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. As to the hypothesis that a mortgage of the stock was effected, the court said: "The proceeding is a suit against the party, to obtain by decree of court the benefit of the mortgage right. But where the mortgagor in possession is a sovereign state, no such proceeding can be maintained. The mortgagee's right against the state may be just as good and valid, in a moral point of view, as if it were against an individual. But the state cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a state might be sued in it by a citizen of another state, or of a foreign state; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits." But in *Swasey v. North Carolina R. Co.* (1874) 1 Hughes, 17, 71 N. C. 571, Fed. Cas. No. 13,679, a somewhat similar case, it appeared that the state subscribed to part of the stock of the defendant railroad. In an action against the railroad company it was insisted by the defendant that the state was in fact a party defendant, and in consequence the court could not entertain jurisdiction of the cause. To this contention, however, the court said: "The state, although directly interested in the subject-matter of the litigation, is not a party to the record. The 11th Amendment to the Constitution of the United States provides that no suit can be prosecuted in this court against a state, or by citizens or subjects of a foreign state. It has long been held, however, that this amendment applies only to suits in which a state is a party to the record, and not to those in which it has an interest merely." It was held that, inasmuch as the stock which belonged to the state was pledged for the payment of complainant's bonds,

it was held by the railroad company as trustee for the bondholders as well as the state, and that, since the trustee was a party to the suit, it was not necessary that the state should be a party.

In *Meier v. Kansas P. R. Co.* (1877) 4 Dill. 378, Fed. Cas. No. 9,394, a bill was originally filed in the state court to foreclose a mortgage on the railroad and property of the Kansas Pacific Railway Company. The United States, under an act of Congress, had certain rights in and liens on the property, and was made a defendant to the bill, but entered no appearance. After removal of the suit to the United States court, the complainant moved that a notice be issued, addressed to the Attorney General, notifying him that a suit had been instituted against the United States, accompanied by a copy of the complaint, and requesting him to appear and state whether the United States claimed any right in the premises which were the subject-matter of the action, and whether the United States desired any adjudication of its rights. The motion was granted, but the court did not commit itself to the proposition whether it could, on the final hearing, pronounce a decree against the United States, without an authorized appearance by the Attorney General.

The relation of the United States to the Panama Railroad Company seems to be such that the immunity of the government from suit does not attach to that railroad. Thus, in *Panama R. Co. v. Curran* (1919) 168 C. C. A. 114, 256 Fed. 768, action was brought against the defendant railroad company for the recovery of damages claimed to have resulted from injuries sustained by the plaintiff, in consequence of her slipping and falling on the floor of the defendant's commissary in the Canal Zone. The right of the plaintiff to maintain the action was brought into question on the ground that the commissary, at which the injury complained of occurred, was not being operated by the defendant under its charter and by-laws, but, at the time of the injury and for some years prior thereto, was operated by



the defendant as an agency of the government of the United States in the construction and operation of the Panama Canal. It was held that an intention to preserve the existence of the Panama Railroad as a private corporation was clearly manifested in acts of Congress, and departmental regulations and rulings, and in consequence the suit would lie although the United States government owned all of the stock of the company. In this connection the court said: "From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder." See to the same effect, *Panama R. Co. v. Robert* (1919) 168 C. C. A. 119, 256 Fed. 773.

The same view is supported by *Salas v. United States* (1916) 148 C. C. A. 440, 234 Fed. 842, a case not strictly within the scope of this note, but which is cited and distinguished in the reported case (*BALLAINE v. ALASKA NORTHERN R. Co.* ante, 990). In that case it appeared that the defendant and one Burke, who was the manager of the commissary department of the Panama Railroad Company, were indicted for conspiring to defraud the United States. It was held that although the government owned all of the stock of the Panama Railroad Company, the combination proved was not one intended to defraud the United States, or when the United States entered into a commercial business it abandoned its sovereign capacity, and was to be treated like any other corporation.

But in the reported case (*BALLAINE v. ALASKA NORTHERN R. Co.*) it is held that the ownership by the Federal government of the Alaska Northern Railroad Company, under the Act of March 12, 1914 (1 Fed. Stat. Anno. 2d ed. p. 336), precludes an action against that company.

Though somewhat beside the purview of this discussion, it may be noted in this connection that state ownership of a railroad has been held to preclude proceedings to condemn an easement over the right of way. *West-*

*ern U. Teleg. Co. v. Western & A. R. Co.* (1914) 142 Ga. 532, 83 S. E. 135. In that case condemnation proceedings were instituted by a telegraph company to condemn a right of way over a railroad line which was owned by the state, but was operated by a lessee. It was held that the proceedings were properly enjoined, since the lessee held only a usufructuary interest which could not be condemned separately and apart from the state, and the legislature had made no provision for the condemnation of property belonging to the state.

### III. By legislative permission.

Permission has in some instances been granted by a state legislature, to sue a railroad which the state owns or has an interest in. Thus, in *East Tennessee, V. & G. R. Co. v. Nashville, C. & St. L. R. Co.* (1897) — *Tenn.* —, 51 S. W. 202, action was brought in Tennessee against certain railroad companies and the state of Georgia, owner of the Western & Atlantic Railroad. The state demurred to the complaint, insisting that she could not be sued because she was a sovereign state. It appeared that by a statute of Tennessee the state of Georgia was authorized to construct a railroad in Tennessee, and was given all the "rights, privileges, and immunities, with the same restrictions," which were granted by a former act to the Nashville & Chattanooga Railroad Company. That act included, among the rights and restrictions, the right to sue and be sued. It was held that the state of Georgia was, under the act, subject to suit.

So in *Western & A. R. Co. v. Carlton* (1859) 23 Ga. 180, action was instituted against the superintendent of the Western & Atlantic Railroad for the recovery of damages to a shipment of freight. The state owned and operated the railroad. A statute provided that persons having claims against the railroad should present them to the superintendent of the railroad, and that, if a dispute should arise concerning any claim which could not be amicably settled, the claimant might bring suit against the superintendent of the railroad. It was insisted that, as the state

was not a common carrier, it was not subject to the rules of law applicable to common carriers. Answering this contention, the court said: "When a state embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulations with persons engaged in the same calling. . . . We think, then, that the state, engaging in the carrying business, assumes the obligations and liabilities incident to that business when carried on by individuals, and the remedy is by suit against the superintendent of the road when the claim cannot be adjusted without."

Likewise, in *Amstein v. Gardner* (1883) 134 Mass. 4, action was brought against the manager of the Troy & Greenfield Railroad and the Hoosac tunnel to recover damages for injuries occasioned to the plaintiff's horse by falling into an opening between the ties of a bridge. The railroad, it appeared, was owned by the commonwealth of Massachusetts, and provision was made by statute for bringing suits for damages against the manager of the railroad. It was held that the action could be maintained against the defendant manager, although the injury occurred in consequence of defective construction, which was the fault of a former manager. *W. F. F.*

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JOSEPH P. MANNING  
v.  
LIBERTY TRUST COMPANY.

*Massachusetts Supreme Judicial Court—January 9, 1930.*

(— Mass. —, 125 N. E. 691.)

**Mortgage — foreclosure — sale at less than value — effect.**

1. A sale under mortgage foreclosure is not invalidated by mere absence of bidders other than a representative of the mortgagee, nor the fact that the property brought substantially less than its value.

[See note on this question beginning on page 1061.]

**Evidence — bad faith in mortgage foreclosure.**

2. That a sale under mortgage foreclosure was held on a cold winter morning, with no one present but a representative of the mortgagee, does

not establish that the mortgagee acted in bad faith with a purpose to secure the property to itself at its own price.

[See 19 R. C. L. 613, 614.]

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EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County (Hitchcock, J.) made during the trial of an action brought to recover damages alleged to have been sustained from the foreclosure, under a power of sale, of certain mortgages owned by plaintiff, which resulted in a verdict in his favor. *Judgment for defendant.*

The facts are stated in the opinion of the court.

Mr. William E. Clapp for defendant.  
Messrs. James E. Cavanagh and Philip A. Hendrick for plaintiff.

Pierce, J., delivered the opinion of the court:

This is an action of tort to recover damages resulting to the plaintiff from the foreclosure, under a power

of sale, of certain mortgages on five distinct parcels of land situated in Watertown, Massachusetts, and owned by the plaintiff. The declaration is in five counts. Each count, after describing a particular mortgaged parcel of land, set out as the grievance complained of "that in the

acceptance of said mortgage the defendant was bound in the exercise of the power of sale therein contained to observe good faith and suitable regard for the interest of the plaintiff in any sale that might be made under or by virtue of said power of sale; that on or about [February 2, 1918] the defendant undertook and did sell said parcel of land with the buildings thereon at public auction, but in the conduct of said sale the defendant did not exercise good faith or suitable regard for the interest of the plaintiff in the manner and conduct of the said sale, or in the advertising thereof, nor in the time in which said sale took place, but on the contrary, and notwithstanding the protest of the plaintiff, the said premises were sold for a price far below its fair market value, and by reason of the lack of good faith on the part of the defendant, and the careless and negligent manner in which said sale was conducted, the plaintiff has been damaged."

Primarily the case is before this court, after a verdict for the plaintiff, on exceptions to the refusal of the presiding judge to direct a verdict for the defendant.

"The plaintiff admitted the legality of the mortgages, admitted that the same were overdue and that the bank had the right to foreclose, admitted that the notices of foreclosure were published in accordance with the requirements of the statute, and of the mortgage, and that the sale was made by a licensed auctioneer," and rested his case "wholly upon this proposition: That notwithstanding a literal compliance with the requirements of the mortgage and of the statute relative to foreclosure of mortgages, the bank did not exercise good faith and a reasonable regard for the interests of the plaintiff in the conduct of the sale." In essence, the allegation of the declaration, as interpreted by the plaintiff, is a charge of bad faith, evidenced by a dishonest intention to take an unconscionable advantage of the plaintiff through

the forms of law and a literal compliance with the terms of the mortgage agreement. *Clark v. Simmons*, 150 Mass. 357, 23 N. E. 108; *Bon v. Graves*, 216 Mass. 440, 447, 103 N. E. 1023.

The circumstances bearing upon the good faith of the bank are as follows: In November, the notes and mortgages then being overdue four months, the bank told the plaintiff in substance that the work on the buildings in process of construction must go on more rapidly; that the interest of the bank was being jeopardized by letting the property be with only one or two men working on it; and that some action on foreclosing the property would be necessitated unless the work was carried on more rapidly. In the middle of January, 1918, the plaintiff was again told that the interest of the bank was jeopardized by the fact that no further work was done after the talk in the previous November. Foreclosure proceedings began January 11, 1918, by publication in a newspaper published in Watertown, Massachusetts, as required by the mortgages, and the notice was again published in the same paper on January 18 and 25. Saturday, February 2, 1918, was designated as the date of the sale of all the lots,—the first to be sold at 9 o'clock in the morning, and the others at ten-minute intervals until 10:40 A. M. As regards the notice the plaintiff testified: "I wasn't surprised that the bank took some action at the time they started foreclosure. The work stopped November 25, and practically five months the bank did nothing except protest to me before starting foreclosure proceedings. I received notice of the foreclosure sale of all these lots on January 17, 1918. I knew what it was. I had personal knowledge of this sale to take place on February 2, on January 16 or 17. I was personally present as a result of the notice of that sale."

In November, when the work had ceased entirely, efforts were made by the defendant with the

(— Mass. —, 125 N. E. 691.)

knowledge and desire of the plaintiff, by advertisement in the papers, to interest contractors and at least one lumber dealer to take over the houses and finish them; and the plaintiff testified that he was glad to have somebody come to his rescue and to have the defendant make some effort to assist him at this time. No success, however, was attained, and after foreclosure proceedings were determined upon efforts were made by the defendant to interest people as customers to attend the sale and buy the property.

As advertised, the sales were held on February 2, 1918,—a very cold morning, clear and bright. There were present when the first sale began, the plaintiff, the auctioneer, and an attorney for the bank. The plaintiff testified: "After the first house was put up for bid there wasn't anybody there. I said, 'I protest this sale; this is a farce; this is not a sale.'"

When the second sale began he said: "I protest this sale; this thing should be postponed; there are no bidders here."

At the third sale the plaintiff again protested. No evidence was offered by the plaintiff or by others to establish or to warrant an inference that an adjournment of the sale would have been likely to have attracted a larger number of bidders, some one or more of whom would have been ready and willing to pay a substantially greater sum for any parcel of land than was in

fact bid by the defendants. Of course the mere absence of bidders other than the representative of the mortgagee does not make the sale invalid; nor does the fact that the estate brought substantially less than its value, as found by the jury. Learned v. Geer, 189 Mass. 31, 29 N. E. 215; Vahey v. Bigelow, 208 Mass. 89, 92, 93, 94 N. E. 249; Taylor v. Weingartner, 223 Mass. 248, 248, 111 N. E. 909; Radley v. Shackford, 226 Mass. 435, 115 N. E. 924.

Mortgage—  
foreclosure—  
sale at less than  
value—effect.

Upon a consideration of all the evidence, we are of opinion the facts, considered separably and collectively, do not warrant an inference, much less prove, that the defendant acted in bad faith, with a purpose to secure the property to itself at its own price "rather

than to make a fair sale in accordance with the power, under such conditions as are rationally calculated to result in getting for the property as much as it reasonably may be made to bring." Bon v. Graves, supra. Nor do we think the evidence was sufficient to support the claim that the sale was conducted in a careless or negligent manner, or to warrant the submission of that issue to the jury.

Evidence—bad  
faith in  
mortgage  
foreclosure.

The motion to direct a verdict for the defendant should have been allowed, and judgment should now be entered for the defendant. Stat. 1909, chap. 236, § 1.

So ordered.

## ANNOTATION.

### Sale under power in mortgage or trust deed as affected by inadequacy of price.

- I. Introductory, 1001.
- II. The rule, 1002.
- III. Cases supporting the rule, but stating or suggesting a qualification, 1004.

- IV. Qualification of rule, 1006.
- V. Inadequacy of price with other elements, 1007.
- VI. Miscellaneous, 1010.

#### I. Introductory.

It will be observed that many cases are cited below to the proposition that mere inadequacy of price alone is not

sufficient to invalidate the sale of land under a power in a mortgage or deed of trust. These are cases where the rule is not qualified. The reader,

however, will understand that these cases were not necessarily decided on the principle that no inadequacy of price could be great enough to demand the interference of a court of equity. Comparatively few of the cases are so definite. It will also be observed that there is a considerable number of cases where the court, while declining to interfere, suggests or declares that there might be an inadequacy of price great enough to require interference, but that, on the other hand, there are very few cases in which sales under such powers have been set aside for inadequacy of price alone. It is clear that the courts prefer to find some other element of attack than inadequacy of price, even when that is very great.

Sales of chattels, and sales, where the statute requires a certain percentage of an appraisement, are excluded.

#### II. *The rule.*

Mere inadequacy of price alone is not sufficient to invalidate a sale of land under a power in a mortgage or deed of trust.

**United States.**—Haggart v. Ranger (1882) 4 Woods, 402, 15 Fed. 860 (purchase by creditor); Riggs v. Clark (1896) 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 560.

**Alabama.**—Ward v. Ward (1895) 108 Ala. 278, 19 So. 354 (purchase by creditor); Hunter v. Mellen (1899) 127 Ala. 343, 28 So. 468 (the same); Windes v. Russell (1907) 150 Ala. 625, 43 So. 788; Harmon v. Dothan Nat. Bank (1914) 186 Ala. 360, 64 So. 621 (as stating the rule); Dinkins v. Latham (1918) — Ala. —, 79 So. 493.

**Arkansas.**—Hudgins v. Morrow (1886) 47 Ark. 515, 2 S. W. 104.

**California.**—Kennedy v. Dunn (1881) 58 Cal. 389 (purchase by creditor, and debtor slandered the title).

**Colorado.**—Lathrop v. Tracy (1897) 24 Colo. 382, 65 Am. St. Rep. 229, 51 Pac. 486 (purchase by creditor).

**District of Columbia.**—Hitz v. Jenks (1900) 16 App. D. C. 530, reversed on another ground in (1911) 185 U. S. 155, 46 L. ed. 851, 22 Sup. Ct. Rep. 598.

**Illinois.**—Burns v. Middleton (1882) 104 Ill. 411 (purchase by creditor); Laclede Bank v. Keeler (1884) 109 Ill.

385; Bowman v. Ash (1889) 36 Ill. App. 115, affirmed in (1891) 143 Ill. 649, 32 N. E. 486.

**Massachusetts.**—King v. Bronson (1877) 122 Mass. 122 (purchase by creditor); Wing v. Hayford (1878) 124 Mass. 249 (as stating the rule); Learned v. Geer (1885) 139 Mass. 31, 29 N. E. 215 (purchase by creditor); Stevenson v. Dana (1896) 166 Mass. 163, 44 N. E. 128 (stating that a reasonable effort is enough); Vahey v. Bigelow (1911) 208 Mass. 89, 94 N. E. 249 (by inference, purchase by creditor) Turansky v. Weinberg (1912) 211 Mass. 324, 97 N. E. 755; Taylor v. Weingartner (1916) 223 Mass. 243, 111 N. E. 909 (as stating the rule); Radley v. Shackford (1917) 226 Mass. 435, 115 N. E. 924 (by inference, purchase by creditor); Downing v. Brennan (1919) 232 Mass. 535, 122 N. E. 729 (purchase by creditor).

**Michigan.**—Cameron v. Adams (1875) 31 Mich. 426 (where there was a right to redemption within certain time).

**Minnesota.**—Johnson v. Cocks (1887) 37 Minn. 530, 35 N. W. 436 (where there was a right to redemption within certain time); Lundberg v. Davidson (1898) 72 Minn. 49, 42 L.R.A. 103, 74 N. W. 1018 (the same).

**Missouri.**—Dover v. Kennerly (1866) 38 Mo. 469, subsequent appeal in (1869) 44 Mo. 145; Maloney v. Webb (1892) 112 Mo. 575, 20 S. W. 683; Betzler v. James (1910) 227 Mo. 375, 126 S. W. 1007; Roby v. Smith (1914) 261 Mo. 192, 168 S. W. 965 (in effect, purchase by creditor); Kline v. Vogel (1881) 11 Mo. App. 211.

**New York.**—March v. Ludlum (1845) 3 Sandf. Ch. 35.

**North Carolina.**—Haines v. Cowles (1850) 16 N. C. (1 Dev. Eq.) 420; Monroe Bros. v. Fuchtlar (1897) 121 N. C. 101, 28 S. E. 63 (purchase by creditor).

**North Dakota.**—Grove v. Great Northern Loan Co. (1908) 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345 (as stating the rule); Bailey v. Hendrickson (1918) 25 N. D. 500, 143 N. W. 184, Ann. Cas. 1915C, 739 (purchase by creditor).

**Rhode Island.**—Beacon Hill Land

Co. v. Bowen (1912) 38 R. I. 404, 32 Atl. 81.

**South Dakota.**—Loomis v. Stoddard (1919) — S. D. —, 173 N. W. 869.

**Texas.**—Klein v. Glass (1880) 53 Tex. 37; Seip v. Grinnan (1896) — Tex. Civ. App. —, 36 S. W. 349 (defeating creditor's suit to set aside sale); Evants v. Erdman (1913) — Tex. Civ. App. —, 153 S. W. 929; Zeiss v. First State Bank (1916) — Tex. Civ. App. —, 189 S. W. 524 (purchase by creditor); Eustis v. Frey (1918) — Tex. Civ. App. —, 204 S. W. 118 (purchase by creditor); Thornton v. Goodman (1919) — Tex. —, 216 S. W. 147 (the same).

**Wisconsin.** — Maxwell v. Newton (1886) 65 Wis. 261, 27 N. W. 31 (purchase by creditor).

**England.**—Adams v. Scott (1859) 7 Week. Rep. 213.

"The fact that the lands sold at the foreclosure sale for a price greatly disproportionate to their real value does not invalidate or affect the sale." Hunter v. Mellen (1890) 127 Ala. 343, 28 So. 468.

In Harmon v. Dothan Nat. Bank (1914) 186 Ala. 360, 64 So. 621, the court said: "It has been repeatedly held by this court, and must now be regarded as settled law, that gross inadequacy of the price paid by the purchaser at a foreclosure sale will not of itself, even in a court of equity, invalidate or affect the sale."

It is only in conjunction with other facts that inadequacy of price is a ground to invalidate a sale. Hudgins v. Morrow (1886) 47 Ark. 515, 2 S. W. 104.

In Downing v. Brennan (1919) 282 Mass. 535, 122 N. E. 729, the court said: "The allegation that the property was worth much more than the indebtedness, standing alone, does not impair the validity of the foreclosure sale, where it appears that in making and conducting the sale the mortgagee acted in good faith and with reasonable regard for the interests of the mortgagor."

It will be seen that it is held in the reported case (MANNING v. LIBERTY TRUST Co. ante, 999) that mere inadequacy of price does not justify the

submission to the jury of the case of an action of tort by the mortgagor against the mortgagee for damages on account of its sale under the power, the court stating that such inadequacy does not make the sale invalid.

In Thornton v. Goodman (1919) — Tex. —, 216 S. W. 147, the court said: "The sale was valid, without taint of fraud, unfairness, or slightest irregularity, or any circumstances tending to prevent the property from bringing approximately its reasonable value. This being true, the sale cannot be avoided merely because of inadequacy of price."

Where one of the creditors bought the property for one half of its alleged value, the court said: "We do not say but what the facts in this case create suspicion of fraud upon our minds. But we cannot give plaintiff the relief demanded because we may suspect that there has been something wrong—fraud—in this transaction, on the part of the defendants." Monroe Bros. v. Fuchter (1897) 121 N. C. 101, 23 S. E. 68.

In Maloney v. Webb (1892) 112 Mo. 575, 20 S. W. 683, the court, in reversing a judgment setting aside a sale for one half the value of the property, said: "While sales made by a trustee, being a harsh mode of foreclosing the equity of redemption, have ever been watched by this court with a jealous eye, and a disposition not to sustain them unless conducted in all fairness is manifested in all the decisions, . . . yet no case can be found in which such a sale was set aside upon the sole ground that the price was inadequate. Nevertheless, it is strongly intimated in some of the opinions that this might be done where the inadequacy was so gross as to shock the moral sense. At forced sales, property is often sold for 50 per cent of its true value. While this fact may be the source of regret, and enlist our sympathies for the one whose property is sacrificed, yet its occurrence is so frequent that it can hardly be said to be unexpected, must less to shock the moral sense. To set aside sales for such inadequacy would have a tendency to impair, if not destroy, the value of

such securities, to seriously embarrass business operations, be productive of incalculable injury, and is without precedent."

"It is to be regretted that the property in controversy brought, at most, not more than one fourth of its value at the trustee's sale, but such things frequently happen, and will continue to happen as long as people encumber property for debts which they do not or cannot pay." *Roby v. Smith* (1914) 261 Mo. 192, 168 S. W. 965.

It is no badge of fraud that property sold under a deed of trust to secure \$750, and later sold for \$700, brought only \$25 at the sale. *Routt v. Milner* (1894) 57 Mo. App. 50. And in *Betzler v. James* (1910) 227 Mo. 375, 126 S. W. 1007, it was held to be error to set aside a sale for \$275 of property worth \$700.

Sometimes it is held that the creditor is never required to bid more than his debt and expenses. Thus the court upheld the purchase by the creditor of property worth \$4,000, for \$113.22. *Bailey v. Hendrickson* (1913) 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739. So the court sustained the purchase by the holder of a second mortgage, for the amount of the debt and expenses—about \$100—of property worth about \$3,000 above the first mortgage. *Loomis v. Stoddard* (1919) — S. D. —, 173 N. W. 859.

In *Klein v. Glass* (1880) 53 Tex. 37, the court sustained a sale to the creditor for \$100, of property worth \$2,000, where the trial judge charged the jury: "The validity of the trust sale, if in other respects valid, would not be affected by the mere fact that the lot at the sale may have brought much less than its value; but if property is sold at a grossly inadequate price, unless there be other evidence tending to show fraud in the sale, then such inadequacy of price cannot be taken into consideration for the purpose of showing the sale to be fraudulent."

In *Eustis v. Frey* (1918) — Tex. Civ. App. —, 204 S. W. 118, the court sustained a sale to the creditor for 5 per cent of the value.

### *III. Cases supporting the rule, but stating or suggesting a qualification.*

There are many cases which, while holding that the inadequacy of price is no ground to invalidate the sale, suggest or state that there might be an inadequacy of price so great as to require the interference of a court of equity.

**United States.**—*Clark v. Freedman's Sav. & T. Co.* (*Clark v. Eaton*) (1879) 100 U. S. 149, 25 L. ed. 573 (purchase by creditor).

**Alabama.** — *Schloss v. Brightman* (1915) 195 Ala. 540, 70 So. 670 (purchase by creditor).

**California.** — *Stockwell v. Barnum* (1908) 7 Cal. App. 413, 94 Pac. 400.

**Colorado.**—*Martin v. Barth* (1894) 4 Colo. App. 346, 36 Pac. 72.

**District of Columbia.**—*Bailor v. Daly* (1889) 7 Mackey, 175; *Anderson v. White* (1894) 2 App. D. C. 408.

**Illinois.** — *Booker v. Anderson* (1864) 35 Ill. 66; *Weid v. Rees* (1868) 48 Ill. 428; *Jenkins v. Pierce* (1881) 98 Ill. 646; *Hoyt v. Pawtucket Inst. for Sav.* (1884) 110 Ill. 390 (purchase by creditor); *Magnusson v. Williams* (1884) 111 Ill. 450 (the same); *Hoodless v. Reid* (1885) 112 Ill. 105, 1 N. E. 119 (the same); *Reedy v. Millizen* (1885) 155 Ill. 636, 40 N. E. 1028 (as stating the rule); *Kerfoot v. Billings* (1896) 160 Ill. 563, 43 N. E. 804.

**Iowa.**—*Singleton v. Scott* (1859) 11 Iowa, 589.

**Mississippi.** — *Newman v. Meek* (1844) Freem. Ch. 441 (purchase by creditor); *Weyburn v. Watkins* (1907) 90 Miss. 728, 44 So. 145 (the same).

**Missouri.**—*Landrum v. Union Bank* (1876) 63 Mo. 48; *Hardwicke v. Hamilton* (1894) 121 Mo. 465, 26 S. W. 342; *Harlin v. Nation* (1894) 126 Mo. 97, 27 S. W. 380; *Markwell v. Markwell* (1900) 157 Mo. 326, 57 S. W. 1078; *Million v. McRee* (1880) 9 Mo. App. 344 (purchase by creditor).

**South Carolina.**—*Robinson v. Amateur Asso.* (1880) 14 S. C. 148 (purchase by creditor).

**Virginia.**—*Hopkins v. Givens* (1916) 119 Va. 578, 89 S. E. 871.

**West Virginia.**—*Lallance v. Fisher* (1887) 29 W. Va. 512, 2 S. E. 775 (purchase by creditor); *Atkinson v. Wash-*

ington & J. College (1903) 54 W. Va. 32, 46 S. E. 253 (defeating action of subsequent lienor); Copelan v. Sohn (1914) 75 W. Va. 83, 82 S. E. 1016 (obiter).

England.—Warner v. Jacob (1882) L. R. 20 Ch. Div. 220, 51 L. J. Ch. N. S. 642, 46 L. T. N. S. 656, 80 Week. Rep. 721, 18 Eng. Rul. Cas. 452.

Canada.—Saltman v. McColl (1910) 19 Manitoba L. R. 456.

(It is not clear whether or not a qualification of the rule is suggested or intended in Austin v. Hatch (1893) 159 Mass. 198, 84 N. E. 95; Keith v. Browning (1897) 189 Mo. 190, 40 S. W. 764; or in Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. (1906) 196 Mo. 858, 98 S. W. 1111.)

Thus it is suggested that the inadequacy may be so great as to shock the conscience of the court. Clark v. Freedman's Sav. & T. Co. (Clark v. Eaton) (1879) 100 U. S. 149, 25 L. ed. 573 (purchase by creditor); Martin v. Barth (1894) 4 Colo. App. 346, 36 Pac. 72; Anderson v. White (1894) 2 App. D. C. 408; Weyburn v. Watkins (1907) 90 Miss. 728, 44 So. 145 (the same); Hopkins v. Givens (1916) 119 Va. 578, 89 S. E. 871.

So, it is suggested or declared that the inadequacy may be so great as to raise a presumption or inference of fraud.

United States.—Clark v. Freedman's Sav. & T. Co. (Clark v. Eaton) (1879) 100 U. S. 149, 25 L. ed. 573 (purchase by creditor).

California. — Stockwell v. Barnum (1908) 7 Cal. App. 413, 94 Pac. 400.

District of Columbia. — Bailor v. Daly (1889) 7 Mackey, 175.

Illinois. — Weld v. Rees (1868) 48 Ill. 428; Jenkins v. Pierce (1881) 98 Ill. 646; Magnusson v. Williams (1884) 111 Ill. 450 (purchase by creditor); Hoodless v. Reid (1885) 112 Ill. 105, 1 N. E. 119 (the same); Kerfoot v. Billings (1896) 160 Ill. 563, 43 N. E. 104.

Mississippi. — Newman v. Meek (1844) Freem. Ch. 441.

Missouri.—Hardwicke v. Hamilton (1894) 121 Mo. 465, 26 S. W. 342; Harlin v. Nation (1894) 126 Mo. 97, 27 S. W. 330; Million v. McRee (1880) 9

Mo. App. 344 (purchase by creditor).

South Carolina.—Robinson v. Amateur Asso. (1880) 14 S. C. 148 (purchase by creditor).

Virginia.—Hopkins v. Givens (1916) 119 Va. 578, 89 S. E. 871.

West Virginia.—Lallance v. Fisher (1887) 29 W. Va. 512, 2 S. E. 775 (as stating the rule); Copelan v. Sohn (1914) 75 W. Va. 83, 82 S. E. 1016 (obiter).

In Clark v. Freedman's Sav. & T. Co. (Clark v. Eaton) (1879) 100 U. S. 149, 25 L. ed. 573, the court, in refusing to set aside a sale to the mortgagee, said: "It is next contended that relief should be given because the price which the property brought was grossly inadequate. That fact alone does not constitute a sufficient reason to impeach the genuineness or validity of the sale. Besides, the inadequacy was not such as to shock the conscience, or raise a presumption of fraud or unfairness."

The general doctrine is that, where there are no other equitable incidents, a sale will not be set aside "because the price is inadequate, unless the case very clearly demonstrates that a difference between the value of the property and the price that it brought is such as to shock the judgment and conscience of the chancellor." Martin v. Barth (1894) 4 Colo. App. 346, 36 Pac. 72.

"The familiar doctrine as to inadequacy of price is that, before a sale will be set aside for inadequacy of price alone, it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once, upon its being mentioned, a suspicion of fraud." Bailor v. Daly (1889) 7 Mackey (D. C.) 175. Evidently the same idea was in the court's mind in Starkweather v. Jenner (1902) 27 App. D. C. 348.

"Mere inadequacy of price is not sufficient to avoid a deed, unless so gross as to shock the conscience of the chancellor and raise a presumption of fraud." Hopkins v. Givens (1916) 119 Va. 578, 89 S. E. 871.

In Maryland, where the statute requires the report of sale and ratification, the same general rule applies.

Thus, there must be such inade-



quacy as to indicate misconduct or fraud. *Shaw v. Smith* (1908) 107 Md. 523, 69 Atl. 116 (purchase by creditor). This is, in substance, the theory of *McCarty v. Hamburger* (1910) 112 Md. 40, 75 Atl. 964, and probably of *Chilton v. Brooks* (1889) 71 Md. 445, 18 Atl. 868. In *Condon v. Maynard* (1889) 71 Md. 601, 18 Atl. 957, the court said: "Mere inadequacy of price is not sufficient to set aside a sale, unless it be so gross as to indicate want of reasonable judgment and discretion, or misconduct and fraud in the mortgagee, or some mistake or unfairness for which the purchaser is responsible." The same was held in substance on a sale to the creditor. *Warfield v. Ross* (1873) 38 Md. 85. In *Davis v. Blackiston* (1908) 108 Md. 640, 71 Atl. 89, it was held that a sale to the creditor for one half of the value is not so inadequate as to require the same to be set aside.

Gross inadequacy of price is required to set aside a sale. *Hoyt v. Pawtucket Inst. for Sav.* (1884) 110 Ill. 390. It must be sufficient to amount to evidence of fraud. *Magnuson v. Williams* (1884) 111 Ill. 450; *Reedy v. Millizen* (1895) 155 Ill. 636, 40 N. E. 1028. (as stating the rule). It must be so gross as to raise the inference of fraud or imposition. *Harlin v. Nation* (1894) 126 Mo. 97, 27 S. W. 330. The inadequacy must be very great. *Atkinson v. Washington & J. College* (1908) 54 W. Va. 32, 46 S. E. 253 (defeating action of subsequent lienor).

A sale for three fourths of the value is not grossly inadequate. *Pence v. Jamison* (1917) 80 W. Va. 761, 94 S. E. 383.

In *Saltman v. McColl* (1910) 19 Manitoba L. R. 456, it was held that "a sale by public auction of a property valued at \$7,200, for \$4,850," is not "one at a gross undervalue, calling for the interference of a court of equity."

A sale for \$20,100 of property worth from \$30,000 to \$35,000 is not so inadequate in price as to shock the conscience or raise the suspicion of unfairness. *Anderson v. White* (1894) 2 App. D. C. 408.

Nor does a sale to a creditor for

about four sevenths of the value indicate misconduct, unfairness, or fraud on the part of the trustee. *Stockwell v. Barnum* (1908) 7 Cal. App. 413, 94 Pac. 400.

Where the land was bought by the creditor for 40 per cent of its value, the court said: "It is settled law, however, in this state, that a sale of land made by a trustee, otherwise valid, will not be set aside for mere inadequacy of price, unless the inadequacy is such as to shock the conscience. While the sale of this land was for less than its actual value, we would be unwilling to disturb the sale on that account." *Weyburn v. Watkins* (1907) 90 Miss. 728, 44 So. 145.

In *Markwell v. Markwell* (1900) 157 Mo. 326, 57 S. W. 1078, the court said: "But the mere fact that the land brought about one third of its value was not such inadequacy of price as to justify the court in setting aside the sale upon that ground alone."

The price will not invalidate the sale, if not grossly inadequate. *Singleton v. Scott* (1859) 11 Iowa, 539, sustaining the sale for \$150, of property valued at from \$320 to \$1,600.

A sale for \$100 to the creditor, of property worth \$500, is not so grossly inadequate as to raise the inference of fraud. *Harlin v. Nation* (1894) 126 Mo. 97, 27 S. W. 330.

#### IV. Qualification of rule.

It has been held in a few cases that inadequacy of price may be great enough to invalidate a sale. *Vail v. Jacobs* (1876) 62 Mo. 130; *Wright v. Wilson* (1829) 2 Yerg. (Tenn.) 294, *Rohrer v. Strickland* (1914) 116 Va. 755, 82 S. E. 711; *Hope v. Valley City Salt Co.* (1885) 25 W. Va. 789. See also *Horse v. Hough* (1873) 38 Md. 130, *infra*, V.

Thus, a sale under a trust deed to the creditor, for \$1,000, of property worth from \$5,000 to \$8,000, was set aside. *Vail v. Jacobs* (Mo.) *supra*.

So, a sale under a trust deed for \$50, to a creditor, of land worth \$500 or \$600, was set aside in *Wright v. Wilson* (1829) 2 Yerg. (Tenn.) 294. The complaining surety was out of the state at the time of the sale, but the court does not dwell on this fact.

So, sales under trust deeds to creditors, at from one fifth to one third of the value of the properties, were set aside as so grossly inadequate as to be almost conclusive evidence of fraud. *Hope v. Valley City Salt Co.* (1885) 25 W. Va. 789.

In *Rohrer v. Strickland* (1914) 116 Va. 755, 82 S. E. 711, relief was granted to the debtor where the creditor purchased for less than 40 per cent of the value, and the trustee was the creditor's son-in-law.

In reversing a decree dismissing a bill to set aside a sale, the court said: "The bill charges that Mr. Bell, the beneficiary in the trust deed, purchased the property for one seventh of its value; that complainant was not present at the sale, knew nothing about it, and did not even know that the trustee had accepted the duties imposed upon him by the instrument. These facts being true, the complainant will be entitled to set aside the sale for inadequacy of consideration." *Fenton v. Bell* (1899) — Tenn. —, 53 S. W. 984.

*V. Inadequacy of price with other elements.*

Strictly speaking, cases in which inadequacy of price is dealt with as only one of several grounds of attack on the sale are beyond the scope of this annotation, but a few out of the multitude of cases of this character are here referred to by way of illustration.

It is usual to see in the books statements to the effect that inadequacy of price, with other elements, is a cogent reason for setting aside a sale. This hardly seems a satisfactory way of stating the situation. In most cases inadequacy of price is the result complained of; it is usually only because of the inadequacy of price that the complaint is made. That is to say, there are few attacks on sales in which there is not a real or alleged inadequacy of price.

The inadequacy of price has been held material in sales—

—where there was evidence of fraud and oppression, and the price was about 5 per cent of the value, *Ventres v. Cobb* (1882) 105 Ill. 83;

—where there were circumstances

of undue advantage, *Elmslie v. Mayor* (1903) — Miss. —, 35 So. 201; *McPherson v. Davis* (1909) 95 Miss. 215, 48 So. 625;

—where the sale was at an unusual time, and for one third of the value, *Holdsworth v. Shannon* (1893) 113 Mo. 508, 35 Am. St. Rep. 719, 21 S. W. 85;

—where the sale was not made in parcels, *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364; *Montgomery v. Miller* (1895) 131 Mo. 598, 33 S. W. 165 (perhaps this is the most common cause of complaint);

—where the purchaser deterred other bidders, *Chew v. Baker* (1919) 133 Md. 637, 105 Atl. 756 (where the statute required report of sale and ratification);

—where the mortgagee's president kept the bidder away, *Loeber v. Eckes* (1880) 55 Md. 1.

In a case where a sale for \$2,000 of property worth about \$7,000 was set aside as not made in parcels, the court said: "Mere inadequacy of price is not sufficient to set aside a sale, unless so gross and inordinate as to furnish in itself evidence of fraud or misconduct on the part of the trustee. This is the recognized rule; and if these objections stood alone upon the simple fact of a sale largely under value, there would be a strong disposition to set it aside on this ground." *Hubbard v. Jarrell* (1865) 23 Md. 66 (where the statute required report of sale and ratification).

The court set aside a sale for one fourth of the value in the absence of the debtor without fault (*Meath v. Porter* (1872) 9 Heisk. (Tenn.) 224); and a sale for one ninth of the value, where the debtor mistakenly supposed that he had an agreement for a postponement (*Daggett Hardware Co. v. Brownlee* (1905) 186 Mo. 621, 85 S. W. 545); and a sale for \$40, made under the supposition that there was an encumbrance of \$900, when there was no encumbrance, and the property was worth \$5,000 (*Hoffman v. McCracken* (1902) 168 Mo. 337, 67 S. W. 878).

Where the sale was made for at least one fifth less than the value, and was made in the dark, and not in parcels, the court, in setting it aside, said: "Without deciding that the insuffi-

ciency of price disclosed by the testimony in this case is so great as to amount to the 'gross inadequacy' referred to in the books, it is yet so serious that we must be satisfied the other charges of irregularities and improvidence in the conduct of the sale are not sustained by the proof, before the court can agree to confirm it." *Fowler v. Taylor* (1890) 8 Mackey (D. C.) 456.

In *Montgomery v. Miller* (1895) 131 Mo. 598, 33 S. W. 165, the court said: "It thus appears that the property was sold in bulk, for an inadequate price, at an unusual hour, and the plaintiff's entire interest in the property sacrificed thereby. While no one of these facts would of itself afford ground for setting aside the sale, yet when all of them are found concurring, as they do in this sale, otherwise not void of suspicion, the sale should be set aside, and the plaintiff be permitted to redeem."

Where a sale for one fifth of the value was set aside because the purchaser slandered the title, the court said: "It may be said generally that mere inadequacy of price, independent of other grounds of relief, will not invalidate a sale, but it is a cogent circumstance to be considered by the jury when it appears, in connection with it, that there has been unfairness, or that an undue advantage has been taken, or that there has been any other inequitable conduct, and a court of equity will readily seize upon any such incident as a ground of relief when the property has sold for a price so low as to result in hardship." *Davis v. Keen* (1906) 142 N. C. 497, 55 S. E. 359.

A sale was set aside when made for an inadequate price to a stockholder of the creditor, and there was evidence of favoritism by the trustee, who was president of the creditor, and the sale was made on the instant of the appointed time in a low voice, where a second mortgagee was prepared to bid for the benefit of himself and the debtor. *Borth v. Proctor* (1920) — Mo. —, 219 S. W. 72.

#### **Purchases by creditor.**

Inadequacy of price has been held material in sales to creditors—

—where there was oppression and unfairness, and the price was only 10 per cent of the value, *Winbigler v. Sherman* (1917) 175 Cal. 270, 165 Pac. 943;

—where there were circumstances of undue advantage, *Martin v. Swoford* (1881) 59 Miss. 328; *Herring v. Sutton* (1905) 86 Miss. 283, 38 So. 235 (a plain swindle);

—where there were elements of unfairness, and the price was grossly inadequate, *Judge v. Booge* (1871) 47 Mo. 544;

—where there was not fair and reasonable notice, *Clark v. Simmons* (1890) 150 Mass. 357, 23 N. E. 108; *Bon v. Graves* (1913) 216 Mass. 440, 103 N. E. 1023 (purchased for 60 per cent);

—where the sale was at an unusual time, and for ten seventeenths of the value, *Stoffel v. Schroeder* (1876) 62 Mo. 147;

—where the sale was near dusk on a deserted beach, *Long v. Richards* (1878) 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083;

—where the sale was held in a severe storm, *Chilton v. Brooks* (1898) 69 Md. 584, 16 Atl. 273.

In *Briggs v. Briggs* (1883) 135 Mass. 306, the court showed a disposition to be exacting in the matter of notice upon a mortgagee who purchased, for \$700, encumbered property having an equity of \$1,150, and set the sales aside.

In *Stewart v. Hamilton Bldg. & L. Asso.* (1898) — Tenn. —, 47 S. W. 1106, a sale to the creditor for one third of the value, in the ignorance of the debtor, after advertisement in an obscure newspaper, was set aside as a fraud.

So, it has been held that the sale will be set aside if, owing to the manner thereof, the creditor buys at a grossly inadequate price, such as 30 per cent of the value. *Lalor v. McCarthy* (1878) 24 Minn. 417.

And the sale was set aside where the property was bought by the creditor for one seventh of its value, under circumstances not adapted to get the best price. *Goode v. Comfort* (1866) 39 Mo. 313.

In a case of great oppression, where

the creditor purchased the land for a trifle, the court said: "While neither the publication of the notice of foreclosure sale at Minot nor the inadequacy of price at which the property was sold is, standing alone, sufficient to avoid the sale, we think all the facts, when considered together, clearly establish a want of good faith on the part of the Gjertsens in exercising such power of sale, and a total disregard of the rights of the mortgagor." *Hedlin v. Lee* (1911) 21 N. D. 495, 131 N. W. 390.

In setting aside a sale to the mortgagee for about one fourth of the value of the property, where other facts of unfairness appeared, the court said: "No sale will be set aside, in all other respects unexceptionable, for inadequacy of price, unless the sum reported by the trustee is so grossly inadequate as to indicate a want of reasonable judgment and discretion in the trustee. . . . We think the inadequacy of the price of the property in this case comes within the range of the above rule, and must be regarded, in connection with the other facts in the case, as a sufficient reason for affirming the order vacating the sale." *Horsey v. Hough* (1873) 38 Md. 130 (where the statute required report and ratification of the sale).

In *Encking v. Simmons* (1871) 23 Wis. 272, a purchase by the mortgagee for less than half the value, when the mortgagor was insane, was set aside as a fraud. And in *James v. Chaney* (1913) — Tex. Civ. App. —, 154 S. W. 679, the court, while basing its decision on another ground, inclined to the opinion that a sale to the creditor for \$101, of property having an equity of over \$1,000, when the debtor was insane, was properly set aside. But in *Lundberg v. Davidson* (1898) 72 Minn. 49, 42 L.R.A. 103, 74 N. W. 1018, where there was a right to redemption for a year after the sale, it was held that insanity of the mortgagor, with inadequacy of price, does not make cause for setting aside a sale, which was here to a subsequent lienor who had afterwards improved the property.

In *Meyer v. Jefferson Ins. Co.* (1878) 5 Mo. App. 245, the sale was set aside where the trustee was the secretary

of the creditor, and, though knowing that it would pay \$15,000, sold the property to it for \$3,000. But in *Million v. McRee* (1880) 9 Mo. App. 344, where the trustee knew that the creditor would bid \$15,000 for the property, it was held proper to sell it to her for \$5,000.

**Where creditor attacks sale.**

In some of the cases the sale is attacked by the creditor.

Thus, where property worth \$3,000 was fraudulently sold in the absence of the mortgagee, for less than \$200, the sale was set aside on the mortgagee's suit. *Hanson v. Neal* (1908) 215 Mo. 256, 114 S. W. 1073.

So, a sale was set aside on the suit of one of the creditors, where he misunderstood the circumstances and the property was sold for about one fourteenth of the value. *Orr v. McKee* (1895) 184 Mo. 78, 34 S. W. 1087.

So, the sale was set aside where the creditor mistook the time of sale, and arrived a few minutes after the property had been sold for 3 or 4 per cent of its value, and asked a resale, which was refused. *Middleton v. Baker* (1914) 262 Mo. 398, 171 S. W. 328.

In *Stacy v. Smith* (1896) 9 S. D. 137, 68 N. W. 198, where there was a mistake of fact, the court said, in sustaining the creditor's suit to set aside the sale: "A court of equity, in the exercise of its equitable powers, will scrutinize with care sales made under powers of sale contained in the mortgage; and, where there is great inadequacy of consideration, it will be astute in extracting from the facts of the case sufficient to justify annulling the sale. . . . The inadequacy of the price bid, and for which the property was sold by Smith, is so great that no court of equity would permit the sale to stand. The fact that property of the value of \$600 was sold for \$10.60 clearly shows either mistake or fraud; and we apprehend no court of equity would refuse to relieve the party from such sale. In this case the evidence so clearly establishes a mistake on the part of the plaintiff's agents that we feel no hesitancy in holding that this fact, together with the inadequacy of consideration, fully

justified the findings and judgment rendered in this case."

In *Bullock v. Eldredge* (1914) — R. L. —, 90 Atl. 737, the court declined the purchaser's demand for specific performance of a sale to him at an inadequate price, where there were circumstances of unfairness to the creditor.

#### VI. Miscellaneous.

Where a mortgagee sold for one half the value, without advertising or efforts to get more, the sale was set aside. *Latch v. Furlong* (1866) 12 Grant, Ch. (U. C.) 303.

Where a debtor gave his creditor a deed as a mortgage, and the creditor sold the property to a third person, at private sale, the court said: "Durgan's position was that of a mortgagee with power to sell. To say that a mortgagee with power to sell, who has an encumbrance on the estate of less than one third its value—an encumbrance which five or six months' rent

will discharge—has the right to sell the estate absolutely to the first man he meets who will pay the amount of encumbrance, without any attempt to get a larger price for it, would, in our opinion, be equivalent to saying fraud and oppression shall be protected and encouraged." *Runkle v. Gaylord* (1865) 1 Nev. 123.

It may be noted that in *Warner v. Jacob* (1882) L. R. 20 Ch. Div. 220, 18 Eng. Rul. Cas. 452, it was said: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere, even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud." Quoted in *Haddington Island Quarry Co. v. Huson* [1911] A. C. (Eng.) 722. B. B. B.

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ANNA T. YOUNG et al., Appts.,

v.

BEATRICE A. STEARNS et al., Respts.

*Massachusetts Supreme Judicial Court — January 9, 1920.*

(— Mass. —, 125 N. E. 697.)

**Will — child of adopted daughter as heir.**

1. A devise to "my lawful heirs" will include children of a deceased adopted daughter where, by statute, such daughter has the same standing as though born in lawful wedlock, and in case she dies intestate her property acquired by inheritance from the adopting parents shall be distributed among the persons who would have been her kindred if she had been born to the adopting parents in lawful wedlock.

[See note on this question beginning on page 1012.]

— when takes effect.

2. A will speaks from date of death of testator.

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APPEAL by petitioners from an order of the Land Court for Suffolk County (Davis, J.) dismissing their petition for registration of title to a certain tract of land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Robert Homans and Richard S. McCabe for appellants.

Messrs. Bolster, Vincent, & Wrightington for respondents.

Braley, J., delivered the opinion of the court:

It appears from the record that Elizabeth P. Young, the mother of the petitioners, who died in 1910, testate, and her sister, Mary A. Rugg, owned the tract for which registration is sought in undivided halves, and that Mary A. Rugg, who died March 25, 1897, by her will dated September 23, 1870, which has been admitted to probate, devised and bequeathed all her estate to her husband for life, and "after the death of my husband my said estate is to go to my heirs at law." If nothing further were disclosed, the respondents concede that the petitioners are seised of the remainder. The testatrix and her husband, however, on November 27, 1871, legally adopted as their daughter a child who married John S. Whitaker, and had by him two children, the present respondents. The husband of the testatrix is dead, and the adopted daughter, Alice H. Whitaker, also having died in 1896, a widow and intestate, the question is whether the petitioners are seised of the whole estate, or only of an undivided half.

The petitioners contend that the children of Alice are not "heirs" within the meaning of the devise. The date of the death of the tenant for life does not appear. But this is unimportant. It is immaterial in view of the contention of the parties whether the remainder over was vested or contingent. The will speaks only at the death of the testatrix, and Pub. Stat. chap. 148, §§ 7-10, now by codification without any material change Rev. Laws, chap. 154, §§ 7-10, were then in force. By § 7: "As to the succession to property, a person adopted . . . shall take the same share of property which the adopting parent could have devised by will that he would have

taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him. In case the person adopted dies intestate, his property, acquired by himself or by gift or inheritance from his adopting parent, or from the kindred of such parent, shall be distributed, according to the provisions of chapters one hundred and twenty-five and one hundred and thirty-five, among the persons who would have been his kindred if he had been born to his adopting parent in lawful wedlock.

This section is a re-enactment of Stat. 1876, chap. 213, §§ 8 and 9, the purpose of which "is to provide for cases where property comes to a man's children, not by inheritance, but under a settlement, trust deed, or will, and to establish a rule governing the rights of adopted children in such cases. There is no word which is exactly the equivalent of 'child,' so as to be interchangeable with it under all conditions. We think the intention was to provide that if, by a settlement, deed, or will, property is given by terms which embrace and include a child born in wedlock, and which, in their application to existing facts, have the same effect and mean the same thing as child or children, such as the terms 'issue,' 'descendant,' or 'heir at law,' the rules provided by this section shall apply in the construction of the instrument. Any other construction would give the statute a very narrow scope, and to a great extent defeat its purposes." Morton, Ch. J., in *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729.

If we turn to Pub. Stat. chap. 125, § 1, now Rev. Laws, chap. 133, § 1, relating to the descent of real property, we find that land, tenements, or hereditaments, or any right therein shall descend, subject to his debts: "First. In equal shares to his children and to the issue of any deceased child by right of representation. . . ."

The testatrix was the adopting parent; the respondents are the lawful children and heirs of the adopted daughter: It is hardly conceivable, under the circumstances, the testatrix intended that if her adopted daughter survived, she should be disinherited, and the property pass to collateral relatives. The devise does not read to my "issue," or "heirs of my body," or "right heirs," but to "my lawful heirs." It is not what the testatrix might have said, but what she did say which governs. The word "heir" or "heirs" will be construed to mean a child or children, where such is the plain intention of the testator. *Sewall v. Roberts*, 115 Mass. 262, 278; *Walcott v. Robinson*, 214 Mass. 172, 174, 100 N. E. 1109, and cases collected. We cannot adopt the argument urged in the petitioner's behalf that, if the issue of a deceased illegitimate child could not inherit from the child's mother under Stat. 1828, chap. 139, the issue of a deceased adopted child cannot inherit under Pub. Stat. chap. 148, § 7. It was the purpose of the legislature to put an adopted child on the same footing as a child born in wedlock to the adopting parents, and the words "legal descendants," unless shorn of their ordinary meaning, include the legitimate offspring of an adopted child. *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349; *Delano v. Bruerton*, 148 Mass. 619, 2 L.R.A. 698, 20 N. E. 308; *Ross v. Ross*, 129 Mass. 243, 267, 37 Am. Rep. 321; *Warren v. Prescott*, 84

Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948.

We are accordingly of opinion that by the words "my lawful heirs" she intended at her death to include her child by adoption, and under the statute, as we construe it, her children by right of representation take the estate to which their mother, if living, would have succeeded. *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349; *MacMaster v. Fobes*, 226 Mass. 396, 399, 115 N. E. 487; *Warren v. Prescott*, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948; *Hartwell v. Tefft*, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; *Re Walworth*, 85 Vt. 322, 37 L.R.A.(N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223. The cases of *Wyeth v. Stone*, *supra*, *Blodgett v. Stowell*, 189 Mass. 142, 75 N. E. 138, *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612, *Gammons v. Gammons*, 212 Mass. 454, 99 N. E. 95, and *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109, where the status of children by adoption was under discussion, are contests between collateral kindred, and are plainly distinguishable from the case at bar, in which the testatrix is the adopting parent as well as the owner of the property devised. The decision of the judge of the Land Court, in which he very fully and clearly points out and follows the principles to which we have adverted, shows no error of law, and the order dismissing the petition should be affirmed.

So ordered.

### ANNOTATION.

**Right of children of an adopted child to take the share which the parent would have taken under a will if he had survived the testator.**

Remarkably few cases seem to have passed upon the question here presented, but these cases, like those which pass upon the question whether or not general terms in a will include an adopted child, generally turn upon the intent of the testator as determined in view of the existing statutes.

The reported case (*YOUNG v. STEARNS*, ante, 1010) is illustrative of those cases which apply the ultimate test of intention, as determined under the statutes relating to adoption and succession to property. In this case which arose in Massachusetts it was held that in view of the fact that the

Statute of Descent and Distribution provided that property should descend "in equal shares to his children and to the issue of any deceased child by right of representation," and that the Adoption Statute provided that a person adopted "shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock," etc., a testatrix, by bequeathing her estate over to her "heirs at law," intended at her death to include a daughter by adoption so that under the statutes the children of the adopted daughter who predeceased the testatrix were entitled to take by right of representation the estate to which their mother, if she had been living at the death of the testatrix, would have succeeded.

A similar conclusion was reached in the recent Missouri case of *Williams v. Weber* (1917) 271 Mo. 150, 195 S. W. 1009. Here the statute provided that the property of an intestate shall descend, "first, to his children or their descendants," which by interpretation was declared to include an adopted as well as a natural child, and it was held that the children of an adopted child who died before her adopting parents could take the same estate which their mother would have taken, had she outlived her adopting parents, by inheritance from her adopting mother, to whom the husband had willed certain personal property absolutely. In so holding, the court, among other things, said: "This question is determinable by a consideration of the first clause of the Statute of Descents, viz., 'first, to his children or their descendants' (Rev. Stat. 1909, § 332), which has been interpreted in *Bernero v. Goodwin* (1916) 267 Mo. 434, 184 S. W. 74, to include, under the term 'to his children' in the first subdivision thereof, an adopted child as well as a natural child. It necessarily follows from that ruling that the alternative term of said statute, viz., 'or their descendants,' likewise embraces the children of an adopted, as well as a natural, child. Hence, in case of the death of an adopted child prior to the death of the adopting parent, such child stands

in the same relation of heirship to the estate possessed by the adopting parent at the time of his or her death that a natural and lawfully born child would occupy under similar circumstances. Applying this principle to the facts in the instant case, the result is that the Cline children, whose mother was lawfully adopted both by Thomas F. Ackerman and his wife Susan, are entitled to inherit the undisposed estate of either of her adopting parents at the time of their respective deaths, just as if they were natural and lawful grandchildren of the adopting parents of their mother. There was no residuary clause in the will of Thomas F. Ackerman; neither did his wife, Susan Ackerman, make any testament. It follows that the personal estate which was devised absolutely to his wife under the will of Thomas F. Ackerman descended, upon the death of his wife, to the Cline children as the lawful 'descendants' of Mary Cline, the adopted daughter of the deceased wife."

On the other hand, in *Clarke v. Rathbone* (1915) 221 Mass. 574, 109 N. E. 651, where a testator adopted a grandchild and bequeathed the remainder of a trust fund to his grandchildren, but in his will expressly provided that it was not his intention to have the adopted grandchild share as one of his "children," but that he should take only the share of a grandchild, and the adopted grandchild died before the termination of the trust, leaving a son, it was held that upon the subsequent distribution of the remainder the great-grandchild, claiming to be a grandchild by adoption of his father by testator, should be excluded, since the intent of the testator was that for the purpose of distribution by the will the adoption should be disregarded.

But the intention of the testator is not always controlling. This is illustrated by *Phillips Estate* (1901) 17 Pa. Super. Ct. 103, where, in determining the rights of the children of an adopted daughter of the testator, the court held that such children could not take any benefit from the devise to their deceased mother, even though it be assumed that the testator did not



suppose that the gift to his adopted daughter would lapse by reason of her death in his lifetime. This decision was upon the theory that the Statute of 1833, which provided that no devise or legacy in favor of a child or other lineal descendant of a testator should be deemed or held to lapse by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee "shall leave issue surviving the testator," did not contemplate a devise or legacy in favor of an adopted child, because at the time of its enactment it was not in the power of an individual to adopt the child of another as his own, that being first authorized by the Act of 1855; that there was no later act expressly extending the provisions of the Act of 1833 in favor of adopted children; and that the Act of 1837, which gives an adopted child all the rights of a child and heir of the adopting parent, does not make an adopted child a child within the intent and meaning of the Act of 1833. The court argued as follows: "Assuming that Maggie Morgan was the lawfully adopted child of the testator, it may be surmised that he did not suppose that the gift to her would lapse by reason of her death in his lifetime; for he made no provision for disposition of the property in case of her death, and where it is possible to construe a will so as to avoid intestacy as to any part of the estate, the courts favor that construction. But it is to be borne in mind, as pointed out

in the opinion of the court below, that the testator's supposition that the legacy and the devise to her would not lapse would not prevent them from lapsing, if the 12th section of the Act of 1833, does not apply. . . . Referring again to the Act of 1855, as amended by the Act of 1877, which must control the decision of the present question, What right of Maggie Morgan is involved in this case? For whilst . . . a child adopted under that act becomes a child and heir of the person adopting him, so far as he can be made such by legislative enactment, yet . . . the act does not attempt the impossibility of making him a child in fact. It gives him the rights of a child, and in any litigation in which he is concerned he may assert them successfully. It does not undertake to define or determine what the rights of his children shall be. As we have already suggested, the 12th section of the Act of 1833, at the time of its enactment, only contemplated devises and legacies to children by birth, and every word of subsequent acts relative to the adoption of children can be given full effect without implying any amendment of that section or an abrogation of the common-law rule as to the lapsing of legacies. Until the death of the testator, Maggie Morgan could have no right under his will; and as she died before him, it is impossible to conclude that a right to the legacy and the devise was transmitted to her issue." G. J. C.

LUCEBA E. GEORGE

v.

ESTATE OF ASA G. DUTTON.

*Vermont Supreme Court — January 7, 1920.*

(— Vt. —, 108 Atl. 515.)

**Husband and wife — entireties — personal property.**

1. A man and wife may hold personal property by entireties.  
[See note on this question beginning on page 1017.]

**Appeal — agreed facts — construction.**

2. Agreed facts that property was

paid for by the proceeds of real estate owned in entirety by a man and wife, "and by funds from the sale of per-

sonal property also owned by them," mean that the personal property was owned by them by entireties.

Executors and administrators — right to property held by entireties.

3. No part of store property purchased by a man and wife with funds derived from property held by entire-

ties passes to his administrator where he predeceases her.

Husband and wife — partnership — effect on property held by entireties.

4. The entering by a man and his wife into a partnership business, with funds held by entireties, does not change the character of the estate.

EXCEPTIONS by plaintiff to a ruling of the Washington County Court (Waterman, J.) affirming an order of the Probate Court allowing the account of the administrator of the estate of Asa G. Dutton, deceased.

*Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. Ward Carver and Walter A. Dutton for plaintiff.

Mr. Erwin M. Harvey, for defendant:

The whole conduct of the business, both as between Mr. and Mrs. Dutton and in their relation to the public, was a joint or partnership undertaking.

Lane v. Bishop, 65 Vt. 575, 27 Atl. 499; Schofield v. Jones, 85 Ga. 816, 11 S. E. 1032; Noel v. Kinney, 106 N. Y. 74, 60 Am. Rep. 423, 12 N. E. 351; Reiman v. Hamilton, 111 Mass. 245; Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; Holmes v. Reynolds, 55 Vt. 39; Reed v. Newcomb, 59 Vt. 630, 10 Atl. 593; Schouler, Pers. Prop. 5th ed. § 156.

Mrs. Dutton, at the death of her husband, took the entire property by survivorship, and the individual or private creditors of Asa Dutton have no rights therein.

Corinth v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. 618; Richardson v. Daggett, 4 Vt. 336; Citizens' Sav. Bank & T. Co. v. Jenkins, 91 Vt. 13, 99 Atl. 250; 21 Cyc. 1197; Phelps v. Simons, 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657; Bramberry's Estate, 156 Pa. 628, 22 L.R.A. 594, 36 Am. St. Rep. 64, 27 Atl. 405; Ward v. Ward, L. R. 14 Ch. Div. 506, 49 L. J. Ch. N. S. 409, 42 L. T. N. S. 523, 28 Week. Rep. 943; Platt v. Grubb, 41 Hun, 447; Abshire v. State, 53 Ind. 64; Draper v. Jackson, 16 Mass. 480; Borst v. Spelman, 4 N. Y. 284; Wilder v. Aldrich, 2 E. I. 513; Johnson v. Lusk, 1 Tenn. Ch. 3; Pile v. Pile, 6 Lea, 508, 40 Am. Rep. 50; Basford v. Pearson, 7 Allen, 506; Tatham v. Wilson, 59 N. C. (6 Jones, Eq.) 250; Patton v. Rankin, 68 Ind. 245, 34 Am. Rep. 254; Tuttle v. Campbell, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384.

Watson, Ch. J., delivered the opinion of the court:

The store property, both real and personal, was purchased by Asa G. Dutton and Mary J. Dutton, his wife, and paid for (in language of the agreed facts) "by funds which were the proceeds of real estate owned in entirety by Asa G. Dutton and Mary J. Dutton, and by funds from the sale of personal property also owned by them." It will be observed that the character of the ownership of the latter funds is not more definitely nor otherwise stated. The word "also" is significant in this respect, relating back, as it does, to the character of the ownership of the real estate from the sale of which the funds previously mentioned were derived; and it has the meaning of "in like manner." To give it the force of indicating additional ownership makes the word redundant, for by the words "owned by them," immediately following, this is expressly stated. We think the agreed facts in this respect are to be understood as meaning the same as though they read, "and by funds from the sale of personal property in like manner owned by them." See Webster's New Int. Dict.

Appeal—agreed facts—construction.

The marital rights of the husband at common law, in the personal property acquired by his wife during coverture, are not inconsistent with the theory that estates by entirety may exist in personality; for the wife may hold such property by virtue of a gift or bequest to her sole

and separate use; or she may so hold it by reason of a surrender and waiver by the husband of his marital rights therein; or, if her property consists of choses in action, the husband may not reduce it to possession within his lifetime. *Barron v. Barron*, 24 Vt. 375; *Albee v. Cole*, 39 Vt. 319; *Child v. Pearl*, 43 Vt. 224; *Bent v. Bent*, 44 Vt. 555. In addition to the foregoing, by Acts of 1884, No. 140, § 2, all personal property and rights of action acquired by a woman before coverture, or during coverture, except by her personal industry or by gift from her husband, shall be held to her sole and separate use, and neither a wife's separate property nor the rents, issues, income, and products of the same shall be subject to his disposal or liable for his debts. By Acts of 1888, No. 84, the foregoing section was amended by striking out the words, "by her personal industry or," thereby making the law as it hitherto has been and now is in § 3524 of the General Laws 1917.

That estates in entirety may exist in personal property growing out of real estate so owned was held in *Citizens' Sav. Bank & T. Co. v. Jenkins*,

**Husband and wife—entireties—personal property.**

91 Vt. 13, 99 Atl. 250. And no good reason is apparent why such an estate

may not exist in other personal property. We think it can. Although there is some difference in judicial opinion on the question in other jurisdictions, we think the better view is as here stated, and in support of it cite the following cases: *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657; *Boland v. McKowen*, 189 Mass. 563, 109 Am. St. Rep. 663, 76 N. E. 206; *Bramberry's Appeal*, 156 Pa. 628, 22 L.R.A. 594, 36 Am. St. Rep. 64, 27 Atl. 405; *Parry's Estate*, 188 Pa. 33, 41 Atl. 448, 49 L.R.A. 444, 68 Am. St. Rep. 847; *Johnston v. Johnston*, 173 Mo. 91, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202; also 13 R. C. L. 1105, § 128.

It has been held by this court that the statute exempting from attach-

ment or levy of execution for the sole debts of the husband, during coverture, the rents, issues, and profits of the real estate of a married woman, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she acquires by gift, grant, devise, or inheritance, during coverture, applies to estates by entirety, the court saying that such estate is the real estate of a married woman, although her husband is joined with her in the title; that it is the real estate of each; and that, under a holding that the statute applies only to real estate owned by the wife separately, the interest of the husband in his wife's right in her real estate could be taken upon the sole debt of the husband, which would annul the statute. *Corinth v. Emery*, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. 618; *Laird v. Perry*, 74 Vt. 454, 59 L.R.A. 340, 52 Atl. 1040. The same course of reasoning is equally forcible when applied to § 3524 of

**Executors and administrators—right to property held by entireties.**

the statute relating to personal property and rights of action of a married woman, and we hold that estates by entirety are within the provisions of that section.

It is urged that it is still within the power of the wife to give to her husband the same rights to her personality that he took at common law, and that this is just what she does when she turns such property over to him to be used in carrying on a general mercantile business, with unlimited power to commingle her property with his and the right to dispose of the same at will. Whatever force this argument might have when appropriate to the circumstances of the case in hand, it has none here where the husband and his wife were engaged in carrying on the business together.

The fact that, with funds owned and held by the husband and wife as tenants by entirety, they engaged in mercantile business ostensibly as

partners, did not change the character of the estate. In law, as between themselves, the business was carried on by them as such tenants, and the property purchased for that purpose, including goods as needed, and the proceeds from the sales were owned and held in the same manner; and on the death of the husband the wife took the whole estate by right of sur-

Husband and wife—partnership—effect on property held by entireties.

vivorship. *Laird v. Perry*, supra; *Citizens' Sav. Bank & T. Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250.

It follows that since none of such property belonged to deceased husband's estate, none could by right enter into the administrator's account.

Other questions were presented in argument, but it is unnecessary to consider them.

Decree affirmed. To be certified to the Probate Court.

## ANNOTATION.

### Estates by entirety in personal property.

I. Scope, 1017.

II. Introduction, 1018.

III. Estate by entirety may exist in personal property, 1018.

IV. Rule that estate by entirety cannot exist in personal property, 1022.

#### I. Scope.

The present annotation is mainly confined to cases wherein there was a gift or bequest by a third person to a husband and wife, or there was a mutual investment by them in personal property title to which was taken in their joint names, or real estate held by them as tenants by the entirety was sold and choses in action taken back by them. With respect to cases where either the husband or wife turns individual property into personal property the title to which is taken in the names of both, it has been stated (*Re Albrecht* (1892) 186 N. Y. 91, 18 L.R.A. 329, 32 Am. St. Rep. 700, 32 N. E. 632) that "there are many authorities holding that where the husband purchases a security, or makes a deposit, or subscribes for stock in the joint name of himself and wife, and pays therefor with his own funds, upon his death the entire security belongs to the wife, if she survives him," but that "the decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift causa mortis which

he may revoke in his lifetime, and which does not take effect until his death, if not previously recalled." Decisions of this kind, which are upon the ground that there was a gift, do not expressly discuss the question from the viewpoint, and evidently have no real bearing on the question, of a tenancy by the entirety in such personal property, and consequently are not treated in this annotation. Illustrations of the class of cases thus excluded are afforded by *Draper v. Jackson* (1820) 16 Mass. 480; *State Bank v. Johnson* (1908) 151 Mich. 538, 115 N. W. 464; *Craig v. Craig* (1848) 3 Barb. Ch. (N. Y.) 76; *Borst v. Spelman* (1850) 4 N. Y. 284; *Sanford v. Sanford* (1871) 45 N. Y. 723, on subsequent appeal in (1874) 58 N. Y. 69; *Fowler v. Butterly* (1879) 78 N. Y. 68, 34 Am. Rep. 507; *Platt v. Grubb* (1886) 41 Hun (N. Y.) 447; *McElroy v. Albany Sav. Bank* (1896) 8 App. Div. 46, 40 N. Y. Supp. 422; *Wilcox v. Murtha* (1899) 41 App. Div. 408, 58 N. Y. Supp. 783; *West v. McCullough* (1908) 123 App. Div. 846, 108 N. Y. Supp. 493, affirmed without opinion in (1909) 194 N. Y. 518, 87 N. E. 1130; *Wegmann v. Kress* (1912) 141 N. Y. Supp. 525; *Roman Catholic Orphan Asylum v. Strain* (1851) 2 Bradf. (N. Y.) 34; *Johnson v. Lusk* (1868) 6 Coldw. (Tenn.) 113, 98 Am. Dec. 445; *Pile v. Pile* (1880) 6 Lea (Tenn.) 508, 40 Am. Rep. 50; and *Smith v. Haire* (1915) 133 Tenn. 848, 181 S. W. 161, Ann. Cas. 1916D, 529. However, a few

cases involving similar facts have not taken this position, and consequently have been included herein.

## II. Introduction.

Strictly speaking, it would seem that a tenancy by the entireties in personal property could not exist at common law, for the reason that under its rules all personal property of the wife was regarded as reduced or reducible to the possession of the husband, which would prevent the existence of such an estate in a true sense. However, under the modern statutes which allow her to retain possession of and control over her separate property, there would seem to be, as a general rule, no valid reason why such a tenancy may not exist as regards personal property. As subsequently shown, the decided weight of authority is to the effect that such statutes merely destroy the husband's absolute right to possession of, or to reduce to possession, the wife's personal property, without destroying or affecting estates by the entireties or the common-law incidents thereof; in other words, such statutes merely permit the wife to hold property to the exclusion of the common-law marital rights of the husband therein.

In fact, it has been held that, neither at common law nor where the statutes permit a married woman to hold her separate property as if sole, are the marital rights of the husband in personal property acquired by the wife during coverture necessarily inconsistent with the theory that estates by entirety may exist in personal property. See the reported case (*GEORGE v. DUTTON*, ante, 1014).

Among text-writers there seems to be a wide difference of opinion as to whether or not estates by entirety may exist in personal property. For instance, Bishop, in § 211 of his *Law of Married Women*, in speaking of estates by the entirety, says "that nothing of this sort is known in respect of personal property," and on the other hand, Freeman in § 68 of his work on *Cotenancy & Partition*, says that "the reports, English and American, new and old, abound in cases recognizing

tenancy by entirety in all kinds of personal property."

## III. Estate by entirety may exist in personal property.

As stated in the next preceding subdivision of this annotation, the decided weight of authority is to the effect that estates by the entirety may exist in personalty as well as in realty.

**District of Columbia.**—*Flaherty v. Columbus* (1914) 41 App. D. C. 525.

**Maryland.** — *Brewer v. Bowersox* (1901) 92 Md. 567, 48 Atl. 1060; *Baker v. Baker* (1914) 123 Md. 32, 90 Atl. 776.

**Massachusetts.** — *Phelps v. Simons* (1893) 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657; *Boland v. McKowen* (1905) 189 Mass. 563, 109 Am. St. Rep. 668, 76 N. E. 206; *Woodard v. Woodard* (1918) 216 Mass. 1, 102 N. E. 921.

**Mississippi.**—*Allen v. Tate* (1881) 58 Miss. 585.

**Missouri.** — *Shields v. Stillman* (1871) 48 Mo. 86; *Johnston v. Johnston* (1902) 173 Mo. 91, 61 L.R.A. 166, 96 Am. St. Rep. 486, 78 S. W. 202; *Ramsey v. Hicks* (1893) 53 Mo. App. 190; *Ryan v. Ford* (1910) 151 Mo. App. 689, 132 S. W. 610; *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081; *Rezabek v. Rezabek* (1917) 196 Mo. App. 673, 192 S. W. 107; *Re Greenwood* (1919) 201 Mo. App. 39, 208 S. W. 635; *Lomax v. Cramer* (1919) — Mo. App. —, 216 S. W. 575.

**North Carolina.**—*West v. Aberdeen & R. F. R. Co.* (1906) 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360. And see *Jones v. W. A. Smith & Co.* (1908) 149 N. C. 318, 19 L.R.A.(N.S.) 1037, 128 Am. St. Rep. 661, 62 S. E. 1092.

**Pennsylvania.**—*Bramberry's Estate* (1893) 156 Pa. 628, 22 L.R.A. 594, 36 Am. St. Rep. 64, 27 Atl. 405; *Parry's Estate* (1898) 188 Pa. 33, 49 L.R.A. 444, 68 Am. St. Rep. 847, 41 Atl. 443; *Klenke's Estate* (1905) 210 Pa. 572, 60 Atl. 166; *Sloan's Estate* (1916) 254 Pa. 346, 98 Atl. 966; *Donnelly's Estate* (1889) 7 Pa. Co. Ct. 196; *Homburger v. Whitely* (1892) 12 Pa. Co. Ct. 10; *Young's Estate* (1894) 15 Pa. Co. Ct. 296; *Leet v. Miller* (1896) 6 Pa. Dist. R. 725.

Rhode Island.—See *Wilder v. Aldrich* (1853) 2 R. I. 518.

Tennessee. — *McMillan v. Mason* (1868) 5 Coldw. 263, 98 Am. Dec. 401.

Vermont.—*Citizens' Sav. Bank & T. Co. v. Jenkins* (1916) 91 Vt. 13, 99 Atl. 250; *GEORGE v. DUTTON* (reported herewith) ante, 1014.

Wisconsin. — *Fiedler v. Howard* (1898) 99 Wis. 388, 67 Am. St. Rep. 865, 75 N. W. 163; *Dupont v. Jonet* (1917) 165 Wis. 554, 162 N. W. 664.

England. — *Bricker v. Whatley* (1684) 1 Vern. 238, 23 Eng. Reprint, 435; *Coppin v. —* (1728) 2 P. Wms. 496, 24 Eng. Reprint, 832; *Atcheson v. Atcheson* (1849) 11 Beav. 485, 50 Eng. Reprint, 905, 18 L. J. Ch. N. S. 230, 13 Jur. 666; *Laprimaudaye v. Teissier* (1849) 12 Beav. 206, 50 Eng. Reprint, 1038, 19 L. J. Ch. N. S. 16, 13 Jur. 1040; *Moffatt v. Burnie* (1858) 18 Beav. 211, 52 Eng. Reprint, 83, 23 L. J. Ch. N. S. 591, 18 Jur. 32, 2 Week. Rep. 83; *Ward v. Ward* (1880) L. R. 14 Ch. Div. 506, 49 L. J. Ch. N. S. 409, 42 L. T. N. S. 523, 28 Week. Rep. 943, followed in *Re Bryan* (1880) L. R. 14 Ch. Div. 516, 49 L. J. Ch. N. S. 504, 28 Week. Rep. 761; *Re March* (1884) L. R. 27 Ch. Div. 166, 54 L. J. Ch. N. S. 143, 51 L. T. N. S. 380, 32 Week. Rep. 241; *Jupp v. Buckwell* (1888) L. R. 39 Ch. Div. 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712. And see *Norton v. Glover*, Noy, 149, 74 Eng. Reprint, 1110; *Cowper v. Scott* (1781) 8 P. Wms. 119, 24 Eng. Reprint, 993; *Gordon v. Whieldon* (1848) 11 Beav. 170, 50 Eng. Reprint, 722, 18 L. J. Ch. N. S. 5, 12 Jur. 988, and *Hunt v. Hunt* (1908) 25 Times L. R. 132.

This rule has been applied to many forms of personal property. For example, it has been so held in a number of cases where the personal property in question did not arise out of or represent real property held by the estate. Such a holding has been made with respect to a bank deposit standing in the joint names of a husband and his wife (*Brewer v. Bowersox* (1901) 92 Md. 567, 48 Atl. 1060; *Baker v. Baker* (1914) 123 Md. 82, 90 Atl. 776; *Craig v. Bradley* (1910) 153 Mo. App. 586, 184 S. W. 1081; *Sloan's Es-*

*tate* (1916) 254 Pa. 346, 98 Atl. 966; *Donnelly's Estate* (1889) 7 Pa. Co. Ct. 196); and this although it expressly appears that all the money so deposited originally belonged to the husband (*Klenke's Estate* (1905) 210 Pa. 572, 60 Atl. 166; *Dupont v. Jonet* (1917) 165 Wis. 554, 162 N. W. 664); a certificate of bank stock issued to a husband and wife, "and to the survivor of them, and the heirs of such survivor" (*Phelps v. Simons* (1893) 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657); a promissory note (*Shields v. Stillman* (1871) 48 Mo. 86; *Re Greenwood* (1919) 201 Mo. App. 39, 208 S. W. 685); a note and mortgage given for land, and as to which both husband and wife furnished a part of the consideration (*Fiedler v. Howard* (1898) 99 Wis. 388, 67 Am. St. Rep. 865, 75 N. W. 163); an obligation executed to a husband and wife jointly in payment for land belonging to the wife (*McMillan v. Mason* (1868) 5 Coldw. (Tenn.) 263, 98 Am. Dec. 401); a judgment obtained in an action brought by a husband and wife (*Coppin v. —* (1728) 2 P. Wms. 496, 24 Eng. Reprint, 832); a judgment assigned to husband and wife jointly (*Homburger v. Whitely* (1892) 12 Pa. Co. Ct. 10); a mortgage assigned to husband and wife jointly (*Young's Estate* (1894) 15 Pa. Co. Ct. 296); a lease of property (*Rezabek v. Rezabek* (1917) 196 Mo. App. 678, 192 S. W. 107); a legacy (*Lomax v. Cramer* (1919) — Mo. App. —, 216 S. W. 575; *Bricker v. Whatley* (1684) 1 Vern. 233, 23 Eng. Reprint, 435; *Atcheson v. Atcheson* (1849) 11 Beav. 485, 50 Eng. Reprint, 905, 18 L. J. Ch. N. S. 230, 13 Jur. 666; *Laprimaudaye v. Teissier* (1849) 12 Beav. 206, 50 Eng. Reprint, 1038, 19 L. J. Ch. N. S. 16, 13 Jur. 1040; *Moffatt v. Burnie* (1858) 18 Beav. 211, 52 Eng. Reprint, 83, 23 L. J. Ch. N. S. 591, 18 Jur. 32, 2 Week. Rep. 83; *Re March* (1884) L. R. 27 Ch. Div. (Eng.) 166, 54 L. J. Ch. N. S. 143, 51 L. T. N. S. 380, 32 Week. Rep. 241; *Jupp v. Buckwell* (1888) L. R. 39 Ch. Div. (Eng.) 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712); an annuity (*Ward v. Ward* (1880) L. R. 14 Ch. Div. (Eng.) 506,

49 L. J. Ch. N. S. 409, 42 L. T. N. S. 523, 28 Week. Rep. 943, holding that "the interest which the husband and wife take is that curious kind of joint tenancy which is called a tenancy by entirety;" and see *Cowper v. Scott* (1731) 3 P. Wms. 119, 24 Eng. Reprint, 993; a chose in action the nature of which is not reported (*Norton v. Glover*, Noy, 149; 74 Eng. Reprint, 1110); a saloon business conducted by a husband and wife (*Flaherty v. Columbus* (1914) 41 App. D. C. 525); and even to a letter of credit purchased by a husband with his own money, and made payable to himself and wife with the intent of being used by them to travel (*Parry's Estate* (1898) 188 Pa. 33, 49 L.R.A. 444, 68 Am. St. Rep. 847, 41 Atl. 448). In fact, in the reported case (*GEORGE v. DUTTON*, ante, 1014), it was expressly held that estates by entirety may exist in personal property other than personal property growing out of real estate so owned. And it has been held that an estate by entirety may exist in personal property other than that growing out of real estate so held, although such estates, with their incidents, are regarded as continuing in the jurisdiction, as they existed at the common law, unaffected by a Married Women's Statute. *Brewer v. Bowersox* (1901) 92 Md. 567, 48 Atl. 1060; *Phelps v. Simons* (1893) 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657; *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081; *Parry's Estate* (1898) 188 Pa. 33, 49 L.R.A. 444, 68 Am. St. Rep. 847, 41 Atl. 448, supra; *Jupp v. Buckwell* (1888) L. R. 39 Ch. Div. (Eng.) 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712). And see *West v. Aberdeen & R. F. R. Co.* (1906) 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360.

And the rule that there may be an estate by the entirety in personal property has been applied to personality derived from real estate held in entirety, even though the statutes in regard to the separate property and separate rights of married women are regarded as not affecting the common law in regard to estates by entirety. It has been so held with respect to a

note given for land held by entirety (*Allen v. Tate* (1881) 58 Miss. 585; *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081); a note secured by a purchase-money mortgage taken jointly by a man and wife upon the sale of real estate held by the entirety (*Boland v. McKowen* (1905) 189 Mass. 563, 109 Am. St. Rep. 663, 76 N. E. 206); and to a purchase-money bond and mortgage taken under similar circumstances (*Bramberry's Estate* (1893) 156 Pa. 628, 22 L.R.A. 594, 36 Am. St. Rep. 64, 27 Atl. 405); and a purchase-money mortgage and the proceeds thereof (*Leet v. Miller* (1896) 6 Pa. Dist. R. 725). At least, this has been held to be the rule in equity in a jurisdiction where the Married Woman's Law was regarded as entitling a wife to hold property, to the exclusion of the common-law marital rights of her husband therein. *Citizens' Sav. Bank & T. Co. v. Jenkins* (1916) 91 Vt. 13, 99 Atl. 250. In this case, in holding that timber cut from an estate by entirety was personal property and itself constituted an estate by entirety, the court said: "Estates by entirety may exist in personal property growing out of real estate, as well as in real estate strictly, and the cutting of the timber by mutual consent effected, in equity, only a transmutation of property from real to personal, but did not change the character of the estate in the timber cut." In *Allen v. Tate* (1881) 58 Miss. 585, the court, after referring to a number of authorities which established the rule that the surviving wife is entitled, as against the representative of the husband, to paper payable to the husband and wife, where it was given for property or money of the husband alone, argued as follows: "A fortiori would that rule apply where, as in this case, the note was given for land held by entirety, and made payable to the husband and wife. The presumption is irresistible that in selling the land and taking notes for the purchase money, payable to themselves, they intended the notes to represent the land, and, in case of the death of one of them, to survive to the other, as the land would have done in like case."

In a considerable number of jurisdictions in which it has been held that estates by the entirety exist in personal property, it has also been held that such estates either were not abolished by the respective Married Woman's Acts (to this effect are *Flaherty v. Columbus* (1914) 41 App. D. C. 525; and *West v. Aberdeen & R. F. R. Co.* (1906) 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360), or that such statutes do not prevent the holding of personal property by the entireties (*Brewer v. Bowersox* (1901) 92 Md. 567, 48 Atl. 1060; *Phelps v. Simons* (1893) 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657; *Boland v. McKowen* (1905) 189 Mass. 563, 109 Am. St. Rep. 663, 76 N. E. 206; *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081; *Bramberry's Estate* (1893) 156 Pa. 628, 22 L.R.A. 594, 36 Am. St. Rep. 64, 27 Atl. 405; *Leet v. Miller* (1896) 6 Pa. Dist. R. 725; *GEORGE v. DUTTON* (reported herewith) ante, 1014; *Jupp v. Buckwell* (1888) L. R. 39 Ch. Div. (Eng.) 148, 57 L. J. Ch. N. S. 774, 59 L. T. N. S. 129, 36 Week. Rep. 712). In *Bramberry's Estate* (Pa.) supra, the court said: "It has been contended, and some jurisdictions held, that the legislation which secures to the wife the enjoyment of her separate estate is destructive of the legal unity of husband and wife on which tenancies by entireties depend. But the better view is that such tenancies are not destroyed or impaired by it." It was also stated that such acts are intended to protect the property of the wife from the dominion or control of the husband, but not to change the nature of her estate or to destroy the legal unity of person which characterizes the relation of husband and wife to each other. Statements to the same effect are found in *Leet v. Miller* (Pa.) supra. And in *Jupp v. Buckwell* (Eng.) supra, in discussing the effect of the English Married Women's Property Act of 1882 upon estates by entirety, Kay, J., among other things, said that the following statement: "It is said that it destroys the doctrine of the common law by which there was what has been called a unity of person between husband and wife. Again, I

answer, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply,"—expressed perfectly his opinion; and continued as follows: "The capacity of a married woman to take property is not altered as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The act only enlarges her capacity to take such property 'as her separate property.' That is, as I read it, as between her and the grantor she takes the same as before, but as between her and her husband what she takes is 'her separate property.' . . . In my opinion, as I have said, the capacity of a married woman to take property is only altered between herself and her husband. The true view seems to me to be that the wife had an unlimited capacity before the act to acquire property, but that upon its acquisition the marital right of the husband gave him certain interests in it which the act has interfered with. This seems to me to be the extent to which her status, if that be the right word, is intended to be altered. But for collateral purposes, that is, for any purpose in respect of property, except altering her right to property as between herself and her husband, I do not find in the act any intimation of an intention to change her legal position. If that had been the intention, I should have expected to find in the act an express provision to the effect, for example, that in all questions relating to property the husband and wife should be considered, not only as between themselves, but also as between them and third persons, two separate individuals, and that the old



law of unity of person should be abolished."

Another view has been advanced in Missouri, where the rule is that estates by the entirety may be created in personal property as well as realty, it having been declared that the statutes placing the husband and wife on the same footing as regards the right to have and hold personal property in effect abolish the legal unity which gave rise to estates by the entirety, without abolishing the estate itself, and that now "a husband and wife must be held to have the same right to hold a joint estate, an estate by the entirety, with the incident of survivorship, that any other persons have." *Johnston v. Johnston* (1902) 173 Mo. 99, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202.

*IV. Rule that estate by entirety cannot exist in personal property.*

In seeming conflict with many of the decisions treated in the preceding subdivision, are a few cases which maintain that there can be no estate by the entirety in personal property. *Re Berry* (1917) 247 Fed. 700 (holding such to be the law of Michigan); *Abshire v. State* (1876) 53 Ind. 64; *Fogleman v. Shively* (1891) 4 Ind. App. 197, 51 Am. St. Rep. 213, 30 N. E. 909; *Wait v. Bovee* (1877) 35 Mich. 425; *Morrill v. Morrill* (1904) 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, 4 Ann. Cas. 1100; *Polk v. Allen* (1854) 19 Mo. 467 (but see other Missouri cases set out supra, some of which state that the Polk Case is no longer the law of the state); *Re Albrecht* (1892) 136 N. Y. 91, 18 L.R.A. 329, 32 Am. St. Rep. 700, 32 N. E. 632, reversing (1890) 32 N. Y. S. R. 193, 10 N. Y. Supp. 388, which affirmed (1888) 1 Connolly, 12, 4 N. Y. Supp. 462; *Re McKelway* (1917) 221 N. Y. 15, L.R.A. 1917E, 1143, 116 N. E. 848, reversing (1917) 176 App. Div. 929, 162 N. Y. Supp. 1129, which affirmed (1916) 95 Misc. 473, 160 N. Y. Supp. 788; *Re Baum* (1907) 121 App. Div. 496, 106 N. Y. Supp. 113, appeal dismissed in (1908) 190 N. Y. 564, 83 N. E. 1122; *Re Kaupper* (1910) 141 App. Div. 54, 125 N. Y. Supp. 878.

In *Re Albrecht* (N. Y.) supra, the court, referring to estates by the entirety, said: "That relation can only exist where there is a conveyance of a vested interest in or title to real property." And in *Re Baum* (1907) 121 App. Div. 496, 106 N. Y. Supp. 113, it was again said that "the law of ownership or tenancy by the entirety does not apply to personal property."

At common law, this was upon the theory that the entire personal estate of the parties to a marriage was vested in the husband. See *Polk v. Allen* (1854) 19 Mo. 467.

And under the statutes which enlarge a married woman's rights so as to make her sole with respect to her property rights, it has been declared that such legislation places the parties to a marriage contract upon the same footing, with respect to the acquisition and control of their individual properties, as if the conjugal relation did not exist, and therefore that "the rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rest upon different grounds than those which support a tenancy by the entirety." *Re Albrecht* (1892) 136 N. Y. 91, 18 L.R.A. 329, 32 Am. St. Rep. 700, 32 N. E. 632.

The view that an estate by the entirety cannot exist in personal property has been held to apply not only where the wife's common-law disabilities and the husband's control over her whole property existed (*Ashire v. State* (1876) 53 Ind. 64; *Morrill v. Morrill* (1904) 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, 4 Ann. Cas. 1100; *Polk v. Allen* (Mo.) supra), and where the personal property in question either grew out of or represented real property held by the husband and wife as tenants by the entirety (*Morrill v. Morrill* (1904) 138 Mich. 112, 110 Am. St. Rep. 306, 101 N. W. 209, 4 Ann. Cas. 1100, supra, which involved crops grown on land held by entirety), or was acquired by gift or bequest to the husband and wife (*Polk v. Allen* (Mo.) supra); but also under some of the more modern statutes which allow a married woman

to hold separate property, or which entirely free her from all restrictions (*Fogleman v. Shively* (1891) 4 Ind. App. 197, 51 Am. St. Rep. 213, 30 N. E. 909), where cash was received by an agent in payment for real estate held by the entireties, upon a sale made by him at the voluntary request of the tenants; *Wait v. Bovee* (1877) 35 Mich. 425, where separate moneys were pooled and securities were bought in the joint names of the husband and wife; *Morrill v. Morrill* (Mich.) supra, where crops were grown on land held by entireties; *Re Albrecht* (1892) 136 N. Y. 91, 18 L.R.A. 329, 32 Am. St. Rep. 700, 32 N. E. 632, reversing (1890) 32 N. Y. S. R. 198, 10 N. Y. Supp. 338, which affirmed (1888) 1 Connoly, 12, 4 N. Y. Supp. 462, where a husband and wife each furnished half of a loan and took as security therefor a bond and mortgage payable to them jointly; *Re Baum* (1907) 121 App. Div. 496, 106 N. Y. Supp. 113, where real estate held by the husband and wife as tenants by the entirety was sold, and a purchase-money bond and mortgage were made payable to both of them). In *Re Baum* (N. Y.) supra, the court said that the fact that the land was owned by the husband and wife as tenants by the entirety did not make a different case,

and that "when it was sold such tenancy was ended."

In fact it has been declared (*Wait v. Bovee* (Mich.) supra) that statutes enabling a married woman to hold separate property as though she were sole are repugnant to a blending, and inconsistent with the common-law doctrine of estates by the entireties. The court said: "The bare fact that the securities were taken in the joint names could no more change the holding into one by entirety than it would if the parties had not been married. Indeed the tenure was just what it would have been if the parties had been unmarried. Her right was separate and distinguishable up to her husband's death, and under the impress of the statute it continued so, and his right was therefore necessarily separate and distinguishable from hers, and so continued." But that, under the Michigan statutes in force in 1904, estates by entirety remained as at common law, see *Morrill v. Morrill* (Mich.) supra.

And of course, in jurisdictions where estates by entireties, as known at the common law, have never been recognized, there can be no such estate in personal property. For an illustrative case, see *Semper v. Coates* (1904) 98 Minn. 76, 100 N. W. 662. G. J. C.

**E. WELLS JOHNSON, Plff. in Err.,**  
v.  
**CADILLAC MOTOR CAR COMPANY.**

*United States Circuit Court of Appeals, Second Circuit — November 12, 1919.*

(261 Fed. 878.)

**Appeal — ruling on first appeal — law of case.**

1. A court will not, on second appeal, follow a ruling on the first appeal which is an error, resulting in injustice and at the same time laying down a principle of law for future guidance which is unsound and contrary to the interests of society.

[See note on this question beginning on page 1033.]

**Pleading — theory of case — judgment must follow complaint.**

2. A complaint seeking damages for negligence in the construction of an

automobile will not sustain a judgment for fraudulent concealment of defects.

[See 15 R. C. L. 604.]

**Negligence — duty of manufacturer of automobile to consumer.**

3. A manufacturer of an automobile owes to the purchaser from a middleman the duty of exercising care in inspecting parts bought for use in

constructing the car, failure to perform which will render him liable for the injury thereby inflicted upon the purchaser.

[See 24 R. C. L. 512-519.]

(Ward, Circuit Judge, dissents.)

**ERROR** to the District Court of the United States for the Northern District of New York (Ray, District Judge) to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Messrs. Homer J. Borst, Andrew J. Nellis, and Daisy L. Snook for plaintiff in error.

Messrs. William Van Dyke and William L. Carpenter, for defendant in error:

The "law of the case" applies, on second writ of error, to the same case with the same facts from the very record used on appeal on the first writ.

Bates v. Bodie, 245 U. S. 527, 62 L. ed. 449, L.R.A.1918C, 355, 38 Sup. Ct. Rep. 182; Burns v. Cooper, 82 C. C. A. 300, 153 Fed. 148; Ouray County v. Geer, 47 C. C. A. 450, 108 Fed. 478; Beiseker v. Moore, 98 C. C. A. 272, 174 Fed. 368; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 600; Balch v. Haas, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 975; Johnson v. Cadillac Motor Car Co. 197 Fed. 485, L.R.A. 1915E, 287, 137 C. C. A. 279, 221 Fed. 801, Ann. Cas. 1917E, 581; Clark v. Keith, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; Chaffin v. Taylor, 116 U. S. 572, 29 L. ed. 728, 6 Sup. Ct. Rep. 518; Connelley v. Pennsylvania R. Co. 221 Fed. 509; Coal & Iron R. Co. v. Reherd, 141 C. C. A. 271, 226 Fed. 441; D'Arcy v. Jackson Cushion Spring Co. 129 C. C. A. 409, 212 Fed. 889; Development Co. of America v. King, 96 C. C. A. 139, 170 Fed. 923; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 244, 37 L. ed. 437, 13 Sup. Ct. Rep. 611; Good v. Central Coal & Coke Co. 95 C. C. A. 586, 170 Fed. 416; Great Western Tele. Co. v. Burnham, 162 U. S. 348, 40, L. ed. 993, 16 Sup. Ct. Rep. 850; Guaranty Trust Co. v. International Steam Pump Co. 155 C. C. A. 508, 242 Fed. 920, 145 C. C. A. 480, 231 Fed. 594; Guarantee Co. of N. A. v. Phenix Ins. Co. 59 C. C. A. 376, 124 Fed. 170; Hart Steel Co. v. Railroad Supply Co. 244 U. S. 298, 61

L. ed. 1152, 37 Sup. Ct. Rep. 506; Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647; Hickman v. Ft. Scott, 141 U. S. 416, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; Kershaw Oil Mill v. National Bank, 126 C. C. A. 559, 209 Fed. 835; Leese v. Clark, 20 Cal. 388; Linkous v. Virginian R. Co. 155 C. C. A. 504, 242 Fed. 916; Mathews v. Columbia Nat. Bank, 40 C. C. A. 444, 100 Fed. 397; Messenger v. Anderson, 96 C. C. A. 445, 171 Fed. 785, 85 C. C. A. 468, 158 Fed. 252, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; Montana Min. Co. v. St. Louis Min. & Mill. Co. 78 C. C. A. 33, 147 Fed. 897; Mutual L. Ins. Co. v. Hill, 55 C. C. A. 536, 118 Fed. 708; Mutual Reserve Fund L. Asso. v. Ferrenbach, 7 L.R.A.(N.S.) 1163, 75 C. C. A. 304, 144 Fed. 342; National Bank of Commerce v. United States, 140 C. C. A. 219, 224 Fed. 681; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Northern P. R. Co. v. Ellis, 144 U. S. 458, 464, 36 L. ed. 504, 506, 12 Sup. Ct. Rep. 724; Olsen v. North Pacific Lumber Co. 55 C. C. A. 665, 119 Fed. 77; Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 195 Fed. 641, 120 C. C. A. 392, 202 Fed. 179; Panama R. Co. v. Napier Shipping Co. 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Roth v. Mutual Reserve L. Ins. Co. 89 C. C. A. 262, 162 Fed. 282; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; Wayne County v. Kennicott, 94 U. S. 498, 24 L. ed. 260; Straus v. American Publishers' Asso. 119 C. C. A. 544, 201 Fed. 306; Smith v. Baltimore & O. R. Co. 127 C. C. A. 146, 210 Fed. 414, 138 C. C. A. 215, 222 Fed. 667; Standard Sewing Mach. Co. v. Leslie, 55 C. C. A. 323, 118 Fed. 557; Thatcher v. Gottlieb, 8 C. C. A. 334, 19 U. S. App. 469, 59 Fed. 872; Fletcher v. Hickman, 125

C. C. A. 346, 208 Fed. 118; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; United States v. Denver & R. G. R. Co. 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep. 33; Re Waterloo Organ Co. 83 C. C. A. 481, 154 Fed. 657; Elliott, App. Proc. p. 490, § 578; Wells, Res Judicata & Stare Decisis, p. 569, § 613.

Rogers, Circuit Judge, delivered the opinion of the court:

This is an action against a corporation manufacturing automobiles, and which sold one of its cars to a retail dealer, who resold to the plaintiff. The car was defective, and, while being used by plaintiff, broke down and overturned, seriously injuring the plaintiff, who brought this action to recover damages in the sum of \$40,000.

The action was commenced in the supreme court of the state of New York in 1910, and was regularly removed to the United States court for the northern district of New York, where it was tried and judgment obtained in plaintiff's favor in the amount of \$8,000. The judgment was brought to this court on writ of error covering some 500 pages. This court reversed the judgment upon the ground that, as no contractual relation existed between plaintiff and defendant, there could be no recovery. L.R.A.1915E, 287, 137 C. C. A. 279, 221 Fed. 801, Ann. Cas. 1917E, 581.

The action was tried again before the court, and without a jury this time, and judgment was entered dismissing the complaint. The trial court found as a fact that the injuries were occasioned by the negligence of defendant, and that plaintiff was free from any contributory negligence, and that the damages amounted to \$10,000. The dismissal of the complaint was based on the decision of this court upon the former writ of error, when we held that no contractual relation existed.

The plaintiff, in February, 1909, purchased from the Utica Motor Car Company a Cadillac touring car manufactured by the Cadillac Motor

Car Company, a foreign corporation, organized under the laws of the state of Michigan, and having its principal office in Detroit. The Utica Motor Car Company is a dealer in motor cars, and purchased to resell. It was the original vendee or immediate buyer, and plaintiff is the subvendee of the car.

The plaintiff, who was an experienced driver of automobiles, stored the automobile in question for some months. But, after some little previous use of it, he was, on July 31, 1909, driving it on a main public highway and one in good condition at the time. The car was running between 12 and 15 miles an hour, when the front right wheel of the car suddenly and without any notice broke down, and the car turned over on the plaintiff, and, as the trial court found, "cut, mangled, and seriously and permanently injured him." The court also found that plaintiff had not recovered from the injuries which resulted from the accident, and that he never would recover. The finding is that "his face and ear and eye are distorted, and the sight of his one eye is partially destroyed and so injured as to affect the sight of the other; plaintiff's shoulder and ribs were broken; his mouth and face were paralyzed; he cannot work his jaws at all, cannot smile, whistle, nor spit, nor control his lips at all; some of the nerves of his throat are paralyzed; he cannot speak clearly or distinctly; his right ear was torn out and the inner ear fractured. The plaintiff to the present time has been in part unable to do work or to look after his business to any extent; and he never will be able to look after his said business, or to conduct and manage any business. That prior to the time of the said accident plaintiff was in good health, free from pain and suffering, and of the age of forty-four years."

The court has also found as a fact that this automobile was manufactured, assembled, and put on the market by the defendant with a weak, inadequate and defective

wheel thereon, and that this defective condition was the proximate cause of the accident, and that the car, when defendant put it on the market, was dangerous to human life and unsafe for use, and that defendant ought to have known it, and, had it exercised ordinary care, would have known it.

The defendant did not manufacture the wheels, but purchased them of another company. The court found that defendant carelessly and negligently failed and omitted to use reasonable inspection and tests to discover the real condition and weakness of the wheels. There were other findings, some of which will be considered in a subsequent part of this opinion.

The amended complaint upon which the present action was tried is the same as that upon which the former action was tried. Nothing has been added to it, and nothing has been subtracted from it. The basis of the action is negligence.<sup>1</sup>

The amended complaint does not contain any allegation of deceit or fraud, and those words are not to be found anywhere therein. There are

no allegations that any representations were fraudulently or deceitfully made. The only allegation as to any representation is found in the following: "It [defendant] had represented and declared to such ultimate purchaser, who relied thereon, that the machine was capable of enduring such use and operation, its wheels were the best obtainable, and equal to those of the highest priced cars, made from well-seasoned second-growth hickory, with steel hubs, the spokes special strength, wide spokes of ample dimensions to secure great strength."

The complainant goes on to say that, if the wheels were not as represented, the car would be a deadly instrument. Then it alleges that defendant "carelessly and negligently omitted and failed to" use a reasonable inspection to discover the real condition of the wheels. There is no allegation that any representation was made with a fraudulent intent, and fraudulent intent is, in most jurisdictions, an essential element in every actionable fraud.

As the cause of action stated in

<sup>1</sup>"That the defendant, well knowing the premises, and that the said motor vehicle was to be used by the purchaser thereof for the purposes hereinbefore alleged, and to carry passengers, and to run at a considerable speed, wrongfully, negligently, and carelessly put in spokes in the said wheel and in the hub thereof made out of dead, dozy, and rotten timber, which was unfit for that purpose, and was not strong, and was liable to break; that the defendant also wrongfully, negligently, and carelessly bored through five of the ten spokes in said wheel, and put bolts through the same, so that the strength of the same was almost entirely destroyed, and were wholly unable to stand the strain or load which the same were designed to stand and hold, and broke as hereinbefore alleged, and caused said accident, and all through the wrongful, negligent, and careless acts of the defendant.

"That the defendant further negligently painted the said spokes of the said wheel over, and the hub in which the same went, and varnished the same, and thereby concealed from the plaintiff and the purchaser of the said vehicle the condition

of the said spokes, and the fact that the said spokes were nearly cut off by the said bolts and were defective, so that this plaintiff was entirely ignorant of the condition of the said wheel and the spokes and the hub thereof, and did not know that the same was constructed of said improper material and timber, and that the strength and efficiency of the same were weakened by the said bolts passing through the said spokes; that the said wheel was constructed negligently, without any notice to this plaintiff, and by reason thereof the said accident was caused, and this plaintiff injured as herein alleged, all through the said wrongful and negligent acts of the defendant, and all to the great damage of this plaintiff in the sum of \$40,000. . . ."

And, after stating the representations the defendant was alleged to have made as to the wheels it used in its cars, the amended complaint concludes: "Nevertheless, defendant carelessly and negligently omitted and failed to use reasonable inspection and tests to discover the real condition and weakness of said wheels and the several parts of each of them."

the pleadings is the defendant's negligence, and not defendant's fraud,

Pleading—  
theory of case—  
judgment must  
follow com-  
plaint.

whatever judgment is entered must conform to the cause of action stated in the plaintiff's pleadings.

It must conform, not only to the proofs, but to the issues tendered by the pleadings. When a complaint tenders one cause of action, judgment cannot go upon another and different cause of action. But, whatever the cause of action is, it cannot be denied that it is the identical cause of action that was here, and upon which this court passed, when the case was here before; and so far as the evidence or proof in the record is concerned that is in no respect different.

When the second trial was begun, it was stipulated that the testimony introduced by the plaintiff on the first trial should be considered in evidence as the plaintiff's case on the second trial, and that no other testimony should be introduced, except that the plaintiff might introduce the testimony of one additional witness, who was specified, to establish the same facts which that witness had testified to in another case. As matter of fact, however, no such testimony was introduced. The defendant was content to have the case disposed of upon the testimony presented by the plaintiff, and no testimony for defendant is found in the record.

The first time the case was tried by a jury, and the second time, as already stated, by the court. So that we have before us now certain findings of fact which were not in the record when the case was here before. Some of these findings are without warrant, there being nothing in the record to support them; as, for example: "Nevertheless defendant carelessly and negligently failed and omitted to use reasonable inspection and tests to discover the real condition and weakness of the wheels on said machine as herein-after described, and the several parts of each of them, and to conceal

any defects in the spokes of the wheels in the said machine so purchased by the plaintiff it painted and varnished the same, so that the defective condition thereof and that the spokes in said wheels were rotten and dozy could not be seen nor determined by the plaintiff or other purchaser by any reasonable inspection."

There is no evidence that the spokes were painted and varnished with intent to conceal their defective condition. That they were painted and varnished the evidence showed, but it did not show the intent. There is evidence showing that paint hardens the surface of hickory spokes and gives them a glossy appearance.

Counsel in the argument to this court put stress upon certain representations made by defendants in their catalogues and literature in reference to the wheels with which their cars are equipped, to the effect, as found by the trial judge, that such wheels were the best obtainable, and equal to those used on the highest priced cars; that they were of the artillery type, made from well-seasoned second-growth hickory, with steel hubs and spokes of ample dimensions to insure great strength. And the judge has found the plaintiff purchased his car relying upon the representations. But this finding clearly cannot change the issue made by the pleadings, which we have already considered.

The question presented, and which this court decided on the former appeal, was whether defendant owed a duty of care to the plaintiff, who was not the immediate purchaser of the car, but a subvendee. This court then held that, as there was no contractual relation between plaintiff and defendant, there could be no recovery. This court, in an opinion written by Judge Ward and concurred in by Judge Lacombe (L.R.A.1915E, 287, 137 C. C. A. 279, 221 Fed. 801, Ann. Cas. 1917E, 581), stated the law governing the liability of manufacturers as follows: "One who manufactures ar-

ticles inherently dangerous, e. g., poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure, is liable in tort to third parties whom they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. . . . On the other hand, one who manufactures articles dangerous only if defectively made or installed, e. g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of wilful injury or fraud."

Judge Coxe filed a vigorous dissenting opinion, in the course of which he said: "The principles of law invoked by the defendant had their origin many years ago, when such a delicately organized machine as the modern automobile was unknown. Rules applicable to stagecoaches and farm implements become archaic, when applied to a machine which is capable of running with safety at the rate of 50 miles an hour. I think the law as it exists to-day makes the manufacturer liable if he sells such a machine under a direct or implied warranty that he has made, or thoroughly inspected, every part of the machine, and it goes to pieces because of rotten material in one of its most vital parts, which the manufacturer never examined or tested in any way. If, however, the law be insufficient to provide a remedy for such negligence, it is time that the law should be changed. 'New occasions teach new duties,' situations never dreamed of twenty years ago are now of almost daily occurrence."

Since this court decided this case, when it was here before, the New York court of appeals has decided *MacPherson v. Buick Motor Co.* 217 N. Y. 382, L.R.A.1916F, 696, 111 N. E. 1050, Ann. Cas. 1916C, 440, 13 N. C. C. A. 1029 (1916). That court affirmed the court below in holding, in a case similar in its facts to the instant case, that the manufacturer

of an automobile is not at liberty to put his product on the market without subjecting its component parts to ordinary and simple tests, and is not absolved from the duty of inspection because it buys the wheels from a reputable manufacturer. The court held the manufacturer's liability was not confined to the immediate purchaser, but extended to third persons not in contractual relations with it. In the course of its opinion the court, Judge Cardozo, writing, said: "Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew, also, that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent, also, from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in *Devlin v. Smith* [89 N. Y. 470, 42 Am. Rep. 311] supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

In the *Buick Case* the court reviewed the authorities at great length, and reached its conclusion in

a well-reasoned and discriminating opinion. Its conclusion upon the law is the reverse of that which this court reached in its former decision. The question we must now decide is whether we shall consider the matter as settled as between these parties, or whether we may still look into the matter to ascertain whether an erroneous doctrine was laid down in our former decision, which we are at liberty to correct, now that the same suit is here again on a second writ of error.

The answer to be given to the question is somewhat the more difficult because the court as now constituted differs in its membership from the court as it was constituted when the former opinion was rendered; two of the judges who were on the bench at that time having retired. The question now here is exactly the same question which Judges Lacombe, Coxe, and Ward passed upon.

It has been said that whatever is once established between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case. *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 628. And it has been a maxim of the law that it is the duty of a judge to keep the scales of justice even and steady, and not let them waver with every new judge's opinion. *Broom's Legal Maxims*, 7th ed. 147. His duty is to expound the law as he finds it has been decided, and not as he may wish it to be. In *Parsons v. Gingell*, 4 C. B. 560, 136 Eng. Reprint, 626, 16 L. J. C. P. N. S. 227, 11 Jur. 437, *Coltman, J.*, said: "It is not our province to invent rules. It is our duty to discover and be guided by the rules that guided our predecessors."

In *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 456, 42 L. ed. 539, 541, 18 Sup. Ct. Rep. 123, *Mr. Justice Brewer*, speaking for the court, said: "It is the settled law of this court, as of others,

that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case."

The court, long before this decision was rendered, had announced the same doctrine. In *Himely v. Rose*, 5 Cranch, 313, 3 L. ed. 111 (1809), the Supreme Court reversed a decree of a circuit court, and the cause was remanded, with directions to enter a final decree conformable to the Supreme Court's opinion. From a decree then entered by the circuit court an appeal was taken. On the argument Chief Justice Marshall declared that "nothing is before this court but what is subsequent to the mandate," and he begins the opinion of the court by saying: "A decree having been formerly rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning."

In *Browder v. M'Arthur*, 7 Wheat. 58, 5 L. ed. 397 (1822), the court denied an application for a rehearing upon the merits, made after the cause had been remitted to the court below to carry into effect the decree of the Supreme Court according to its mandate. The court declared the application came too late, and it stated that a subsequent appeal for supposed error in carrying into effect the mandate brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. In *Roberts v. Cooper*, 20 How. 467, 15 L. ed. 969 (1857), *Mr. Justice Grier* declared that the court could not "be compelled, on a second writ of error in the same case, to review our own decision on the first." And he added: "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. . . . There would be no end to a suit if every obstinate litigant could, by repeated appeals,



compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

And see *The Santa Maria*, 10 Wheat. 431, 442, 6 L. ed. 359, 361; *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 466, 14 L. ed. 768, 774; *Sizer v. Many*, 16 How. 98, 103, 14 L. ed. 861, 862; *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. ed. 1167, 1169; *Tyler v. Magwire*, 17 Wall. 253, 284, 21 L. ed. 576, 583; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Clark v. Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 170; *The New York*, 44 C. C. A. 38, 104 Fed. 561; *United Press Asso. v. National Newspapers' Asso.* 165 C. C. A. 572, 254 Fed. 284.

In *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167, Chief Justice Bleckley, speaking for the court, said: "Some courts live by correcting the errors of others and adhering to their own." And he declared that, when the court was satisfied that it had fallen into a great error, "the maxim for a Supreme Court, supreme in the majesty of duty as well as in the majesty of power, is not 'stare decisis,' but 'fiat justitia ruat cælum.'"

In *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, 93 Am. St. Rep. 287, 59 L.R.A. 711, the court, on a second writ of error, overruled its earlier opinion on the first writ of error, saying: "Counsel for defendant in error have invoked the rule stare decisis, and insist that the former decision must govern on the second appeal. This would come to us with more force, if we were not now considering the same case, with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of the former case is shattered by

the pressing weight of opposing authority, and that reason is against it."

In *Baker v. Lorillard*, 4 N. Y. 257, 261 (1850), Judge Harris, speaking for the New York court of appeals, said: "It [the court] may, and undoubtedly ought, when satisfied that either itself, or its predecessor, has fallen into a mistake, to overrule its own error. I go farther, and hold it to be the duty of every judge and every court to examine its own decisions and the decisions of other courts without fear, and to revise them without reluctance. But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been *res nova*, it is not at liberty to disturb or unsettle such decision, unless impelled by 'the most cogent reasons.' 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'"

In *Cluff v. Day*, 141 N. Y. 580, 36 N. E. 182 (1894), the court, after expressing the opinion that to permit the parties to an action to reopen a discussion on the law or the facts, once deliberately determined by the court of last resort, on a subsequent appeal in the same case on a suggestion of error in the former decision, would encourage litigation and diminish respect for judicial tribunals, went on to say: "There is no iron rule which precludes a court from correcting a manifest error in its former judgment, or which requires it to adhere to an unsound declaration of the law. It may, for cogent reasons, reverse or qualify a prior decision, even in the same case. But the cases in which this will be done are exceptional, and the power should be sparingly exercised. Where by inadvertence a settled principle of law is supposed to have been overlooked, or a rule of property violated, the court affords by its rules an opportunity to have its attention again called to

the matter before final judgment is entered. If the party against whom the judgment is rendered omits to avail himself of this opportunity, or if, having applied for a reargument, the application is denied, and the case goes to a new trial on the law as declared, the circumstances must be very unusual which would justify the court in reversing its decision on a second appeal in the same case and upon the same facts. The decision is a precedent upon the point of law involved which the court may or may not follow in cases subsequently arising, but in the particular case it is 'more than authority—it is a final adjudication' between the parties."

The fact that the action is the same action, and the litigation has not yet terminated, and the further fact that the original error, if error was committed, was the error of a divided and not a unanimous court, are circumstances which are entitled to consideration.

There are other cases, some of them cited below, in which the courts have declined on a second appeal or writ of error to be bound by a decision rendered upon the first appeal, and have declared that the rule is not inexorable and without exception that a decision on the first appeal is in all cases to be adhered to. *Bomar v. Parker*, 68 Tex. 435, 4 S. W. 599; *Bird v. Sellers*, 122 Mo. 23, 26 S. W. 668; *Chambers v. Smith*, 30 Mo. 156, 158; *Barton v. Thompson*, 56 Iowa, 571, 41 Am. Rep. 119, 9 N. W. 899.

In 2 Van Fleet's *Former Adjudication*, § 664, the doctrine is stated as follows: "If a cause is reversed in a higher court, the lower one is bound to proceed in accordance with the opinion sent down. The parties are compelled to retry the case on the new rules laid down, and to shape their respective causes of action or defense accordingly. Having done so, and in many cases having irretrievably changed their positions, it would work injustice to overturn these rules on a second appeal, and these again on a third, and

so on ad infinitum. The suit might never end. Besides, it would be very undignified, and tend to bring the courts into merited disrespect, if the lower court should be compelled to retrace its steps on one appeal, and then to trace them back again on a second, and so on. Hence, with a few exceptions, it is a rule that a matter decided on appeal becomes in effect *res judicata* in that cause; or, as it is frequently expressed, it becomes the 'law of the case' in all its subsequent proceedings. . . . The rule under consideration is not a cast-iron one, nor strictly one of *res judicata*, but simply one of expediency, which is not to be lightly disregarded."

The writer then quotes the extract already quoted from the New York court of appeals that the rule is not an iron rule which precludes the court from correcting a manifest error, or which requires the court to adhere to an unsound statement of the law, and declares his approval of the statement.

In *Wells on Res Adjudicata & Stare Decisis*, § 624, the author, referring to the doctrine of *stare decisis*, declares that the rule must not be so rigidly pressed as to shield error needlessly, adding: "And although prior decisions are not lightly to be departed from, yet any error may be corrected when no substantial injury is to be expected from the change, or when the evils of adherence are manifestly greater than those of departure. It must, of course, be clear that there is an error, and, as we have seen, it is not sufficient that a present court would have decided the matter differently, if it were *res integra*. But where this is clear, and a plain rule of law is manifestly violated, and especially if the rule established is mischievous, rather than beneficial to the community at large, in its practical operations, or to a particular class of the community, as, for example, the holders of commercial paper, it should be abrogated without delay."

We recognize the full force and

effect of the doctrine of stare decisis, and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not be again considered. It is, like the rule of res judicata, not a mere rule of practice inherited from a more technical time than ours. It is a rule "of public policy and of private peace," and is to be cordially regarded and followed in all proper cases. *Hart Steel Co. v. Railroad Supply Co.* 244 U. S. 294, 298, 61 L. ed. 1148, 1152, 37 Sup. Ct. Rep. 506. But the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same

**Appeal—ruling on first appeal—law of case.**

time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. We are satisfied that the present case falls under the exception to which we have referred. We shall not consider at length the reasons which have satisfied us that a serious mistake was made in the first decision. The reasons may be found in the opinion in the *Buick Case*, to which we have already referred, and which render it unnecessary to traverse the ground anew. We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of "tables, chairs, pictures, or mirrors hung on walls." The analogy is rather that of a manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the trade rotten foodstuffs. The liability of a manufacturer of food products was considered by this court at length in *Ketterer v. Armour & Co. L.R.A.* 1918D, 798, 160 C. C. A. 111, 247 Fed. 921 (1917). In that case we

**Negligence—duty of manufacturer of automobile to consumer.**

laid down the rule that one who puts on the market an imminently dangerous article owes a public duty to all who may use it

to exercise care in proportion to the peril involved, and we declared that the liability does not grow out of contract, but out of the duty which the law imposes to use due care in doing acts which in their nature are dangerous to the lives of others.

The judgment is reversed.

**Ward, Circuit Judge, dissenting:**

The opinion of the court concedes that the record on this appeal is the same as that on the former appeal. If the question then decided were raised between different parties, we should be affected only by the rule of stare decisis, and might overrule our former decision on the law; but between the same parties our former decision makes the law of the case, and is in this respect res judicata. I refer, among other opinions of the Supreme Court, to *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Clark v. Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121. We have so understood the law in this circuit (*Development Co. of America v. King*, 96 C. C. A. 139, 170 Fed. 923), and it has been so declared in the following circuit courts of appeals: fourth circuit, *Linkous v. Virginian R. Co.* 155 C. C. A. 504, 242 Fed. 916; fifth circuit, *Woodruff v. Yazoo & M. Valley R. Co.* 137 C. C. A. 567, 222 Fed. 30; *McClellan v. Rose*, 137 C. C. A. 519, 222 Fed. 67, certiorari refused in 241 U. S. 668, 60 L. ed. 1229, 36 Sup. Ct. Rep. 552; seventh circuit, *Standard Sewing Mach. Co. v. Leslie*, 55 C. C. A. 323, 118 Fed. 557; eighth circuit, *United Press Asso. v. National Newspaper Asso.* 165 C. C. A. 572, 254 Fed. 284; ninth circuit, *Mathews v. Columbia Nat. Bank*, 40 C. C. A. 444, 100 Fed. 393; *National Bank v. United States*, 140 C. C. A. 219, 224 Fed. 679.

I think the opinion of the court is a departure from a wise and salutary rule which requires us to affirm the final judgment in this case, and therefore dissent.

## ANNOTATION.

**Erroneous decision as law of the case on a subsequent appeal.**

The present annotation is supplemental to that appended to *United States Annuity & L. Ins. Co. v. Peak*, 1 A.L.R. 1267.

As is stated in the earlier annotation, many courts have insisted and still insist, that the doctrine or principle of "the law of the case" is sound and should be applied in all cases, although the former decision is clearly erroneous. Such, for instance, is the decision in *Deke v. Huenkemeier* (1919) 289 Ill. 148, 124 N. E. 381, it having been held that a final judgment affirmed on appeal is the law of the case on an appeal in a subsequent proceeding between the same parties, even though the former decision was erroneous. And see *Chipman v. American Fork City* (1919) — Utah, —, 179 Pac. 742, wherein the court, on a second appeal of the case, said that "being now bound to yield to the doctrine of the law of the case as that law is declared on the former appeal, it is immaterial what the view of the writer or the other members of the court would be" respecting a point now raised, but which had been decided on such former appeal.

However, as is also stated in the parent annotation, there has been a considerable tendency, and probably a growing one, to make an exception to the general rule that matters decided on one appeal cannot be considered on a subsequent appeal in the same case, where it clearly appears that the former decision was erroneous. This view is taken in the reported case *JOHNSON v. CADILLAC MOTOR CAR CO.* ante, 1023, wherein it was squarely held that the general rule is not an inexorable one, and should not be adhered to where the former decision results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. And in *Hoagland v. Kansas City R. Co.* (1919) — Mo. App. —, 209 S. W. 569, the court stated the rule and rec-

ognized the exception thereto in the following terms: "While the decision rendered on the former appeal is not *res judicata*, in the sense that we are precluded from again investigating the soundness of the conclusions reached therein, yet, unless it is made to appear that such conclusions are erroneous, the former decision becomes the law of the case and will not be reopened."

And in *Stratton v. Bankers Life Co.* (1918) 102 Neb. 755, 1 A.L.R. 1671, 169 N. W. 722, the court recognized the general rule to be that questions once determined in an appellate court will not ordinarily be examined there on a second appeal in the same case, but held that there are exceptions to the rule, and that the case under consideration was within the exception, the former decision having been manifestly outside of the pleadings and proof as well as contrary to law and to the rules of equity.

So in *Chase v. United States* (1919) 261 Fed. 833, the court recognized the rule that an appellate court by a former decision does not preclude itself from doing justice between the parties on a subsequent appeal if it should be convinced that its former decision was erroneous.

And in *Smith v. Denver & R. G. R. Co.* (1919) — Colo. —, 180 Pac. 683, it was held that an exception to the general "law of the case" rule should be made where, subsequent to the decision on the former appeal, the appellate court in another case has laid down a different rule, especially where, as in the present case, the erroneous decision vested no property or contract right in the winning litigant.

And that, where two views which are in direct conflict are adopted on an appeal, neither is the law of the case on a subsequent appeal so that a re-examination of the question is necessary, see *Re Walker* (1919) — Cal. —, 181 Pac. 792. G. J. C.

## MARION HALL, Plff. in Err.,

v.

## STATE OF FLORIDA.

*Florida Supreme Court—November 13, 1919.*

(— Fla. —, 83 So. 513.)

**Homicide — intoxication — effect on degrees.**

1. Intoxication as an excuse for the commission of murder in the first degree does not apply to murder in the other degrees.

[See note on this question beginning on page 1052.]

**Appeal — refusal to excuse juror — peremptory challenge.**

2. If, in the examination of jurors upon their voir dire in a criminal case, it appears that a certain juror is unqualified, but the court refuses to sustain the defendant's challenge for cause, who afterwards excuses the juror by a peremptory challenge, the court's ruling will not be regarded as harmful error.

[See 16 R. C. L. 291-293.]

**— ruling on qualification of juror.**

3. The question of the qualification of a venireman is a judicial one, and is addressed to the court's discretion; any alleged error in the court's ruling upon a juror's qualification, therefore, should be made affirmatively to appear, and that it was harmful to the defendant, to constitute reversible error.

[See 16 R. C. L. 289.]

**Evidence — photograph of place of crime.**

4. The admission in evidence of a photograph of a house at which a homicide was committed, and a photograph of the interior of the room in which it was committed, which photograph showed white spots, indicating the places upon the floor where the persons fell who were shot, is not erroneous, where such photographs do not themselves constitute a picture version or interpretation of the character of the actual occurrence.

[See 10 R. C. L. 992, 1153.]

**— statement by accused.**

5. It is not error for the court in the trial of a criminal cause to admit in evidence the defendant's voluntary and noncommittal account or statement to the sheriff of the transaction upon which the charge against the defendant rests.

[See 1 R. C. L. 472.]

**— nonexpert opinion as to sanity.**

6. Where, in a prosecution for murder, the sanity of the defendant at the time of the alleged crime is a material issue, it is proper to receive in evidence the opinions of nonexpert witnesses as to the defendant's mental condition when such opinions are based upon facts, circumstances, and transactions in the defendant's life observed and noted by the witnesses, who should detail such facts, circumstances, and transactions in their testimony.

[See 11 R. C. L. 601.]

**Appeal — admission of opinion as to sanity.**

7. Where nonexpert witnesses are offered in behalf of defendant as to his mental condition, and such witnesses can recall no facts in the defendant's life tending to show insanity, but are permitted to express their opinions concerning his insanity, the court's action in allowing such evidence to be introduced at defendant's request will not constitute reversible error, where he instructs the jury that it is admitted "for what it is worth."

**Criminal law — instruction — doubt as to evidence.**

8. A charge, requested by defendant, which conveys the idea that if the jury, considering any portion of the evidence necessary to a conviction, entertain a reasonable doubt as to its verity, they should acquit him, is erroneous.

[See 8 R. C. L. 219.]

**Definition — reasonable doubt.**

9. The "reasonable doubt" which the law provides shall acquit a defendant is one that arises in the minds of the jury after considering, compar-

ing, and weighing all the evidence in the case.

[See 8 R. C. L. 221.]

**Appeal — refusal of instruction.**

10. Where the court charges the jury correctly upon reasonable doubt and presumption of innocence, it is not error to refuse an instruction in behalf of the defendant that he is presumed to be innocent, and that presumption goes to the jury as independent evidence.

**— duplicate instructions.**

11. It is not error for the trial court to refuse requested instructions which are substantially covered by charges which the court has given.

[See 14 R. C. L. 751.]

**Criminal law — segregation of jury as to doubt.**

12. A requested instruction which conveys the idea that the rule of reasonable doubt applies to each individual juror, and segregates the jury as a body into individual parts, and requires each one to be free from reasonable doubt before the jury can return a verdict, is erroneous.

**Homicide — irresistible impulse as defense.**

13. In a prosecution of a person for murder where the sanity of the accused at the time of the commission of the alleged offense is a material issue, the doctrine of irresistible impulse or moral insanity is not recognized in this state as a defense.

[See 13 R. C. L. 710.]

**— drunkenness as defense.**

14. Drunkenness as an excuse for the commission of an unlawful act is no defense, and mitigates no degree of unlawful homicide, except murder in the first degree, where drunkenness

may be so complete as to eliminate the possibility of entertaining a premeditated design to kill, unless, as a result of drunkenness, there is a fixed or settled frenzy or insanity, either permanent or intermittent.

[See 13 R. C. L. 719.]

**Trial — instruction featuring particular witness.**

15. A requested instruction, which is designed to direct the jury's attention to any particular witness or set of witnesses, segregate them from the entire body of witnesses, or to separate any fact from all the material facts sought to be established, and give such witness or witnesses or fact undue prominence or importance, either for the purpose of disparaging the witnesses or strengthening the testimony, is erroneous.

[See 14 R. C. L. 733, 780.]

**— bias of witness — effect.**

16. A requested instruction, which directed the jury when a state witness exhibited bias or ill will towards the defendant, or gave evidence that the jury did not believe, they should nevertheless weigh the evidence of such witness in the light of such bias or ill will, was correctly refused.

[See 14 R. C. L. 736.]

**— effect of intoxication.**

17. An instruction which directed the jury to acquit the defendant if the jury did not believe that the defendant had understanding or intelligence to commit murder, by reason of being intoxicated, was properly refused.

[See 13 R. C. L. 715 et seq.]

**Evidence — sufficiency.**

18. Evidence examined, and found sufficient to support the verdict.

**ERROR** to the Circuit Court for Walton County (Campbell, J.) to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sollie & Sollie and Daniel Campbell & Son, for plaintiff in error:

The ruling of the court in allowing the white spots in the photograph to go to the jury as evidence was erroneous.

Hampton v. Norfolk & W. R. Co. 120 N. C. 534, 35 L.R.A. 808, 27 S. E. 96, 2 Am. Neg Rep. 444; Adams v. State, 28 Fla. 511, 10 So. 106; Ortiz v. State, 30 Fla. 256, 11 So. 611; Fore v. State, 75 Miss. 727, 23 So. 710.

The verdict of the jury in a crimi-

nal case cannot legally be rested or predicated upon a reasonable doubt arising out of a portion only of the evidence, and the verdict must rest and be predicated upon the entire evidence.

Bryant v. State, 34 Fla. 291, 16 So. 177; Ernest v. State, 20 Fla. 383; Lovett v. State, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550.

If a certain number of facts are necessary to make out the crime charged, and the jury do not, upon all the evi-

dence, believe any one of such necessary facts beyond a reasonable doubt, the defendant must be acquitted.

Gavin v. State, 42 Fla. 553, 29 So. 405; Wharton, Homicide, §§ 646-650; Com. v. McKie, 1 Gray, 61, 61 Am. Dec. 410; Com. v. Kimball, 24 Pick. 366; State v. Taylor, Houst. Crim. Rep. (Del.) 436.

When the proof shows such condition of fixed insanity or delirium tremens brought about by long-continued drinking as to disable the drinker to execute the mental functions necessary to the commission of the crime, he may be acquitted.

Cochran v. State, 65 Fla. 91, 61 So. 187.

Insanity which destroys knowledge of right and wrong, as applied to the act in question, or which produces an irresistible impulse, as a direct product of a disease, under duress of which the act is committed, prevents a defendant so afflicted from being responsible for the deed or act committed.

Parrish v. State, 139 Ala. 16, 36 So. 1012; Osborne v. State, 140 Ala. 84, 37 So. 105; Granberry v. State, 182 Ala. 4, 62 So. 52; James v. State, 193 Ala. 55, 69 So. 569, Ann. Cas. 1918B, 119; State v. Felter, 25 Iowa, 82; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; Smith v. Com. 1 Duv. (Ky.) 231; Flanagan v. State, 103 Ga. 619, 30 S. E. 550, 11 Am. Crim. Rep. 525; State v. Lyons, 113 La. 998, 37 So. 890.

Bearing upon the measure of proof necessary to conviction, the special charges requested by defendant are each material in the highest possible degree, and the refusal of each of them was hurtful error.

Howell v. State, 10 Ala. App. 1, 64 So. 522; Yarbrough v. State, 105 Ala. 43, 16 So. 758, 10 Am. Crim. Rep. 57; McCoy v. State, 170 Ala. 10, 54 So. 428; Bones v. State, 117 Ala. 138, 23 So. 138; Sherrill v. State, 138 Ala. 3, 25 So. 129; Griffin v. State, 150 Ala. 49, 43 So. 197; Garrett v. State, 97 Ala. 18, 14 So. 327; Bryant v. State, 116 Ala. 445, 23 So. 40; Howard v. State, 108 Ala. 571, 18 So. 813; Bell v. State, 115 Ala. 25, 22 So. 526; Henderson v. State, 120 Ala. 360, 25 So. 236; 3 Greenl. Ev. § 29; McCoggle v. State, 41 Fla. 525, 26 So. 734.

A man cannot be convicted of crime if, upon all the evidence, he is probably not guilty.

Bain v. State, 74 Ala. 38; Cohen v.

State, 50 Ala. 108; Mims v. State, 141 Ala. 93, 37 So. 354.

Messrs. Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant Attorney General, for the State:

Overruling a challenge to a juror for cause is not ground for reversal, he having been excused on a peremptory challenge, and it not appearing that the party exhausted his peremptory challenges.

Green v. State, 40 Fla. 191, 23 So. 851; Mathis v. State, 45 Fla. 46, 34 So. 287; Peadon v. State, 46 Fla. 124, 35 So. 204; Colson v. State, 51 Fla. 19, 40 So. 183; Ford v. State, 44 Fla. 421, 33 So. 301; Leaptrot v. State, 51 Fla. 57, 40 So. 616; Stokes v. State, 54 Fla. 109, 44 So. 759; M'Rae v. State, 62 Fla. 74, 57 So. 348.

The photographs in question were admissible.

2 Wharton, Crim. Ev. § 518-j; People v. Mahatch, 148 Cal. 200, 82 Pac. 780.

Technical errors in the admission or rejection of testimony will not cause a reversal where the supposed errors are harmless.

Rhodes v. State, 65 Fla. 541, 62 So. 653; Wallace v. State, 41 Fla. 547, 26 So. 713; Wilson v. State, 47 Fla. 118, 36 So. 580.

It was within the province of the court to determine whether or not the witness had detailed such facts and circumstances within his knowledge and observation as would entitle his conclusions as to the sanity or insanity of defendant to admission; and it is immaterial that the court assigned, if he did, an erroneous reason for his ruling.

Jones v. State, 35 Fla. 289, 17 So. 284; Dibble v. Truluck, 11 Fla. 135; Smith v. Croom, 7 Fla. 180; McLeod v. Dell, 9 Fla. 427; Hoopes v. Crane, 56 Fla. 395, 47 So. 992; Murrell v. Peterson, 57 Fla. 480, 49 So. 31; Armstrong v. State, 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; Scott v. State, 64 Fla. 490, 60 So. 356; Robinson v. L'Engle, 13 Fla. 482; Smith v. State, 65 Fla. 56, 61 So. 120; Thomas v. State, 47 Fla. 99, 36 So. 161.

Where the judge in his general charge has correctly given the law of reasonable doubt, it is not error to refuse to give instructions defining such doubt in other language and forms of statement of the law.

Cook v. State, 46 Fla. 20, 35 So. 665;

Dixon v. State, 13 Fla. 636; Sylvester v. State, 46 Fla. 166, 35 So. 142.

To refuse requested instructions when the same points are covered by other instructions given is not error.

Gilbert v. State, 61 Fla. 25, 55 So. 464; Peeler v. State, 64 Fla. 385, 59 So. 899; Bennett v. State, 65 Fla. 84, 61 So. 127; Owens v. State, 65 Fla. 483, 62 So. 651; Johnston v. State, 65 Fla. 492, 62 So. 655; Padgett v. State, 64 Fla. 389, 59 So. 946, Ann. Cas. 1914B, 897.

Charges already substantially covered are correctly refused.

Sherman v. State, 17 Fla. 888; Pinson v. State, 28 Fla. 735, 9 So. 706; Maloy v. State, 52 Fla. 101, 41 So. 791; Smith v. State, 57 Fla. 24, 48 So. 744; Sylvester v. State, 46 Fla. 166, 35 So. 142; Bass v. State, 58 Fla. 1, 50 So. 531; Green v. State, 43 Fla. 556, 30 So. 656.

Instructions so involved as to be calculated to confuse the jury should be refused.

Cochran v. State, 65 Fla. 91, 61 So. 187; Cook v. State, 46 Fla. 20, 35 So. 665; McCoggle v. State, 41 Fla. 525, 26 So. 734.

The court had sufficiently charged the jury as to reasonable doubt.

Baker v. State, 51 Fla. 1, 40 So. 673; Lovett v. State, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550; Brown v. State, 46 Fla. 159, 35 So. 82.

The issues were fairly submitted to the jury, which found defendant guilty of murder.

Holland v. State, 12 Fla. 117; Olds v. State, 44 Fla. 452, 33 So. 296; Barnhill v. State, 56 Fla. 39, 48 So. 251; Cook v. State, *supra*; Rivers v. State, — Fla. —, 78 So. 343.

Ellis, J., delivered the opinion of the court:

The plaintiff in error was convicted of the murder of Arnold Mitchell in the circuit court for Walton county during January of 1919, and sentenced to suffer the penalty of death. He seeks here a reversal of the judgment on writ of error.

There are over 133 assignments of error, numbered from 1 to 131, two numbers, 87 and 106, being repeated. Many of the assignments of error are duplications. Assignments from 7 to 58 are repeated in assignments numbered from 62 to 111, which attack the court's re-

fusal to give certain requested instructions to the jury. Assignments numbered from 118 to 131 attack the charge given by the court. Other assignments of error attack the sufficiency of the evidence to support the verdict and the court's rulings in the admission and rejection of evidence.

The facts in the case are few. The circumstances of the homicide, which were exceptionally harsh to the point of brutality, are practically undisputed in any detail. The defense was that the defendant was under the influence of alcohol or some intoxicating liquor to that degree where it could legally be said that he was insane, and therefore irresponsible for his act, or was incapable of entertaining a premeditated design to take the life of the deceased or any person, and therefore could not be guilty of murder in the first degree.

On the night of December 25, 1918, Charlie Carter, father-in-law to the deceased, who was living with him at the time, gave a party at his home, at which many people in the neighborhood attended. Dancing was continued late into the night. It was observed that whisky, in bottles, large and small, was plentiful, and that the defendant drank some of it, although the matter of his soberness or intoxication was disputed. Some time during the late evening the defendant, who had been dancing with a certain lady guest, left the room during the dance and his place was taken by Alvin Miller for the remainder of that dance, or set, as it was called. Soon another set was begun, and the defendant returned to the room and claimed the lady with whom he had been dancing for a partner. It was explained to him that the set which was on when he left had been finished, and the one now on was a new one. This explanation seemed not to please the defendant, who appeared to entertain the idea that his dignity, gallantry, or bravery was impugned. He directed his resentment toward Arnold Mitchell, who



had invited the lady to dance with him and whose invitation had been accepted. This lady, observing the displeased and resentful man, sought to pacify his feelings and restore his composure by offering to dance with him, and turned from Arnold Mitchell with that purpose. This action seemed to have the contrary effect, for the defendant immediately drew his revolver, and, after shooting down Charlie Carter, the host of the evening, who seemed to be in the way of defendant's anger, he caught the deceased in the collar with one hand, fired the pistol into his body, and, while the victim was on the floor, his head being supported by his wife, the defendant walked around the body and fired several more bullets into it, remarking as he left the room, "By God, I reckon you will dance now," or, "I guess, by God, you are dead now." Just before the defendant fired the first time he said, "Arnold Mitchell, G—d—— you; I am going to kill you."

There was much evidence as to the defendant's habits of drink, but as to his intoxication on the night of the homicide the evidence was conflicting. The evidence of the man's insanity was sought to be established by witnesses in the neighborhood and vicinity, who had known him for years and observed his conduct. These witnesses said in substance that the defendant had drunk whisky since he was about fifteen years old; that of late years he had consumed more than usual; that when he was not drinking "he didn't act so curious;" that since he had been drinking so heavily of late "he acted like a different man;" that as the years went on the defendant's habit of drinking intoxicating liquors became "worse and worse;" and he acted "less like a man in his mind." One witness, Sell Knowling, who was first cousin to the defendant and who was with him a great deal, a kind of companion, or comrade, said that the defendant was a "pretty heavy drinker;" that he had had the habit of drinking about "five or six years;" that sometime before

"Mitchell was killed he (defendant) had been worse than he had been before;" that the defendant's "conduct had changed from what it had been in other years after he got to drinking so heavily. It had changed a little bit; I mean by that his ways and acting. He acted a little different from what he used to. There was a little difference in his ways and acting from what it used to be. He acted like he had less sense, less sense than he used to have." The witness said that in his opinion the defendant's "mind was bad." The defendant drank some whisky that night he danced, but "staggered like a drunken man." Other witnesses saw the defendant at the dance, but could not tell from his conduct and manner whether he was drunk or not. The court permitted witnesses to state whether in their opinion the defendant was or was not of sound mind. Some of these witnesses, a brother, an uncle, a friend, his mother, testified that the defendant in their opinion was of unsound mind. A physician, answering a hypothetical question, said the killing of Mitchell was "evidence of insanity;" "that the man (defendant) was probably insane." He afterwards qualified the statement, when all the facts were embraced in the question, to the extent of saying that the conduct of defendant showed "temper;" that he could not say conclusively that the defendant was insane. Other witnesses who saw the defendant at the dance, the night of the homicide, who have known him for years, observed his conduct, and knew many of his ways and habits, said that he was not drunk the night of the dance; that if he was, they could not tell it; that he was quiet, did not stagger, and talked rationally; that the defendant himself had, since the homicide, said he was not drunk that night and knew what he was doing.

The jury decided with all the evidence before it that the defendant, on the night of the homicide, when he killed the deceased, was not insane; that he committed the act

from a premeditated design to take the life of Arnold Mitchell and was guilty of murder in the first degree. After a careful review of the evidence and consideration of its probative force and bearing upon the unfortunate affair of that night in December, we are satisfied that the verdict was amply sustained by the evidence.

The first assignment of error attacks the ruling of the court in overruling the defendant's challenge for cause of the juror Hinzie. The record does not show that a juror by such name was either examined or sat upon the jury. A juror named Heinsley upon his voir dire said that he was not related to either the defendant or deceased; if he was taken as a juror would render a fair and impartial verdict according to the testimony; had formed no opinion as to the guilt or innocence of the accused; that he had heard and read about the homicide, but what he had read and heard "would not weigh" with him in considering the evidence; although it had made an impression upon his mind, which, however, would not "weigh with him" at all after hearing the evidence; that as a juror he would have to "exert his will power to overcome" that opinion or impression he had from reading and hearing about the case. The defendant's challenge for cause was overruled. It appears that this man did not serve as a juror in the case. The defendant challenged him peremptorily. It also appears from the record that the defendant did not exhaust all his peremptory challenges. Even if the venireman was unqualified to serve

Appeal—refusal  
to excuse juror  
—peremptory  
challenge.

as a juror and the challenge for cause should have been sustained, it appears that he did not serve, and the defendant's peremptory challenges had not been exhausted, so there was no harmful error, and the assignment should fail. Mathis v. State, 45 Fla. 46, 34 So. 287; Denham v. State, 22 Fla. 664; Lambright v. State, 34 Fla. 564, 16 So.

582, 9 Am. Crim. Rep. 383; Peadon v. State, 46 Fla. 124, 35 So. 204; Colson v. State, 51 Fla. 19, 40 So. 183; Melbourne v. State, 51 Fla. 69, 40 So. 189.

The question of the qualification of a venireman is a judicial one, and is addressed to the court's discretion; <sup>—ruling on qualification of juror.</sup> any error, therefore, should be made affirmatively to appear, and that it was harmful to the defendant.

A photographer on January 15th, following the homicide, made two photographs, one of the Carter house and the other of the room in the house where the homicide occurred. When the latter picture was taken, someone placed on the floor of the room two pieces of paper; one to indicate where Mr. Carter fell when he was shot, and the other to indicate where the deceased fell. It is not clear what purpose was served in introducing this evidence, as there was no dispute as to the house or room in which the alleged crime occurred, no denial in the evidence that the defendant did the shooting, nor that Carter the host was shot and fell upon the floor and that Arnold Mitchell was killed. After these photographs were admitted in evidence and it was explained by the witness what the white spots in the photograph were caused by, the defendant's counsel objected to "so much of the pictures as contained said white spots, and moved the court to strike the testimony about the papers being placed where the bodies lay, and to exclude from the jury the white spots in the pictures as parts of the evidence." There was no ruling upon this motion; consequently no exception. The objection to the evidence was not made until the photographs had been admitted. The motion to strike the testimony about the papers being placed where the bodies lay was a little indefinite, and might have been granted, but how the white spots in the pictures could be excluded without excluding the photographs is not clear. However,

no error is made to appear, as the bill of exceptions does not show that any ruling was made on the motion. If the evidence was permitted to stand, it could have worked no injury to the defendant, in view of the nature of the case, the character of the defense. The photographs were introduced as mere representations of the place where the alleged crime was committed; not a representation of the act itself. And as there was no dispute between the parties as to the place where the homicide occurred, and who committed it, and upon whom it was committed, the photographs appear to have been unnecessary, but harmless. The fact that placing the pieces of paper on the floor to represent the spots where the two wounded men were lying after the shots were fired made the photographs a kind of tableau picture, yet they were not subject to the criticism that anyone's version, theory, or interpretation of the character of the act was thus sought to

Evidence—  
photograph of  
place of  
crime.

be brought before the jury as a photographic view of the actual occurrence. We think the assignment of error based upon the defendant's motion to strike the testimony and exclude the white spots from the pictures is without merit, and must fail.

The sheriff of Walton county testified that on the morning of December 26th, the defendant came to him in company with another and told him, the sheriff, "that there was some shooting out at Mr. Carter's." The defendant's counsel moved the court to exclude that statement from the evidence. The motion was overruled, and that action of the court

—statement by  
accused.

is assigned as the third error. There was no error in this ruling. Every word a defendant utters before or after arrest is not a confession of guilt. Sometimes the statements are self-exculpatory and many times noncommittal. The statement that there had been some

shooting at Mr. Carter's certainly inculpated no one, and appeared to be entirely voluntary, as the defendant seemed to have come to the sheriff of his own volition, merely to tell him of the fact.

The assignment of error is not sustained. The character of the defendant's statement to the sheriff does not support the theory upon which the argument is made in support of the assignment.

During the progress of the trial the defendant's counsel introduced several witnesses, some of whom were relatives, others acquaintances and friends of the defendant, and sought by such witnesses to ascertain whether the defendant was sane or insane at the time he killed the deceased. This information was to be based on the opinion of the several witnesses, who, knowing the defendant as a boy and later as a man, had observed his conduct, watched his career, observed his manners, and noticed his bearing and conversation, and were supposed to speak with a reasonable degree of scientific accuracy as to his mental condition at the time he killed the deceased. At first the offer to supply this kind of evidence upon the question of the defendant's sanity was declined by the court, but later the court revised its ruling and permitted defendant's counsel to recall his witnesses and obtain their views as to the soundness of defendant's mind. The defendant's counsel then recalled James Hall, a brother of defendant, Henry Knowling, an uncle, William Crowder, and Mrs. Colvin, defendant's mother. These witnesses all testified that, in their opinion, the defendant was of "unsound mind," or "not in his right mind," or "not right at times." The court stated that the witnesses should detail all the facts they knew concerning the defendant and what they had observed with reference to his conduct. The first witness examined after the announcement of this rule stated that he could not point out any acts now, but the witness was permitted nevertheless to

give his opinion that his brother was of unsound mind. After that, no further attention was paid to the rule announced by the court. Witnesses were permitted to testify that in their judgment the defendant was not in his "right mind" or of "unsound mind," because he did not "seem to be just like he ought to be;" that he made a trade once that was not profitable to him; he talked "foolish at times when he was sober as well as when he was drunk;" "he looked different out of his eyes," and such matters. These statements were permitted to go to the jury, at the defendant's request, as the basis of the witnesses' judgments and opinions concerning his insanity. Counsel for the defendant say that the "inquiry of defendant's sanity or not shows up in shreds and bits scattered through pages and pages of the record, each shred or bit being so connected with the context to which it belongs, and to the matter immediately preceding and following it, that it is wholly impracticable for [them] to separate these shreds and bits in [their] brief and present them in ordered form."

We appreciate the difficulty under which counsel labored in the effort to show error in the court's ruling prejudicial to the defendant in this evidence, for it was admitted seemingly under no rule, but merely upon defendant's request. We are unable to discover in the judge's rulings that he "reluctantly admitted in evidence" that which he had previously through error excluded. The interpretation which counsel place upon the court's words when he announced that the testimony of these witnesses concerning the defendant's sanity should be admitted for what it was worth is not justified by any conduct or word of the court during the progress of the trial. By that expression there was no encroachment by the judge upon the province of the jury, nor do we perceive in it any effort to influence their minds against the reliability of such testimony. Counsel com-

plain that the court first ruled that the testimony of the nonexpert witnesses should not be admitted, and then changed his ruling by allowing such testimony to go to the jury "for what it was worth." The record shows that the first witness placed upon the stand in defendant's behalf was a first cousin, a young man about twenty years old, who testified that defendant drank heavily in recent months; the witness drank with him. In answer to a leading question propounded by defendant's counsel, he said that recently there had been something apparently wrong with defendant's mind. The court stated that the "witness [should] tell the acts that [defendant] had done, but he can't testify that [defendant's] mind was wrong. He is not an expert."

The witness then said: "I have been in the presence of this man when he was drunk with recent years a right smart. I don't know how much he remains drunk as an ordinary thing. A pretty good percentage of all his time. I saw him while he was drunk and while he was sober. I know his conduct and how he appeared when he was drunk. I think from his conduct and manner that he has become heavily addicted to drink."

He was then asked by defendant's counsel the following question: "Was he of sound or unsound mind, sane or insane, for several months before the killing?"

The state attorney objected to this question, and the objection was sustained. The witness was then asked: "Was that man since his habit of heavy drinking—has he been sane or has he been as you have testified—was he, in your judgment, sane or insane?"

The court sustained an objection to this question and defendant's counsel excepted. Later during the trial, the court announced of its own motion that the defendant might recall the witnesses which the court had refused to allow counsel to examine concerning the sanity or insanity of the defendant. Then fol-

lowed the testimony referred to above. The court, however, first announced the rule under which the opinion of the witnesses should be received. That rule was in conformity with the rule announced in *Armstrong v. State*, 30 Fla. 170, 17 L.R.A. 484, 11 So. 618, referred to in the brief of counsel for plaintiff in error. Whatever may have been the reason for not insisting upon the rule, the fact is, it appeared not to have been observed, and the opinions of the defendant's relations and

—nonexpert  
opinion as to  
sanity.

Appeal—  
admission of  
opinion as to  
sanity.

friends concerning his sanity were permitted to go to the jury, as the court said, for what they were worth. Such opinions were not based upon any facts within the knowledge of the witnesses, but opinions based on vague, indefinite, obscure notions about defendant's abnormality. Such evidence was permitted, however, to be given. It was undoubtedly favorable to defendant. He could not have been injured by it unless, on account of its complete transparency and inherent defects, it reacted upon the jurors' minds in a way not expected by counsel. But defendant is not in a position to complain that evidence admitted at his request against the rule turns out to his disadvantage. On the subject of the rule announced by the court under which nonexpert opinion is admissible concerning insanity, see *Leaptrot v. State*, 51 Fla. 57, 40 So. 616; *Davis v. State*, 44 Fla. 32, 32 So. 822; *Scott v. State*, 64 Fla. 490, 60 So. 355.

Assignments of error numbered 4, 5, and 6, based upon the rulings above referred to, are not sustained.

Counsel for plaintiff in error discuss together assignments of error numbered 7, 8, 9, 11, 12, 13, 14, and 19. The same order is followed in the able brief of the assistant attorney general, who calls attention to the rule, often referred to by this court, that, where several assignments of error are grouped in the

brief of plaintiff in error, and one assignment fails, they all fail. See *Atlantic Coast Line R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812. Two of the counsel for plaintiff in error, however, who are practitioners from an adjoining state, express in their brief some apprehension of inadvertent departure from our rules. We are not disposed in this case to apply with very strict fidelity to practice the several rules adopted for the convenience of the court and bar, for several reasons. The case is one of extreme gravity; counsel for plaintiff in error have labored diligently to present their client's case to this court in all its phases, and some of the counsel, at least, labor under the disadvantage of imperfect acquaintance with our rules of practice.

The assignments of error referred to above are based upon the refusal of the court to give certain special instructions requested by the defendant and numbered, respectively, 1, 2, 3, 5, 6, 7, 8, and 13. The refusal of the court to give these instructions constitutes some of the grounds of the motion for a new trial, and is again assigned as error under other and differently numbered assignments. Such duplications in the assignment of errors frequently occur, and render the consideration of the case here very tedious, even difficult, and the transcript and briefs unnecessarily large and expensive. The instructions above referred to, which were refused by the court, are upon the same subject; that is to say, they involve one principle only. They express the idea that, where one is tried upon a criminal charge, and any portion of the evidence which is necessary to a conviction is not believed by the jury beyond a reasonable doubt, the defendant is entitled to an acquittal.

This instruction, in substance, was disapproved in the case of *Cook v. State*, 46 Fla. 20, 35 So. 665; *Bryant v. State*, 34 Fla. 291, 16 So. 177; *Ernest*

Criminal law—  
instruction—  
doubt as to  
evidence.

v. State, 20 Fla. 383; Lovett v. State, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550. The trial court correctly and fully instructed the jury upon the law of a reasonable doubt, and explained that such doubt might arise upon a full and fair consideration of all the evidence. The requested instructions were not only properly refused, because the court had instructed the jury upon the subject of a reasonable doubt, and was not required to repeat the same principle of law in different form and couched in different phraseology, but the requested instructions were misleading, if not insidious. Although this court had said that a reasonable doubt cannot arise from considering "a part or parcel" of the testimony, these instructions seem

**Definition—  
reasonable  
doubt.**

to advise the jury that it might consider any portion of the evidence upon any material question involved, and if the portion so considered was not believed to be true beyond a reasonable doubt, the defendant should be acquitted. It often occurs that several witnesses are called to establish one or more essential elements of the crime charged, the testimony of each witness is a "portion" of the evidence, the jury may not believe a certain witness, they may doubt his veracity, and yet believe what others have testified to on the same point; yet, under the rule announced in the requested instructions, the defendant should be acquitted, notwithstanding the jury, upon consideration of all the evidence, would entertain no reasonable doubt of guilt. As the court said in the Bryant Case, 34 Fla. 296, 16 So. 177: "The reasonable doubt which the law requires shall acquit the defendant is one that arises in" the minds of the jury "after . . . consideration, comparing, and weighing of all the testimony in the case."

If it is objected that the construction here placed upon the requested charges is too narrow, that the word "portion" must be taken to mean all the evidence which may bear direct-

ly or indirectly upon any material element of the crime charged, then the charges are in substance not different from the court's general charge upon the subject of a reasonable doubt.

The principle announced in the case of Gavin v. State, 42 Fla. 553, 29 So. 405, that proof beyond a reasonable doubt must be had as to all facts necessary to make out the case of the prosecution, in a criminal case, does not afford any argument in support of the requested charges, which deal not with any essential fact to be proved, but with any portion of the evidence as to such fact.

After considering all the evidence in the case, if the jury has a reasonable doubt as to the existence of any fact necessary to constitute guilt on defendant's part, there should be an acquittal. But this is not the meaning of either one of the eight charges requested. The able discussion of these charges by counsel for plaintiff in error fails to convince us that the court departed from any sound rule or denied the defendant any right in this particular. The fact that it required ten pages of counsel's brief, practically without citations of authority to take up space, in which to explain the phraseology of these requested charges, is in itself almost sufficient proof of the involved and entangling terms in which they are framed.

The charges deal with the phrase "any portion of the evidence." This court in the Gavin Case uses the phrase "facts necessary to make out the case." The brief of counsel would make no distinction or difference in the meaning of the two phrases, because counsel say that the words "material and necessary to a conviction" are coupled with the words "any portion of the evidence," so that consideration of all the evidence is essential to determine which parts of it are essential to conviction. But when would two men upon any jury place precisely the same valuation upon the testimony of any witness, either as to probative value or materiality, es-

pecially if the case should happen to be one of circumstantial evidence? To send the jury upon a quest for those portions of the evidence material and essential to conviction would involve them in more difficulties than should be saddled upon man, who, as a juror, is required to consider and compare all the evidence and arrive at a conclusion that satisfies his conscience under the rule of reasonable doubt, regardless of the processes of reason or lack of it by which others arrive at their conclusions. If all men reasoned alike, the necessity for twelve jurors in a murder case would not be apparent.

Requested instruction No. 4 was refused, and complaint is made of that ruling under the tenth assignment of error. The charge declared that the law presumes the defendant to be innocent, that the presumption goes to the jury as independent evidence,

Appeal—  
refusal of  
instruction.

and there can be no conviction until the presumption is overcome by proof beyond a reasonable doubt of defendant's guilt, and unless it is so overcome he must be acquitted. The court instructed the jury that the defendant was presumed to be innocent until his guilt was proven beyond a reasonable doubt, and that the burden of proof was upon the state to prove his guilt and every material fact necessary to constitute the offense beyond a reasonable doubt. There is no difference in substance, so far as language is concerned, between the two charges, further than in one case the jury are told that the presumption of innocence is one of law and comes to them as independent evidence. In effect, however, the instruction given by the court is the same. The jury knows that the court gives them the law in charge. Therefore, under the charge as given, they knew that the presumption of innocence was one of law, that they were required by law to consider, and that before a conviction could be had the presumption of in-

nocence had to be overcome by proof of guilt beyond a reasonable doubt. Counsel seems to contend that there are two stages in the process of conviction, viz.: First, where presumption of innocence is overcome; second, where proof of guilt beyond reasonable doubt is established. The argument is more specious than sound. The defendant is either guilty or not guilty. There is no middle ground or "twilight zone" known to the criminal law. The state must establish guilt beyond a reasonable doubt or fail in the prosecution; in which case the defendant is innocent in law. If there could be such a state of case where the jury would say that the evidence removes the presumption of innocence, but fails to show guilt, the defendant would still, in law, be presumed to be innocent and entitled to acquittal. This, in substance, is what the court charged the jury. We think there is no merit in this assignment of error.

The next assignment of error discussed is No. 42. It rests upon the refusal of the court to give an instruction similar in all respects to the one just discussed.

—duplicate  
instructions.

It is a little fuller, in that it contains more words, but no more meaning.

Assignments of error numbered 15, 29, 30, 45, 46, 49, 50, 54, 55, and 56, are discussed together. These assignments attack the rulings of the court in which it refused certain requested instructions in defendant's behalf. These assignments are repeated in those numbered 70, 84, 85, 99, 100, 103, 104, 107, 108, 109. These requested instructions were designed, not only to emphasize the thought to the jury that the verdict should be unanimous, but to segregate the jury into twelve parts and confine the doctrine of reasonable doubt to each part; that there could be no verdict of guilty unless each juror believed the defendant to be guilty beyond a reasonable doubt; that if any one or

more of the jurors had such doubt after considering all the evidence, the defendant could not be found guilty. At the request of defendant's counsel, the court gave the following charge: "It is the duty of the jurors severally and separately and jointly to weigh and consider the evidence and determine whether or not in their joint and several minds they believe from the evidence that defendant is guilty, and there can be no conviction until the entire jury believe from the entire evidence and beyond a reasonable doubt that he is guilty."

Counsel in their brief say that they are "impressed" that this charge, in substance, covers those which were requested and refused upon this subject, but they do not concede it. We think it does. The law does not require the court to repeat its charges. When a proposition of law is embraced in a charge which clearly conveys the thought to the minds of the jury, it is not error for the court to refuse other instructions, embracing in substance the same thought, but in different phraseology. See *Pinson v. State*, 28 Fla. 735, 9 So. 706; *Smith v. State*, 57 Fla. 24, 48 So. 744; *Green v. State*, 43 Fla. 556, 30 So. 656; *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237, 29 So. 410; *Graham v. State*, 72 Fla. 510, 73 So. 594; *Hawthorne v. State*, 72 Fla. 524, 73 So. 590; *Fine v. State*, 70 Fla. 412, 70 So. 379.

The principle announced in the requested instructions, however, was disapproved in the case of *Boyd v. State*, 33 Fla. 316, 14 So. 836; *Barker v. State*, 40 Fla. 178, 24 So. 69; *Ayers v. State*, 62 Fla. 14, 57 So. 349.

To attempt to confine the doctrine of reasonable doubt to individual jurors, or that segregates the jury as a body into individual members, and requiring each of such members to be free from reasonable doubt before they can return a verdict, is error. Such is the language of the

headnote in the case last cited. This very thing the refused instructions undertook to do; and, though the court did give an instruction, the effect of which would be that which this court has disapproved, the instruction was given at defendant's request, for his benefit, and he cannot now complain.

Assignment of error numbered 16 is based upon the court's refusal to give charge numbered 10, requested by defendant. This assignment is also covered by No. 71. The requested instruction is upon the subject of the "diseased mind" of the defendant, which it was contended at the trial was caused by the habit of drinking alcoholic liquors. The instruction is not clear, and is calculated to mislead. It advises the jury that although they may not be satisfied from the evidence that the defendant was of "diseased mind from the habit of drinking alcoholic liquors" when he killed Mitchell, if he killed him, yet if, from the evidence, the jury believed defendant was drunk to such an extent as to "disable him to exercise those mental faculties which must be exercised to render one guilty of murder in either degree," the jury could only convict of manslaughter, and could not convict of manslaughter unless they believed him guilty of that offense.

It is conceded that the instruction is "involved." It is not only involved in the sense that it is complicated and entangled in confusing and misleading words, but if it bears the interpretation contended for by counsel for plaintiff in error, the law was correctly and fully given by the court in other charges.

We have examined carefully all the charges given by the court, as well as those requested by the defendant's counsel and refused, which cover the subject of drunkenness and insanity, and we are of the opinion that the court, by charges appropriate to the evidence, submitted to the jury for their determination the question whether the accused, at the time of the unlaw-

Criminal law—  
segregation of  
jury as to  
doubt.



ful act with which he was charged, had a sufficient degree of reason to know that he was doing an act that was wrong. See *Cochran v. State*, 65 Fla. 91, 61 So. 187; *Davis v. State*, 44 Fla. 32, 32 So. 822; *Copeland v. State*, 41 Fla. 320, 26 So. 319.

In the *Davis Case*, *supra*, this court adopted the rule laid down in *M'Naghten's Case*, 10 Clark & F. 200, text, pp. 209-211, 8 Eng. Reprint, 718, 8 Scott, N. R. 595, 1 Car. & K. 130, note, as to insanity as a defense to crime. If the accused at the time the act in question was committed had the use of his understanding so as to know that he was doing a wrong act, he was in a sound state of mind. The idea is also expressed in these words in the *Davis Case*: "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."

The court said the question should be left to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong. The "irresistible impulse" or "moral insanity"

**Homicide—  
irresistible  
impulse as  
defense.**

doctrine is not recognized in this state as an excuse for an unlawful act. See

*Cochran v. State*, *supra*.

In the case last cited, this court, speaking through Mr. Justice Whitfield upon the subject of drunkenness as excusing the commission of an unlawful act or relieving from its consequences, said: "Intoxication does not excuse or mitigate any degree of unlawful homicide, except murder in the first degree, unless as a result of such intoxication there be a fixed or settled frenzy or insanity, either permanent or intermittent." . . . If excessive and long-continued use of intoxicants produces a mental condition of insanity, permanent or intermittent, which insane condition exists when an unlawful act is committed, such insane mental condition may be of a nature that would relieve the per-

son so affected from the consequences of the act that would otherwise be criminal and punishable."

In the case of *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835, it was said that voluntary intoxication is a matter for consideration with reference to the ability of the accused to form or entertain a particular or specific intent essential to an offense. That as between murder in any degree below the first and manslaughter, voluntary intoxication plays no part. "The only purpose," said the court, "for which it is admissible, is to show an absence of a premeditated design to kill, or that the killing was not murder in the first degree; and the only effect of proof of intoxication rendering the accused incapable of forming or entertaining such design will be to reduce the killing to murder of the second or third degree, according to the circumstances."

We will briefly review the charges given by the court to the jury in this case, to the end that it may be shown that the law on the subject of intoxication as an excuse for the commission of an unlawful act was fully given in charge to the jury.

The court charged the jury fully upon the subject of a premeditated design as an element in the crime of murder in the first degree, and that, before there could be a conviction of the defendant, the jury had to find beyond a reasonable doubt that the defendant killed the deceased from a premeditated design to take his life; that if the defendant unlawfully killed the deceased, and at the time was under the influence of liquor voluntarily taken by him, his intoxication would be no excuse for committing the act, unless such intoxication deprived the defendant, at the time of the killing, of the mental capacity to form a premeditated design or malicious purpose to kill, in which case the defendant may be found guilty of murder in the second degree or manslaughter. The court said that voluntary intoxication, not resulting in a fixed or settled frenzy or insan-

ity, either permanent or intermittent, does not excuse or mitigate any degree of unlawful homicide below murder in the first degree. "While the mental effects of a mere intoxication may not excuse the commission of an unlawful act or relieve from its consequences, yet, if excessive and long-continued use of intoxicants produces a mental condition of insanity, permanent or intermittent, and that such insane condition exists when an unlawful act is committed, such insane mental condition may be of a nature that would relieve the person so affected from the consequences of the act that would otherwise be criminal and punishable. Therefore, gentlemen of the jury, should you find from the evidence beyond a reasonable doubt that the defendant shot and killed Arnold Mitchell, if he did kill him, was at the time in such a state of fixed or settled frenzy or mental insanity induced by antecedent and long-continued use of intoxicating drinks or liquors, and not produced by the immediate effects of intoxicating drinks, as not to have been conscious of what he is doing, or that the act was wrong, you will find the defendant not guilty."

At the request of the defendant the court instructed the jury that if the defendant was drunk when he committed the homicide, so that he was unable to entertain the "purposes or designs or to exercise the mental faculties necessary for the commission of the crime of murder in the first degree, then the jury could not convict him of murder in that degree." They were also instructed that voluntary drunkenness on the defendant's part at the time of the killing would excuse him from the charge of murder in the first degree if he was incapable of exercising his mental faculties, which must be exercised to commit murder in that degree; also that, before the jury could find the defendant guilty, they must believe beyond a reasonable doubt that he possessed a mind sufficiently free from disease to enable him, at the

time of the killing, to exercise the mental function, which must be exercised in the perpetration of murder in one of its degrees or manslaughter.

Charges were requested by defendant, embracing the same view of the law upon the subject of intoxication as an excuse for the commission of a crime requiring a certain or specific intent, and enlarging the doctrine as announced by this court to the point where they were <sup>—drunkenness as defense.</sup> without merit, in that they declared the doctrine of irresistible impulse, which has been shown to have been condemned by this court. These charges were made the subjects of assignments of error numbered 16, 18, 23, 31, 33, 44, 47, and 59. Assignment of error numbered 17 is abandoned. These assignments are also covered by those numbered 71, 72, 73, 78, 86, 87b, 98, 101. No error is made to appear by these assignments, and they are not sustained. The learned counsel for the plaintiff in error urge us to reverse the decisions of this court, in which it was announced that the doctrine of "irresistible impulse" or "moral insanity" was not recognized in this state as an excuse for an unlawful act.

The question as to what degree of irresponsibility should constitute incapacity to commit a criminal act was fully discussed in the case of Davis v. State, 44 Fla. 32, 32 So. 822. It was there pointed out that, in the absence of a statute defining such degree of irresponsibility, the common-law rule should govern. In 1903 the Davis Case was followed on this question in Williams v. State, 45 Fla. 128, 34 So. 279, and again in 1913 in Cochran v. State, 65 Fla. 91, 61 So. 187. The question seems to have first engaged the attention of this court in 1899, where, in Copeland v. State, 41 Fla. 320, 26 So. 319, the doctrine in the M'Naghten Case, supra, was first referred to as announcing the correct rule. For nearly twenty years the doctrine of "moral insanity" has been expressly

repudiated in this state, and in the meantime legislatures have assembled and adjourned without enacting that doctrine into law. If it is true that there can be such a condition of mental irresponsibility on the part of any person that he or she may be fully conscious of the nature and character of the act intended to be committed, and know that it is a wrong act, and deliberately, from a premeditated design to kill, commit the act, and yet be said to be irresponsible because impelled by a so-called "irresistible impulse" to commit the act, that condition has never commended itself to the common sense of the legislature, and as such doctrine was not the rule at common law, it is not the rule in this state. We deem it unnecessary to discuss the merits of the doctrine, if it possesses any. We prefer to leave the matter to legislative action, both as to the degree of mental irresponsibility that should operate as an excuse for committing an unlawful act, and the method of proof of the existence of such mental condition. Human life is not held at the mercy of the unreasonable fears or cowardice of persons; neither should it be held at the caprice of those individuals who move among their fellows unrestrained, attend public places and social functions, but who claim immunity from punishment for violation of law upon the ground that they are so constituted that when they want to do a thing they just can't help doing it. It is possible that science may discover such a mental condition and the means of proving it. When it does, and the legislature enacts that such mental condition should excuse one from committing crime, such as murder, rape, arson, burglary, larceny, etc., then the courts will avail themselves of "every advance in science" to discover the truth in the case presented.

Assignments of error numbered 20, 24, 25, and 38 attack the ruling of the court in refusing instructions numbered 14, 18, 19, and 32. The

above assignments are also duplicated by those numbered 75, 79, 80, and 92. Some of these charges express the idea that the jury are the judges of the weight of evidence and credibility of the witnesses. In so far the charges were correct, and were fully covered by the general charge. Some of them, notably the fourteenth and eighteenth, directed special attention to the state's witnesses in connection

with the duty of the jury to reject such evidence as they deemed unworthy of belief. In this particular the requested instructions were wrong. It is improper to segregate any witness from the entire body of witnesses, or any fact from all the material facts sought to be established, and, by calling special attention to him or it, give him undue prominence, or the fact undue importance, either for the purpose of strengthening the testimony of the witness or disparaging it. Nor should this be done with reference to any class of witnesses. A witness is no more a liar because he is called by the state than when he is called by the defense, and there is no greater reason for cautioning the jury to disregard the evidence of state witnesses when they speak falsely than to disregard that of the defendant's witnesses for the same reason. Charge numbered 19, in phraseology slightly different from that used by the court, dealt with the question of a reasonable doubt and the jury's duty in the matter of weighing the evidence. In the discharge of this duty they were instructed to use common sense. Although the court did not tell the jury in those words that, in the performance of their function, they should use that very desirable degree of sense, we think that the failure to do so on request was not reversible error. In the thirty-second charge requested, the jury were directed to give to the "defense in this case and the evidence which tends to support them, if any of it tends to support them,

**Trial—instruction featuring particular witness.**

a charitable, as distinguished from an unfriendly, view and consideration, and not captiously to reject either." If it was intended by this charge to direct the jury's attention to the witnesses for the defense, and ask for them charitable consideration of their testimony, the charge was both unjust to the defendant and unfair to the witnesses, in so far as such direction might imply that, without the exercise of that virtue by the jury, the disingenuous character of their testimony might be apparent. We find no error in these assignments, and the same are not sustained.

Assignments numbered 21, 26, 27, 32, 43, 48, 51, 52, 53, and 60 are next considered. These raise the question of the correctness of the court's refusal to give requested instructions numbered 15, 20, 21, 26, 37, 42, 45, 46, 47, and No. (c). The same questions are also presented by assignments numbered 76, 81, 82, 87, 97, 102, 105, 106, 106b. These requested instructions dealt with the subject of reasonable doubt, which was fully covered by the court in its general charge, and they sought to apply an abridged interpretation of the rule in cases of circumstantial evidence, which was not applicable to the facts in this case. Some of them seemed to place the burden upon defendant of establishing his innocence by putting the affirmative side of the rule of reasonable doubt, as, for instance: "No. 47. If every aspect of the evidence when duly weighed and considered supports a reasonable supposition that defendant is innocent, he must be acquitted;" which, we think, would have constituted error to have given. The court charged the jury fully on the subject of a reasonable doubt. The defendant got the full benefit of his right to have the jury informed upon this subject. He also had full benefit of the law of presumption of innocence. The charges requested could have produced no other effect than to confuse, perplex, and obscure the true principle

or law, so clearly expressed by the court in its general charge, couched in language often approved by this court. See *Brown v. State*, 46 Fla. 159, 35 So. 82; *Baker v. State*, 51 Fla. 1, 40 So. 673; *Lovett v. State*, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550; *McCoggle v. State*, 41 Fla. 525, 26 So. 734; *Cook v. State*, 46 Fla. 20, 35 So. 665; *Bass v. State*, 58 Fla. 1, 50 So. 531.

The refusal to give the sixteenth instruction requested is made the basis of the twenty-second and seventy-seventh assignments of error. The instruction directed the jury that when a state witness exhibited bias or ill will toward the defendant, or gave evidence which the jury did not believe, it was nevertheless their duty to "weigh the evidence of such witness in the light of such bias or ill will, and accord it such weight or credibility as they think it entitled to," etc. In many typewritten pages of high-sounding phrases and "learned talk" counsel undertake to demonstrate the correctness of the above charge from a standpoint of logic and the "canons and recognized forms of thought and reasoning." We think the charge is bad, because if the jury does not

believe the testimony of a witness because of his ill will or bias, or for other reason, then the jury is not required for any reason to give such testimony any credibility or weigh it at all. The court fully and correctly charged the jury as to its duty and privileges in the matter of weighing evidence and estimating the credibility of witnesses. There was no error in refusing this charge.

The twenty-eighth and eighty-eighth assignments of error are based upon the court's refusal to give instruction numbered 22, as requested by the defendant. This instruction directed the jury to acquit the defendant of murder, if they were reasonably satisfied that he did not have "understanding or intelligence to commit murder," by reason of being intoxicated. There

—bias of witness  
—effect.

are many reasons why this instruction was bad. In the first place, murder is divided into three degrees, and the charge takes no account of voluntary intoxication. In the second place, if the principle announced was correct, it would not be required of defendant to satisfy the jury that he was in such mental condition; it would be sufficient for acquittal if the evidence raised in the jury's minds a reasonable doubt as to the defendant's ability to entertain the necessary intent or design. There was no error in refusing this instruction.

The thirty-fourth, thirty-fifth, and eighty-ninth assignments of error are based upon charges numbered 28 and 29, requested by the defendant and refused. In the case of charge numbered 28, counsel admits that it is "universally condemned by the decisions of the Florida courts," but that the state of Alabama holds differently. As to the twenty-ninth requested instruction, counsel admit that it was substantially covered by the general charge. So there was no error in refusing these two instructions. The twenty-eighth charge sought to apply the doctrine of intoxication as an excuse for committing murder in the first degree to murder in all its degrees, and the twenty-ninth charge was upon the subject of a reasonable doubt.

Homicide—  
intoxication—  
effect on  
degree.

Requested instruction numbered 33 is made the basis of the thirty-ninth and ninety-third assignments of error. This charge informed the jury that they could not find the defendant guilty of murder or manslaughter unless they believed from the evidence beyond a reasonable doubt that he was guilty. The general charge covered the proposition.

Assignments of error numbered 36 and 90 attack the court's refusal to give charge numbered 30. In the brief, however, counsel discuss requested instruction numbered 34, the refusal to give which is made

the basis of assignments numbered 40 and 100. There was no error in the refusal to give either charge. No. 34 required acquittal if there was a probability of innocence, and No. 30 directed the jury to consider the good character of defendant for peace and quiet with all the other evidence, and, if there was a reasonable doubt of his guilt, to acquit him. The defendant's reputation for peace and quiet was not attacked nor put in issue. He was not even a witness in his own behalf, but the court's charge was full upon the law of presumption of innocence, reasonable doubt, and self-defense, although the latter charge was not applicable to the evidence.

The forty-first assignment of error and the ninety-fifth attack the court's ruling in refusing the thirty-fifth requested instruction. This was an instruction upon the subject of manslaughter which was fully covered in the general charge.

The fifty-seventh and one hundred and tenth assignments of error attack the refusal to give requested instruction numbered 64. This charge directed the jury to acquit the defendant if they believed that his mind, at the time of the killing of Mitchell, was in a state of settled frenzy or insanity, either permanent or intermittent, as distinguished from voluntary intoxication, and to such an extent as to dethrone reason and subdue his will and disable him from exercising the mental functions necessary to constitute murder in either degree of manslaughter. The court refused the charge upon the ground that it was covered in the general charge. Under assignment of error numbered 16, as discussed in this opinion, the charge there quoted, which was given by the court, we think fully states the law upon the subject. But other instructions, given at defendant's request, covered the same proposition of law, and those charges given by the court were even more favorable to the defendant than the one requested.

Under the fifty-eighth and one

hundred and eleventh assignments of error counsel for defendant insist that the court should have instructed the jury to acquit him. It is argued that there was no proof of venue. This position is without merit. There was evidence that the crime was committed at the home of Charlie Carter, and that he lived in Walton county. A picture of the house was made and identified by witnesses as the home of Carter and the place where the crime was committed.

The 112th, 113th, 114th, 115th, 116th, and 117th assignments of error raise the question of the sufficiency of the evidence to support the verdict. Although the bill of exceptions in this case does not conform to the rule, which requires a certificate that it contains all this evidence, and in fact purports to set forth only in substance the testimony of the witnesses, and by reason of such defect in the bill of exceptions the assignments of error based upon the contention that the evidence was insufficient to support the verdict would have to fail, we have, nevertheless, in view of the consideration heretofore mentioned,

**Evidence—  
sufficiency.** examined the evidence as shown by the bill of exceptions, and we are of the opinion that is amply sustains the verdict.

The assignments of error numbered 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, and 131 challenge the correctness of the court's charge to the jury in many particulars. It would be of no benefit to set out in this opinion the court's charge in full, nor to answer the criticisms of counsel. Arguments have been made in support of what to us appear impossible positions. For instance, complaint is made that the court erred in directing the jury that, if they believed from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree, they should find him guilty. Other equally clear and perfectly correct and sound propositions of law are

attacked and made the subject of assignments of error, and many pages of the brief devoted to their support. We have carefully examined the instructions given by the court upon its own motion, and, at the request of defendant's counsel, we have also examined the instruction requested and refused, and we have found no reversible error in any particular in the trial of this case. The record shows that the defendant was represented by able and resourceful counsel; that the jury was composed of fair and impartial men; that the judge was liberal in his rulings both in the admission and rejection of evidence and the instructions to the jury. The trial was without prejudicial error to the defendant in any of its phases, and the court's rulings were in no instance subject to the criticism that the strict rule of the law was invoked against the defendant. We have discovered no error in the record, so the judgment is affirmed.

Browne, Ch. J., and Taylor, Whitfield, and West, JJ., concur.

**Browne, Ch. J., concurring:**

I concur in the decision and opinion in this case, but wish to call attention to a remark by the court which, under a different condition of facts, would, in my opinion, be harmful error.

In the examination of one of the witnesses who gave his opinion as to the mental condition of the prisoner, this question was asked: "In your judgment, are you prepared to say that your brother was of unsound mind?"

In ruling upon an objection to this question, the court said: "Well, the value of it is for the jury, to judge from the nature and the conduct; you can let it go to the jury for what it is worth."

The use of expressions of this character by a trial judge in admitting testimony—"it can go to the jury for what it is worth"—is not to be commended. If the testimony is proper to be considered by the

jury, it should not go to them discredited by a slighting remark from the trial judge as to what it is worth. All testimony goes to the jury "for what it is worth," and trial judges should not select portions and submit them to the jury with this or similar discrediting remarks.

Mr. Justice Ellis has fully dis-

cussed the testimony of the witnesses relating to the sanity of the defendant, and this court holds that the testimony was not properly admitted; but, as it was permitted to go to the jury at the defendant's request, and was favorable to him, no harm was done the prisoner in this instance by the judge's remark.

### ANNOTATION.

#### **Drunkenness as affecting existence of elements essential to murder in second degree.**

- I. Introduction, 1052.
- II. View that drunkenness is immaterial, 1053.
- III. Cases holding that drunkenness may negative existence of essential elements, 1057.

##### *I. Introduction.*

The present annotation includes cases of voluntary intoxication only. It does not include cases dealing merely with such questions as the effect of drunkenness on provocation or self-defense, but treats rather of such effect independent of specific defenses. In other words, as is indicated in the title, the annotation purports to deal only with the effect of drunkenness on what are or may be the essential elements of second degree murder, such as malice and intent.

The question as to what degree of drunkenness is sufficient to constitute a defense on a prosecution for homicide is not considered in the annotation, it being assumed that the intoxication is such as might at least reduce murder from the first to the second degree.

Cases decided under the common law, which did not divide murder into degrees, or under statutes not creating degrees of murder, are obviously, from the title of the present annotation, not within its scope. Broad statements are sometimes made as to the effect of drunkenness to reduce homicide from murder to manslaughter; but these cases, of course, where there are no statutory degrees of murder, are not in point in the present annotation. Attention may, however, profitably be called in this connection to the fact that a general rule on the question,

where there are no statutory degrees of murder, can scarcely be laid down, because, if murder generally is defined by statute, the conclusion depends on the particular statute, and different results have been reached in different jurisdictions. Thus, there are decisions in some states, independent of statutory degrees of murder, to the effect that murder cannot be reduced to manslaughter by showing that the perpetrator was drunk. See *Rafferty v. People* (1872) 66 Ill. 118; *People v. Rogers* (1858) 18 N. Y. 9, 72 Am. Dec. 484; *Harris v. State* (1914) 74 Tex. Crim. Rep. 652, 169 S. W. 657; and *Truett v. State* (1914) 74 Tex. Crim. Rep. 284, 168 S. W. 523 (decided after amendment of law consolidating first and second degree murder).

Under the Oklahoma statute, however, defining homicide as murder "when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being," it is held that one who commits a homicide while so drunk as to be incapable of forming a premeditated design to kill, if he had formed no purpose to commit the crime prior to the time he became intoxicated, is not guilty of murder, but is guilty of manslaughter in the first degree. *Morris v. Territory* (1909) 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111; *Updike v. State* (1913) 9 Okla. Crim. Rep. 124, 130 Pac. 1107; *Cheadle v. State* (1915) 11 Okla. Crim. Rep. 566, L.R.A.1915E, 1031, 149 Pac. 919; *Perryman v. State* (1916) 12 Okla. Crim. Rep. 500, 159 Pac. 937; *Beshirs v. State* (1918) 14

**Okla.** *Crim. Rep.* 578, 174 *Pac.* 577; *Tubby v. State* (1919) 15 *Okla. Crim. Rep.* 496, 178 *Pac.* 491; *Chambers v. State* (1919) — *Okla. Crim. Rep.* —, 182 *Pac.* 714; *Collier v. State* (1920) — *Okla. Crim. Rep.* —, 186 *Pac.* 963. It is so held notwithstanding a statute in that state providing that no act committed by a person while in a state of voluntary intoxication shall be deemed the less criminal by reason of his having been in such condition.

And in Kentucky it has been held that evidence of drunkenness of the accused, in connection with other circumstances, is admissible as tending to show lack of malice, and so to reduce a homicide to manslaughter. *Shannahan v. Com.* (1871) 8 *Bush (Ky.)* 463, 8 *Am. Rep.* 465, overruling *Blimm v. Com.* (1870) 7 *Bush (Ky.)* 820, and *Smith v. Com.* (1864) 1 *Duv. (Ky.)* 224; *Nichols v. Com.* (1875) 11 *Bush (Ky.)* 575; *Buckhannon v. Com.* (1887) 86 *Ky.* 110, 5 *S. W.* 358 (the court saying that, as a deliberate intent to take life is an essential element of murder, drunkenness may be proved as bearing upon its existence or nonexistence); *Wilkerson v. Com.* (1888) 88 *Ky.* 29, 9 *S. W.* 836 (the court saying that evidence of intoxication is admissible as bearing on the existence or nonexistence of that deliberate intent essential to the crime of murder); *Madison v. Com.* (1891) 13 *Ky. L. Rep.* 313, 17 *S. W.* 164; *Rogers v. Com.* (1894) 96 *Ky.* 24, 27 *S. W.* 813; *Bishop v. Com.* (1901) 109 *Ky.* 553, 60 *S. W.* 190.

The cases cited above in jurisdictions where murder is not divided into degrees, or was not at the time of the decision, or, at least, where no reference is made to any statutory degrees of murder, are referred to merely for illustrative purposes, to show that different decisions have been reached in different states, and that the question depends largely on the statutory definition of murder.

While the holding or assumption in the case as to the elements or ingredients of murder in the second degree must be taken in consideration in determining the effect of the decision on the question under consideration, the

note, of course, is not concerned with the correctness or incorrectness of the holding or assumption in that regard.

*II. View that drunkenness is immaterial.*

The rule is well settled that drunkenness does not excuse a homicide. It is also well settled that drunkenness may be such as to reduce a homicide from first to second degree murder, because it may negative the existence of some of those elements essential to first degree murder. The question then arises whether drunkenness may be a defense to murder in the second degree and reduce the homicide to manslaughter, or some other criminal offense below murder. And this would seem to depend on the essentials under the statute defining second degree murder. It is said in 21 *Cyc.* 712, that at common law and under many statutes a homicide may be malicious, and hence be murder, although there was no actual design to take life. Malice, of course, may be implied under the common law. And many of the statutes defining second degree murder do not require a specific intent to kill. Eliminating such elements as provocation and self-defense, the rule appears to be that where implied malice is sufficient to constitute murder in the second degree, and a specific intent to kill is not required, the voluntary drunkenness of the accused at the time of committing the homicide is immaterial so far as that degree is concerned, and will not reduce the crime to manslaughter, or other crime of a lower degree than murder.

**Arkansas.**—*Byrd v. State* (1905) 76 *Ark.* 286, 88 *S. W.* 974; *Henslee v. State* (1910) 97 *Ark.* 103, 133 *S. W.* 172; see also *Chowning v. State* (1909) 91 *Ark.* 503, 121 *S. W.* 735, 18 *Ann. Cas.* 529 (distinguishing effect of drunkenness where crime is assault to kill and where it is second degree murder, on ground that in former intent is necessary).

**California.** — *People v. Nichol* (1867) 34 *Cal.* 211; *People v. Langton* (1885) 67 *Cal.* 427, 7 *Pac.* 843, 7 *Am. Crim. Rep.* 439; see also *People v. Conte* (1912) 17 *Cal. App.* 788, 122 *Pac.* 457 (where the court said that



intoxication could at most have reduced the offense to second degree murder); and *People v. Belencia* (1863) 21 Cal. 544, which quotes the rule.

**Connecticut.** — *State v. Johnson* (1874) 41 Conn. 584.

**Florida.**—*Garner v. State* (1891) 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *Thomas v. State* (1904) 47 Fla. 99, 36 So. 161; *HALL v. STATE* (reported herewith) ante, 1034.

**Iowa.**—*State v. Wilson* (1913) 166 Iowa, 309, 144 N. W. 47, 147 N. W. 739, citing *State v. Dorland* (1897) 103 Iowa, 169, 72 N. W. 492, as expressly recognizing the rule that, as bearing on second degree murder and manslaughter, intoxication is not material.

**New Jersey.** — *Wilson v. State* (1897) 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428.

**New Mexico.** — *State v. Cooley* (1914) 19 N. M. 91, 52 L.R.A.(N.S.) 230, 140 Pac. 1111.

**Oregon.**—*State v. Weaver* (1899) 35 Or. 415, 58 Pac. 109; *State v. Trapp* (1910) 56 Or. 588, 109 Pac. 1094; *State v. Morris* (1917) 83 Or. 429, 163 Pac. 567.

**Pennsylvania.** — *Com. v. M'Fall* (1794) Addison, 255; *Com. v. Perrier* (1858) 3 Phila. 229; *Com. v. Crozier* (1867) 1 Brewst. 349; *Com. v. Platt* (1876) 11 Phila. 415; *Com. v. Baker* (1876) 11 Phila. 631; see also, as implying rule, *Jones v. Com.* (1874) 75 Pa. 403, 1 Am. Crim. Rep. 262; *Com. v. Cleary* (1890) 135 Pa. 64, 8 L.R.A. 301, 19 Atl. 1017, later appeal in (1892) 148 Pa. 26, 23 Atl. 1110, and *Com. v. Detweiler* (1910) 229 Pa. 304, 78 Atl. 271.

**Tennessee.**—*Pirtle v. State* (1849) 9 Humph. 663; *Haile v. State* (1850) 11 Humph. 154; *Norfleet v. State* (1857) 4 Sneed, 340; *Atkins v. State* (1907) 119 Tenn. 458, 13 L.R.A.(N.S.) 1031, 105 S. W. 353; see also, as implying rule, *Cartwright v. State* (1881) 8 Lea, 376.

**Texas.**—*Colbath v. State* (1878) 4 Tex. App. 76; *Brown v. State* (1878) 4 Tex. App. 275; *McCarty v. State* (1878) 4 Tex. App. 461; *Gaitan v. State* (1882) 11 Tex. App. 544; *Hous-*

*ton v. State* (1883) 26 Tex. App. 657, 14 S. W. 352; *Clore v. State* (1888) 26 Tex. App. 624, 10 S. W. 242; *Evers v. State* (1892) 31 Tex. Crim. Rep. 318, 18 L.R.A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Hernandez v. State* (1893) 32 Tex. Crim. Rep. 271, 22 S. W. 972; *Tippett v. State* (1897) 37 Tex. Crim. Rep. 186, 39 S. W. 120; *Lyles v. State* (1912) 64 Tex. Crim. Rep. 621, 142 S. W. 592.

**Virginia.**—*Boswell v. Com.* (1871) 20 Gratt. 860 (approving rule); *Willis v. Com.* (1879) 32 Gratt. 929.

**West Virginia.**—*State v. Robinson* (1882) 20 W. Va. 713, 43 Am. Rep. 799.

**Wyoming.** — *Gustavenson v. State* (1902) 10 Wyo. 300, 68 Pac. 1006.

Proof of intoxication alone is no defense to the charge of murder in the second degree. *State v. Trapp* (Or.) supra. And it was held in this case that, where the conviction was of murder in the second degree, rulings of the trial court and instructions regarding the degree of intoxication of the accused, or its effect on his mind, were not prejudicial, there being no evidence tending to show insanity or any other condition than voluntary, immediate drunkenness.

Drunkenness cannot be taken into consideration in determining whether a party is guilty of murder in the second degree. *Haile v. State* (1850) 11 Humph. (Tenn.) 154.

Intoxication is a mere circumstance to be considered in determining whether premeditation is present or absent; what constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man. *Gustavenson v. State* (Wyo.) supra. And the court said this is so even when the intoxication is so extreme as to make a person unconscious of what he is doing, or to create a temporary insanity.

And in *Wilson v. State* (N. J.) supra, the court said that what constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man.

Also in *Byrd v. State* (1905) 76 Ark. 286, 88 S. W. 974, supra, the court

said: "No specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute, and the law is that 'the intention to drink may fully supply the plea of malice aforethought;' so that, if one voluntarily becomes too drunk to know what he is about, and then, without provocation, assaults and beats another to death, he commits murder, the same as if he was sober."

The rule was laid down in *Thomas v. State* (1904) 47 Fla. 99, 36 So. 161, that voluntary intoxication, not resulting in a fixed or settled frenzy or insanity, either permanent or intermittent, does not excuse or mitigate any degree of unlawful homicide below murder in the first degree.

And that the view that intoxication may negative the commission of murder in the first degree does not apply to murder in the other degrees, see the reported case (*HALL v. STATE*, ante, 1034).

It was said in *Tippett v. State* (1897) 37 Tex. Crim. Rep. 186, 39 S. W. 120, that all the authorities concur in holding that drunkenness produced by the recent use of intoxicating liquors is no defense to murder in the second degree.

"If anything is well settled in the law, it is that drunkenness is no defense for crime unless intent or knowledge is an essential element of the offense charged, and not then unless the accused was so drunk as to be incapable of entertaining the requisite intent or of possessing the requisite knowledge. . . . At the common law, degrees of murder were not recognized, and a specific intent to kill was not essential. Any killing with malice, either express or implied, without justification or excuse, was murder, and voluntary intoxication, however excessive, did not constitute a defense, nor did it excuse or mitigate the offense. . . . The unexplained killing of a human being with a deadly weapon is presumed to have been with malice and is murder in the second degree under the statutes of this state, and the burden of proof is on the state to raise the offense to murder

in the first degree. . . . To accomplish this, deliberation and premeditation with a specific intention to kill must be established. This being shown, intoxication furnishes no defense, but it may be proven as bearing on whether the accused in fact acted with deliberation, premeditation, or intent to kill. . . . As neither the specific intent to kill nor premeditation and deliberation are essential to constitute murder in the second degree or manslaughter, the court did not err in omitting reference to these offenses in the instructions given." *State v. Wilson* (1913) 166 Iowa, 309, 144 N. W. 47.

"While temporary insanity produced by the recent use of intoxicating liquors may be considered in passing on whether one is guilty of murder in the first or second degree, yet it cannot be considered in fixing the grade of offense in any other instance." *Lyles v. State* (1912) 64 Tex. Crim. Rep. 621, 142 S. W. 592. And it was said that the trial court did not err in instructing the jury that temporary insanity produced by intoxicants might be considered in determining the punishment, but could not be considered in determining whether or not the defendant was guilty of murder in the second degree, assault to murder, or aggravated assault.

Voluntary drunkenness even to the extent of stupefaction or unconsciousness is not a defense to murder in the second degree. *Com. v. Platt* (1876) 11 Phila. (Pa.) 415.

The rule has been said in some cases to be that, as between murder in the second degree and manslaughter, the drunkenness of the defendant can form no legitimate subject of inquiry. *People v. Nichol* (1867) 34 Cal. 211; *People v. Langton* (1885) 67 Cal. 427, 7 Pac. 843, 7 Am. Crim. Rep. 439; *Wilson v. State* (1897) 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; *State v. Cooley* (1914) 19 N. M. 91, 52 L.R.A. (N.S.) 230, 140 Pac. 1111; *Pirtle v. State* (1849) 9 Humph. (Tenn.) 663; *Atkins v. State* (1907) 119 Tenn. 458, 13 L.R.A. (N.S.) 1031, 105 S. W. 353; *Boswell v. Com.* (1871) 20 Gratt. (Va.) 860 (approving rule); *State v.*

Robinson (1882) 20 W. Va. 713, 43 Am. Rep. 799; see also *People v. Belencia* (1863) 21 Cal. 544, which quotes the rule.

In *State v. Cooley* (1914) 19 N. M. 91, 52 L.R.A. (N.S.) 230, 140 Pac. 1111, supra, the court, after laying down the rule that between the two offenses, murder in the second degree and voluntary manslaughter, the drunkenness of the offender forms no legitimate matter of inquiry, said that if the killing was unlawful and voluntary, and without deliberate premeditation, the offense was murder in the second degree, malice being implied, unless the provocation were of such a character as would reduce the crime to voluntary manslaughter, for which offense a drunken man was equally responsible as a sober one.

Also in *State v. Robinson* (1882) 20 W. Va. 713, 43 Am. Rep. 799, supra, the court said: "We think we are fully authorized under the authorities to say that drunkenness is no excuse for crime; at common law the implied malice from his act would doom him to the scaffold, although he was too drunk, when he committed the deed, to harbor express malice. Now the only change made in the stringent rule of the common law is, that where, under a statute, in order to constitute murder in the first degree, deliberation and premeditation are required, upon the question of whether there was on the part of the prisoner deliberation and premeditation, the jury may consider the fact that he was intoxicated at the time of the killing. The change goes no further. Upon the question of whether the prisoner is guilty of murder in the second degree or manslaughter, the jury are not permitted to consider the drunkenness of the prisoner at all."

And in the syllabus by the court in *Garner v. State* (1891) 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835, it is held that as between murder in any degree below the first and manslaughter, intoxication plays no part; that the only purpose for which it is admissible is to show an absence of a premeditated design to kill, or that the killing was not murder in the first degree; and

that the only effect of proof of intoxication rendering the accused incapable of forming or entertaining such design is to reduce the killing to murder of the second or third degree, according to the circumstances.

In *State v. Johnson* (1874) 41 Conn. 584, the court said that murder in the second degree rested on implied malice; that malice may be implied from the circumstances of the homicide; and if a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury is warranted in finding the existence of malice, although no express malice is proved; that intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and altogether affords sufficient grounds for implying malice; and that intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied.

Since intoxication does not of itself, as matter of law, reduce the homicide from murder in the first to the second degree, it will not, of course, as matter of law, reduce it to manslaughter. *State v. Johnson* (1873) 40 Conn. 136.

Drunkenness is not a defense to manslaughter where this crime involves no specific intent. *Laws v. State* (1905) 144 Ala. 118, 42 So. 40. The court said that the most that could be claimed was that the fact of excessive drunkenness was sometimes admissible to reduce the grade of the crime when the question of intent, malice, or premeditation was involved; that as manslaughter did not involve a specific intent, drunkenness was no defense, and all the charges predicated the defendant's acquittal upon his drunken condition were properly refused.

*State v. Powell* (1844) 1 Ohio Dec. Reprint, 38, does not seem to be in accord with the authorities cited under III, infra, where a specific intent to kill was necessary, the court instructing the jury that, to constitute murder in the second degree, there must be an actual intention to kill, and that the intoxication of the ac-

cused could not be taken into consideration by the jury for the purpose of determining whether he intended to kill the deceased.

*III. Cases holding that drunkenness may negative existence of essential elements.*

If a specific intent to take life is required to constitute murder even in the second degree, drunkenness of the accused may be such as to reduce the crime from murder to manslaughter. Thus, there are a number of Alabama cases which apparently assume that an intention to take life is essential to murder even in the second degree, but not setting out the statute, to the effect that drunkenness on the part of the accused at the time of committing the homicide may reduce the offense from murder to manslaughter, if it is shown to have been so excessive as to render him incapable of forming the design to take life. *Williams v. State* (1886) 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179, 7 Am. Crim. Rep. 443; *Morrison v. State* (1887) 84 Ala. 405, 4 So. 402; *Cleveland v. State* (1888) 86 Ala. 1, 5 So. 426; *King v. State* (1890) 90 Ala. 612, 8 So. 856; *Springfield v. State* (1892) 96 Ala. 81, 38 Am. St. Rep. 85, 11 So. 250; *Heninburg v. State* (1907) 151 Ala. 26, 43 So. 959; *Hill v. State* (1913) 9 Ala. App. 7, 64 So. 163.

It was said in *Morrison v. State* (1887) 84 Ala. 405, 4 So. 402, *supra*, that "the theory on which drunkenness may sometimes reduce a homicide from murder to manslaughter is, that it may so cloud the mind, so obscure the reasoning powers, as to satisfy the jury that the perpetrator could not have formed the design to take life. This, it is said, repels the idea that there was a preconceived purpose to kill. The drunkenness, however, to produce this mitigating effect, must be such as to render the accused incapable of forming or entertaining a specific intention; of premeditation, or deliberation."

In *Heninburg v. State* (1907) 151 Ala. 26, 43 So. 959, *supra*, the court stated that the law was too well settled to admit of question that drunkenness may never excuse or justify homicide; yet, when it exists to the degree that it renders the person in-

capable of entertaining malice or of forming an intent to kill, it may reduce the homicide from murder to manslaughter

And in *State v. Corrivau* (1904) 93 Minn. 38, 100 N. W. 688, the court approved instructions that if the defendant was so intoxicated at the time of the killing as to be incapable of entertaining a premeditated design to effect the death of the deceased, he could not be convicted of murder in the first degree; and that if he was so intoxicated that he was incapable of entertaining any design to kill the deceased, he could not be convicted of murder in the second degree, and that such a finding would reduce the offense to first degree manslaughter. The court said these instructions were in strict accord with the provisions of the Penal Code that whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act.

In *Smith v. State* (1876) 4 Neb. 277, the court held that requested instructions should have been given to the effect that if the jury believed that, at the time of the killing, the accused was intoxicated, they might consider this fact to rebut the idea that it was done in the cool and deliberate state of mind necessary to constitute first degree murder; and that unless they were satisfied beyond a reasonable doubt that the accused, at the time of the killing, was in such a state of mind that he could form an intention maliciously to kill, and did form such intention, they could not convict him of a higher crime than manslaughter.

The rule that where intent to kill is an essential ingredient in second degree murder the intoxication of the accused may be such as to reduce the homicide to a lower degree is implied in *Davis v. State* (1874) 25 Ohio St. 369, where the court approved instructions to the effect that drunkenness not amounting to insanity is of little weight as applicable to the crime of

murder in the second degree, unless it exists to an extent which shows that the accused was, at the time, incapable of forming a purpose, or that he did not intend the act he did, or unless it caused or was connected with a sudden quarrel, so as to make the act manslaughter. The court cited as holding substantially to this effect the case of *Nichols v. State* (1858) 8 Ohio St. 435. In the latter case it was said that both in first and second degree murder, as defined by the statute of that state, the intent to kill is an essential ingredient of the crime; that the killing must be "purposely" done.

And the use of the word "purposely" in the Kansas statute defining second degree murder has been held to imply the existence of an intention to cause death; hence, if drunkenness is so extreme as to prevent the existence of an intention to kill, it may reduce a homicide from murder to manslaughter. *State v. Rumble* (1909) 81 Kan. 16, 25 L.R.A. (N.S.) 376, 105 Pac. 1. The court said: "If a person is too drunk to form an intent to kill, he cannot be guilty of any offense for the commission of which such intent is necessary. . . . At common law murder may be committed without any

actual design to take life . . . and therefore drunkenness can be no defense to that charge. . . . Under some statutes which divide murder into degrees, an involuntary homicide may be murder in the second degree. . . . But in *State v. Young* (1895) 55 Kan. 355, 40 Pac. 659, it was held, following the Ohio decisions, that the use of the word 'purposely' in defining second degree murder implies the existence of an intention to cause death; and this is the interpretation elsewhere placed upon that language. . . . It necessarily follows that drunkenness so extreme as to prevent the forming of a purpose to kill might, under our statute, reduce what would have been murder at the common law to manslaughter, and in a proper case instructions to that effect should be given. . . . It is to be borne in mind, however, that 'the fact of intoxication, no matter how complete and overpowering, is not conclusive evidence of the absence of an intent to take life.'" And the court referred to the doctrine as stated in another case in the same state that "for a person to be too drunk to entertain an intent to kill, it would seem that he would have to be too drunk to entertain an intent to shoot."

R. E. H.

### BIDWELL COAL COMPANY, Appt.,

v.

### FLORA DAVIDSON.

*Iowa Supreme Court—November 15, 1919.*

(— Iowa, —, 174 N. W. 592.)

#### **Workmen's compensation — who is employee — shot firer in mine.**

1. A shot firer in a mine, who under agreement between the miners and the owner may be designated and discharged by the miners, and who is paid by deductions from the ton rate allowed the miners for doing the work, is an employee of the owner so as to be entitled, in case of injury, to compensation under the Workmen's Compensation Act.

[See note on this question beginning on page 1064.]

#### **— liberal construction of statute.**

2. A workmen's compensation act is to be liberally construed so as to bring alleged injuries within its spirit rather than within its letter.

#### **— finding of commissioners — how far binding on court.**

3. A finding of the commissioners

that an injured person was not an employee of the one from whom compensation is sought under the Workmen's Compensation Act, being jurisdictional, is not binding on the court on appeal.

**APPEAL by defendant from a judgment of the District Court for Wapello County (Vermillion, J.) in favor of plaintiff in an action brought, under the Workmen's Compensation Act, to recover compensation for injury, resulting in death of her husband, while in the employ of defendant. Affirmed.**

**Statement by Gaynor, J.:**

Action to recover compensation under the Workmen's Compensation Act. The commissioner refused to allow compensation on the theory that the deceased was not an employee of the company at the time he received his injuries. On appeal to the district court a different conclusion was reached. Appeal was taken to this court from the action of the district court, and this is affirmed.

**Messrs. Stipp, Perry, Bannister, & Starzinger, for appellant:**

The finding of facts made by the board of arbitration and industrial commissioner are final and cannot be appealed from.

*Griffith v. Cole Bros.* 183 Iowa, 415, L.R.A.1918F, 923, 165 N. W. 577, 15 N. C. C. A. 674; *Pace v. Appanoose County*, — Iowa, —, 168 N. W. 916, 17 N. C. C. A. 682; *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; *Pigeon's Case*, 216 Mass. 51, 102 N. E. 982, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; *La Veck v. Parke, D. & Co.* 190 Mich. 604, L.R.A.1916D, 1277, 157 N. W. 72; *Dale v. Saunders Bros.* 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721.

Under the Compensation Act, the defendant company is obligated to pay compensation only to its own employees.

*Pace v. Appanoose County*, — Iowa, —, 168 N. W. 916, 17 N. C. C. A. 682.

Whether Davidson was the employee of appellant depends on some or all of the following four facts: (1) Who selected or hired him as shot firer. (2) Who paid him as shot firer. (3) Who had power to discharge him as shot firer. (4) Who controlled him as to the details of the manner in which he did his work.

1 *Labatt, Mast. & S.* pp. 56, 60, 66, 68; *Brown v. Industrial Acci. Commission*, 174 Cal. 457, 163 Pac. 664; *Pace v. Appanoose County*, — Iowa, —, 168 N. W. 916, 17 N. C. C. A. 682.

**Messrs. John T. Clarkson, Fred C. Huebner, and John W. Lewis, for appellee:**

In construing a statute, the rule is to liberally construe the act so as to bring the case within the spirit rather than the letter of the law.

*Rural Independent School Dist. v. New Independent School Dist.* 120 Iowa, 119, 94 N. W. 284.

The Compensation Law should be liberally construed.

*Brien v. Wisconsin Pub. Service Co.* 166 Wis. 24, 163 N. W. 182; *Rish v. Iowa Portland Cement Co.* — Iowa, —, 170 N. W. 532; *State ex rel. Virginia & R. Lake Co. v. District Ct.* 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

Benjamin Davidson was an employee of the defendant company at the time he sustained the injury which caused his death.

*Hitchcock v. Arctic Creamery Co.* 170 Iowa, 368, 150 N. W. 727; *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. Rep. 377, 102 N. W. 838, 4 Ann. Cas. 441, 18 Am. Neg. Rep. 71; *Princeton Coal Min. Co. v. Downer*, 48 Ind. App. 136, 93 N. E. 1009; *McAllister v. National Fire-Proofing Co.* Ohio Ind. Comm. Dec. No. 83, Aug. 31, 1914; *Employers' Indemnity Co. v. Kelly Coal Co.* 156 Ky. 74, 49 L.R.A.(N.S.) 850, 160 S. W. 914; *Interstate Coal Co. v. Trivett*, 155 Ky. 795, 160 S. W. 731; *Curvin v. Grimes*, 132 Ky. 555, 116 S. W. 725; *Harris v. McNamara*, 97 Ala. 181, 12 So. 103; *Potorff v. Fidelity Coal Min. Co.* 86 Kan. 774, 122 Pac. 120; *M'Cready v. Dunlop*, 2 F. 1027, 37 Scot. L. R. 779, 8 Scot. L. T. 91; *State ex rel. Virginia & R. Lake Co. v. District Ct.* 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Yolo Water & Power Co. v. Industrial Acci. Commission*, 35 Cal. App. 14, 168 Pac. 1146; *State ex rel. Nienaber v. District Ct.* 138 Minn. 416, L.R.A.1918F, 200, 165 N. W. 268; *Brown v. Industrial Acci. Commission*, 174 Cal. 457, 163 Pac. 664; *Claremont Country Club v. Industrial Acci. Commission*, 174 Cal. 395, L.R.A.1918F, 177, 163 Pac. 209; *Tuttle v. Embury-Martin Lumber Co.* 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664; *Winn v. Anthon*, 179 Iowa, 620, 161 N. W. 642; *De Noyer v.*

Cavanaugh, 221 N. Y. 273, 116 N. E. 992; *White v. George A. Fuller Co.* 226 Mass. 1, 114 N. E. 829.

The court may determine whether or not the board of arbitration or Iowa industrial commissioner arrived at the correct conclusion after applying the law to the facts.

*Columbia School Supply Co. v. Lewis*, 68 Ind. App. 386, 115 N. E. 103; *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, L.R.A.1916A, 369, 142 N. W. 271, Ann. Cas. 1915B, 877.

Gaynor, J., delivered the opinion of the court:

This case arises under the Workmen's Compensation Act (Code Supp. 1913, §§ 2477m to 2477m51). The plaintiff is the widow of one Ben Davidson. She claims that her husband was killed while in the employ of the defendant company. She claims, and the fact appears to be, that the defendant company is a corporation organized under the laws of this state and engaged in the business of mining, selling, and shipping coal, and was so engaged on and prior to the date on which Ben Davidson sustained the injuries that caused his death. Defendant company has a large number of men employed in its mine whose regular work is the mining of coal. The mining is not done by picks. Holes are drilled in the solid face. These holes are charged with powder and tamped, leaving a fuse extending from the mouth of the hole back to the charge. These fuses are lighted and followed by a blast which loosens the coal preparatory to being loaded in the mine car. After the blast the coal is gathered and loaded into cars by the miners. We need not enter into any detailed statement of this work. The drilling of the holes, charging the same with powder, tamping and placing the fuse, and loading the coal are all necessary to the work of securing the coal for the market, for which the company agrees to pay a stipulated sum per ton. After the holes are prepared by the miner in charge of the work, they are examined by what is called a shot examiner, for

the purpose of ascertaining whether they are of the proper depth and properly located so that they can be discharged with safety, not only to the operator's property, but to the miners as well. The statute requires the company to furnish the examiner, and he must be qualified for that purpose. The shot may be fired by the miner in charge of the work, or by a shot firer selected for that purpose. After the holes have been prepared and examined by the examiner, the miner or the shot firer lights the fuse, to the end that the coal may be blasted from the face of the mine.

It is conceded that the examiner is employed and paid by the company. He is under the control and direction of the company. The contention here is that the shot firer is not an employee of the company, but is selected and controlled and paid by the miners themselves, and that it is his duty, as firer, to do that part of the work which the miner himself might do, and which it was his duty to do in the absence of a shot firer. It appears that prior to the time Ben Davidson was killed, one Medford had been employed by this company as shot examiner, and had been designated by the miners as the proper person to act in the capacity of shot firer, and acted in both capacities up to a certain date, when he left. Thereupon, with the knowledge and consent of both parties (the miners and the company), Ben Davidson took his place and acted in the capacity of shot examiner and shot firer. We do not find in the record any evidence of any specific employment of Davidson as shot firer. He acted as shot examiner with the knowledge and consent of the company. It was the duty of the company to furnish a shot examiner. The company accepted him to perform that work and discharge that duty. As said before, though there was no specific evidence that Davidson was employed by anyone as shot firer, he discharged that duty with the full knowledge of the company, and was discharging that

duty at the time he was killed, and, we take it, was killed while discharging the duty of shot firer. The work of shot examiner precedes that of the shot firer and takes some time. After the work of examining is completed by the shot examiner, the shot firer follows, lighting each fuse as the same is prepared for that purpose. Where the same person acts as shot examiner and shot firer, he first proceeds with the examination, and when that is completed, and after the miners have all left, lights the fuses to blast the coal from the solid. Davidson had only been working about two days when he was injured. He had been a miner before that time, and had worked in this same mine. He was discharging this double duty, and had completed his work as examiner before he began the firing. He had already fired some of the shots in the mine when the explosion occurred which caused his death.

The following stipulation was entered into between the parties at the time of the submission of the cause to the industrial commissioner:

"(1) Benjamin Davidson sustained an injury which caused his death in the defendant coal company's mine, which occurred on or about September 6, 1916.

"(2) That the defendant company owned and operated the mine in or near the village of Bidwell, Wapello county, Iowa, being the mine in which Benjamin Davidson sustained the injury which caused his death.

"(3) That the defendant company was operating under the Workmen's Compensation Law, on and prior to September 6, 1916.

"(4) That Benjamin Davidson came to his death on said date in said mine in the course of, and growing out of, his employment of shooting down coal.

"(5) That Flora Davidson is the surviving widow of Benjamin Davidson, and is the dependent of decedent, Benjamin Davidson.

"(6) That exhibit A is the agreement between the miners and coal

operators of Iowa, being an agreement between the members of the Coal Operators' Association on one part, and the members of District 13, U. M. W. of A., on the other part.

"(7) That Benjamin Davidson was a member of local union No. 3,039 in good standing, at Bidwell, Iowa, which local union was a constituent part of District 13, U. M. W. of A., under which agreement the said Benjamin Davidson, as a member of said local union, was working on September 6, 1916.

"(8) That on the said date, to wit, September 6, 1916, the Bidwell Coal Company was a member of the Iowa Coal Operators' Association and working under said agreement."

Under this stipulation but one question remains open for consideration: Was Ben Davidson an employee of the defendant company at the time he received his injuries?

At the time he received his injuries, he was acting in the capacity of shot firer. The exhibit A referred to in the stipulation is what is known as the "Des Moines Agreement," an agreement between the coal operators and coal miners, which contains, among other things, the following: "Whenever a majority of miners in any mine so decide, they may employ a shot firer for said mine, and whenever satisfactory arrangements can be made between the miners and the shot examiner for the same person to act as shot examiner and shot firer, the same may be done."

As said before, the state law requires the coal company to employ a shot examiner, but it does not require them to employ a shot firer. At least, this duty is not imposed by the statute. It grew to be a custom in mines to select as shot firer the one appointed by the company as shot examiner. A shot examiner was required to have a certificate of qualification, and we take it that it was thought to be safer for all that a qualified man should act in the dual capacity. But this was not imperative. The miners had a right,



under this agreement, to designate and select any other person as shot firer if they so wished. While it does not appear affirmatively in this case that the miners selected Davidson, yet he was acting as shot firer with the knowledge and consent of the miners and the operators. He had succeeded to the work of Medford both as shot firer and shot examiner, and was discharging this double duty. It appears that the miners have not only the right to select the shot firer, but have the right also to discharge him. On complaint to the state inspector, however, the company may secure his removal if he is shown not to be qualified or competent for the work. Davidson was paid by the company as shot examiner. He was paid as shot firer in the following way: It was assumed, and probably is true, that the duty of firing the shot rested on the miner, and was included in the work necessary to be done in mining the coal, for which the operator allowed so much per ton. Both parties, assuming, however, that it would be better to have one person do the firing than to have each miner discharge his own shot, entered into an agreement by which the company deducted from the amount allowed per ton a certain sum to be, and which was, paid to the local union to compensate the shot firer for his work. This was paid by it to the shot firer. That is, the company did not pay to the miner the full sum per ton which the agreement called for, because of the fact that the miner did not discharge his own shots, and another was employed, by mutual consent, to do that work which the miner ordinarily was called upon to do, in order to earn the sum allowed for mining a ton. The company therefore deducted from the sum per ton allowed for the completed work a sufficient amount to meet the demands of the shot firer. What is the situation then?

This company was engaged in mining coal for the market. Its business was to get this coal out of

the ground and upon the market. To this end it employed men to bring the coal from the ground that the company might place it upon the market. Every act in the mine in the way of getting this coal to the surface of the ground was done in the service of the company, and to effectuate the purpose for which the company was organized, and to make profitable to the company the work it had undertaken. The boring of these holes in the face of the mine, preparing the blast, and tamping the hole were all work done in furtherance of that purpose. The examining and the firing were all done with one end in view, to wit, to secure coal for the market. Had the miner who bored the hole, charged it with powder, and tamped it, lit the fuse to the blast, he would be clearly in the line of his employment, and clearly working as an employee in the service of the company. If he was injured or killed while so engaged, compensation should be made under the Workmen's Compensation Act. However, the company delegated to the miners the right to select one man to discharge this specific duty. This duty, when discharged, was discharged in the interests of the company. The agreement between the company and the miners was that the miners might designate or select a person to do this firing instead of doing it themselves. The company was not willing, however, to pay the miner the full amount per ton which he was entitled to under his contract, unless he did the firing which was a part of that work. It was not willing to pay the miner the full price for mining a ton while another was employed and paid for doing a part of the work. So it was agreed that the company should deduct a sum per ton from what it had agreed to pay per ton for the completed work, and pay this to the one who did this part of the work. The miners and the company agreed that this sum should be paid by the company to the man who did this particular work for the company.

So we find that the shot firer was in fact paid by the company. In the bookkeeping of the company it would appear that the full sum per ton agreed to be paid was allowed to the miner for mining the coal, and that the miner, out of this sum, paid the shot firer. That, however, is a mere matter of housekeeping. The real purpose and intent of the agreement was that the miner should not receive the full price per ton for mining, while another was doing part of the work essential to be done in order to procure the ton for which the compensation was allowable; that the company should pay to the one who did part of the work a portion of the sum which it had agreed to pay per ton for mining the coal.

It is next contended that the deceased was not an employee of the defendant for the reason that he was not under the control of the company; that he was employed by, and the power to discharge him rested in, the miners themselves, and not in the company.

It is true, as a general proposition, and we think the record shows it was so understood in conferences between the miners and the company, that the management of the mine and the direction of the mine are vested exclusively in the operators of the mine, and that the miners have no right to abridge this right. The selection of a shot firer was given by the company to the miners in the mine, and it is said that whenever a majority of the miners in any mine decide to do so, they may select the shot firers for the mine. That is, the company, having authority to select its own employees, delegated to the miners the right to select certain persons to do certain work in the mine. The work to be done in the mine was for the use and benefit of the mine owners. The power to select the workmen rests originally and primarily in the owners. They may delegate that right to select to another. The selection made under this delegated power is the selection of the mine operators themselves. Ordinarily,

the mine owners have a right to control the action of their employees and discharge them if thought proper. The law gives them this right. They may delegate to the miners themselves a right to select the shot firer. The miners are peculiarly interested in this selection. They are in a position to judge of the character of the man employed. Their work and their personal safety are involved in the selection. They designate a person. The person designated is satisfactory to the operators of the mine, and they consent that the person selected perform this work in the mine. The work is performed for the company, in the interests of the company, and for the advancement of the very purpose for which the company is organized. The company may delegate the right to supervise the person selected, and the right to discharge him whenever his conduct imperils the safety of the miners. In this, too, the miners act under delegated power from the owner. When the company delegates this power to the miners and they act, make the selection, the act of selecting becomes the act of the mine owners themselves. We think here the most that can be said of the arrangement between the miners and the operators was that the operators had delegated this right to the miners.

This thing is clear: This man was working in the mine, doing work for the company in the mine, with the knowledge and consent of the company, and for the purpose of more effectually carrying on the work in which the operators were engaged. He was engaged at the time he was injured in performing an indispensable part of the mining operations carried on in the mine. He was doing a part of the business of mining for which miners were directly employed. The appellant knew that he was doing this work for them. If he had been employed directly by the company as shot firer, the liability of the company would be apparent under the Work-

men's Compensation Act. The fact that they had delegated to the miners the right to select him to do this particular work, indispensable to a proper carrying on of the work, does not change the relationship.

The statute is to be liberally construed so as to get it within the spirit, rather than with-

**Workmen's  
Compensation  
—liberal  
construction of  
statute.**

in the letter of the law. See *Brien v. Wisconsin Pub. Service Co.* 166 Wis.

24, 163 N. W. 182.

In construing the provisions of the Compensation Law the court is bound, not to a narrow, technical construction, but rather to a broad and liberal construction to make effectual the very purposes for which the law was passed. *Rish v. Iowa Portland Cement Co.* — Iowa, —, 170 N. W. 532; *State ex rel. Virginia & R. Lake Co.* 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

We think § 2477m16, Supplement Code 1913, is peculiarly applicable to the facts of this case. As bearing upon this question, see *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. Rep. 377, 102 N. W. 833, 4 Ann. Cas. 441; *Hitchcock v. Arctic Creamery Co.* 170 Iowa, 368, 150 N. W. 727.

We reach the conclusion, therefore, that Ben Davidson was an employee of the defendant company at the time he received his injuries; that this fact brought

**—who is em-  
ployee—shot  
firer in mine.**

the case within the purview of the Workmen's Compensation Act, and that the commissioner erred in finding to the contrary.

It is argued in this case that we are bound by the fact finding of the board of arbitration, and the finding of the commissioner on review.

It is true as to disputed facts which do not go to the jurisdiction we are bound by the finding of the commissioner, but where the only question presented is whether or not the jurisdictional fact exists, entitling the person to be heard before the

**—finding of  
commissioners  
—how far bind-  
ing on court.**

commissioner, we have a right to review the action of the commissioner even to the extent of finding the fact to be other than the commissioner found it. Upon this point see *Griffith v. Cole Bros.* 183 Iowa, 415, L.R.A.1918F, 923, 165 N. W. 577, 15 N. C. C. A. 674, and cases therein cited.

The district court from which appeal was taken found as a matter of fact that the deceased was an employee of the defendant at the time he received his injuries. It is stipulated in the agreement, hereinbefore set out, that the injury grew out of and was received in the course of his employment. We agree with the District Court in its finding. Its action is therefore affirmed.

Ladd, Ch. J., and Weaver and Stevens, JJ., concur.

## ANNOTATION.

**Workmen's compensation: workman representing employees, or public.**

As indicated by the title, this note deals with the question whether a workman selected or paid by other employees, or who represents the public, as, for example, one serving as an inspector in a packing house in pursuance of a statute, is an employee of the owner of the plant within the meaning of the Workmen's Compensation Acts.

Such a situation obviously gives rise to ground for argument in the nega-

tive, and no doubt cases may arise in the future where negative decisions will be justified. In considering the question, however, the legislature's purpose in enacting the Workmen's Compensation Acts should be borne in mind, and a liberal construction in accord with such purpose should be given to them.

It will be observed that in the reported case (*BIDWELL COAL CO. v. DAVIDSON*, ante, 1058) a short firer in

a mine, who under an agreement between the miners and the mine owners could be designated and discharged by the miners, and who was paid by a deduction from the ton rate allowed to the miners for doing the work, on the theory that the shot firing was a part of the miners' work, was held an employee of the mine owner within the meaning of the Workmen's Compensation Act. It appears in the case that the mine owner was required by statute to employ a qualified shot examiner, and that in pursuance of a custom the shot examiner was also the shot firer. This fact was apparently considered by the court in reaching its conclusion.

There is as yet little authority on the question under annotation, but one other case bearing thereon having been disclosed.

In *Simpson v. Ebbw Vale Steel, Iron, & Coal Co.* [1905] 1 K. B. (Eng.) 453, one appointed manager of a mine, in pursuance of an act providing that "every mine shall be under a manager who shall be responsible for the control, management, and direction of the mine," who received a salary of \$400 per year, and house rent and coal, and was required to do no manual labor, was held not a "workman" within the meaning of the Workmen's Compensation Act, so that no recovery could be had thereunder for his death, which occurred while he was in the mine in the capacity of manager for the purpose of inspecting a fall of the roof in one of the workings. Discussing the meaning of "workman," as used in the act, Collins, M.R., said: "Where then is the limit to be drawn? In my opinion it should be so drawn as to embrace the classes whose remuneration can properly be described as wages. The popular

meaning must be given to a definition where we are confronted with such an expression as 'wages,' and we must interpret the act as applying to persons whom *ex hypothesi* the legislature regards as not being in a position to protect themselves. None of these considerations apply to the case of a person holding the position of a certificated manager of a colliery, who comes within a very different category from that of an ordinary workman. I do not say that a person in the position of the deceased is absolutely excluded from the possibility of coming within the act, for it is possible that such a man might in fact work as a workman, though I do not know that such a contingency is at all probable; there might, however, be facts in a particular case from which the conclusion might be drawn that, although the man was a certificated manager, he was also a workman. So far as the facts have been found in the present case, the learned county judge has found that he was not a workman, and the highest at which the appellant's case can be put is that there might be evidence that he was, although there is strong evidence that he was not. The county court judge was not bound to come to a conclusion contrary to common sense, and there was abundant evidence that the deceased was not within what the act intended by the word 'workman.' It is impossible to lay down any absolute line, or to say that a judge must direct himself as to the line within which a man is a workman, so as to debar him from finding that, although the employment comes within the terms of the definition clause, the man is not to be taken as a workman when all the circumstances of the case are considered."

J. T. W.

ROBERT R. KEININGHAM, Appt.,

v.

JOHN D. BLAKE, Local Registrar of Vital Statistics.

*Maryland Court of Appeals — December 9, 1919.*

(— Md. —, 109 Atl. 65.)

**Physician — right of osteopath to furnish birth and death certificates.**

1. An osteopath is not a physician entitled to register with the registrar of vital statistics and to furnish him certificates of birth and death, where the statute relating to osteopathy provides that it shall not authorize an officer to accept from the osteopathic practitioner any birth or death certificate.

[See note on this question beginning on page 1070.]

**Constitutional law — presumption in favor of constitutionality of statute.**

2. All reasonable presumptions must be made in favor of the constitutionality of a provision of a health law denying osteopaths the right to furnish birth and death certificates, which physicians are permitted to do.

[See 6 R. C. L. 97 et seq.]

**— classification — osteopath and physician.**

3. A separate classification of osteopaths and regular physicians is not so unreasonable as to be unconstitutional.

[See 6 R. C. L. 378.]

**— denial of right to osteopath.**

4. No constitutional right of osteopaths is infringed by denying them the right to furnish birth and death certificates, when providing for licensing them as practitioners of osteopathy.

**Health — collection of vital certificates — denial of right to furnish.**

5. The legislature may determine the method to be employed in obtaining vital statistics for the use of the public, and no one can complain of being denied constitutional rights because he is not authorized to furnish them.

**APPEAL** by petitioner from an order of the Superior Court of Baltimore City (Bond, J.) dismissing a petition for a writ of mandamus to compel respondent to register him as a physician entitled to file certificates of births and deaths. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Baum & Sykes, for appellant:

Both the legal and popular meaning of the word "physician" includes an osteopath.

Harrison v. State, 102 Ala. 170, 15 So. 563; People ex rel. Gage v. Siman, 278 Ill. 256, 115 N. E. 817; Bragg v. State, 134 Ala. 173, 58 L.R.A. 925, 32 So. 767; State v. Schmidt, 138 Wis. 53, 119 N. W. 647; State v. Yates, 145 Iowa, 332, 124 N. W. 174; People v. Allcutt, 117 App. Div. 546, 102 N. Y. Supp. 678; State v. Beck, 21 R. I. 288, 45 L.R.A. 269, 43 Atl. 366; Whitlock v. Com. 89 Va. 337, 15 S. E. 893; Richardson v. State, 47 Ark. 562, 2 S. W. 187; People v. Gordon, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858, 15 Am. Crim. Rep. 540; State v. Zechman, 157 Iowa,

158, 138 N. W. 387; State v. Miller, 146 Iowa, 521, 124 N. W. 167; Com. v. Zimmerman, 221 Mass. 184, 108 N. E. 893, Ann. Cas. 1916A, 858; Medical Examiners v. Freenor, 47 Utah, 430, 154 Pac. 941, Ann. Cas. 1917E, 1156; State Medical Examiners v. Terrill, 48 Utah, 647, 161 Pac. 451, Ann. Cas. 1918B, 1117; State v. Wilhite, 132 Iowa, 226, 109 N. W. 730, 11 Ann. Cas. 180; Little v. State, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549; Bibber v. Simpson, 59 Me. 181; Harvey v. State, 96 Neb. 786, 148 N. W. 924; State v. Smith, 233 Mo. 260, 33 L.R.A. (N.S.) 179, 135 S. W. 465; Ex parte Collins, 57 Tex. Crim. Rep. 2, 121 S. W. 501; Com. v. Jewelle, 199 Mass. 558, 85 N. E. 858.

Correctly construed, the word "physician," in the sections of the law relating to vital statistics and the health

ordinances of the city of Baltimore, includes an osteopath.

*Allegany County v. State Lunacy Commission*, 127 Md. 161, 96 Atl. 260; *Phillips v. Baltimore*, 110 Md. 431, 25 L.R.A.(N.S.) 711, 72 Atl. 902; *People ex rel. Redman v. Wren*, 5 Ill. 269; *Cutty v. Carson*, 125 Md. 25, 93 Atl. 302; *Brenner v. Brenner*, 127 Md. 189, 96 Atl. 287; *Baltimore v. Williams*, 129 Md. 290, 99 Atl. 362; *Baltimore & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225; *Brager v. Bigham*, 127 Md. 148, 96 Atl. 277; *People ex rel. Gage v. Siman*, 278 Ill. 256, 115 N. E. 817.

If the word "physician" in the sections of article 43 means only an allopath, homeopath or eclectic, and not an osteopath, then to that extent those sections are in contravention of the 14th Amendment of the Constitution of the United States and article 2 of the Constitution of the state of Maryland, and therefore invalid.

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Bragg v. State*, 134 Ala. 165, 58 L.R.A. 925, 32 So. 767; *State v. Heath*, 125 Iowa, 585, 101 N. W. 429.

If § 301 of article 43 was intended to deny osteopaths the same rights and privileges as other physicians, in the matter of making and filing birth and death certificates, it is in contravention of the 14th Amendment of the Constitution of the United States and article 2 of the Constitution of the state of Maryland.

*Dent v. West Virginia*, 129 U. S. 128, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Fisher*, 52 Mo. 174; *State v. Rice*, 115 Md. 317, 36 L.R.A.(N.S.) 344, 80 Atl. 1026, Ann. Cas. 1913A, 1247; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474.

Messrs. Roland R. Marchant and Robert F. Leach, Jr., for appellee.

Urner, J., delivered the opinion of the court:

The appellant is duly licensed and registered under the laws of Mary-

land for the practice of osteopathy. In his pending petition for mandamus he claims the right to be registered with the registrar of vital statistics of Baltimore city as a physician entitled to file certificates of births and deaths, notwithstanding the provision of the statute relating to osteopathy that nothing therein contained shall authorize any state or municipal officer "to accept from any osteopathic practitioner any birth or death certificate." Code, art. 43, § 301. The question to be determined is whether that provision is constitutional.

The argument on behalf of the appellant was largely directed to the support of the contention that osteopaths are physicians, and as such are required and entitled to register with the local registrar of vital statistics, and to furnish him certificates of birth and death, under statutory provisions by which "physicians" are charged with such duties. Code, art. 43, §§ 12, 14, 21. The express terms of the statute dispose of this contention. It is not material in this case to inquire whether osteopaths are to be regarded as physicians within the accepted meaning of that term. There are numerous cases dealing with questions as to whether various regulations of the practice of physicians apply to osteopaths. A collection of such cases may be found in a note to *People v. Cole* in L.R.A.1917C, 822. The subject is well discussed and cases are cited in 21 R. C. L. 370, 371. A very recent case not included in the citations just given is that of *People ex rel. Gage v. Siman*, 278 Ill. 256, 115 N. E. 817. The decisions on the subject are mainly based on the definitions or apparent purpose of the particular statutes under consideration. In the Code provisions with which we are here concerned, there is no definition of the term "physician," except in so far as may be implied from the requirement that any person desiring to "practise medicine or surgery" in this state "shall be duly registered as a physician or sur-

geon." Code, art. 43, § 122. But "osteopathy" is defined to be "a system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts," and it is provided that the license issued to a practitioner of osteopathy "shall authorize the holder thereof to practise by manipulations only," and that nothing in the act relating to such license "shall be construed as affecting the so-called practice of medicine." Code, art. 43, §§ 300, 302. A definite distinction is thus made between licensed practitioners of osteopathy and those licensed to practise medicine or surgery. But conclusive indication of the legislative intent, upon the subject of the present inquiry, is given by the section already referred to, prohibiting the acceptance of birth or death certificates from "any osteopathic practitioner." The purpose of the existing law to exclude osteopaths

Physician—  
right of  
osteopath to  
furnish birth  
and death  
certificates.

from the classification of physicians, so far as the giving of such certificates is concerned, is too clearly and positively expressed to leave any room for doubt on that subject.

The vital question in the case is whether the prohibition against the acceptance of birth or death certificates from licensed osteopaths is a violation of any of their constitutional rights. It is contended that this provision is a denial of the equal protection of the law to those practising osteopathy, and is therefore in contravention of the 14th Amendment of the Federal Constitution.

The enactment in question forms part of the Code article entitled "Health," and its relation to that subject is obvious. It is therefore within the scope of the police power of the state, and should be sustained as an exercise of that power unless the discrimination it makes can be held to be plainly arbitrary and

without any perceptible relation to the objects sought to be accomplished. All reasonable presumptions must be made in favor of the validity of the provision. The judgment of the legislature that such a regulation is proper and desirable should be respected and enforced by the courts if there is any rational theory upon which it can be supported.

Constitutional  
law—presump-  
tion in favor of  
constitutional-  
ity of statute.

The separate classification, for licensing purposes, of practitioners of medicine and surgery and those practising by manipulation only, cannot be held to be unreasonable. Practitioners of the former class were licensed in this state many years before such a provision was made as to osteopaths. The methods of treatment and the prescribed qualifications differ in important particulars for the two classes of practitioners, and the differences by which they are actually distinguished suggest an adequate reason for their separate classification by statute.

—classification  
—osteopath and  
physician.

Prior to the enactment in 1914 (Laws 1914, chap. 786) of the provisions relating to osteopathy, it seems clear that no practitioner of that form of treatment, unless he was qualified and licensed as a practitioner of medicine and surgery, could have found any basis for the contention that he was entitled to be registered by the registrar of vital statistics to furnish the birth and death certificates for which the pre-existing statutes provided. It was certainly competent at that time for the legislature to direct that the certificates of birth and death, from which the vital statistics of the state were to be obtained, should be furnished primarily by duly licensed medical practitioners. It did in effect so provide, with supplemental directions that, if a death occurs without medical attendance, the certificate shall be prepared by the health officer, or local registrar, and that, in the case of a birth when

no physician is in attendance, the birth certificate shall be made out by the midwife, if one is present, otherwise the father, coroner, householder, keeper of an institution, officer of a ship, or conductor of a train, in which a birth occurs, is charged with the duty of reporting the facts to the local registrar, who must thereupon make an investigation and prepare the certificate of birth in due form. Midwives are required to be examined, registered, and licensed. Code, art. 43, §§ 69-88. If the legislature had determined not to regulate the practice of osteopathy, it is clear that the appellant could not have claimed the right as an unlicensed physician to give the certificates of birth and death which the statute designs to have furnished. Not having been licensed as a practitioner of medicine or surgery, under the terms of the statute, but having procured a license which limits his practice to treatment by manipulations only, under provisions of law which exclude him from the class of practitioners from whom birth and death certificates may be accepted, the question is whether he can justly complain that he has thereby been subjected to an arbitrary and unconstitutional discrimination.

The certificates of birth and death to which the statute refers are required to contain such "items of information as the state registrar of vital statistics shall deem important or necessary," in addition to such facts as the date and place of a birth or death, the name, sex, and color of a child reported born, the name, age, color, occupation, condition, and birthplace of a person reported to have died, the cause of death, duration of illness, and the name and address of the attending physician. It was the evident theory of the legislature that some of the information which the law directed, or the state registrar of vital statistics might deem necessary, to be included in the birth or death certificates, could be furnished more satisfactorily by a physician having the qualifications

demanding by the statute of practitioners of medicine and surgery than by those who were licensed to practice osteopathy exclusively. As to the real necessity for making such a distinction, this court has no right to decide. The only inquiry we are authorized to make is whether the action of the legislature in restricting the means and agencies by which vital statistics are to be obtained is clearly unreasonable.

In the case of *Watson v. State*, 105 Md. 650, 66 Atl. 635, where the decision sustained the validity of an act which required licenses to be procured by practitioners of medicine or surgery, but which exempted certain classes of physicians and surgeons, and chiropodists, midwives, and masseurs, or other "manual manipulators who use no other means," the opinion of the Supreme Court in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594, discussing the constitutional provision as to the equal protection of the laws, was quoted in part as follows: "This rule prescribes no rigid equality, and permits to the wisdom and discretion of the legislature a wide latitude so far as the interference of this court is concerned. . . . Equality of operation does not mean indiscriminate operation on persons, merely as such, but on persons according to their relations. . . . Hardships, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity."

The decision in *Watson v. State* was affirmed by the Supreme Court in 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. In holding that none of the exemptions complained of rendered the act invalid, the Supreme Court said: "Before a law of this kind can be declared violative of the 14th Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is 'no fair reason

—denial of right to osteopath.



for the law that would not require with equal force its extension to others whom it leaves untouched.' Such was the expression of this court in *Missouri, K. & T. R. Co. v. May*, 194 U. S. 269, 48 L. ed. 972, 24 Sup. Ct. Rep. 638, quoted with approval in *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865. . . . The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive, and apply equally to all persons similarly situated."

In our opinion the discrimination we are considering in the present case is not so clearly arbitrary as to justify the court in declaring it

void. It relates solely to the collection of vital statistics. The legislature has the undoubted right to determine as to the methods to be employed in obtaining such information for the use of the public. Its designation of certain agencies for that purpose, in the statute under consideration, is not such an obvious abuse of its discretion as to authorize the court to substitute its own for the legislative judgment and to refuse to recognize the provision as a valid enactment:

Health—collection of vital certificates—denial of right to furnish.

The order dismissing the petition for mandamus will be affirmed.

Order affirmed with costs.

### ANNOTATION.

#### Who is a physician or surgeon within statute in relation to vital statistics.

No definite rule can be laid down to determine who is a physician or surgeon within the meaning of statutes in relation to vital statistics, since this question depends, to a great extent, upon the statutory law of the different states.

#### Osteopaths.

The rule as to osteopaths, in so far as a rule can be laid down in view of the statutory nature of the subject, and the small number of cases found, seems to be that a duly licensed and registered osteopath is a physician within the meaning of that term as used in vital statistics statutes, unless expressly excluded by the statute. *People ex rel. Gage v. Siman* (1917) 278 Ill. 256, 115 N. E. 817; *Re Opinion of Justices* (1919) — R. I. —, 107 Atl. 102; *KEININGHAM v. BLAKE* (reported herewith) ante, 1066.

Thus, it was held in *People ex rel. Gage v. Siman* (Ill.) supra, that one who practices osteopathy, pursuant to the certificate of the state board of health authorizing him to treat human ailments without the use of medicine and without performing surgical operations, is a physician entitled to registration under an act to provide for the registration of births and deaths.

The court said: "That the relator was engaged in practising medicine is settled by § 7 of the Act to Regulate the Practice of Medicine in the State of Illinois (*Hurd's Stat.* 1916, p. 1701), and the case of *People v. Gordon* (1902) 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858, 15 Am. Crim. Rep. 540. Though the osteopathic physician does not use medicine or perform surgical operations he does treat and operate on patients for physical ailments, and but for his certificate from the state board of health would be liable to the penalty prescribed for practising medicine without a license. A physician is one versed in or practising the art of medicine, and the term is not limited to the disciples of any particular school. The term 'medicine' is not limited to substances supposed to possess curative or remedial properties, but has also the meaning of the healing act,—the science of preserving health and treating disease for the purpose of cure,—whether such treatment involves the use of medical substances or not. In common acceptance, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician, and this is the

sense in which the term is used in the Medical Practice Act. The term is not used in any different sense in § 15 of the Vital Statistics Act, which requires every physician, midwife, undertaker, and sexton to register his or her name, address, and occupation with the local registrar of the vital statistics registration district in which he resides." It was further held in this case that a provision of the Medical Practice Act, declaring that only those who were authorized to practise medicine and surgery in all their branches shall call or advertise themselves as physicians or doctors, did not sustain the position that only persons licensed to practise medicine and surgery in all their branches were authorized to issue certificates of death, upon the ground that such provision did not declare that persons treating physical ailments without the use of medicine, and without performing surgical operations, were not physicians, but only that they should not call themselves physicians or advertise themselves as such.

In *Re Opinion of Justices* (1919) — R. I. —, 107 Atl. 102, the justices of the supreme court, upon the receipt from the governor of a request for their opinion, answered in the affirmative the following question: "Are the persons who have received certificates to practise osteopathy from the state board of health under chapter 1058 of the Public Laws of 1914, and who have registered, under chapter 198 of the General Laws in the town clerk's office of the city or town in which they reside, their authority for so practising, legally entitled to sign death certificates in those cases where they were last in attendance professionally upon the deceased?" The justices in giving the reason for their answer said: "Section 7, chap. 121, of the General Laws 1909, as amended by § 2, chap. 575, Public Laws 1910, provides that in case of death the undertaker or embalmer who has charge of the body shall file with the town clerk or registrar a certificate of death prepared in accordance with § 3 of this chapter. This section also provides that the

medical certificate, which is a required part of the death certificate, shall state the cause of death in detail as specified in the statute, and that 'the medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased. But whenever the body of a person is lying dead in any town or city, who has been unattended in his or her last sickness, by a physician registered to practise in this state, the town or city clerk, or in the city of Providence the city registrar, shall call upon a registered physician, or the medical examiner of the district in which the remains are lying to inquire into and to certify as to the cause and manner of death. . . . Is a registered practitioner of osteopathy a 'physician registered to practise' in this state within the fair meaning of these words in this section? We think that he is. There is no express and specific requirement in chapter 1058 which requires an osteopath to register his certificate. The obligation to register is imposed by § 2, chap. 198, which is general in its terms, and applies to all persons who practise medicine or surgery. The person registering under this section is required to subscribe and verify by oath an affidavit of his age, address, etc., and 'the school or system of medicine to which he or she proposes to belong.' Section 1 of chapter 198 provides as follows: 'It shall be the duty of each town and city clerk to purchase a book of suitable size, to be known as the "medical register" of each city or town, and to set apart one full page for the registration of each physician.' The recognition in the sections referred to of the practitioner of osteopathy as a physician is clear and unmistakable. The osteopath is required to register, and by § 1 he is to be registered as a physician in the 'medical register.' All physicians get their authority to sign medical certificates in cases of death by the provisions of chapter 198, of which chapter 1058 is now a part. As the osteopaths are now authorized to practise medicine in a particular way, as they are required to be registered in the medical register and are

subject to the disciplinary control of the board of health by the same general provisions of chapter 193 as all doctors of medicine, so called, we think that the word 'physician' in § 2, chap. 575, should properly be construed in its broader meaning to include osteopaths, and that as used in this part of the statutes it is not to be confined to its limited meaning of doctor of medicine."

But in the reported case (*KEININGHAM v. BLAKE*, ante, 1066) osteopaths were held not to have the right to be registered with the city registrar of vital statistics as physicians entitled to file certificates of births and deaths, because of the express provision in the statute that nothing therein contained shall authorize any state or municipal officer "to accept from any osteopathic practitioner any birth or death certificate."

#### **Christian Scientists.**

A Christian Scientist is not a physician within the meaning of a statute requiring the report of contagious diseases to the board of health, and making a violation thereof a misdemeanor. The court said: "There is no doubt whatever that defendant was not a physician. The statute itself upon which the city relies to sustain the conviction demonstrates this. The statute is under the significant heading of 'Medicine and Surgery,' and in the body thereof it refers to and contemplates 'persons practising medicine and surgery.' Rev. Stat. 1899, §§ 8507, 8517. It regulates the practice of medicine and surgery by requiring persons who engage in practice to have diplomas and to obtain certificates from the board of health. The words 'medicine and surgery,' and 'practising medicine and surgery,' being in a penal statute, must be taken to have a meaning in their ordinary sense. Medicine, in its ordinary sense, as applied to human ailments, means something which is administered, either internally or externally, in the treatment of disease, or the relief of sickness. It may be applied externally, and it need not necessarily be a substance which may be seen and handled. It may consist of electricity

conveyed by instruments or the human hand. And he whose profession it is to prescribe and administer this, after diagnosing the complaint, is a physician as commonly and ordinarily understood. Thus the statute will include what is known as 'a medical clairvoyant' who visits sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed most appropriate. *Bibber v. Simpson* (1871) 59 Me. 181; *Nelson v. Harrington* (1888) 72 Wis. 591, 1 L.R.A. 719, 7 Am. St. Rep. 900, 40 N. W. 228. And so one is practising surgery who professes and practises bone-setting in dislocations and fractures, reducing sprains, swellings, and contraction of the sinews by friction and fomentation. *Hewitt v. Charier* (1835) 16 Pick. (Mass.) 353." The contention was made in this case that the lawmaking power, as it frequently does, had stepped in and given to the word "physician" a broader meaning than it would have without such aid in that, at another place in the same statute, it described those who should be regarded as practising medicine, by providing that any person should be regarded as practising medicine, within the meaning of such statute, who should profess publicly to be a physician and to prescribe for the sick, or who should append to his name the letters "M. D." The court, in overruling this contention, said: "This section does not bear out the city's contention. It does not pretend to enlarge the ordinary meaning understood by the use of the word 'physician.' The entire article lays down qualifications and makes regulations for all those 'practising medicine and surgery.' And by the section just quoted it declares that all those shall be regarded as practising medicine who shall publicly profess to be physicians and prescribe for the sick; that is to say, physicians practising and prescribing medicine for the sick. In a broad sense there may be 'a physician for the soul,' but surely the statute does not include those prescribing moral doctrine for the moral-

ly infirm. The statute evidently does not intend, by that section, to make anyone a practitioner of medicine who is not such practitioner, or who does not pretend to be such. Its only object is to prevent the escape of those actually practising medicine (whether

skilled physicians or fraudulent pretenders) by declaring they shall be considered as so doing if they publicly announce or 'profess' that they are physicians, or append 'M. D.' to their names." *Kansas City v. Baird* (1902) 92 Mo. App. 204. G. V. I.

HORACE F. TILTON, Exr., etc., of Thomas H. Daniels, Deceased,  
v.

WALTER H. DANIELS.

*New Hampshire Supreme Court—February 3, 1920.*

(— N. H. —, 109 Atl. 145.)

**Wills — witness — official certifying to signatures.**

1. A justice of the peace certifying upon a will the verity of the signatures thereto becomes a witness to the will.

[See note on this question beginning on page 1075.]

— attestation — what is.

2. The attestation of a will consists in the witness seeing that those things exist and are done which the statute requires.

Evidence — intent in signing will — effect.

3. Testimony of the justice of the

peace who certified upon a will the verity of the signatures, that he did not sign as a witness, is not conclusive of that fact.

[See 10 R. C. L. 946, 947.]

TRANSFER by the Superior Court for Grafton County (Sawyer, J.) for the opinion of the Supreme Court of an appeal from a decree of the Probate Court, allowing the will of Thomas H. Daniels, deceased. *Appeal dismissed.*

The document in question was signed as follows:

Thomas H. Daniels.

Witnesses:

Wilmer C. Cox,

Amos Blake.

Signed before me.

John R. Connor, Just. of Peace.

Connor testified that he did not understand that he was to sign as a witness, but simply as a justice of the peace which he did.

Messrs. Kenson E. Dearborn, Alvin F. Wentworth, and Walter M. Flint, for plaintiff:

The only evidence the will itself need bear of a proper attestation is the signatures of the witnesses.

8 A.L.R.—68.

40 Cyc. 1125; Mead v. Presbyterian Church, 229 Ill. 526, 14 L.R.A.(N.S.) 255, 82 N. E. 371, 11 Ann. Cas. 426; Ela v. Edwards, 16 Gray, 91; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Forsaith v. Clark, 21 N. H. 409.

Witnesses are not all required to subscribe at the same time.

Smith (N. H.) 448; 40 Cyc. 1128.

An acknowledgment of a previous signature by a testator is a sufficient execution.

Lord v. Lord, 58 N. H. 9, 42 Am. Rep. 565; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687.

The witnesses need not know that the instrument they were attesting was a will.

*Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155; *Welch v. Adams*, 63 N. H. 347, 56 Am. Rep. 521, 1 Atl. 1; *Swinb. Wills*, 27; *Re Clafin*, 75 Vt. 19, 58 L.R.A. 261, 52 Atl. 1053; *Keely v. Moore*, 196 U. S. 38, 49 L. ed. 376, 25 Sup. Ct. Rep. 169; *Adams v. Norris*, 23 How. 353, 16 L. ed. 539; *Re Hull*, 117 Iowa, 738, 89 N. W. 979.

When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him, his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say.

*Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617, 6 Ann. Cas. 413.

*Mr. Thomas F. Clifford*, for defendant:

A will must be "attested and subscribed by three or more creditable witnesses."

*Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661, 32 Atl. 158.

A will must be executed in accordance with the statutory requirements; otherwise, it is entirely void.

40 Cyc. 1097, 1098.

The request to sign must be shown either by the attestation clause or by other evidence.

*Re McMulin*, 6 Dem. 847; *Lockwood v. Lockwood*, 51 Hun, 337, 2 L.R.A. 425, 3 N. Y. Supp. 887.

There being no conflict of evidence, and there being no competent evidence from which a jury of impartial and reasonable men could find that *Thomas H. Daniels* ever requested *John R. Connor* to sign as a witness, the court correctly directed a verdict for the appellant.

*Paphro D. Pike Co. v. Baty*, 69 N. H. 453, 43 Atl. 623; *Perry v. Hardy*, 71 N. H. 151, 51 Atl. 644.

*Peaslee, J.*, delivered the opinion of the court:

The contestant bases his claim to have the will disallowed upon the proposition that *Connor* did not sign as a witness. No other objection is suggested, and, unless this is well taken, the exception to the ruling directing a verdict for him must be sustained.

In order that a will be duly authenticated, two things are required.

It must be both "attested and subscribed." Pub. Stat. chap. 186, § 2. Attestation "consists in the witnesses seeing that those things exist <sup>Wills—</sup> and are done which <sup>attestation—</sup> what is. the statute requires." *Nunn v. Ehlert*, 218 Mass. 475, L.R.A. 1915B, 87, 106 N. E. 165. "Attestation is the act of the senses; subscription is the act of the hand; the one is mental; the other mechanical." *Swift v. Wiley*, 1 B. Mon. 114, 117. To attest the signature means to take note mentally that the signature exists as a fact. If this is done, and the attester also subscribes his name, the statute is complied with. The essential thing is that "by the signature he meant to affirm that the deceased executed the will in his presence." *Griffiths v. Griffiths*, L. R. 2 Prob. & Div. 300, 304, 41 L. J. Prob. N. S. 14, 25 L. T. N. S. 574, 20 Week. Rep. 192. In this case *Connor* was requested to and did take note of the signature. At the testator's request, he was sworn by *Connor* to the truth of the asserted verity of the signature, and *Connor* certified that fact upon the will.

"The only object the testator could have had in acknowledging his signature, declaring his will, and asking a certificate was to get *Beam* as a witness to those facts. They may have ascribed to the certificate of a justice an evidentiary force and dignity not accorded it by the law, but this mistake cannot impair the force which the law accords to attesting signatures, without regard to the station of the signer. The testator, in asking for *Beam's* certificate, sought to make him a witness to the facts he had acknowledged and declared, and perhaps believed that the official form of attestation would import such indisputable verity as would dispense with further testimony from the witness. While this effect cannot be accorded to it, we can see no reason, in law or justice, why the effect of an ordinary attestation should be denied to it. Whether testifying through his certificate or as a wit-

ness in a probate proceeding, Beam was asked to bear witness to the fact that the writing had been subscribed by, and was the will of, the testator. That is the ordinary office of a witness, and as such Beam signed the will." *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

The authorities are uniform.

—witness—  
official  
certifying to  
signatures.

Such an execution makes the official a witness to the will.

Keely v. Moore, 196

U. S. 38, 49 L. ed. 376, 25 Sup. Ct. Rep. 169; *Adams v. Norris*, 23 How. 353, 16 L. ed. 539; *Murray v. Murphy*, 39 Miss. 214; *Re Hull*, 117 Iowa, 738, 89 N. W. 979; *Bolton v. Bolton*, 107 Miss. 84, 64 So. 967; 1 *Schouler, Wills*, § 344.

It is argued that, since Connor testified that he was not asked to sign as a witness, and that he did not undertake to sign as one, therefore it cannot be found that he did so. The conclusion drawn is based upon an erroneous idea of the nature of the question involved. There is no dispute as to the language of the request, nor as to the mental attitude of the testator and of Connor. The question whether this request, the state of mind of the testator evidenced thereby, and the resulting understanding and signing on the part of Connor constitute a request for and an execution of the act of an attesting witness, is one of law. It was Connor's opinion that

Evidence—  
intent in  
signing will—  
effect.

they did not. Accordingly he testified that he was not requested to sign as

a witness, and did not do so. But

that is merely his conclusion touching the law. In his view it was necessary that the request to sign as a witness be made eo nomine; and, as it was not so made, he concluded that he was not requested so to act. And so of his act subscribing his name as a justice of the peace. His view of the law was that signing in that capacity did not include individual action. He thought that the certificate of attestation by John R. Connor, justice of the peace, was a thing entirely separable from his subscribing as an individual. His testimony that he did not sign as an individual, i. e., as a "witness," is merely a denial of the law. It is not evidence which varies or contradicts the facts to which he also testifies.

The occurrences between the testator and Connor include every safeguard intended to be provided by the statute. Connor was fully informed and took note of the fact that the paper in question had been signed; and his signature affixed thereto identified the paper. If technical reasons could be assigned for holding that there was not a compliance with the statute, they would not be entitled to prevail against the practical reasons for the opposite result. The motion to direct a verdict for the appellant should have been denied.

In accordance with the stipulation made at the trial, the order is, appeal dismissed.

All concur.

## ANNOTATION.

**Wills: character as witness of one who signed will for another purpose.**

- I. Officer attaching official certificate, 1075.
- II. Person who writes testator's name and attests the signature by his own, 1078.
- III. Miscellaneous, 1079.
- IV. Conclusion, 1080.

*I. Officer attaching official certificate.*

In a number of cases in which an

officer authorized to take acknowledgments has attached his official certificate to a will, in accordance with the request of the testator, the officer has been regarded as a witness, the certificate being regarded as superfluous. Thus, in *Payne v. Payne* (1891) 54 Ark. 415, 16 S. W. 1, a will was held sufficiently attested where,

after it had been signed by the testator and one witness, it was taken by the testator to a justice of the peace, who was asked by the testator to put his certificate as a justice of the peace to it, and who thereupon signed and certified the will in his official character. The court stated that the form in which the will was attested was immaterial; that "the question is, Did the testator acknowledge the signature, declare the writing to be his will, and request Beam to sign it as a witness to those facts? and, if so, did Beam sign it in evidence thereof? The evidence shows, as applying to this question, a literal compliance with the law in every respect except that the testator asked Beam to put his official certificate to the will, instead of formally asking him to sign it as a witness. Was this substantially a request of Beam to sign the will as a witness? He could not make the certificate to the will without signing it, and, in response to the request to make his certificate, did sign it in the presence of the testator. The only object the testator could have had in acknowledging his signature, declaring his will, and asking a certificate was to get Beam as a witness to those facts. They may have ascribed to the certificate of a justice an evidentiary force and dignity not accorded it by the law, but this mistake cannot impair the force which the law accords to attesting signatures, without regard to the station of the signer. The testator, in asking for Beam's certificate, sought to make him a witness to the fact he had acknowledged and declared, and perhaps believed that the official form of attestation would import such indisputable verity as would dispense with further testimony from the witness. While this effect cannot be accorded to it, we can see no reason in law or justice why the effect of an ordinary attestation should be denied to it. Whether testifying through his certificate, or as a witness in a probate proceeding, Beam was asked to bear witness of the fact that the writing had been subscribed by and was the will of the testator." In *Adams v. Norris* (1860) 23 How. (U. S.) 353, 16

L. ed. 539, a will signed by the testator, whose signature was followed by the signatures of an officer and witnesses in the following form: "Before me, in the absence of the two alcaldes, Roberto T. Ridley, *sindico*. Witnesses: Nathan Spear. Guillermo Hinckley," was held to be witnessed by the *sindico*. The court states that it did not appear that a *sindico* was charged with any function in the preparation or execution of testaments, by the law or custom of the state in which the will was executed, and further, that it did not appear that the *sindico* in the instance at bar expected to give any sanction to the instrument by his official character; that he attested the execution of the will; and that his description of himself which he affixed to his signature should not detract from the efficacy of that attestation.

See the reported case (*TILTON v. DANIELS*, ante, 1073).

In *Gump v. Gowans* (1907) 226 Ill. 635, 117 Am. St. Rep. 275, 80 N. E. 1086, where it was sought to probate, as a will, a deed which was acknowledged before a notary public, who affixed his signature to the certificate of acknowledgment, the court states that perhaps the certificates which show that the maker acknowledged to the notary that she signed the instrument would be sufficient to make him a subscribing witness; but the instrument was denied probate as a will because there was no other competent witness.

The intent with which the testator and official taking the acknowledgment acted is not emphasized in the foregoing cases. It has been expressly held, in the case of a will executed in a foreign country, that, although the acknowledgment was probably prepared under the belief that such an acknowledgment was necessary, where the facts necessary to a valid attestation were present, the official might be regarded as a witness. *Keely v. Moore* (1904) 196 U. S. 38, 49 L. ed. 376, 25 Sup. Ct. Rep. 169. In this case it is stated that the certificate of the officer was probably prepared under the belief that wills, like deeds, made in a foreign country, must be executed and acknowledged

before some foreign official, or before a secretary of legation or consular officer of the United States. The certificate in question was to the effect that the testator attended before the vice consul taking the acknowledgment, upon the day following the date of the will, acknowledged it to be his last will and testament, and that the signature was genuine. The court states that if the words "vice consul of the United States of America," which were added to the consul's signature, were omitted, there would be no failure to comply with the statute relating to attestation, unless in the omission to certify that the vice consul attested and subscribed in the presence of the testator. It is stated that the jury might properly draw the conclusion that it was signed in the testator's presence, as this would be the usual course of business, and the presumption would be that the vice consul conformed to it and to his duty as a certifying officer. Under these circumstances, the court states that "as such certificate was unofficial and contributes nothing, as such, to the validity of the will, it can only be looked upon as the affirmation of an ordinary witness to the facts therein stated. No particular form of attestation was necessary, as appears to be the case in England and in several states of the United States; and if the certificate of Cooksey [the vice consul] had been written at the foot of the will and signed by himself and by the two witnesses . . . it would have been a sufficient attestation. How, then, can it be regarded as insufficient when an attestation in one form is signed by two witnesses, and an attestation in another form by a third? Bearing in mind that the certificate, if given any force at all, must be considered an attestation, we do not think that the fact that it may have been written and signed under a mistaken impression as to its necessity and purpose vitiates it as an attestation. What use was intended to be made of it is immaterial, if it were useless for any purpose as an official certificate. The facts certified are appropriate to the attestation of the in-

strument, and, if true, we see no reason for holding it to be invalid as an attestation because it was signed under the impression that it was necessary for some possible purpose as a certificate."

In other cases the intent with which the official acted is held to be the determining factor. If the officer intended to act as a witness, and added the certificate of acknowledgment in the belief that it would give greater validity to his attestation, the officer has been held to be a sufficient witness. *Murray v. Murphy* (1860) 39 Miss. 214; *Bolton v. Bolton* (1914) 107 Miss. 84, 64 So. 967. A request by the testator to a county clerk, to whom the testator had taken his will after it had been signed by testator and other witnesses, "to authenticate it," was treated as a request to witness it, and the attestation by the clerk was held sufficient, although the clerk took the testator's acknowledgment of his signature to the paper, and attached a certificate of acknowledgment, and signed the same with his official signature. *Franks v. Chapman* (1885) 64 Tex. 159. In *Murray v. Murphy* (Miss.) supra, it appeared that the testator published and declared the paper to be his last will and testament in the presence of each and all of the witnesses, and each and all of the witnesses subscribed their names thereto as witnesses in the presence of the testator and of each other; that the witness, who was an officer entitled to take acknowledgments, signed his name in his official capacity because he and the other witnesses believed that greater validity would be given to his signature by prefixing thereto his official certificate, but he intended thereby to be an attesting witness to the will. In holding him to be a sufficient attesting witness, the court states that the certificate was intended and signed by him as an attestation to the execution of the will; that though the certificate is useless his signature as a subscribing witness, which was the essential thing and that which was intended, is valid; that the superfluous certificate cannot invalidate the regular signature. In



this case the certificate of acknowledgment was on the reverse side of the page on which the will was written. The court states that as to the place of signature of the attesting witnesses all that was necessary for that purpose was that the witnesses should sign their names upon the paper in the presence of the testator, in testimony of the fact that it was the paper signed and published by him as his will. In *Bolton v. Bolton* (Miss.) *supra*, the testator, the person who wrote the will, and the officer entitled to take acknowledgments were present when the will was executed. The officer was about to sign his name as an attesting witness, when the testator said to him, "I would rather you take my acknowledgment to it because I think it is better;" whereupon, the officer took from his pocket a blank printed acknowledgment, took the testator's acknowledgment, and filled out and signed the blank. There was some dispute as to whether or not it was attached to the will at that time; according to the officer, it was not physically connected with the will; according to the other witness an effort was made to paste it to the will, but, the paste being defective, the effort resulted in a failure, and afterwards it was attached to the will with mucilage. In sustaining the validity of the officer's attestation, the court stated that the will was signed by the testator in his presence, and "there can be no question that his taking the acknowledgment and attaching his signature thereto was for the purpose of evidencing the fact that he had witnessed the execution of the will by the testator." As to the separation of the sheets, the court stated it not to be necessary for the signature of the attesting witness to be on the same sheet with the signature of the testator; that if the sheets were, after the execution, pasted together, there could be no doubt that the attestation of the officer would have been sufficient; that the same result must follow when the testator himself, knowing what the officer's signature was intended to be, handed the papers to the scrivener, folded together, as his completed will.

But where the officer taking the acknowledgment was not asked to witness the execution, and did not affix the acknowledgment with the knowledge of the testator that he was signing as a witness, it has been denied that he may be treated as a witness. *Hull v. Hull* (1902) 117 Iowa, 738, 89 N. W. 979. The court says that "it seems to be settled that if the testator asks a person who is competent to be a witness, but also is competent to take acknowledgments, to attest the will, and the person thus requested, instead of attesting the will in the usual way as a witness, affixes his certificate of acknowledgment thereto, the will is nevertheless sufficiently witnessed by him. The important fact is whether he signed as witness, under circumstances rendering his attestation proper. . . . But the difficulty about treating Smith as a witness is that it does not clearly appear that he was asked to witness the execution of the will, or that he affixed the acknowledgment with the knowledge of the testatrix that he was signing it as a witness."

*II. Person who writes testator's name and attests the signature by his own.*

Where a person who signs the testator's name merely writes his name under that of the testator, to evidence that it has been signed in this manner, the courts are not agreed whether such person can be regarded as a witness. A will signed by the testator, "per H. M. M.," was held not to be sufficiently witnessed by H. M. M., the court stating that a mere inspection of the paper demonstrated that he did not sign as a subscribing witness, but only as the amanuensis of the testator in signing the testator's name to the instrument. *Burton v. Brown* (1898) — Miss. —, 25 So. 61. The writer of a will, who signed testator's name "by . . ." (the scrivener's name), is not a sufficient witness to the will. *Peake v. Jenkins* (1885) 80 Va. 293. The court stated that while the statute required no form or particular place on the paper for subscribing witnesses to sign, yet the witnesses, to attest a will not wholly written and signed by the testator, must sign the paper as wit-

nesses. Speaking of the fact of the particular case, the court stated that the signature of the scrivener was a special attestation by her to the one fact of her signing the testatrix's name for her.

But it has been held, where the law requires that where another person signs the testator's name by his direction the will is invalid unless such person shall also write his own name as witness, that there is a sufficient attestation where the testator's signature was followed by the words: "By [the name of the person signing testator's name]. In his presence, and at his request," although such person did not sign at another place. *Abraham v. Wilkins* (1856) 17 Ark. 292. The court says that this person subscribed his own name, and clearly indicated that he signed the name of the testator, at testator's request, and that he wrote his own name immediately under that of the testator, "but there is no good reason why it should not be as valid as if he had written it in the margin on the left. The statute does not point out the particular place on the paper where the name shall be signed. He does not expressly state that he signed it as a witness, but in doing the act he placed himself in the attitude of a witness to the fact."

In *Pollock v. Glassell* (1846) 2 Gratt. (Va.) 439, a will was held sufficiently attested where the person who wrote the paper wrote at the foot of it the words, "written by S. S. Ashton for," intending to add the name of the testatrix if the latter should be unable to authenticate the paper by her own signature; but when this was mentioned to the testatrix she did sign her name to it herself, and when she was about to do so the draftsman of the will struck out with a pen the word "for," which at first followed her own name and was intended to precede that of the testatrix if it were found necessary that the latter should be written by the draftsman. The testatrix requested another person to witness the paper, which was accordingly done, and then requested S. S. Ashton to do so, but she thought, and told the deceased, that it was not necessary for

her to sign it again, as her name was already there in the manner above stated. The court refers to the provision of the statute requiring wills to "be attested by two or more credible witnesses, subscribing their names in his or her presence," and, after reviewing the facts as above stated, says: "I cannot doubt, therefore, that the attestation by Miss S. S. Ashton of the paper 'F' is sufficient under the statute. It is not to be presumed that she placed her name there merely to attest the circumstance that the paper was written by her; a fact utterly insignificant in respect to the legal authentication of the instrument. Her subscription alone was a sufficient attestation, and the memorandum does not disprove it was so intended. At most it can only call for explanation, and that given by her testimony is completely satisfactory."

### III. Miscellaneous.

A will was admitted to probate as being duly attested, in *Griffiths v. Griffiths* (1871) L. R. 2 Prob. & Div. (Eng.) 300, where one of the witnesses signed after the abbreviation, "Exceptrs.," in accordance with the request of the testator that he sign as executor. The court states that the question resolves itself into one of fact, namely, "Did he sign as an executor only, or as a witness also?" In holding that the person thus signing was a sufficient witness, the court further states: "It may have very well been that Homer was called upon to sign as witness as well as executor, and that he considered he signed in both characters. Homer himself gave evidence that the testator asked him to sign as executor. In cross-examination, he said the testator's words were: 'He asked me to sign.' The court is of opinion that Homer did not sign exclusively as executor, but that by his signature he meant to affirm that the deceased executed the will in his presence."

The fact that the scrivener of a will, who was named therein as executor, necessarily wrote his own name in the course of preparing the will, cannot be regarded as making him a witness, although the writing was done

in the presence of the testator who afterwards signed the will in the presence of the scrivener, where the testator did not look upon or consider him as a subscribing witness to the will but called others to perform that function. *Snelgrove v. Snelgrove* (1812) 4 S. C. Eq. 4 (Desauss.) 274. The court, after stating that the subscribing witnesses to a will are placed about the testator as guardians to prevent imposition, and to secure to the public the due execution of one of the most important acts of a man's life, often performed in extremis, continues: "I cannot consider the accidental circumstance which placed Mr. Cleary's name in his own handwriting on the face of the will, as executor, in the presence of the testator, and the accidental circumstance of the testator's afterwards signing in his presence, as constituting him a subscribing and attesting witness."

The probate of a will was refused in *Wilson's Goods* (1866) L. R. 1 Prob. Div. (Eng.) 269, where it was signed at the bottom of the first page by the testator, and immediately below this by one witness following the word "witness;" on the next page, under a memorandum relative to some leasehold houses, appeared the names of three other persons to whom the leasehold property was appointed as trustees in the will. In denying that the persons whose names appeared under the leasehold memorandum could be regarded as witnesses, it is stated that "if these names appeared at the top of the page it might have been supposed that they were put there for the purpose of attesting the will. But we find this memorandum, and these names written under it, very probably because they are to become trustees of the property to which the memorandum relates. They probably signed for the purpose of giving their assent to the acceptance of the trust; but whatever may have been their motive for attesting the memorandum, it does not appear that they were placed there in order to attest the deceased's signature to the will."

The signing of a will by a wife with the name of her husband, as requested

by the testator, does not make the wife a sufficient witness to the will. *Re Jones* (1918) 101 Wash. 128, 172 Pac. 206. The court states that the wife did not sign as a witness, and did not intend to do so; was never even requested to sign as a witness, but was requested to sign for her husband and in his name. This is held not to be sufficient to make the wife a witness.

One who at the request of the testator, and in his presence, signed his name as a witness to a will, but failed to write his place of residence as required by law, because after some conversation with the testator he supposed the testator would have the will redrawn, and the witness did not regard it as an executed will, was held to be a sufficient witness in *Lyman v. Phillips* (1883) 3 Dem. (N. Y.) 459.

The fact that the scrivener who wrote the will at the request of the testator saw him sign and acknowledge it as his last will and codicil, and saw the subscribing witnesses sign the same as witnesses in the presence of each other and of the testator, does not make the scrivener a sufficient witness. *Dunlap v. Dunlap* (1812) 4 S. C. Eq. (4 Desauss.) 305.

#### IV. Conclusion.

From the foregoing cases a tendency appears to hold one who signs for some other purpose a sufficient witness, where the person thus signing possessed the necessary qualifications for a witness, and would have been a sufficient witness if he had signed in that capacity. It cannot be denied that this is not a strict compliance with the statute. The position of the Iowa court in *Hull v. Hull* (1902) 117 Iowa, 738, 89 N. W. 979, *supra*, is, without doubt, the logical position upon this question. The signing must be with the intent that the person should act as a witness, or the person thus signing cannot logically be regarded as a witness. It will be observed that in some of the foregoing cases an intent to act as a witness is imputed to the person, although such an intent is directly contrary to the evidence and to inferences arising from the form in which the signing

was done. Practical considerations, however, support the tendency to regard such signers as sufficient witnesses, notwithstanding there is not a strict compliance with the statutes, and these considerations have, without doubt, been the determinative element with the courts. W. A. E.

J. S. WYNNE et al.

v.

GREENLEAF JOHNSON LUMBER COMPANY, Appt.

*North Carolina Supreme Court — March 17, 1920.*

(— N. C. —, 102 S. E. 403.)

**Arbitration — violation of agreement — making witness drunk.**

1. Intentionally getting drunk a material witness for the adversary in an arbitration proceeding, for the purpose of preventing him from testifying, is such a breach of the arbitration agreement as to justify its revocation by the adversary.

[See note on this question beginning on page 1082.]

**Appeal — conclusiveness of referee's finding of fact.** proved by the trial judge, is conclusive on appeal.

2. A referee's finding of fact, ap- [See 2 R. C. L. 210.]

**APPEAL** by defendant from a judgment of the Superior Court for Franklin County (Guion, J.) confirming a report of the referee in favor of plaintiff in an action brought to recover damages for cutting timber under contract size, and for the negligent burning of his lands, after revocation of a common-law arbitration agreement. *Affirmed.*

Statement by Clark, Ch. J.:

This was an action for damages for cutting timber under contract size and negligent burning of lands of plaintiffs, submitted to R. B. White, referee. No exceptions were taken to his findings of fact or conclusions of law, with the single exception of his findings and conclusions as to the breach of the agreement to arbitrate by plaintiffs, and consequent damage to the defendant. The judgment of the referee was confirmed, and the defendant appealed.

Messrs. William H. Ruffin, Thomas W. Ruffin, and W. H. Yarborough, for appellant:

It must be shown by competent evidence that there was an intention of the party to influence or improperly obtain the award; and that the award had been, or would have been, affected by such conduct.

3 Cyc. 746, and note 42; Eaton v. Eaton, 43 N. C. (8 Ired. Eq.) 107;

Mangum v. Mangum, 151 N. C. 270, 65 S. E. 1004.

Withdrawal from arbitration leaves the party liable to answer in such damages as occurred thereby.

Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831; Williams v. Branning Mfg. Co. 153 N. C. 7, 31 L.R.A. (N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954.

Messrs. Jones & Bailey and Benjamin T. Holden, for appellees:

Where a party takes a fraudulent advantage of the other party, the award will be set aside.

2 R. C. L. p. 391; Chambers v. Crook, 42 Ala. 171, 94 Am. Dec. 637; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604.

Clark, Ch. J., delivered the opinion of the court:

The only question presented is as to the right of the plaintiffs to revoke the contract of arbitration.

The referee found as facts upon the testimony, which, being ap-

proved by the judge, are conclusive on appeal, that "on October 3, 1916, the parties entered into written agreement to arbitrate, arbitrators were selected, and a hearing set at Vaughn. Witnesses for Wood came to Vaughn on defendant's train. As the train was leaving Wood, defendant's superintendent, Hayes, caused inquiry to be made for whisky, giving as his reason that he wished to get one Denton, a witness for plaintiffs and a passenger on the train, drunk so that he could not testify. Upon learning that another passenger had a pint of whisky in his bag back at the station, he had the train stopped and backed half a mile to the station. The whisky was procured. Most of it was given to Denton, who became drunk. Denton was a material witness for the plaintiffs."

The plaintiffs not long after gave notice of their revocation of the arbitration, and brought this action.

The defendant breached the contract of arbitration by this action of its superintendent, and we agree with the counsel for the plaintiffs that they might well have insisted upon the recovery of \$500 liquidated damages on account thereof. They chose rather to proceed to assert their original rights in this action. Mr. R. B. White the referee, we think, stated the law tersely and correctly as follows, in his report, which the judge approved: "An agreement to submit a controversy to arbitration by nec-

essary implication carries with it the condition that neither party will attempt by any unfair or fraudulent means to affect the award which is to be made. The condition is concurrent and vital. A breach of such condition by one party to the agreement justifies a revocation by the other. Intentionally getting a material witness drunk for the purpose of keeping him from testifying in behalf of the other party is such a breach, and your referee is of the opinion that the defendant should recover nothing on his counterclaim."

In 2 R. C. L., p. 391, it is said: "It has been held that where a party takes a fraudulent advantage of the other party, the award will be set aside. *Chambers v. Crook*, 42 Ala. 171, 94 Am. Dec. 637; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604."

In 5 C. J. 61, it is said, in summing up the authorities cited: "If the party revoking the submission has sufficient cause to do so, he, of course, incurs no liability for damages."

The conduct of the defendant's superintendent, for which the defendant company is responsible, was so clearly reprehensible and contrary to good faith and public policy that the action of the referee and of the court needs no citation of authorities in approval.

It may be proper to add in the language of Lord Erskine, when at the bar: "Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers."

Affirmed.

### ANNOTATION.

**Improper attempt by influencing or by attempting to influence decision as ground for revocation of arbitration, or for avoidance of award thereunder.**

- I. Introductory, 1083.
- II. Equity and law, 1083.
- III. Fraudulent concealment of facts, 1087.
- IV. Perjury of party, 1088.

- V. Ex parte communications with arbitrator, 1088.
- VI. Attorney drafting award, 1089.
- VII. Miscellaneous, 1090.

Appeal—conclusiveness of referee's finding of fact.

Arbitration—violation of agreement—making witness drunk.

*I. Introductory.*

It may be said briefly as to the statutes that it was provided by the Statute of 9 & 10 Wm. III. chap. 15, that any arbitration or umpirage procured by corruption or undue means shall be void, and set aside by any court of law or equity, so as such corruption or undue practice be complained of in the court where the rule is made for such arbitration, before the last day of the next term after such arbitration made and published to the parties. The Statute 52 & 53 Vict. chap. 49, § 11 (2), declares that where "an arbitration or award has been improperly procured, the court may set the award aside." There are many other statutes on the subject in the United States and Canada, in some of which is the expression "undue means," probably taken from the Statute of Wm. III.

The cases on the subject of attack on awards for fraud or unfairness of a party often do not show whether the arbitration was one at common law or under statutes, or whether the attack was made at law or in equity, or whether the relief was provided for by statute.

This annotation excludes cases of fraud in procuring the agreement to arbitrate, or in the submission to arbitration. Cases of entertainment of arbitrators are also excluded.

*II. Equity and law.*

Equity will relieve against an award obtained by fraud or unfair means.

**England.** — *Norgate v. Ponder* (1627) *Nelson*, 6, 21 Eng. Reprint, 775; *South Sea Co. v. Bumstead* (1734) 2 Eq. Cas. Abr. 80, 22 Eng. Reprint, 70; *Medcalfe v. Medcalfe* (1737) 1 Atk. 63, 26 Eng. Reprint, 42; *Burton v. Ellington* (1791) 3 Bro. Ch. 196, 29 Eng. Reprint, 487; *Gartside v. Gartside* (1796) 3 Anstr. 735, 145 Eng. Reprint, 1023; *Charter v. Trevelyan* (1844) 11 Clark & F. 715, 8 Eng. Reprint, 1274.

**Alabama.** — *Chambers v. Crook* (1868) 42 Ala. 171, 94 Am. Dec. 637.

**Connecticut.** — *Bulkley v. Starr* (1807) 2 Day, 552.

**Florida.** — *Johnson v. Wells* (1916) 72 Fla. 290, 73 So. 188 (obiter).

**Illinois.** — *Spurck v. Crook* (1858) 19 Ill. 414 (obiter); *Catlett v. Dougherty* (1885) 114 Ill. 568, 2 N. E. 669; *Woods v. Roberts* (1900) 185 Ill. 489, 57 N. E. 426; *Stufflebeam v. Allen* (1913) 184 Ill. App. 133.

**Maryland.** — *Sisk v. Garey* (1867) 27 Md. 401.

**Michigan.** — *Beam v. Macomber* (1876) 33 Mich. 127; *Hewitt v. Reed City* (1900) 124 Mich. 6, 50 L.R.A. 128, 83 Am. St. Rep. 309, 82 N. W. 616.

**New Hampshire.** — *Craft v. Thompson* (1852) 51 N. H. 536.

**North Carolina.** — *Eaton v. Eaton* (1851) 43 N. C. (8 Ired. Eq.) 102.

**Oregon.** — *Fire Asso. v. Allesina* (1907) 49 Or. 316, 89 Pac. 960.

**Pennsylvania.** — *Hartup v. Pittsburgh* (1889) 131 Pa. 535, 19 Atl. 507 (obiter).

**Vermont.** — *Cutting v. Carter* (1836) 29 Vt. 72.

**West Virginia.** — *Dickinson v. Chesapeake & O. R. Co.* (1874) 7 W. Va. 390.

**Canada.** — *Wilson v. Richardson* (1851) 2 Grant, Ch. 448.

In *Norgate v. Ponder* (1627) *Nelson*, 6, 21 Eng. Reprint, 775, it is reported that "an award was obtained by fraud, by which the arbitrators did award that one of the parties to the submission should seal and deliver a bond to the other after general releases first given. All which was done pursuant to the award, and upon a bill to be relieved it was decreed that the bond to stand to the award, and the arbitration itself, and the releases, and the other bond executed by the parties should be brought into court and canceled."

Where a submission to arbitration was made a rule of the court of exchequer, and an award made, it was held that one of the parties might bring a bill to open the matter on the ground that the other party wilfully misrepresented facts to the arbitrator, and that the plaintiff had not till lately discovered the fraud. *Gartside v. Gartside* (1796) 3 Anstr. 735, 145 Eng. Reprint, 1023.

"A bill in chancery to set aside an award is not demurrable for want of

equity, which alleges that the award was obtained by the fraud of one of the parties to the arbitration, who was complainant's copartner in business, and the fraud was committed by the defendant, complainant's copartner, by making false entries in the books of the copartnership, to which complainant did not have access, and was ignorant of the existence of the fraud, and that the books containing the fraudulent entries were submitted to the arbitrators by the defendant, and the award was based largely upon such false entries, which were against complainant's interest." *Johnson v. Wells* (1916) 72 Fla. 290, 73 So. 188, where, however, the award was sustained.

Bringing forward before the arbitrators a paid claim will cause the award to be set aside in equity. *Woods v. Roberts* (1900) 185 Ill. 489, 57 N. E. 426 (where the arbitration agreement also was set aside).

Equity will give relief in case of an award, where the agent of one of the parties deceived the arbitrators in matters of fact. *Eaton v. Eaton* (1851) 43 N. C. (8 Ired. Eq.) 102.

"A court of equity will, and should, set aside and annul an award for fraud or imposition on the part of the party attempting to set up an award, by means of which the arbitrators were deceived." *Dickinson v. Chesapeake & O. R. Co.* (1874) 7 W. Va. 390.

Equity will set aside an award unfairly obtained. *Medcalfe v. Medcalfe* (1737) 1 Atk. 63, 26 Eng. Reprint, 42.

An award having been obtained against the estate of the decedent, there being no personal property, the administrator brought a proceeding to sell the real estate to satisfy the award. It was held that an heir might attack therein the award as fraudulently obtained, as what would be good ground for a bill in equity is good ground for a civil action under the Code. *Conway v. Duncan* (1875) 28 Ohio St. 102.

In an action to recover upon a fire insurance policy for loss by fire, and also to set aside a certain appraisalment or award of damages made by appraisers under the policy, the court,

in affirming a judgment for the plaintiff, said: "A rule which seems to be reasonable, and one well settled by authorities, is that a party to an arbitration, who by his own acts either attempts to corrupt or improperly influence one or more of the arbitrators to make an award in his favor, cannot be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed." *Insurance Co. of N. A. v. Hegewald* (1903) 161 Ind. 631, 66 N. E. 902.

The two following cases may be here referred to, although they seem to involve fraud in inducing the agreement rather than in procuring the award:

In an arbitration between partners, one of them, in the presence of the arbitrators, falsely representing the debtor to be solvent, induced the other to take as cash a certain claim, and, he consenting, the arbitrators made up their award accordingly. It was held that the award would be corrected in equity in this particular, it being considered that this part of the award, "being procured by fraud," was not binding on the defrauded party. *Brown v. Harklerode* (1846) 7 Humph. (Tenn.) 18.

An award between two brothers was set aside in equity for fraud, where one of them induced the other to suppress two items under a threat that otherwise he would prosecute their aged father for perjury, there being no foundation for the charge of perjury. *Mathews v. Mathews* (1870) 1 Heisk. (Tenn.) 669.

It has been held in Vermont that equity will set aside an award for a party's fraudulent concealment of a fact (*Cutting v. Carter* (1856) 29 Vt. 72, *infra*, III.), but not for perjury by a party (*French v. Raymond* (1909) 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324, *infra*, IV.).

The court's views of what constitutes fraud in *Emerson v. Udall* (1841) 13 Vt. 477, 37 Am. Dec. 604, seem perhaps to be affected by the doubt as to the jurisdiction of equity. The court there said: "It is very certain that the mere fact that the party offered, and prevailed before the arbi-

trators upon, a groundless claim, is no ground for charging him with fraud. This he might have done with perfect innocence and sincerity. It is necessary something more should be shown. And I feel very confident that the fact that the party making the claim considered it one of doubtful equity, or even that he might honestly have believed that the claim was not well founded, either in law or equity, if all the facts known to him were fairly laid before the arbitrators, and they allowed the claim, is no such fraud as will justify a court of equity in interfering. The party must, either by suggestion of falsehood or the suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of the claim, which were factitious, and which the party at the time believed to be such. And it is questionable even how far such a case will justify a court of equity in setting aside the award. Some cases of good authority seems to justify such a course. It is certain nothing short of this would justify it."

In *Auriol v. Smith* (1823) *Turn. & R.* 121, 37 *Eng. Reprint*, 1041, it was held that where accounts between trustee and cestui que trust are referred to arbitration, and the award is made a rule of a court of law under the Statute 9 & 10 Wm. III., though there be fraudulent misrepresentation by the trustee to the arbitrators as to particular items of the account, a bill cannot be maintained by the cestuis que trustent, after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items, the award upon the face of it being entire.

In *Elliott v. Adams* (1846) 8 *Blackf. (Ind.)* 103, it was held that a party cannot resort to chancery to set aside an award made pursuant to a statute authorizing the submission to be made a rule of court, on the ground that the award was procured by fraud, when the question has been heard and determined in a court of law, "and discloses no facts pertaining to the question of fraud of which the complainant might not, by due diligence.

have availed himself on the trial in that court. The jurisdiction in the case for granting relief was as extensive, on the law side of the court, as is that of a court of equity on the same subject. Under such circumstances, no principle is better settled than that equity will not interfere with a judgment at law."

In *French v. Raymond* (1910) 83 *Vt.* 265, 75 *Atl.* 267, it was held that a bill to set aside an award because the defendant fraudulently induced a material witness for the plaintiff to leave the state is demurrable, where it does not show "diligence on the part of the orator in respect of the matter complained of, for that it does not show when he first learned of [the witness's] absence, nor that he took any measures to protect his interests by applying to the arbitrators for a continuance, or otherwise, nor show that the defendant did anything to prevent his exercising diligence in this regard."

#### Relief at law.

It is not, of course, intended to take up the general subject of relief from awards at law. The modern cases on the subject of relief from awards on account of the fraud or unfairness of the party have little discussion on the subject of relief at law.

It was a general rule of the old practice that fraud in procuring an award could not be asserted at law. *Blagrove v. Bristol Waterworks Co.* (1856) 1 *Hurlst. & N.* 369, 156 *Eng. Reprint*, 1245, 26 *L. J. Exch. N. S.* 57; *White Water Valley Canal Co. v. Henderson* (1851) 3 *Ind.* 3; *Finley v. Finley* (1848) 11 *Mo.* 624 (obiter); *Pickering v. Pickering* (1849) 19 *N. H.* 389; *Elkins v. Page* (1864) 45 *N. H.* 310; *Devereux v. Burgwin* (1850) 33 *N. C.* (11 *Ired. L.*) 490.

An award cannot be impeached in a court of law by proving that it was procured to be made unfairly and by the exertion of undue influence. *Devereux v. Burgwin* (*N. C.*) *supra*.

A common-law award cannot be impeached in an action at law, for unfairness in obtaining it. *Finley v. Finley* (1848) 11 *Mo.* 624 (obiter).

In *White Water Valley Canal Co. v.*



Henderson (1851) 3 Ind. 3, it was held that a collateral action at law to enforce an award, under a special statutory arbitration for damages for taking lands for a canal, cannot be opposed for the fraudulent concealment by the plaintiff of evidence in the arbitration; the remedy was by bill in chancery to set the award aside.

"That the award was procured by the false and fraudulent testimony of the plaintiff cannot be determined by a jury, or raised by the pleadings in a suit at law," on the submission bond. *Elkins v. Page* (1864) 45 N. H. 310.

Where, as a defense to an action, the defendant pleaded an arbitration and award, and the plaintiff replied "that the award alleged was made upon false and corrupt testimony, procured and laid before the arbitrators by the defendant," the court said that the replication was "bad. There is no allegation of any fraud, corruption, misbehavior, or even mistake in the referees. It is alleged, generally, that the award was based upon false and corrupt testimony, procured and laid before the arbitrators. To try the issue presented by the replication would be to inquire whether the referees arrived at just conclusions upon the testimony. The question whether any portion of it was false is involved in those passed upon and settled by the tribunal chosen by the parties, and to determine it now would be to try the case over again. This cannot be done. Nothing is better settled than that an award made upon a full hearing of the parties, where no mistake or misconduct is imputed to the referees, is forever conclusive upon the parties, and the matter cannot be re-examined in any other tribunal. If there is an exception it must be on the ground of newly discovered evidence, which is not alleged in the present case, and the remedy, if any, must be by petition for a new trial." *Pickering v. Pickering* (1849) 19 N. H. 389.

In *Bradford v. Woollam* (1864) 10 Jur. N. S. (Eng.) 206, 33 L. J. Q. B. N. S. 129, 9 L. T. N. S. 731, 12 Week. Rep. 384, where the ground of the decision apparently is that the relief was asked for after the time provided

in the statute, upon motion for payment of an award made in June, the defendant in January next alleged, against a rule to show cause why he should not pay, that the plaintiff had since been committed for perjury on the hearing of the reference, but the court ruled that they could only look to what appeared on the face of the award.

It was held in *Burroughs v. David* (1878) 7 Iowa, 154, that in an action at law on an arbitration bond the defendant could not show that the plaintiffs procured the award by fraudulent representations and by fraudulent concealments, where the agreement was that all parties should make a full and perfect statement.

In *Blagrove v. Bristol Waterworks Co.* (1856) 1 Hurlst. & N. 369, 156 Eng. Reprint, 1245, 26 L. J. Exch. N. S. 57, it was held that it was no cause of action that the defendant procured an award by fraud; the plaintiff should have moved the court to set the award aside.

In *Emerson v. Udall* (1836) 8 Vt. 357, it was held that in an action at law an award cannot be defended against by simply showing "that the claim was unfounded, and that it is fairly inferable from the evidence exhibited that the party was cognizant of the fact."

In a few cases relief was allowed at law.

Thus, in holding that it might be shown at law that one of the parties had been guilty of fraud in procuring the award, in inducing false testimony, the court said: "Hardin, by his counsel, objects to the award being attacked in a court of law. But we hold that the judgment of a court in this state may be vacated for fraud, at law, and of course an award of arbitrators may be." *Hardin v. Brown* (1859) 27 Ga. 314.

In *Strong v. Strong* (1852) 9 Cush. (Mass.) 560, where the facts are not clearly reported, but it is suggested that ex parte representations were received from a party, the court, in advising a new trial in an action on a bond to perform an award, held that "the exercise of undue or improper

influence, applied by one of the parties to one or more of the arbitrators, by separate conference, or other ways of approach, is a lawful defense to an action on the award."

In *Neal v. Shields* (1830) 2 Penr. & W. (Pa.) 300, in debt on an award, it was said, obiter, that fraud or imposition upon the arbitrators by the plaintiff might be shown. It does not appear whether this was an arbitration at common law or under the Pennsylvania statute.

It will be seen that it is held in the reported case (*WYNNE v. GREENLEAF JOHNSON LUMBER Co.* ante, 1081) that, where to an action for damages the defendant pleaded an agreement to arbitrate and its breach by the plaintiff, the plaintiff might show that the defendant breached the agreement by getting a witness for the plaintiff drunk. (This was an agreement at common law.)

### III. *Fraudulent concealment of facts.*

Fraudulent concealment of matters from the arbitrators is ground for avoiding the award. *South Sea Co. v. Bumstead* (1784) 2 Eq. Cas. Abr. 80, 22 Eng. Reprint, 70 (in equity); *Charter v. Trevelyan* (1844) 11 Clark & F. 715, 8 Eng. Reprint, 1274 (in equity); *Beam v. Macomber* (1876) 33 Mich. 127 (in equity); *Cutting v. Carter* (1856) 29 Vt. 72 (in equity); *Wilson v. Richardson* (1851) 2 Grant, Ch. (U. C.) 448 (in equity).

It is good cause in equity to disregard an award that the other party withheld papers. *Burton v. Ellington* (1791) 3 Bro. Ch. 196, 29 Eng. Reprint, 487.

On a bill to set aside an award on the ground that the defendant had concealed certain matters from the arbitrators, the court said and held: "It is a rule, and so are the express words of the statute, that awards made between parties shall not be set aside but for corruption or partiality in the arbitrators; but there are other reasons equally mischievous and proper to be relieved against in this court; as where there are fraud and concealment in either of the parties." *South Sea Co. v. Bumstead* (Eng.) supra.

An arbitration between a solicitor and his client will not be binding upon the client, when it is shown in equity that in the arbitration the solicitor concealed a material fact. *Charter v. Trevelyan* (1844) 1 Clark & F. 715, 8 Eng. Reprint, 1274.

If one of two partners, on an award between them, conceals an item, equity will correct the award. *Beam v. Macomber* (1876) 33 Mich. 127.

Equity will set aside an award for fraudulent concealment of a fact by a party, which affects the amount of the award. *Cutting v. Carter* (1856) 29 Vt. 72.

In *Green v. Citizens Ins. Co.* (1890) 18 Can. S. C. 338, it was held that it was a good ground, under the Canadian statute, for remitting an award to the arbitrators, that in an insurance matter the insured made fraudulent concealment of saved property.

In *Hickman v. Lawson* (1860) 8 Grant, Ch. (U. C.) 386, where an award was set aside on an application for that purpose, a party in making a representation suppressed a fact, but there were other grounds.

Reference may be made here to the following case, although it seems that the fraud was directed towards the agreement of the parties, and not to the procurement of the award: It was held (obiter) in *Stockton Combined Harvester & Agri. Works v. Glen's Falls Ins. Co.* (1893) 98 Cal. 557, 33 Pac. 633, in an action on a promise to pay an award, that, where by fraudulent concealment one party induced the other to consent to an award of a certain amount without determination of facts by the arbitrators, the award would be set aside.

But in an action to recover the amount of a statutory award for land taken, which was claimed by the defendant to be in a public street, the court said: "None of the authorities that we have been able to find go to the extent that either courts of equity or courts of law will intervene to relieve those who have failed to relieve themselves. There is no evidence that the plaintiff had any more knowledge of the street than the defendant had. The means of information were the

same for both, and both parties might equally avail themselves of it; but having failed to do so heretofore, it is too late now." *Valle v. North Missouri R. Co.* (1866) 37 Mo. 445.

#### IV. Perjury of party.

Relief will be granted in equity against an award obtained by the perjury of a party. *Chambers v. Crook* (1868) 42 Ala. 171, 94 Am. Dec. 637 (collection of a judgment enjoined); *Bulkley v. Starr* (1807) 2 Day (Conn.) 552 (award set aside); *Stufflebeam v. Allen* (1913) 184 Ill. App. 133 (award corrected); *Craft v. Thompson* (1872) 51 N. H. 536 (award set aside); *Fire Asso. of Phila. v. Allesina* (1907) 49 Or. 316, 89 Pac. 960.

"An award based on the fraud or false testimony of the prevailing party will be set aside in equity, in a suit instituted for that purpose, and he will be enjoined from maintaining an action thereon." *Fire Asso. v. Allesina* (Or.) supra.

But on the contrary, in *French v. Raymond* (1909) 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324, it was held that equity would not set an award aside for perjury by a party in testifying before the arbitrators. The court said: "It makes no difference whether the perjury is suborned by the successful party or not, unless you call the subornation the fraud, and not the introduction of the perjured testimony, or whether the successful party himself commits it, in which case it is clearly intrinsic and direct; for when a matter has been actually tried and determined by a tribunal of competent jurisdiction, both parties having been fully heard, as here, a court of equity will not, according to most of the cases, reopen the controversy because of perjury, and throw the whole matter at large again, for that would be sowing dragon's teeth, and disregarding the maxims that 'it is for the public good that litigation should end,' and that 'a man shall not be twice vexed for the same thing,' which maxims are the very foundation of the law of this subject."

See also, as to asserting perjury in a suit at law, cases cited supra, II.

In *Williams v. Danziger* (1879) 91

Pa. 232, it was held that an agreement that an arbitration should be "final and without exception or appeal" precludes a party from claiming that the award was procured by the false testimony of the other party.

#### V. Ex parte communications with arbitrators.

The reader will understand that it is not intended here to take up the general question as to the effect of ex parte communications with arbitrators, but only to refer to those cases where the communication was on the suggestion of the party making it, and with an apparent intent to gain an unfair advantage.

Where one of the parties communicates with the arbitrator privately, the award will usually be set aside.

*Georgia.*—*Wilkins v. Van Winkle* (1887) 78 Ga. 557, 3 S. E. 761.

*Illinois.*—*Spurck v. Crook* (1858) 19 Ill. 415 (obiter); *Catlett v. Dougherty* (1885) 114 Ill. 568, 2 N. E. 669 (in equity).

*Kentucky.* — *Campbell v. Walker* (1907) 32 Ky. L. Rep. 327, 105 S. W. 959 (obiter).

*Maryland.*—*Sisk v. Garey* (1867) 27 Md. 407 (in equity).

*Michigan.* — *Hewitt v. Reed City* (1900) 124 Mich. 6, 50 L.R.A. 128, 83 Am. St. Rep. 309, 82 N. W. 616.

*Pennsylvania.* — *Trump v. Straw* (1852) 1 Pearson, 29.

*Virginia.*—*Jenkins v. Liston* (1856) 13 Gratt. 535 (in equity).

*Canada.* — *Van Egmond v. Jones* (1835) 4 U. C. Q. B. O. S. 119; *Williams v. Roblin* (1858) 2 Ont. Pr. Rep. 234; *Race v. Anderson* (1886) 14 Ont. App. Rep. 213. See also *Strong v. Strong* (1852) 9 Cush. (Mass.) 560, supra, II.

In a suit in equity to enjoin an action upon a bond given to secure the performance of an award, and to set aside the award, it was held that it was sufficient to enjoin the suit at law and to set aside the award that one of the real parties in interest made a statement to one of the arbitrators, "in the absence of his adverse party to the arbitration, evidently designed and having a tendency to improperly affect his decision as an arbitrator,"

and that it was unimportant whether the arbitrator was actually influenced or not. *Catlett v. Dougherty* (1885) (Ill.) *supra*.

Submission of authorities to an arbitrator after close of the testimony, where it is expressly agreed that neither party is to be represented by counsel, is a violation of the spirit of the submission which will avoid the award. *Hewitt v. Reed City* (Mich.) *supra*.

In *Trump v. Straw* (Pa.) *supra*, an award was set aside as procured by undue influence of counsel, who suggested, after the award was made out, that it was too low to carry costs, and it was then increased; this was held to be "undue means" under the Statute of 1836, which provided that an award was subject to exception for "corruption or undue means in procuring it."

On a bill to enforce an award it was held that "an award cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such. Nor will the case be withdrawn from the operation of the general rule by proof that the award would have been the same without such proof." *Jenkins v. Liston* (Va.) *supra*.

In *Race v. Anderson* (1886) 14 Ont. App. Rep. 213, an award was set aside on account of a statement and affidavit sent by one party to the arbitrator after he had written out his decision, but before he had signed it.

But where a party was asked by the arbitrator for a statement, and to send his opponent a copy, and he omitted to send the copy, the court declined to set aside the award where there was no substantial difference between his statement and answers already made in the presence of the other party. *Campbell v. Walker* (1907) 32 Ky. L. Rep. 327, 105 S. W. 959.

And when to an action for work and labor the defendant pleaded an award, and the plaintiff replied that the arbitrators met, the defendant being present but not the plaintiff, and that the defendant "induced the arbi-

trators to make said award by making false representations to them as to the work to be done by the" defendant, the reply was held bad on demurrer, as it did not appear that the plaintiff was prevented from attending upon the arbitrators by any inducement of the arbitrators or the defendant. "Under such circumstances, he cannot avoid the award upon the assumption that his adversary took a false view of the matters in controversy or misrepresented the facts; he should have been present and have shown the arbitrators that the statements of his adversary were not true." *Norton v. Browne* (1883) 89 Ind. 333.

It was held that it was no objection to an award that a letter was written by a party to one of the three arbitrators, which was received by him after the case was decided, though before the signing of the award, which was afterwards signed as decided, and before the other two arbitrators knew of the letter. *Johnson v. Holyoke Water Power Co.* (1871) 107 Mass. 472, where Gray, J., said: "We have no doubt that any communication made by one party to a submission, without the knowledge of the other, while the arbitrators have the case under consideration, attempting to influence them in his own favor, or to prejudice them against the other party, will avoid the award, if seasonably objected to by the latter; because the court cannot know that it did not affect the minds of the arbitrators, and must protect the innocent party from the possibility of being injured by the unlawful attempt of the other party. If such an attempt is made before the award is returned or published, it is ordinarily impossible to ascertain that it did not have any effect."

#### VI. Attorney drafting award.

An award should not be set aside merely because it was prepared by the attorney for one of the parties. *Fetherstone v. Cooper* (1803) 9 Ves. Jr. 68, 32 Eng. Reprint, 526 (on bill to set aside); *Underwood v. Bedford & C. R. Co.* (1861) 11 C. B. N. S. 442, 142 Eng. Reprint, 868 (on motion); *Steere v. Brownell* (1885) 113 Ill. 415 (bill to set aside); *Brown v. Ewing*

(1792) 1 N. J. L. 144, 1 Am. Dec. 195 (on motion, obiter). See also Behren v. Bremer (1854) 3 C. L. R. (Can.) 40, as set out in Re Zuber (1911) 25 Ont. L. Rep. 252, Ann. Cas. 1912C, 1002.

That one of the attorneys drew up the award on the instruction of the arbitrators is no ground to set it aside. *Ex parte Milner* (1875) 16 N. B. 96.

In an action upon an award, the court said: "After the award was agreed upon, we think there was no impropriety in employing the attorney of the prevailing party to draw it up." *Kane v. Fond du Lac* (1876) 40 Wis. 495.

That the formal parts of the award were drawn up by the solicitor of one of the parties after the written result had been handed by the arbitrator to the official reporter is no objection to the award. *Re Armstrong* (1905) 6 Ont. Week. Rep. 104.

An award should not be set aside because a solicitor, before the hearings began, drafted a form with the amount left blank and handed it to one of the arbitrators. *Re Zuber* (1911) 25 Ont. L. Rep. 252, Ann. Cas. 1912C, 1002 (on an application to set aside the award, apparently under the Canadian statute).

However, in *Dickinson v. Chesapeake & O. R. Co.* (1874) 7 W. Va. 390, it was said and held: "Though the simple fact that Rucker (one of the parties) wrote the award in the absence of the company, its agent, or attorney may not of itself be sufficient to make it invalid, still it may be considered unexplained, as affording just ground for suspicion and criticism. But, Rucker having written the award, and so written it as that it is materially erroneous and deceptive in his favor, for the arbitrators to sign, and they did sign it as written, the award may be held invalid in a court of equity, under the circumstances appearing in this case."

In *Burton v. Knight* (1705) 2 Vern. 514, 23 Eng. Reprint, 929, where an award drawn by an attorney for one

of the parties was set aside in chancery, there were other acts on which the decision was particularly based.

#### VII. Miscellaneous.

It was held in *Whiteley v. Roberts* [1891] 1 Ch. (Eng.) 558, 60 L. J. Ch. N. S. 149, 64 L. T. N. S. 81, 39 Week. Rep. 248, that an admission by the arbitrator that he was bribed is not admissible against the successful party on a motion to set aside the award.

In *Chicester v. M'Intire* (1430) 4 Bligh, N. R. 78, 5 Eng. Reprint, 28, 1 Dowl. & C. 460, 6 Eng. Reprint, 597, the court declined to decree a specific performance of an award, partly, it seems, because one of the arbitrators conferred with the wife of one of the parties; but the case is obscurely reported.

In *Worley v. Moore* (1881) 77 Ind. 567, an action to recover money paid upon a settlement for fraud and mistake, the defendant alleged that the payment was by land appraised by arbitrators, one of whom the plaintiff bribed, whereby the land was undervalued. The court said: "It is argued that the answer shows an arbitration, and that, as the only fraudulent act charged is the bribery of the third person, there was therefore no injury to the appellant, because a majority of the arbitrators were uncorrupted. This is a doctrine we cannot approve. The appellant had a right to the judgment of disinterested and honest men, and in bribing one of them to make a false valuation the appellee invaded the rights of his adversary. He cannot be allowed to take advantage of his corrupt and fraudulent act."

In *Reager v. Pennsylvania Co.* (1916) 169 Ky. 479, 184 S. W. 395, the court said obiter: "Fraud used by one of the parties in securing an award will vitiate the decision."

It was held in *Widder v. Buffalo & L. H. R. Co.* (1868) 27 U. C. Q. B. 425, that the making by a party of a claim bad in law is not a fraud such as will be a defense to an award. B. B. B.

CLINTON A. CURTIS et al.  
v.

I. R. CURTIS, Impleaded, etc., Appt.

*West Virginia Supreme Court of Appeals — October 28, 1919.*

(— W. Va. —, 100 S. E. 856.)

**Witness — heir of incompetent — attack on deed.**

1. One who would inherit an interest in land, in case a deed, which is attacked upon the ground of lack of capacity of the grantor, is set aside, is incompetent to testify as to the mental capacity of the grantor in such deed, and this disqualification extends to the wife or husband of such person.

[See note on this question beginning on page 1097.]

**— testimony by grantee — effect.**

2. Where, however, the grantee in such deed testifies as to the mental capacity of the grantor therein, those seeking to overthrow the same become competent witnesses upon that question under the exception contained in § 28 of chapter 130 (§ 4879) of the Code of 1913.

**Deed — incompetent grantor — setting aside.**

3. Proof that the grantor in a deed was feeble, both in body and mind, reposed great confidence and trust in her son, the grantee therein, who acted as her agent under a power of attorney giving him full authority to manage, dispose of, and convey her estate, that he procured his attorney to prepare the deed conveying all of

the grantor's estate to him for an insubstantial consideration, to the exclusion of another son and a daughter, who were left entirely unprovided for, and which deed was executed while the grantor was living with the grantee in his home, without any independent advice being obtained by the grantor or any opportunity for obtaining such advice establishes prima facie the charge of undue influence by the son; and, where such prima facie case is not overthrown by clear evidence that the grantor was of sound mind and acted independently and upon her own judgment in executing such deed the same will be set aside.

[See 4 R. C. L. 504; 14 R. C. L. 598.]

Headnotes by RITZ, J.

**APPEAL** by defendant I. R. Curtis from a decree of the Circuit Court for Upshur County in favor of plaintiffs in a suit to cancel a deed. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. H. Roy Waugh, for appellant:  
Testimony of witnesses bearing upon the mental capacity of Mrs. Smith was not competent or admissible.

Kilgore v. Hanley, 27 W. Va. 451; Kerr v. Lunsford, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493; Freeman v. Freeman, 71 W. Va. 303, 76 S. E. 657; Holcomb v. Holcomb, 95 N. Y. 316.

Katherine E. Smith was not mentally incompetent.

Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E.

201; Smith v. Smith, 48 W. Va. 51, 35 S. E. 876; Black v. Post, 67 W. Va. 252, 67 S. E. 1072; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Woodville v. Woodville, 63 W. Va. 286, 60 S. E. 140; White v. Mooney, 73 W. Va. 304, 80 S. E. 844; Orum v. Rose, 74 W. Va. 164, 81 S. E. 719; Barnett v. Great-house, 77 W. Va. 514, 88 S. E. 1013.

Evidence of physicians as to testamentary capacity is entitled to greater weight than that of nonprofessional persons, if they have had personal knowledge of the person whose mental capacity is in question.

Jarrett v. Jarrett, 11 W. Va. 584; Ward v. Brown, 53 W. Va. 227, 44 S. E. 488.

Mr. C. N. Pew also for appellant.

Messrs. Young & McWhorter for appellees.

Ritz, J., delivered the opinion of the court:

The plaintiffs, Clinton A. Curtis and Mollie E. McNemar, and the defendant, I. R. Curtis, are children of Katherine E. Smith, who was twice married, her first husband being Isom Curtis, the father of the plaintiffs and the above-named defendant. After the marriage of Mrs. Smith to her last husband she resided with him on a farm in Upshur county until the spring of 1912, when their house was destroyed by fire. They then, for something like a year, lived with various of the children of Mr. Smith by his first wife. Early in the year 1913 they acquired a house in the town of Buckhannon, in what is known as the Liggett addition, which was conveyed to Mrs. Smith, although paid for by her husband, in consideration that she release her contingent right of dower in some other lands owned by him. The Smiths continued to reside at this place until the death of the husband in the latter part of July, 1915. At that time it is conceded by all parties that Mrs. Smith was in a very feeble physical condition, and it is contended by the plaintiffs that her mental faculties were very much impaired, if not entirely destroyed. After the funeral of Mr. Smith, and on the same day, the plaintiffs say that at the instance of their brother, I. R. Curtis, they entered into an arrangement for taking care of their mother. According to their contention it was agreed among them that her mental and physical condition was such that she was not able to take care of herself or of her property, and they agreed that she should live with that one of her children whom she might select, and that such one should receive reasonable compensation for caring for her out of her property, and at her death what remained

should be divided equally among them. She was allowed to remain at her home for a few days after her husband's death, in charge of Mr. and Mrs. Queen, who were employed for the purpose of caring for her. She was then removed to the home of her daughter, Mrs. McNemar, in Lewis county, where she remained until about the 25th of September, 1915. At that time she was taken back to Buckhannon and placed in the home of Mr. and Mrs. Queen, where she remained until about the 3d of October, when she was taken to the home of I. R. Curtis, also in the town of Buckhannon, where she remained until her death on the 19th of December, 1915. On the 30th day of July, 1915, the defendant, I. R. Curtis, procured from his mother a power of attorney, authorizing him to transact her business, sue for, and recover any moneys that might be due her from anyone, collect the same, to compound or compromise for the same and give discharges therefor, make settlement of her interest in the estate of her late husband Phillip Smith, and also of her interest in the estate of her deceased father, Randolph Jackson, to sign any bond, deed, obligation, contract, or other paper, to indorse promissory notes and renew the same from time to time, to draw any money she might have out of any banks, to sell or lease any part or parts of her real estate, and to make all necessary deeds of conveyance, with all necessary covenants of warranty and assurances of title, and sign, seal, and acknowledge the same, and to do all other acts and things in relation to all or any part of her affairs that she might do herself. This power of attorney he had recorded in the office of the clerk of the county court of Upshur county. On the 17th day of November, 1915, a deed was executed by Mrs. Smith, conveying to I. R. Curtis all of her real estate, consisting of her house and lot in the town of Buckhannon, and her interest in her father's farm in Lewis county. This deed was also placed upon the record on the same

day that it was executed and acknowledged, but the plaintiffs say that they had no actual knowledge of it until after the death of their mother in December. Shortly after their mother's death they instituted this suit for the purpose of setting aside and canceling said deed, upon the ground that it was in violation of the agreement had between the plaintiffs and the defendant, I. R. Curtis, in regard to taking care of their mother, and the division of the property, and upon the further ground that she was without capacity to make such deed at the time she made the same, and that it was procured from her by undue and fraudulent influence. Much evidence was taken upon the question of the capacity of the grantor to make this deed, and to show the relationship of the various parties to the transaction. The circuit court entered a decree canceling the deed, holding that Mrs. Smith did not have capacity to execute the same, and that it was procured from her by the undue influence of the grantee. From this decree this appeal is prosecuted.

In support of the allegations of their bill that their mother did not have capacity to make the deed sought to be overthrown, both of the plaintiffs, as well as their respective spouses, testify as to the mental capacity of Mrs. Smith. There was no objection made to their testimony in this regard at the time it was introduced, nor was it objected to for this reason at any time in the lower court, but it is now for the first time suggested that they were not competent to testify as to the mental capacity of the grantor in that deed, for the reason that it would be in effect testifying to personal communications with the deceased grantor. It is well settled in this jurisdiction that the one claiming under a deceased person cannot, in a suit affecting his estate, give his opinion as to the mental capacity of such deceased person, as such opinion must be based upon

communications had with the deceased. Impressions or conclusions reached by the witness as to the sanity or insanity of a deceased party must be arrived at from observations of the

Witness—heir of incompetent—  
attack on deed.

conduct of, or from communications had with, such deceased person, and in either event they fall within the inhibition of the statute. *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657. And it is likewise true that where a witness is disqualified to testify as to such personal communications, his spouse is under like disability. *Freeman v. Freeman*, *supra*; *Kilgore v. Hanley*, 27 W. Va. 451.

But the plaintiffs say that, while these witnesses were not competent to testify at the time their evidence was taken, they became competent before any objection was made thereto, or before their evidence was ever read by the chancellor, because the defendant and his wife who are under the same disability, testified as to the mental condition of Mrs. Smith. It is quite true that the defendant and his wife both testify at length as to the mental capacity of the grantor in the deed, and give their opinions in regard thereto. It is insisted that this was testifying in regard to the same communications or transactions to which the testimony of the plaintiffs was directed. It may be said that the observations of the grantor by the witnesses extend practically over the same period of time, they were of the same general character, and the opinions formed are conclusions reached from the same communications or transactions with the deceased party, and if one of the parties

—testimony by  
grantee—effect.

testifies in regard to such communications or transactions, under the exception contained in § 23 of chapter 130 (§ 4879) of the Code, the other interested party is authorized to give his version of the transactions or communications. This was the conclusion reached by



this court in the case of *Wooldridge v. Wooldridge*, 69 W. Va. 554, 558, 72 S. E. 654, Ann. Cas. 1913B, 653. Our conclusion, therefore, is that, while the plaintiffs and their spouses were not competent witnesses at the time their testimony was taken, still, by the action of the defendant in introducing himself and his wife to testify in regard to the mental condition of his mother, he made this evidence competent, and he cannot now complain that it was considered by the chancellor in reaching his conclusion.

As before stated, much evidence is taken by the parties to this suit to establish the mental condition of the grantor in the deed. A number of the children of Phillip Smith, the second husband of Mrs. Smith, were introduced. They had had long acquaintance with Mrs. Smith, and were nearly of the same age, Phillip Smith being many years older than his wife; it appearing that he was past the age of ninety years when he died, while his wife was only about sixty-eight. These children testify that they had known Mrs. Smith for many, many years; that in the year 1912, when the house in which the Smiths lived was destroyed by fire, Mrs. Smith suffered from a severe shock of some kind, which seemed to very seriously depress her; that her physical and mental condition continued to grow worse from that day until the day of her death. They testify that during the last illness of their father they were at the house of the Smiths frequently, some of them almost constantly for quite a while; that Mrs. Smith was at that time in a very deplorable physical and mental condition; that she did not appreciate the gravity of her husband's illness, and did not understand that he had died. It is insisted that these witnesses were biased and prejudiced against the defendant, I. R. Curtis, and that little credence should be given to their testimony. After a careful perusal of the record we cannot see any justification for this conclusion. They certainly had

the means of knowledge, and we see nothing in the record to indicate that their testimony was fabricated because of ill feeling toward the defendant. They had frequent communications with Mrs. Smith after her husband's death, up until the time she died, and they are all of the opinion that for a considerable time before her death her mental condition was such that she did not know what she was doing. Other witnesses are introduced who also testify in the same way. Mr. and Mrs. Queen, who were at the house of Mr. and Mrs. Smith before Mr. Smith's death and who nursed both of them during that time, and stayed there with Mrs. Smith for a short time after the funeral of Mr. Smith, and at whose house Mrs. Smith stayed after her return from her daughter's in Lewis county in the fall of 1915, testify as to her condition during the time they were at the Smith residence with her and during the time she was at their house in the fall of 1915. They testify that she was incapable of understanding what she was doing during that time. They say that at the time the power of attorney was executed she did not realize what she had done, and that after her son had procured her signature to this paper she inquired of them at frequent intervals what it was that she had executed. They say that while she was at their house she thought she was at her own residence, and called attention to the fact that some trees that were formerly in her yard were not there now; that she frequently did not recognize her close friends and associates of long standing. It is also testified by witnesses that on some occasions she did not recognize her own children. Two physicians testify on behalf of the plaintiffs, one who attended Mrs. Smith while she was at her daughter's in Lewis county, and the other who attended her for some time at Buckhannon. The first of these only saw her on two or three occasions, but he attended her professionally at those times, and says

that he found her suffering from paralysis, that she was mentally incapacitated, and that there was in his judgment no possibility of her improving, but that he was reasonably certain that she would continue to grow worse until her death. The other physician saw her on many more occasions, and his conclusion was about the same. However, two physicians testify on behalf of the defendant, and their opportunities were equally as good as those of the physicians above mentioned. One of these only saw her, however, on one occasion, and that was on the very day she executed the deed. He says that he was present for about thirty minutes, and went there for the purpose of making an examination; that she answered his questions intelligently, and he saw nothing to indicate that there was anything wrong with her mind; that in his judgment she was suffering from locomotor ataxia, which disease does not necessarily affect the mind. The other physician who testified for the defendant had attended Mrs. Smith from a short time before her husband's death until her death, with the exception of the time that she was in Lewis county, at her daughter's. He testifies that he saw her on many occasions during that time, and that he believes she was suffering from locomotor ataxia, which does not necessarily affect the mind until shortly before death, and that he did not believe that Mrs. Smith's mind was seriously affected until three or four days before she died, although he admits that during all of the time she was weak, both in body and mind. Other witnesses testify that they had seen Mrs. Smith both before and after her husband's death, on various occasions; that she always knew them, conversed with them intelligently, and seemed to clearly understand what she was doing.

That her mind was affected there is no doubt. Whether it was affected to the extent that the disposition she made of her property under

the circumstances thereof was not in fact her own act is the question we have here. The defendant, I. R. Curtis, was intrusted by her with the full management of all of her property by the power of attorney before referred to. This conferred upon him large powers, even to the extent of selling and conveying any of her estate. It shows that she had the utmost confidence in him. In fact it may be said that it is strong evidence that he exercised a controlling influence with her, even at that time. It is also worthy of remark that at the time he procured this power of attorney he said nothing about it to either his brother or sister, and they had no knowledge of it until after their mother's death. He contends, of course, that he believed his mother was entirely capable of conducting her own affairs, and that he only took this power of attorney from her for the reason that she was physically weak and unable to get around to look after her business, but why did he incorporate in it authority to sell and convey her real estate if she was entirely competent for the purpose of making a deed? It would have required no physical exertion upon her part to have done this. Then, too, he lived many miles away in another part of the state, and if his mother's convenience was his only motive, this would have been better served by conferring the power upon his brother who lived in the same town with the mother. There is another significant fact in connection with this power of attorney, and that is this recital in it: "I am doing this because I am physically unable to look after these matters, but yet of sound mind." Both of the plaintiffs and the wife of Clinton A. Curtis all testify that on the day of Phillip Smith's funeral they and the defendant, I. R. Curtis, agreed among themselves that Mrs. Smith was mentally incapable of transacting her business; that this was I. R. Curtis's own suggestion, and that they assented to it because it was a fact. They introduced two letters

written by the defendant, I. R. Curtis, on the 31st of August, 1915, one to his sister, and the other to his brother. In the letter to his sister he insists on their getting together and agreeing on how his mother shall be taken care of, and insists that his sister be compensated for her care and attention to her, and also states that anything that is left of the mother's estate after they have provided for her they will divide equally among themselves. He also makes the suggestion in this letter that there is no necessity of worrying their mother about it, for she in all her suffering cannot have a clear conception of what she wants, but that he is sure she will want all of her children to share equally. Substantially the same statements are made in the letter written on the same day to his brother. These letters, it is urged, are inconsistent with the statement that he believed his mother's mental condition was sound, and that she was competent to take care of her affairs. Pursuant to these letters, he did come to the home of his sister in Lewis county where his mother was then staying, and removed her to Buckhannon. He claims that he did this because his mother desired it, she complaining that her daughter's children disturbed her. The defendant then kept her at his house in Buckhannon until she died in December. It appears that on the 15th of November he had the deed prepared which is sought to be set aside in this case. He says that he did it at the repeated solicitations of his mother. It conveys all of her property to him, in consideration that he support and maintain her during her life. It was reasonably certain that she could live but a short time. This is shown clearly by the medical testimony, and while he says that he was reluctant to have his mother execute this deed, it does not appear that he ever suggested that she consult with her other children in regard to it, or in fact with anyone else, nor is there any evidence that she ever did con-

sult with anyone else in regard to it. At the time the deed was acknowledged it was not read over to her, the defendant making the statement that he had read it to her the day before, and she knew what was in it. The officer who took the acknowledgment, and the witness who was present and witnessed her mark, say that she assented to this statement, and when she was asked if she acknowledged the deed expressed herself in the affirmative, and that this was all that passed at the time of the execution of the paper. It is rather significant that on this very day, not only the doctor who had been attending her, but another doctor who had never seen her before, and who was never called to attend her afterward, called to examine her just a short time after she executed the deed. While the defendant placed this deed on record on the same day that it was procured, he never said a word to his brother about it, although they lived right in the same town, and saw each other practically every day, nor did he ever mention the matter to his sister. Mrs. Smith, it cannot be doubted, reposed the utmost confidence in her son, the defendant. She was feeble, not only in body, but in mind. He acted as her agent. Under the power of attorney which she had given him he was her other self, and we do not hesitate to say that a deed executed by her, conveying to him all of her estate, practically without consideration, without any advice or consultation from anyone else, is prima facie evidence of undue influence in the procurement of it. *Sperry v. Johnson*, 80 W. Va. 142, 92 S. E. 574; *Turner v. Hinchman*, 72 W. Va. 384, 79 S. E. 18; *Samuel v. Marshall*, 3 Leigh, 567; *Hartman v. Strickler*, 82 Va. 225; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. 113; *Leonard v. Burtle*, 226 Ill. 422, 80 N. E. 992; *Re Hess*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665, and note at page 670, etc.; *Underhill, Wills*, § 137. This prima facie case is not

Deed-Incom-  
petent grantor  
-setting aside.

Our conclusion, therefore, is to affirm the decree complained of, and remand the cause for the purpose of taking the accounts prayed for in the bill.

or disqualifying interested parties from testifying adversely to the interest of the representative of a deceased person. These statutes vary considerably in form, and the construction so far as concerns the question under consideration, is greatly influenced by the view of the court as to whether the statute should be construed strictly or liberally. In the majority of the jurisdictions passing upon the question, the statute construed in effect disqualified witnesses from testifying as to transactions or communications with a deceased person. In these jurisdictions the courts are not in harmony as to whether or not this form of statute disqualifies a person, interested in the proceeding in which his testimony is offered, from testifying in regard to his opinion of the mental capacity of the deceased. In several jurisdictions, after having given the matter very able consideration, the conclusion has been reached that tes-

timony as to the mental capacity of a deceased person does not relate to a transaction or communication with him, and hence a witness is not disqualified from testifying as to the mental condition of a deceased person by a statute in this form; and, since usually to render such testimony of any value it is essential that the witness testify as to matters within his observation upon which he bases his opinion, the witness is not disqualified from testifying as to these matters.

**Alabama.**—*Davis v. Tarver* (1880) 65 Ala. 98.

**Georgia.**—*Cato v. Hunt* (1900) 112 Ga. 139, 37 S. E. 183; *Harris v. Whitney* (1901) 112 Ga. 633, 37 S. E. 883.

**Iowa.**—*Severin v. Zack* (1880) 55 Iowa, 28, 7 N. W. 404; *Denning v. Butcher* (1894) 91 Iowa, 425, 59 N. W. 69; *Re Evans* (1901) 114 Iowa, 240, 86 N. W. 283.

**Kansas.**—*Grimshaw v. Kent* (1908) 67 Kan. 463, 73 Pac. 92; *Harper v. Harper* (1911) 83 Kan. 761, 113 Pac. 300; *Brown v. Brown* (1915) 96 Kan. 510, 152 Pac. 646.

**Kentucky.**—*Williams v. Williams* (1890) 90 Ky. 28, 13 S. W. 250.

**Minnesota.**—*Chapel v. Chapel* (1917) 137 Minn. 420, 163 N. W. 771; *Wheeler v. McKeon* (1917) 137 Minn. 92, 1 A.L.R. 1514, 162 N. W. 1070.

**Missouri.**—*Yant v. Charles* (1920) — Mo. —, 219 S. W. 512.

**North Carolina.**—*Ducker v. Whitson* (1893) 112 N. C. 44, 16 S. E. 854; *Re Stocks* (1918) 175 N. C. 224, 95 S. E. 360; *Bissett v. Bailey* (1918) 176 N. C. 48, 96 S. E. 648; *Plemmons v. Murphey* (1918) 176 N. C. 671, 97 S. E. 648.

**South Dakota.**—*Re Golder* (1916) 37 S. D. 397, 158 N. W. 734.

**Wisconsin.**—*Schultz v. Culbertson* (1905) 125 Wis. 169, 103 N. W. 234.

**Nova Scotia.**—*Re Farquharson* (1900) 33 N. S. 261.

Upon this point in *Denning v. Butcher* (1894) 91 Iowa, 425, 59 N. W. 69, supra, the court said: "It is claimed that the observation of the witness as to the deceased was a personal transaction; that is, if she noticed his demeanor, or his gait, or his expression, or anything else about his appearance,

it was a personal transaction. Such a holding would be giving the statute an interpretation wholly unwarranted by its language, and do violence to the meaning of the words used therein. A 'personal transaction' means the doing or performing of some business between parties, or the management of any affair. To be a personal transaction, in such a case, the matter testified about must have involved some act by or between two parties, or some act by one party for the benefit or to the detriment of another, and which said other was in some way interested in. It is clear that the witness in this case did not testify to any transaction had with the decedent. Her opinion was based upon what she saw; the conversations she heard between Butcher and others."

An interesting point in this connection, suggested by *Gwinn v. Hobbs* (1917) — Ind. App. —, 118 N. E. 155, is as to the effect to be given to the testimony of the witness as to the matters which he relies upon as the basis for his opinion of the mental capacity of the deceased. May such matters be considered by the jury as affirmative evidence bearing upon the issue of mental competency? The case referred to holds that such testimony must not be considered as independent proof upon the issue of competency, but only as bearing upon the weight to be attached to the opinion of the witness upon this issue.

It may be observed that, in the majority of the cases heretofore cited, the testimony as to the conduct of deceased was received as bearing upon the qualification of the witness to express an opinion, and upon the value of that opinion. They do not, affirmatively at least, indicate that the testimony may be used for any other purpose.

## 2. Evidence of conversation with or statement by deceased.

In the application of the majority rule the important question is as to what constitutes a transaction or communication with the deceased so as to render the testimony inadmissible. Many of the cases, relying on the majority rule, hold that the statute does

not apply to conversations with or statements by the deceased, upon which the witness relies as the basis for his opinion as to the deceased's mental capacity, and that hence evidence thereof may be given. *Cato v. Hunt* (1900) 112 Ga. 189, 37 S. E. 183; *Denning v. Butcher* (1894) 91 Iowa, 425, 59 N. W. 69, compare with Iowa cases, *infra*; *Williams v. Williams* (1890) 90 Ky. 28, 13 S. W. 250. But see *Bannon v. P. Bannon Sewer Pipe Co.* (1919) 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Chapel v. Chapel* (1917) 137 Minn. 420, 163 N. W. 771; *Wheeler v. McKeon* (1917) 137 Minn. 92, 1 A.L.R. 1514, 162 N. W. 1070; *Plemmons v. Murphey* (1918) 176 N. C. 671, 97 S. E. 648; *Bissett v. Bailey* (1918) 176 N. C. 43, 96 S. E. 648; *Schultz v. Culbertson* (1905) 125 Wis. 169, 103 N. W. 234; *Re Farquharson* (1900) 33 N. S. 261.

In *Re Golder* (1916) 37 S. D. 397, 158 N. W. 734, *supra*, involving a will contest proceeding, it is held that the proponents may testify as to the physical appearance, actions, and statements of the testator, bearing upon his mental capacity, notwithstanding the statute which disqualifies interested witnesses from testifying as to any transaction whatever with, or statement by, the testator or intestate. The court said: "Such testimony was offered on the ground that it tended to show testator's mental capacity, and would establish facts upon which expert evidence might be based. It is too apparent to need discussion that the trial court erred in excluding the testimony of proponents as to the physical appearance and acts of the testator. By no possible stretch can the words 'transaction' or 'statement' be held to include physical appearance and acts. The primary purpose in the enactment of this statute was to remove the common-law disability resulting from a witness's interest in the outcome of an action, or his relationship to a party thereto. The enacting section is sweeping in its terms and, standing alone, would remove all disabilities. The proviso introduces certain exceptions. Such proviso should be construed strictly, and takes

no case out of the enacting clause which does not fall fairly within its terms; and those who set up such exception must establish it as being within the words, as well as within the reason thereof."

*Denning v. Butcher* (1894) 91 Iowa, 425, 59 N. W. 69, *supra*, also involved a contest over the probate of a will, and it was held that a legatee was not disqualified to testify with regard to his opinion as to the mental capacity of the deceased, since the opinion, based upon the conduct and statements of the deceased, was not a transaction or communication with the decedent.

In *Chapel v. Chapel* (1917) 137 Minn. 420, 163 N. W. 771, a will contest proceeding, a witness was held not disqualified from testifying as to the mental capacity of the testatrix, although interested in the event of the action. It was further held that, in order to lay the foundation for such testimony, the witness might testify as to conversations with, and conduct of, the deceased.

In *Re Farquharson* (1900) 33 N. S. 261, *supra*, involving a will contest proceeding, in holding that the statute disqualifying an interested witness from testifying as to dealings, transactions, and agreements with the deceased does not disqualify an interested witness from testifying as to the mental capacity of the deceased, the court said that the statute applies only to dealings, transactions, and agreements with the deceased, and has no application to the question of testamentary capacity.

In *Cato v. Hunt* (1900) 112 Ga. 189, 37 S. E. 183, *supra*, in considering the effect of a statute which renders witnesses incompetent to testify to any transaction or communication with the deceased, upon the qualification of an interested witness in an action to set aside a deed executed by the decedent in his lifetime on the ground of undue influence and mental incapacity, it was held that the wife of the grantee was a competent witness to the fact that she had seen the decedent daily, and had had frequent con-

versations with him for several months prior to the making of the deed, and that in her judgment he was fully capable of making the contract. The court said that the purpose of this testimony was not to prove "any personal transaction or communication with the deceased grantor, but to show his mental condition. It was simply the opinion of the witness as to his sanity and mental capacity, based upon the facts recited. Mrs. Cato does not appear to have been offered to show the terms or the execution of the deed, or to testify as to what influence was brought to bear upon the deceased by her. Her evidence was simply as to her opportunity for observing the deceased, and as to the impression made upon her by his conduct and conversation. Had the grantor been in life, and brought this action to set aside the deed on the ground of fraud and undue influence, he could not have denied her statement as to the opinion she had formed as to his mental capacity."

In *Plemmons v. Murphey* (1918) 176 N. C. 671, 97 S. E. 648, *supra*, a proceeding to set aside deeds to some of the children of the deceased, it is held that other heirs may testify as to the mental condition of the deceased, and they may state the reason for their opinions, even though this may involve personal transactions and communications with the deceased.

And in *Bissett v. Bailey* (1918) 176 N. C. 43, 96 S. E. 648, on the same ground, it is held that a wife may testify to the mental capacity of her deceased husband, and as to communications and conversations with the deceased upon which her opinion is founded (setting aside of deeds).

In *Wheeler v. McKeon* (1917) 137 Minn. 92, 1 A.L.R. 1514, 162 N. W. 1070, *supra*, the question arose under a statute which forbids parties to the action, or persons interested in the event thereof, from testifying concerning any conversation with or admission of a deceased person. In a proceeding involving an attack upon the validity of a conveyance of real estate by a person since deceased, it was held that

the heirs of the decedent might testify with regard to conversations with the decedent which indicated the loss of memory, a wandering mind, and delusions.

In *Schultz v. Culbertson* (1905) 125 Wis. 169, 103 N. W. 234, *supra*, it is held that a widow may testify to acts, conduct, or conversations of the deceased within her observation not participated in or influenced by her, and, after narrating such acts, conduct, or conversation, she may testify to her impression as to the decedent's mental competency derived therefrom (validity of a contract made by the decedent in his lifetime).

In Iowa, the rule is that a witness is qualified to testify with regard to the mental competency of a deceased person, providing the testimony is based upon the observation of the witness and statements made by the decedent, or conversation by him overheard by the witness, but not directed to the witness personally. This rule is based upon the composite result of several Iowa decisions, rather than upon any particular one.

In *Denning v. Butcher* (1894) 91 Iowa, 425, 59 N. W. 69, it is held that in a will contest proceeding an interested witness may testify as to the mental competency of the deceased, and as the basis for the witness's opinion he may testify as to his observations of the acts, conduct, and appearance of the deceased, and conversations of deceased which he overheard. The court said: "It is clear that the witness did not testify to any transaction had with the deceased. Her opinion was based upon what she saw; the conversations she heard between Butcher and others." In *Re Goldthorp* (1895) 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. E. 845, it is held that an interested witness in a will contest is disqualified to testify with regard to the mental competency of the testator, where the witness's opinion is based upon conversations with the deceased. In this case the court denied the contention that as the witness must show to the court that he was qualified to give an opinion as to the mental condition of the deceased be-

fore he would be permitted to express his opinion, and as testimony tending to show qualification is preliminary, only, to the main issue, the witness should be permitted to testify to conversations had with the deceased. The court pointed out that the evidence showed that the opinion which the witness formed as to deceased's mental condition was largely, if not wholly, based upon conversations. And these conversations, though not in and of themselves a transaction or communications had with decedent, were nevertheless the result, outgrowth, or conclusion arrived at from a consideration of prohibited testimony.

In *Re Van Houten* (1910) 147 Iowa, 725, 140 Am. St. Rep. 340, 124 N. W. 886, a will contest, an interested witness was held to be disqualified to testify with regard to the mental competency of the decedent, where the testimony was based upon a certain transaction between the deceased and a third person, in which the witness took part. The testimony related to the conversation of the deceased at that time. The court, in holding the evidence incompetent, said that the witness was a factor in that transaction, and clearly within the prohibition of the statute. The case of *Hayes v. Snader* (1918) 182 Iowa, 443, 165 N. W. 1041, is not within the scope of the note. The point involved here, however, was discussed by the court as follows: "This court is certainly not committed to the doctrine that this statute excludes the use of 'every means by which one person can derive any impression or information from the conduct or language of another.' One means of deriving such impression or information from the conduct or language of another is to hear what he says to a third person. But we have held that such testimony is not excluded by this statute (*Campbell v. Collins* (1907) 138 Iowa, 152, 110 N. W. 435; *Re Goldthorp* (Iowa) *supra*) in which last case we expressly rule also that it is permitted to receive testimony describing the condition of the testator, though that testimony is based on observation, excluding only that which is based both

upon such observation and statements made by the decedent to the witness. To a certainty, testifying to facts upon which an inference in favor of the claimant may arise is based on the fact that some means has been employed whereby the witness has derived some impression or information from the conduct or language of the decedent. But that this is so does not shut out testimony upon which such inference can be built."

In some jurisdictions, the courts, while sustaining the right of an interested witness to testify as to his opinion with regard to the mental capacity of a deceased person, hold that a witness cannot testify as to conversations with or statements by the deceased, and apparently that his opinion cannot be based upon such conversation or statements. *Brown v. Brown* (1915) 96 Kan. 510, 152 Pac. 646; *Bannon v. P. Bannon Sewer Pipe Co.* (1909) 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Leahy v. Timon* (1919) — Tex. —, 215 S. W. 951.

In *Re Goldthorp* (1895) 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845, in holding, in a proceeding for the probate of a will, that an interested witness was competent to testify to the mental condition of the decedent in so far as the testimony was based upon his observations of the decedent, his appearance, conduct, manners, and habits, nevertheless held that the witness was disqualified to testify as to the mental capacity of the deceased, where the basis of his opinion was conversations with the decedent. It is said that the witness cannot testify as to such conversations, and cannot base his opinion thereon. In answering the contention that an opinion, although based upon conversations with the deceased, was not a transaction or communication, the court said: "Though not in and of itself 'a transaction or communication' had with decedent, yet, if it is in fact but the result, the outgrowth, and the conclusion arrived at from a consideration of prohibited testimony, it is not easy to see upon what ground, in view of the provisions of the statute, the qualification can be shown to give the



opinion, or the opinion itself be stated, under the circumstances herein disclosed. It is said that the decedent, if living, could not dispute the testimony of contestant as to his opinion of her soundness of mind; that the testimony proposed is for the purpose of proving a fact distinct from anything said or done, independent of any information received from the language employed. The position does not seem to us tenable. The opinion, in such a case, where it is based upon the conversations, is dependent upon the facts from which it is deduced,—the conversations. Without the conversations there could be no ground for the opinion. How, then, can the opinion be said to be a fact distinct from and independent of the conversations? Now, clearly, if decedent was alive, she could by her testimony controvert and gainsay the conversations. She might testify that no conversations took place. Where, then, under the facts shown in this record, would be the basis for the opinion?" But see Iowa cases, *supra*.

In *Brown v. Brown* (Kan.) *supra*, it was held that the party interested in the outcome of the suit might testify as to the mental condition of the grantor in a deed involved in a proceeding to set it aside on the ground of the grantor's mental incapacity. It was, however, held that the witness could not testify to conversations had with the grantor. The court said that "the language of the statute is explicit, and does not admit of an exception based upon the purpose for which the communication was offered."

The rule in Texas on this point is not entirely clear. One of the first cases considering the matter is *Martin v. McAdams* (1894) 87 Tex. 225, 27 S. W. 255. This case involved the qualification of heirs or devisees to testify in a proceeding to probate a will, as to the handwriting of the testator. The court held that opinion evidence of the devisees as to the handwriting of the signature of the deceased attached to the will was admissible. In so holding very significant language was used. The court said on the point: "We may concede

that the witnesses whose testimony was excluded in this case were so related to the issue to be tried as to exclude them from testifying as to any transaction with or statement by the deceased whose will was sought to be established; and yet we have the question whether the testimony offered was of such a nature as to fall within the terms of the statute. Testimony to the opinion of the witness that a certain paper, which is offered as a will, is in the handwriting of the alleged testator, is not testimony as to any statement by him; nor do we think that it is testimony as to any transaction with him."

It will be noted that the court thus clearly draws the line that is drawn by this note in considering the question as to opinion evidence of the mental capacity of the testator, this note also being based on the assumption that the witness whose testimony is offered is so related to the issue to be tried as to exclude him from testifying to any transaction with the deceased. Since, however, the case itself involves opinion evidence as to handwriting instead of mental capacity, it is not strictly within the scope of the note.

In several later Texas civil appeals cases other language used by the court in the *Martin* Case was seized upon to sustain the holding that a proceeding to contest a will was not such a proceeding as to bring the case within the statute, nor was the making of a will a transaction by the deceased with any of the heirs or legatees so as to bring the case within the statute; and upon this assumption as to the holding in the *Martin* Case, these later Texas civil appeals cases held that in a proceeding to probate a will, although one of the issues was undue influence, testimony of heirs, devisees, or legatees was nevertheless admissible. Among these cases reference may be made to *Simon v. Middleton* (1908) 51 Tex. Civ. App. 543, 12 S. W. 441, *Grelle v. Grelle* (1918) — Tex. Civ. App. —, 206 S. W. 114, and *Byrnes v. Curtain* (1919) — Tex. Civ. App. —, 208 S. W. 405. Since these cases all held that a proceeding

to probate a will was not within the statute so as to disqualify a witness who was an heir or legatee, they are not strictly within the scope of the note, and, as already stated, one of the issues presented in each of these cases was that of undue influence.

In the later Texas decision of *Leahy v. Timon* (1919) — *Tex.* —, 215 S. W. 951, the question was presented as to the effect of the statute to disqualify an heir or devisee to testify as to the mental capacity of the testator, in a proceeding to contest the validity of the latter's will. In this case one of the issues presented was undue influence, and the testimony of the witness as to the mental competency of the deceased was based upon conversations had with the latter. It is held that the witnesses were disqualified to testify as to the mental capacity of the deceased. The opinion is of considerable length, and is devoted very largely to combating the doctrine that a proceeding to probate a will is not within the disqualifying provisions of the statute, and that devisees, legatees, or heirs are not parties thereto, within such provision. The opinion seems to blend the question of whether the heir or devisee of the testator is a party to the making of the decedent's will so as to be disqualified under the terms of the statute, with the question here under consideration as to the effect of the fact that the testimony relates to opinion evidence of the witness. And the court also seems, in a measure at least, to consider together the two issues as to the mental competency of the deceased as affecting the validity of the will, and the question of undue influence in securing the will as affecting its validity. Upon this point the court expresses the opinion that the action is confessedly by heirs of the deceased, and continues: "It seems to us that it plainly arose out of a transaction with the decedent; for, under the view most favorable to plaintiffs in error, which is that their action arose from the making of the will, and that the making of the will involved a transaction between only Mrs. Timon and the two disinterested attesting witnesses, it

cannot be denied that plaintiffs in error's action arose from a transaction with the decedent." After thus apparently holding that the heirs, devisees, and legatees are sufficiently parties to the making of the will so that it is a transaction with the deceased, the court apparently assumes that that disposes of the entire question presented in the case, and does not, apparently, pass upon the point as to whether or not the testimony is admissible because it relates to opinion evidence as to mental capacity. The decision, even to this extent, however, is placed in doubt by the language used by the court immediately following that already quoted, as follows: "However, it may well be doubted whether so much of plaintiffs in error's action as seeks to set aside the will as procured by undue influence can be properly said to arise from the transaction to which only the decedent and the subscribing witnesses to the will were parties. At least, that part of the action would seem founded to a considerable extent on a transaction of the party exercising the undue influence, with the decedent, and such party was one of the defendants herein." The court expressly overruled or disapproved of the cases heretofore mentioned, being *Simon v. Middleton*, *Grelle v. Grelle*, and *Byrnes v. Curtin* (*Tex.*) *supra*. If the doctrine of *Leahy v. Timon* is limited to cases involving the admissibility of testimony of the mental competency of the testator, the case is not necessarily in conflict with *Martin v. McAdams*, already referred to. Indeed, the court expressly says that it does not think the decision in *Martin v. McAdams* is in conflict with the present decision, nor with the previous decisions of the supreme court. Upon this point the court said: "The questions we have considered depend entirely on the relation of the parties—witnesses to the issue tendered; that is to say, on whether they were parties and witnesses in a suit which is an action arising out of a transaction with the decedent, in the light of the issues tendered. Such questions were excluded from consid-

eration before the court made the pronouncements in *Martin v. McAdams*, claimed to require the admission of the excluded testimony.<sup>24</sup>

The *Turner Case* makes no reference to *Smith v. Guerre* (1913) — *Tex. Civ. App.* —, 159 S. W. 417, which holds that a widow may testify to statements of her deceased husband, to show his mental incapacity, in an action to set aside a contract made by him.

In a Texas civil appeals decision decided subsequently to the *Timon Case*, being *Nimitz v. Holland* (1919) — *Tex. Civ. App.* —, 217 S. W. 244, hereinafter referred to more at length, it is held that the *Timon Case* does not disqualify an heir, devisee, or legatee from testifying as a witness with regard to the mental competency of the deceased, in a will contest proceeding, where the opinion of the witness is not based upon conversations or transactions with the deceased.

3. *Acts, conduct, or appearance of deceased.*

Apparently all of the cases applying the majority rule are agreed that interested witnesses testifying to the mental capacity of the deceased may give evidence of their observations as to his appearance, acts, or conduct, upon which they rely as the basis for their opinion as to the deceased's mental capacity. *Severin v. Zack* (1880) 55 Iowa, 28, 7 N. W. 404; *Grimshaw v. Kent* (1903) 67 Kan. 463, 73 Pac. 92; *Bannon v. P. Bannon Sewer Pipe Co.* (1909) 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Ducker v. Whitson* (1893) 112 N. C. 44, 16 S. E. 854.

In *Ducker v. Whitson* (N. C.) *supra*, an action to enforce notes against the estate of a deceased person, executed by him in his lifetime to certain of his heirs and payable out of his estate after his death, it is held that one of these heirs is not disqualified as a witness to the effect that she had lived with the deceased all of her life, and had seen him make contracts and manage his affairs, and that she based her knowledge on her observation; that she saw him when he returned after executing the notes in question, and his mind was bright, and that in her

opinion he had mental capacity sufficient to make the contract.

*Grimshaw v. Kent* (1903) 67 Kan. 463, 73 Pac. 92, *supra*, involved a suit attacking the validity of a contract between the decedent and a daughter and her husband. It appeared that decedent had lived with these parties for some time prior to the execution of the contract, and it was held that the daughter was not disqualified by the statute from testifying as to the mental capacity of the deceased, based upon her observance of his conduct during this time. The court said that such evidence did not place before the jury any transaction or communications with the deceased, but that it apprised the jury of the mental condition of the deceased at and before the time of the execution of the contract; and, having been shown to have sustained a close and intimate relation with the deceased, the witnesses were competent to express an opinion as to her mental condition.

*Severin v. Zack* (Iowa) *supra*, involved a contest over the probate of a will. The proponent in the proceeding was held not disqualified as a witness to the fact that, about the time of the execution of the will in question, he observed no difference in the testator's mental condition. The court said that this testimony did not relate to a personal transaction or communication between the witness and the testator.

A case decided subsequently to *Leahy v. Timon* (1919) — *Tex.* —, 215 S. W. 951, *supra*, and which construes this case, is *Nimitz v. Holland* (1919) — *Tex. Civ. App.* —, 217 S. W. 244. In this case the distinction is drawn between the qualifications of an interested witness to testify in a will contest proceeding as to the mental competency of the testator where the witness's opinion is based upon the acts and conduct of the deceased, and where it is based upon his statements and conversations with him. The court recognizes that under the rule in *Leahy v. Timon* the witness is disqualified under the latter circumstances, but holds that the witness is not disqualified where his opinion is

based upon the acts and conduct of the deceased. The court said: "We are of the opinion that an interested witness in such a suit may testify that, independently of any statements made by the testatrix, or transactions with her, but merely from observation of the decedent's acts, conduct, and physical and mental condition, the witness is of the opinion that the testatrix was sane or insane at the time of the execution of the will; and we will, as briefly as may be, give the reasons for our holding. In the discussion it will be premitted that a nonexpert witness will not be allowed to testify as to the sanity or insanity of a person without detailing the facts underlying the opinion. The statute precludes the interested party from testifying only as to 'any transaction with or statement by the testator.' It may be conceded that such transactions or statements are not limited to transactions by the testator with the witness, or statements made by the testator to the witness, but include any transaction with, or statement by, the testator, no matter with whom had or to whom made. But this hypothesis does not foreclose the question before us. If the opinion sought to be elicited from Mrs. Nimitz and the other appellants was not founded upon any statements by, or transactions with, the testatrix, the statute does not exclude such opinion, nor testimony of the facts upon which the opinion was based. The facts to which Mrs. Nimitz testified regarding her mother's physical condition during her last illness, including her involuntary expressions of pain and suffering, and her acts and conduct tending to show mental trouble, were not, in the main, either statements by, or transactions with, her mother, but were facts of which the witness claimed to have knowledge, based solely upon observation. They were chiefly acts, conduct, and conditions uninfluenced by, and not participated in by the witness, as were doubtless also many of the facts intimately within her knowledge, through a lifelong acquaintance with her mother, which the witness did not undertake to de-

tail. As to such facts, and an opinion based thereon, we do not think they can fairly be regarded as transactions with or statements by the decedent. They were facts ascertainable from observation alone, and we think Mrs. Nimitz showed herself competent to testify as to the mental condition of the decedent, in so far as her testimony was based upon her observation of decedent, her appearance, conduct, manner, and habits."

In *Williams v. Williams* (1890) 90 Ky. 28, 13 S. W. 250, *supra*, involving the probate of a will, the circuit court held that the parties interested may testify as to the conduct of and conversation with the decedent, as bearing upon his mental condition, since the statute does not apply to actions of this character.

In a later decision by that court, however, in *Bannon v. P. Bannon Sewer Pipe Co.* (1919) 186 Ky. 556, 119 S. W. 1170, 124 S. W. 848, which involved the validity of an assignment of stock by a person since deceased, it was held upon a rehearing that while evidence with regard to the mental capacity of the deceased was admissible, although the witness was interested in the suit, yet such witness was not competent to testify with regard to conversations with or statements of the deceased. In so holding the court drew no distinction between a will contest proceeding and an action of the character before it. Indeed, upon this point, it said: "There can certainly be no reason for applying a different rule of evidence in the trial of the case, where the question is one of capacity in one to make a contract or execute the power of attorney, from that which is applied in the case where the question is one of capacity to execute a will. Evidence that would be competent in the one case would certainly be competent in the other."

4. *As to condition at time of particular transaction involved.*

*Davis v. Tarver* (1880) 65 Ala. 98, *supra*, involved a proceeding in probate court for a license to sell real estate of the deceased to pay his debts, which was contested by the heirs on the ground of the invalidity of the

principal debt. The claimant was held entitled to testify to his opinion of the general mental condition of the deceased, but not as to his mental condition on the date on which the note in question was executed. In this state the statute provides that neither party shall be allowed to testify against the other as to transactions with or statements by the deceased person. As to the effect of this statute upon the question under consideration, the court said: "Under the statute, there can be no exclusion of any witness because he is a party to, or interested in the issue tried, with this exception: that neither party shall be allowed to testify against the other as to any transaction with, or statement by, any deceased person whose estate is interested in the result of the suit. The exception is intended to secure mutuality in the operation of the statute, and to protect the dead, who cannot be heard in explanation or contradiction, from being affected by the evidence of the living with whom they may have had dealings. It is directed to the exclusion of particular evidence, rather than to the competency of the witness. The evidence excluded must be of transactions with, or statements by, a deceased person whose estate is interested in the result of the suit. Any party may testify to any material relevant fact, if it does not fall within this species of evidence. . . . It is apparent that the contention in the present case was narrowed to the inquiry whether, on the day when the note was executed by the intestate, he was of sufficient understanding to enter into a contract. The appellant could, doubtless, have testified that in his opinion the intestate was generally of a sufficient understanding to act with discretion in the ordinary affairs of life. His personal relation to the intestate, his long acquaintance with him, and the opportunities he had of observing and knowing his habits, temper, character, and capacity, would have authorized an inquiry into the opinion he had formed as to the soundness and degree of the understanding of the intestate. This opinion would have been

formed on facts independent of and distinct from the conduct, acts, or declarations of the intestate when the note was executed. But it was not the opinion of the appellant as to the general sanity of the intestate which was sought to be elicited. Having testified as to his general sanity, he is asked if he knew the condition of the mind of the intestate on the day the note was executed. Answering that question affirmatively, he is asked what then was the condition of his mind. His opinion or knowledge of the mental condition of the intestate must have been derived, in part or wholly, from his conduct and declarations on that day, and from his freedom from or subjection to the influence of the disease with which he was afflicted. . . . It is these acts and declarations the statute prohibits the living party from testifying to, when the estate of a decedent is interested. The prohibition cannot be avoided by any general form of question, nor by covering up evidence of them under the expression of an opinion founded upon them. They are excluded by the terms of the exception, and its policy will be defeated, if evidence of them, in whatever form it may be presented, is not excluded."

*b. Minority rule.*

In some jurisdictions, statutes substantially similar in language to those referred to in the preceding cases are held to disqualify interested parties from testifying as to the mental capacity of a deceased person, in actions in which his representative, assignee, or grantee is a party in interest.

**Mississippi.**—*Cooper v. Bell* (1917) 114 Miss. 766, 75 So. 767.

**New York.**—*Holcomb v. Holcomb* (1884) 95 N. Y. 316; *Re Eysaman* (1889) 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613; *Holland v. Holland* (1904) 98 App. Div. 866, 90 N. Y. Supp. 208; *Re McCarthy* (1891) 59 Hun, 626, 38 N. Y. S. R. 124, 14 N. Y. Supp. 2; *Smith v. Meaghan* (1886) 40 Hun, 404; *Re Bartholick* (1891) 35 N. Y. S. R. 730, 12 N. Y. Supp. 640.

**West Virginia.**—*Trowbridge v. Stone* (1896) 42 W. Va. 454, 26 S. E.

363; *CURTIS v. CURTIS* (reported herewith) ante, 1091.

In *Re Eysaman* (1889) 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613, supra, a will contest proceeding, the legatee therein was held disqualified as a witness to testify with regard to his observation of the acts, conduct, and conversation of the deceased at about the time of the execution of the will, and bearing upon his mental capacity.

And in *Holcomb v. Holcomb* (1884) 95 N. Y. 316, supra, also a will contest proceeding, the heirs were held disqualified to testify as to acts, conduct, and statements of their ancestor, tending to show his mental incapacity, although they took no part in the conversation testified to.

And in *Re McCarthy* (1891) 59 Hun, 626, 38 N. Y. S. R. 124, 14 N. Y. Supp. 2, supra, also a will contest proceeding, an heir at law of the testator was held disqualified to testify as to the appearance of the testator on the day the will was made.

And in a proceeding to set aside a deed executed by a person since deceased, on the ground of his mental incapacity, his heir was held disqualified to testify upon that point. *Smith v. Meaghan* (1886) 40 Hun (N. Y.) 401.

In *Steele v. Ward* (1883) 30 Hun (N. Y.) 555, however, on the ground that the testimony relating to the mental capacity of a testator was not a personal transaction or communication, within the statutory prohibition, a witness interested in the will contest proceeding was held not disqualified to testify in this regard.

In *Holcomb v. Holcomb* (1884) 95 N. Y. 316, involving an action to set aside an assignment of a bond and mortgage by a deceased person in his lifetime, it was held that an interested witness was disqualified to testify with regard to matters tending to show the mental capacity of the decedent. After pointing out that the witness was interested in the event of the action, and that the title of the defendant would be affected by their testimony, the court said that it should be borne in mind that the validity of an assignment depends upon

the mental condition of the assignor when it is executed. "The words of exclusion are as comprehensive as language can express: Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. The statute is a beneficial one, and ought not to be limited or narrowed by construction. Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present. A contrary rule would defeat the reasonable intent of the statute that a surviving party should be excluded, as one interested, from maintaining by his testimony an issue which in any degree involved a communication or transaction between himself and a deceased person."

In *Freeman v. Freeman* (1912) 71 W. Va. 303, 76 S. E. 657, it is held that the testimony of the husband of the contestant in a proceeding to probate a will, relating to the mental condition of the testator, is a personal transaction or communication within the statute. The court said that the purpose of the disqualifying statute was to prevent a person having an interest to be affected by the suit, from giving testimony concerning the words or actions of the decedent, which he, if living, would contradict, against those who claim under the decedent. "Death having sealed the lips of one, the law closes the mouth of the other. Therefore, the words 'transactions or communications,' as used in the statute, should be given a liberal construction. To limit their meaning so as to include only individual conversations and direct personal dealings between the witness and deceased would be too narrow a construction, and would result in defeating the purpose of the statute in many cases. The words of the statute include personal contact

with, and observations of deceased's conduct, upon which an opinion of his mental condition could be formed. The opinion of a nonexpert could be formed in no other way."

In *Trowbridge v. Stone* (1896) 42 W. Va. 454, 26 S. E. 363, *supra*, this rule is applied to testimony with reference to the mental capacity of the deceased person as bearing upon her ability to earn her own substance in an action in which her guardian sought to charge her estate for board and clothing.

In *Anderson v. Cranmer* (1877) 11 W. Va. 562, in holding that the cestui que trust in a trust deed was incompetent to testify as to any communication or conversation had with the deceased, and that this disqualified him from testifying as to the mental competency of the deceased, the court said: "The making of the deed of trust is itself a transaction, and he cannot be permitted to testify one word as to its execution. It seems to me it follows as a matter of course, if he could not be permitted to testify as to the conduct and conversation of the deceased at the time the deed was executed, he could not be permitted to give his opinion of the sanity of the grantor at the time the deed was executed, based upon such conduct and conversation. For if he was permitted to give his mere opinion as to the sanity of the grantor, the other party would certainly have the right to show, on cross-examination, upon what facts that opinion was based, and would thus be compelled to have the very testimony before the court or jury that the statute excludes, or be denied his right of cross-examination. The mere opinion of a witness to the sanity of a party is entitled to little or no regard, unless reasons be given which would warrant the opinion. He could not speak at all as a witness in his own behalf as to the execution of the deed; and he surely could not give his opinion of the grantor's condition of mind, made up from the transaction itself. His opinion as to the sanity of the grantor, drawn from any transaction or conversation had personally with him at the time of the execution of the

deed, or at any other time, was clearly inadmissible."

*II. Statutes disqualifying interested parties.*

In Indiana, the statute disqualifies parties to a suit from testifying to matters which occurred prior to the death of the ancestor. Under this statute it has been held that parties interested in the outcome of a will contest proceeding are not disqualified as witnesses, with regard to the mental condition of the testator. *Lamb v. Lamb* (1886) 105 Ind. 456, 5 N. E. 171. And the rule also applies to proceedings involving the validity of other instruments executed by the decedent in his lifetime. *Keys v. McDowell* (1913) 54 Ind. App. 263, 100 N. E. 385; *Gwinn v. Hobbs* (1917) — Ind. App. —, 118 N. E. 155.

In *Lamb v. Lamb* (Ind.) *supra*, the court said that "the question of the soundness or unsoundness of mind is fully open to investigation by both parties, and it is not a question upon which one party can speak of matters of which only he and the dead had knowledge. The question in such a case is essentially unlike a question that arises in cases where the issue is as to the execution of a contract, a deed, or the like, for, in such cases, the matter cannot be generally known, and if the party should say what was not true, it would be impossible to contradict him; while, in such a case as this, the mental capacity of the testator may be proved or disproved by witnesses who knew him, whether parties or not, so that the subject is fully open to investigation. The purpose of the statute was to prevent undue advantage as against those whose interests would be unjustly prejudiced by permitting parties to testify as to matters which they assume were known only to them and the deceased, or as to matters which, from their nature, could only have been known to them and the dead. It was not intended to exclude parties from testifying in cases where the subject is one of which the knowledge that the parties profess to have is not hidden from all other living persons. There is nothing in the spirit of the statute, and certainly

nothing in the letter, which excludes parties from testifying respecting matters open to the observation of all the friends and acquaintances of the deceased. Such a matter is the mental capacity of the testator, whose will is contested."

In *Burkhart v. Gladish* (1890) 123 Ind. 337, 24 N. E. 118, the court said: "It would, perhaps, be impossible to fix any exact rule which would be an inflexible guide in all cases, but, in giving the facts upon which the witness bases his opinion, it cannot be doubted that he should be permitted to state every fact which could be reasonably made the foundation of an opinion as to the mental condition of the testator. If not permitted to state all the facts, it is evident that the rule which permits parties to testify as to the mental condition of the testator would be of little value, as the court or jury would be without the means of weighing such opinions. Under such a rule the court did not err in permitting the parties to this suit to testify to the conduct and conversations of the testator in his family. Such testimony does not fall within the limitation suggested by the court in *Lamb v. Lamb* (Ind.) supra, relating to the execution of a will. The daily conduct and conversation of the testator are supposed to be open equally to all the members of the family—the appellants as well as the appellees."

In *Gwinn v. Hobbs* (1917) — Ind. App. —, 118 N. E. 155, supra, the court said that the interested parties might testify not only as to the mental capacity of the deceased, but also as to matters which occurred prior to his death as a foundation for their opinion. It was, however, held that this testimony could not be construed as tending to establish any such matters as substantive facts, to be given weight in determining the issue of mental capacity.

Generally, the specific question under consideration has not been raised with reference to statutes which disqualify as witnesses the parties to suits or proceedings, where one of the parties is deceased. The question has generally been disposed of on the

broader ground that a will contest was not a suit or proceeding in which one of the parties is dead. It is obvious that under such a holding the particular fact or issue sought to be established by the testimony is not of great importance, although it is at least possible that the court might distinguish a case involving the issue of the execution of the will by the deceased.

Thus, in *Foster v. Dickerson* (1891). 64 Vt. 233, 24 Atl. 253, involving a will contest proceeding, it is held that a legatee under the will is not disqualified from testifying as to the mental capacity of the testator, by the statutory provision disqualifying interested witnesses where one of the original parties to the contract is dead. The decision, however, is not based upon the fact that the issue was the mental competency of the deceased, but rather upon the ground that the testatrix, by her legal representatives, was not a party to the proceedings, or in any way interested therein.

So, in *Seaton v. Lee* (1906) 221 Ill. 282, 77 N. E. 446, it is held that a statute disqualifying a party or person interested in the event of a suit from testifying, where the adverse party sues or defends as the personal representative, etc., does not disqualify a devisee under the testator's will from testifying in a proceeding by the devisees to set aside a deed by the testator to one of his heirs, and the witness may testify as to the mental condition of the decedent, since a grantee cannot claim to be defending the suit as heir or devisee of the decedent. And in *Allen v. North* (1915) 271 Ill. 190, 110 N. E. 1027, applying this statute to a will contest proceeding, it is held that a daughter and legatee of the deceased is a competent witness as to his mental condition, where her interest was to have the will set aside, since under the circumstances the witness was adverse in interest to the contestant.

However, in *Brace v. Black* (1888) 125 Ill. 33, 17 N. E. 66, it is held that, in a proceeding by a bill in equity to contest the validity of a will, the adverse parties defend as legatees, and the object of the suit is not merely to



adjust the rights between the heirs at law, but it is to take the estate from the legatees, some of whom are not heirs at law, and vest it in the heirs at law; hence the legatees are adverse parties, and disqualified as witnesses with regard to the mental capacity of the decedent.

*III. Statutes disqualifying interested parties from testifying as to claim against the estate.*

In *Cooper v. Bell* (1917) 114 Miss. 766, 75 So. 767, it is held that the statutory provision that a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated in his lifetime, disqualifies an interested witness from testifying in a will contest proceeding as to the mental competency of the testator.

This decision is based on the ground that a proceeding of this character constitutes a claim against the estate of the decedent within this statutory prohibition. In this regard the court follows *Whitehead v. Kirk* (1913) 104 Miss. 776, 51 L.R.A. (N.S.) 187, 61 So. 737, 62 So. 432, Ann. Cas. 1916A, 1051, which also involved the question of the testamentary capacity of the testator in a will contest proceeding, it being held that a wife is disqualified as a witness to give evidence relative to acts committed by decedent in her presence when they were alone, such as his habits of intoxication, his hearing voices and communications with spirits of the dead, his mutterings and outcries when asleep, delusions, insults to her, and attempts to take her life.  
A. G. S.

## CONTINENTAL CASUALTY COMPANY

v.

A. J. PILLSBURY et al., as the Industrial Accident Commission of the State of California.

*California Supreme Court (In Banc) — October 8, 1919.*

(— Cal. —, 184 Pac. 658.)

**Workmen's compensation — legal liability for support — decree for separate maintenance.**

A man against whom a decree has been entered for separate maintenance of his wife is legally liable for her support, within the meaning of a Workmen's Compensation Act raising a conclusive presumption of entire dependence for support in favor of the wife, for whose support the husband is legally liable.

[See note on this question beginning on page 1113.]

**APPLICATION for a writ of review to review an order of the Industrial Accident Commission awarding compensation, under the Workmen's Compensation Act, to the widow of a deceased workman. Affirmed.**

The facts are stated in the opinion of the court.

Messrs. Devlin & Devlin, for petitioner:

There can be no award in favor of a wife where she is living separate and apart from her husband at the time of his death, under a decree of maintenance or divorce.

*Byrnes v. Byrnes*, 126 App. Div. 619, 111 N. Y. Supp. 72; *People ex rel. Pub-*

*lic Charities & C. Comrs. v. Cullen*, 153 N. Y. 629, 44 L.R.A. 420, 47 N. E. 894; *Chapman v. Parsons*, 66 W. Va. 307, 24 L.R.A. (N.S.) 1015, 135 Am. St. Rep. 1033, 66 S. E. 461, 19 Ann. Cas. 453; *Bennett v. O'Fallon*, 2 Mo. 69, 22 Am. Dec. 440; *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. Rep. 440; *Manby v. Scott*, 1 Sid. 109, 82 Eng.

(— Cal. —, 184 Pac. 658.)

Reprint, 1000, 2 Smith, Lead. Cas. 12th ed. 436; 14 Cyc. 729; 1 R. C. L. p. 868; 9 R. C. L. p. 488; Knagge v. Pfeiffer, 8 Ohio Dec. Reprint, 122, 5 Ohio L. J. 794; Rogers v. Vines, 28 N. C. (6 Ired. L.) 293; 1 Bl. Com. 441; Johnson v. Johnson, 33 Cal. App. 93, 164 Pac. 121; Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251; Galland v. Galland, 38 Cal. 265; 2 Nelson, Div. & Sep. § 1000; Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679; Holleron v. Hill, 2 Cal. Ind. Acci. Dec. 269; McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260; Perry v. Industrial Acci. Commission, 176 Cal. 706, 169 Pac. 353; Mitchell v. Critcheon, 2 Cal. Ind. Acci. Dec. 931; Gillespie v. Pacific Gas & E. Co. 4 Cal. Ind. Acci. Dec. 279.

A wife who is living separate and apart from her husband at the time of his death, and is maintaining herself by labor and contributions from other sources than her husband, is not "wholly dependent" upon such husband.

Nelson's Case, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694; Finn v. Detroit, Mt. C. & M. C. R. Co. 190 Mich. 112, L.R.A.1916C, 1142, 155 N. W. 721, 13 N. C. C. A. 187; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Lewis v. Lewis, 167 Cal. 732, 52 L.R.A.(N.S.) 675, 141 Pac. 367; Perry v. Industrial Acci. Commission, 176 Cal. 706, 169 Pac. 393; Gillespie v. Pacific Gas & E. Co. 4 Cal. Ind. Acci. Dec. 279; Sweet v. Sherwood Ice Co. 40 R. I. 203, 100 Atl. 316; Gallagher's Case, 219 Mass. 140, 106 N. E. 558; New Monckton Collieries v. Keeling [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240; Avery v. Pacific Gas & E. Co. 2 Cal. Ind. Acci. Dec. 348; Rossi v. Standard Oil Co. 2 Cal. Ind. Acci. Dec. 339; Gorski's Case, 227 Mass. 456, 116 N. E. 811; Bentley's Case, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

The evidence does not justify the findings of fact.

Walker v. Industrial Acci. Commission, 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; Employers Assur. Corp. v. Industrial Acci. Commission, 170 Cal. 800, 151 Pac. 423; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

Mr. A. E. Graupner, for respondents:

The deceased employee was legally liable for the support of his wife at the time of his death.

Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; Mitchell v. Mitchell, 31 Colo. 209, 72 Pac. 1054; Galland v. Galland, 38 Cal. 265; Benton v. Benton, 122 Cal. 395, 55 Pac. 152; Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 525; Finn v. Finn, 62 Iowa, 482, 17 N. W. 739; Farber v. Farber, 64 Iowa, 362, 20 N. W. 472; Platner v. Platner, 66 Iowa, 378, 23 N. W. 764; Simpson v. Simpson, 91 Iowa, 235, 59 N. W. 22; Russell v. Russell, 150 Iowa, 137, 129 N. W. 835; Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Johnson v. Johnson, 33 Cal. App. 93, 164 Pac. 421; H. G. Goelitz Co. v. Industrial Bd. 278 Ill. 164, 115 N. E. 855; Dunbar v. Charleston & W. C. R. Co. 186 Fed. 175; Galveston, H. & S. A. R. Co. v. Murray, — Tex. Civ. App. —, 99 S. W. 144; International & G. N. R. Co. v. Jones, — Tex. Civ. App. —, 60 S. W. 978.

Ida M. Cox was actually dependent upon the deceased employee, her husband, at the time of his death.

State ex rel. London & L. Indemnity Co. v. District Ct. 139 Minn. 409, 166 N. W. 772; State ex rel. G. J. Grant Constr. Co. v. District Ct. 137 Minn. 283, 163 N. W. 509; American Mill Co. v. Industrial Bd. 279 Ill. 560, 117 N. E. 147; Commonwealth Edison Co. v. Industrial Bd. 277 Ill. 74, 115 N. E. 158; H. G. Goelitz Co. v. Industrial Bd. 278 Ill. 164, 115 N. E. 855.

The evidence justifies the findings and award.

Walker v. Industrial Acci. Commission, 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954.

Olney, J., delivered the opinion of the court:

One Cox was killed while in the employ of the Sacramento Northern Railroad. No question is made but that the accident resulting in his death occurred under such circumstances that his dependents, if he had any, are entitled to compensation under the Workmen's Compensation Act, Stat. 1917, p. 831. He left a wife, and she petitioned the Commission for such compensation, and it was awarded her as wholly dependent upon him. The insurance carrier for the employer thereupon

petitioned for and secured an alternative writ from this court to review the award. The sole question is as to whether the decedent's wife was wholly dependent upon him within the meaning of the Workmen's Compensation Act.

The material provisions of the act are the following portions of § 14: "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death. . . .

(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

The wife was not living with the decedent at the time of his death. In order to support the award of the Commission, it must therefore appear, either that the decedent was legally liable for her support, or that she was in fact wholly dependent upon him. The Commission found in favor of the wife on both these issues. As we are of the opinion that the award must be sus-

**Workmen's  
compensation—  
legal liability  
for support—  
decree for  
separate  
maintenance.**

tained upon the first ground, that is, that her husband at the time of his death was legally liable for her support, there is no necessity for considering the second.

The facts upon the first issue are that the decedent deserted his wife in 1911, and never lived with her afterwards. No proceedings for a divorce were ever brought, but in 1912 his wife filed in Iowa a suit for separate maintenance and secured a decree awarding her such maintenance in the sum of \$50 a month. This decree remained in effect until the decedent's death. Pursuant to the decree the decedent sent his wife money from time to time, the

amounts averaging about \$20 or \$25 a month. The position of the insurance carrier is that, by reason of the existence of this maintenance decree, the husband was not legally liable for his wife's support. The mere statement of this position is well nigh enough of an answer to it. It is rather difficult to see what the maintenance decree means if it does not mean that the husband is legally liable for his wife's support.

The contention of the insurance company is that, when the act speaks of the husband being legally liable for the wife's support, "the liability therein referred to must necessarily mean the common-law liability defined by §§ 174 and 175 of the Civil Code, and *cannot mean liability to the wife.*" (The italics are ours.)

Section 175 has nothing to do with the case. It provides that when a wife abandons her husband, or lives apart from him by agreement, he is not liable for her support. Here the wife had not abandoned her husband, nor was she living apart from him by agreement.

Section 174 provides that, if the husband neglects to make adequate provision for the support of his wife, any other person may furnish her with necessities and recover the reasonable value thereof from the husband. The point is made that by the maintenance decree the husband was relieved from liability to third persons under this section. It is immaterial whether he was or not. The compensation provided by the act is for the benefit of the wife, not for that of her creditors, or of those who may supply her with necessities. It is true that the liability of the husband to persons supplying the wife with necessities where he neglects to provide for her is an incident of the obligation which rests upon him to support her. But it is only an incident, not the main obligation. The incident may be removed, and the main obligation remain wholly unaffected.

There are cited in petitioner's behalf authorities to the effect that,

(— Cal. —, 184 Pac. 658.)

when there has been a divorce a mensa et thoro with a decree of maintenance to the wife, the common-law obligation of the husband is supplanted by the obligation of the decree, and the husband's responsibility is measured by the decree. This is true in the sense that the husband's obligation, previously indefinite as to the amount of support or the manner in which it should be provided, is by such a decree made certain, by requiring that the obligation be met by paying a certain amount of money, and paying it to the wife. Thereafter the husband's obligation is measured by the decree, but the fundamental obligation continues. The decree is,

in fact, a judicial determination of the fact that the obligation exists, although the parties are separated. That an action for maintenance is but an action to enforce the husband's duty to support his wife was decided in *Galland v. Galland*, 38 Cal. 265.

It follows that at the time of the decedent's death he was legally liable for the support of his wife, and the action of the Commission in making its award upon that basis was correct.

The award is affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Wilbur, J.; Melvin, J.; Lennon, J.; Lawlor, J.

### ANNOTATION.

#### Workmen's compensation: effect of divorce on right of spouse or child to compensation.

##### Right of spouse.

The effect of a divorce upon the right of a spouse to compensation under the Workmen's Compensation Acts depends upon the phraseology of the particular act and the circumstances of the case.

It will be observed that in the reported case (*CONTINENTAL CASUALTY CO. v. PILLSBURY*, ante, 1110) it is held that a man against whom a decree had been entered for the separate maintenance of his wife was legally liable for her support within the meaning of § 14 of the California Workmen's Compensation Act, providing that a wife shall be conclusively presumed to be wholly dependent for support on her husband, where she is living with him at the time of his death, or the husband is legally liable for her support at that time, and that in all other cases the question of dependency shall be determined in accordance with the facts. The court holds § 175 of the Civil Code, providing that when a wife abandons her husband, or is living apart from him by agreement, he shall not be liable for her support, not applicable to the case, since the wife was not living apart from her husband by agreement.

In another California case, decided at about the same time, *London Guaranty & Acci. Co. v. Industrial Acci. Commission* (1913) — Cal. —, 184 Pac. 864, the wife was held to have been living apart from her husband by agreement within the meaning of § 175, so that he was not personally liable for her support, where, at the time the husband was injured, she had obtained an interlocutory decree of divorce which made no provision for alimony or maintenance, and the decree had become final in the sense that no appeal could be taken therefrom; and it was accordingly held that the wife was not entitled to any award of compensation under § 14 of the Workmen's Compensation Act.

In another California case, *Perry v. Industrial Acci. Commission* (1917) 176 Cal. 706, 169 Pac. 353, under the provision of the Compensation Act relative to a conclusive presumption of dependency, it was held that a finding that a wife was not dependent upon her husband was supported by the evidence, there being testimony that she had received and sought nothing from him in years, and that a few weeks before his death she had obtained an interlocutory decree

of divorce from him without any award of alimony.

In *Sweet v. Sherwood Ice Co.* (1917) 40 R. I. 208, 100 Atl. 316, it was held that a wife could not be presumed to be a dependent under a section of the Rhode Island Workmen's Compensation Act providing that "the following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: a wife upon a husband with whom she lives or upon whom she is dependent at the time of his death,"—where it appeared that she was not living with her husband at the time of his injury, and had not done so for some time; and that an interlocutory decree had been granted her upon the ground of nonsupport, at which trial she testified that her husband had done nothing for her support for two years, and that she had supported herself by her own labors, and the parties had continued to live apart, and she had supported herself after obtaining the divorce.

It was further held in this case that, there being no presumption, the question of dependency was one of fact on the evidence, in accordance with a further provision of the act that "in all other cases questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury," and the court's finding in the case that the wife was neither wholly nor partially dependent on the husband was held conclusive.

It was contended in the case that, the husband being under a direct legal obligation to support his wife, the existence of such obligation must have an important bearing in determining the question of dependency, but the court refused to sanction this argument and adopted the reasoning of an English case, in which it was stated that the fact that the husband was liable in law was not sufficient to maintain an action for compensation; that the obligation or liability to support is not the same as actual support; that money coming to a widow under the Workmen's Compensation Act is not a present in consideration of her

status, but a payment by a third person to compensate her as a dependent for her actual pecuniary loss by her husband's death.

In *Hall v. Industrial Commission* (1917) 165 Wis. 364, L.R.A.1917D, 829, 162 N. W. 312, 16 N. C. C. A. 77, it was held that a marriage, valid where entered into, but in violation of the statute of the state of domicile of the parties, prohibiting remarriage of a divorced person within a specified time after the entry of a decree, would not be recognized in a third state, whose statute also prohibited such marriage, and it was held that an allowance of compensation under the Workmen's Compensation Act to a woman who attempted such a marriage, on account of the death of the man she attempted to marry, was properly refused. It may be observed that the refusal of the court to recognize the marriage in the circumstances is opposed to many cases, not within the scope of this note because not involving workmen's compensation acts.

It appears in *State ex rel. G. J. Grant Constr. Co. v. District Ct.* (1917) 137 Minn. 283, 163 N. W. 509, that the parties had brought suits for divorce, but with what result is not shown. In that case the wife, although living apart from her husband, was held entitled to the presumption of dependency provided by the Workmen's Compensation Act.

#### **Right of child.**

The effect of the entry of a decree of divorce upon the right of children of the parties to compensation under workmen's compensation acts depends upon the particular provisions of the act involved, and the facts of the case.

In *Schwartz v. Gerding* (1918) — Ind. App. —, 121 N. E. 89, a clause of the Indiana Compensation Act involved provided: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death. . . . (c) A boy under the age of eighteen, or a girl under the age of eighteen upon the parent with whom he or she is living at the time of the death of

such parent, there being no surviving dependent parent. . . . In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury.

In this case, the deceased workman had remarried after a divorce had been granted, giving the custody of his daughter to her aunt, and ordering him to pay a certain sum per month toward the support of his daughter, but he had never contributed anything toward her support, and was living with his second wife when he was killed. It was held that the child was not conclusively presumed to be wholly dependent, as she was not living with her father, but that the question of dependency was, under the act, one of fact, and the finding of the industrial board that the widow was entitled to the full award was affirmed. The court said: "While it may be conceded, as contended by appellant, that there was a legal as well as a moral obligation resting upon decedent to support his daughter, yet the question of dependency, in cases such as this, is not to be determined upon such obligations, although they are to be taken into consideration when the question of dependency is to be determined as a matter of fact. Also, the fact that decedent was ordered, in the divorce proceeding referred to, to pay \$8 per month for the support of his child, may be taken into account to determine the existence of the ultimate fact of dependency. Likewise, whether there is any probability that such order would be discharged, either voluntarily or by proper legal proceedings, or the probability that the daughter would ever seek to enforce her rights under the order if the requirements thereof were not voluntarily complied with, are matters which would be proper for the industrial board to consider, in connection with all other competent evidence, to aid them in determining the question of fact whether or not appellant, at the time of her father's injury, resulting in his death, depended upon his wages for her support, in whole or in

part. All these matters the record shows were duly considered by the industrial board, which resulted in a finding against appellant, and, as there is evidence which would lead reasonable men to conclude as did the industrial board, we are not at liberty to disturb such conclusion."

In *State Industrial Acci. Commission v. Downton* (1919) — Md. —, 109 Atl. 63, where a wife of an employee had secured a decree of divorce, providing for no permanent alimony, but giving her the custody of their two children, and the husband, except for a brief time, made no provision for their support, and had only given the children clothing and small sums amounting to about \$10, it was held, in a proceeding for compensation on behalf of the children, that the case was one of partial, and not total, dependency under the Maryland Workmen's Compensation Act, a section of which, although it provided that "the following persons (evidently including children) shall be presumed to be wholly dependent for support upon a deceased employee," concluded with the words, "living with or dependent upon the parent at the time of the injury or death."

In *Ninneman v. Industrial Commission* (1920) — Wis. —, 176 N. W. 909, a divorce decree awarding the care, custody, maintenance and education of a boy nine years old to his mother, and directing his father, the deceased employee, to pay \$10 a month to the mother "as and for the support, maintenance and education" of the boy, was held not to charge the full support and maintenance of the boy upon his father within the meaning of a subdivision of the Workmen's Compensation Act providing that a child under eighteen years should be conclusively presumed to be solely and wholly dependent for support upon the parent with whom he is living, and that in case of divorce the charging of the full support and maintenance of a child upon one of the divorced parents should be held to constitute a living with the parent so charged, and the commission's find-

ing that the boy was only partially dependent upon his father was affirmed.

In *Robert Sherer & Co. v. Industrial Acci. Commission* (1920) — Cal. —, 188 Pac. 798, where compensation was sought on behalf of the minor daughter of an employee, who, in divorce proceedings awarding the child's custody to the wife, had been ordered to pay \$20 per month for the child's support, it was held competent for the Commission to determine as a matter of fact that the father was "legally liable" for the maintenance of the child, it having found upon competent evidence that the sum ordered paid was sufficient for the child's entire support, and accordingly to hold that the child was "wholly dependent"

upon the deceased employee within the meaning of § 14 of the California Workmen's Compensation Act. From the dissenting opinion it appears that the award upheld by the majority of the court exceeded the maximum payable under the divorce decree during the child's minority. It also appears that the dissenting judge took the position that the words "legally liable," as used in the Compensation Act, referred exclusively and only to a complete liability, that is, a liability for the expenses and costs of all necessities required for the support of the child, and did not cover or include a limited liability, such as that of the deceased, which was merely the payment of \$20 a month for his daughter's support.  
J. T. W.

### WILLIAM ESKEW, Appt.,

v.

H. FRIEDBERG et al., Doing Business under the Firm Name of Friedberg & Company.

*Kentucky Court of Appeals — December 19, 1919.*

(— Ky. —, 216 S. W. 1076.)

**Principal and agent — purchase of tobacco — liability for shrinkage.**

1. One contracting to purchase tobacco for another is not responsible for the shrinkage in weight of the tobacco bought, because of its drying out after the purchase was made.

[See note on this question beginning on page 1120.]

**Appeal — excessive verdict — reversal.**

2. A recovery of damages cannot be sustained if, accepting the evidence

of plaintiff upon every point, the amount proven is materially less than the verdict returned.

[See 2 R. C. L. 199-201.]

APPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, in favor of plaintiffs, in an action brought to recover damages for breach of a contract for the purchase of tobacco. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Burnett, Batson, & Cary and Union W. Youngblood, for appellant:

It was error for the trial court to permit under its instructions a recovery in excess of the maximum damage deducible from the evidence, and the judgment appealed from, being grossly in excess of the maximum amount

which could have been awarded under the evidence, must be reversed.

*Louisville R. Co. v. Schwemmer*, 181 Ky. 641, 205 S. W. 685.

Mr. A. J. Carroll for appellees.

Sampson, J., delivered the opinion of the court:

On November 25, 1916, Eskew

entered into a written contract with H. Friedberg & Company, of Owensboro, Kentucky, whereby Friedberg & Company agreed to take over all tobacco bought by Eskew in Spencer and Warrick counties, Indiana, for the season 1916—17, "paying him 75 cents per 100 pounds above the actual cost price." The written contract reads as follows:

Louisville, Ky., Nov. 25, 1916.

This contract entered into by and between H. Friedberg & Company, of Owensboro, Kentucky, parties of the first part, and William Eskew, of Booneville, Indiana, party of the second part, to wit: H. Friedberg & Company, agree to take over all contracts for tobacco bought by William Eskew in Spencer and Warrick counties, Indiana, season 1916—17, paying 75 cents per hundred above the actual contract price. William Eskew agrees to put tobacco on wagons at his factory in Booneville, in case he is unable to secure the farmers' warehouse in Booneville; in case he does secure the Farmers' Warehouse, the tobacco is to be put f. o. b. cars Booneville, Indiana.

H. Friedberg & Company agree that William Eskew shall continue buying tobacco in the country and not to exceed an average price of \$7 per 100 pounds until further notice.

H. Friedberg & Company agree that William Eskew shall pay for tobacco to the growers with drafts furnished by them.

William Eskew agrees to furnish H. Friedberg & Company with a copy of all contracts made by him with the growers, or shall hereafter make.

[Signed] H. Friedberg & Co.,  
By H. Friedberg.  
William Eskew.

Friedberg & Company was a partnership composed of H. Friedberg, Labin Phelps, and J. C. Bright, engaged in buying, handling, and selling tobacco. Eskew was an experienced tobacco man and an expert in buying tobacco from producers.

The 75 cents mentioned in the written contract as going to Eskew was to be his commission for buying. Although Eskew had contracted for considerable tobacco before the making of this contract, he immediately, upon entering into the written contract, began to make contracts for the purchase of other tobacco and to pay for tobacco already contracted for by him, with drafts drawn on Friedberg & Company. Very soon the price of tobacco began to rise, and it was found necessary to pay more than 7 cents per pound as stipulated in the written contract, and Friedberg & Company agreed for Eskew to pay either 7½ cents or 8 cents per pound for tobacco on an average, but this price was soon found to be insufficient to induce the farmers to turn in their crops, and Eskew was allowed to pay even more,—but just how much more is involved in doubt,—in order to obtain tobacco. At any rate, on January 3d the parties to the written contract entered into a verbal agreement whereby, as Friedberg & Company contend, they were to have all of the tobacco purchased by Eskew in the counties named during the entire season, paying him cost and \$1.10 commission, and Friedberg & Company were to bear the expenses of insurance, storage, etc. Eskew contends that he made no such verbal agreement, but says he did agree to continue to buy tobacco for Friedberg & Company, but reserved the right to purchase tobacco on his own account as and when he could not buy tobacco at the price fixed by Friedberg & Company. He says that in buying tobacco he found it necessary to pay more than 8 cents, which Friedberg & Company fixed as the limit, and that such tobacco was purchased on his own account and for his own use and benefit, and not for Friedberg & Company. The company, however, asserts that it would not have employed Eskew to buy tobacco for it and allowed him the privilege to buy for his own account, at the same time, even at a higher price than



the limit fixed by it. At any rate, Eskew bought about 5,000,000 pounds of tobacco during the season, of which he delivered to Friedberg & Company 257,658 pounds as claimed by them. The balance he sold upon his own account at a profit greater than his commission. Eskew contends that he delivered to Friedberg & Company 276,172 pounds, or at least all of the tobacco which was sold to him at that weight, but that from the time he purchased it, in the early part of the season, it shrunk and became lighter, as is the nature of tobacco, until it weighed less than at the time he purchased and received it, and that he delivered every pound of the identical tobacco of which plaintiffs complain. Friedberg & Company contend that they had all of the tobacco sold to a named concern at the price of \$10.84 per 100 pounds, which they insist would have netted them a handsome profit.

After the season closed and a settlement had been made between Friedberg & Company and Eskew, this suit was instituted March 19, 1917, to recover of Eskew on three items: (1) The failure of Eskew to deliver 18,514 pounds of tobacco purchased by him for the company at a cost of \$1,616.52, and paid for with its funds, and which the company claims to have resold for a gross sum of \$2,036.54, or a profit of \$420.02 and which tobacco Eskew claims to have delivered to the company; (2) the failure of Eskew to deliver to the company 226,300 pounds of tobacco which he purchased during the season with his own money, but at a time when the company contends he was their agent and purchasing exclusively for them, whereby the company lost \$7,513.16 in profits from a resale which they had effected; (3) Eskew substituted 38,000 pounds of lugs, an inferior grade of tobacco, for a corresponding amount of leaf tobacco, whereby the company lost the sum of \$1,127.78. Their first contention, however, is that Eskew purchased about 276,172 pounds of

tobacco for them and paid for the same with drafts on the company, and of which amount Eskew only delivered to them 257,658 pounds, thus withholding 18,514 pounds which he should have delivered. Eskew answers this contention by saying that he did purchase the 276,172 pounds for which Friedberg & Company furnished the money to pay, and that he delivered every pound of this to the company, and that the 18,514 pounds discrepancy, if it existed, was the result of shrinkage; that is to say, the tobacco, when he purchased it for Friedberg & Company and weighed it, weighed 276,172 pounds, but on account of drying out it weighed only 257,658 pounds when it was received by the company at Louisville, but that the company was to bear all shrinkage, and therefore he says he is not responsible for the 18,514 pounds discrepancy. The company admits that it was to bear the shrinkage, but it says that the shrinkage in any event would not have amounted to 18,514 pounds; that a shrinkage of tobacco from that district would have amounted to only about one pound per hundred upon such a purchase. Proof was introduced upon this question, and one expert, claiming to have traded in tobacco in this district for a number of years and to have kept close account upon the shrinkage, stated that the shrinkage for that season amounted to only .0195 per cent.

A trial was had before a jury, and a verdict returned in favor of Friedberg & Company for \$1,700 on the first item last discussed, and \$6,000 upon the second item, which is the failure of Eskew to deliver to Friedberg & Company 226,300 pounds of tobacco which they claim he purchased under his contract with them, and which he refused to deliver, but sold on his own account; the total verdict being \$7,700 in favor of Friedberg & Company.

There are no difficult questions of law involved in this case, but there are numerous questions of fact, many of them involved in great

doubt. The evidence for the company does not show with clearness exactly what the tobacco cost Eskew at Booneville, and as the company had agreed to pay him cost plus a commission, it is necessary to know the cost before an intelligent conclusion can be reached. Taking all of the evidence for the company and disregarding wholly the evidence for Eskew, we are unable to figure plaintiff's loss at any sum approximating the verdict of \$7,700. Indeed, on the first item, failure of Eskew to deliver 18,514 pounds of tobacco paid for by drafts on the company, the utmost sum from the evidence appears to be about \$1,400, while on the second item, where the verdict of \$6,000 was returned, we figure the company was not entitled to recover more than about \$2,200. If we accept the evidence of Eskew and his witnesses, the tobacco cost Eskew in Booneville a little more than \$9 per 100 pounds on an average. To this must be added \$1.10 on the 100 pounds, which would make it cost a little more than \$10.10 per 100 pounds to Friedberg & Company. If they had the tobacco sold at \$10.84 per 100 pounds, as appears from the evidence, then their loss was about 74 cents on the 100 pounds and on 226,000 pounds their loss would have been \$1,672.40, and no more, assuming the cost figures to be correct. Friedberg, Phelps, Bright, and their witnesses are very indefinite on the subject of the cost of this tobacco. In all, the testimony for the plaintiffs is entirely too indefinite and uncertain to sustain a verdict to \$6,000 on the second item, or \$1,700 on the first item.

The instructions are complained of and are subject to some criticism, being much longer than were necessary, but upon the whole seem fairly to present the question of fact to the jury.

Upon another trial, after the introduction of such competent evidence as the parties may wish to

offer on the subject of the verbal contract made January 3, 1917, the plaintiff should show with some certainty the actual cost of the tobacco to Eskew in Booneville and the amount of insurance, storage, and other expenses which the company agreed to bear. Of course, Eskew may show this also, and from this evidence the jury will determine (1) whether there was such a verbal contract and its contents, and, if it should decide that the verbal agreement bound Eskew to purchase tobacco only for the company, and not on his own account, (2) it will then be the duty of the jury to find the cost of the tobacco to Eskew in Booneville, together with such other expense as the company was to stand, and to this add the commission, \$1.10 on the 100 pounds, which Eskew was to receive, and take this sum from the proven price at which the company was selling the tobacco; and the difference will be the measure of damages to which the plaintiff is entitled. In the event the jury should conclude from the evidence, as contended by Eskew, that he was to buy only such tobacco for the company as he could obtain at the price fixed by the company, and that he had the right to purchase tobacco on his own account at a higher price, and that he did so purchase all or some material part of the tobacco which he resold, then the company is not entitled to recover anything of Eskew on this item to that extent; nor is it entitled to recover of him on item 1, if the jury should believe from the evidence that Eskew delivered to the company all of the tobacco which he purchased on its account and for which it paid and which it now claims is short 18,514 pounds, if the shortage is the result of shrinkage or other natural loss, and not the result of Eskew's failure to deliver some part of the tobacco for which the company paid.

This case comes within the rule,

Principal and agent—purchase of tobacco—liability for shrinkage.

several times adhered to by this court, that a recovery in damages cannot be sustained if, accepting the evidence of the plaintiff upon every point, the amount proven is materially less than the verdict returned.

Appeal—  
excessive  
verdict—  
reversal.

Louisville R. Co. v. Schwemmer, 181 Ky. 641, 205 S.W. 685.

As the amount of the verdict in this case is greatly in excess of the highest sum proven, the judgment entered thereon must be reversed for a new trial consistent with this opinion.

### ANNOTATION.

#### Liability of agent for shrinkage or shortage in commodity purchased for principal.

In the reported case (*ESKEW v. FRIEDBERG*, ante, 1116) it is held that an agent employed to purchase and ship tobacco is not liable to his principal for a shortage between the amount purchased and that received by the principal, where that shortage is the result of shrinkage or other natural loss, and not the result of the agent's failure to deliver some part of the tobacco for which the principal paid.

But few decisions have considered the liability of an agent for a shortage in a commodity purchased for his principal, and none of these consider a situation similar to that involved in the reported case. The case most similar is *Gilchrist v. Brooklyn Grocer's Mfg. Asso.* (1873) 66 Barb. (N. Y.) 390. In that case a person for whose account potatoes were purchased and shipped by an agent claimed that there was a shortage in quantity. The court defined the duty of the agent as follows: "By his agreement, the plaintiff was to purchase potatoes for the defendant at their market value; and even if this agreement expressly, or by implication, included the duty of the oversight in shipping them off by canal boats, still his duty as agent demanded nothing more of him than the exercise of reasonable skill and ordinary diligence in its performance; and if he performed his duty in this manner, his only liability to the defendant was that occasioned by a want of that reasonable skill, or for ordinary negligence. The agreement of the defendant was 'to reimburse the plaintiff such sum

as he should pay for potatoes, for defendant.' If, in doing this, the defendant was even defrauded; if still he acted with reasonable skill and ordinary diligence, the loss, if any, was that of the defendant. If there happened afterwards to be found short measure, deficiency in quantity as compared with plaintiff's bill, or if a quality of potatoes was purchased inferior to his instructions, in that respect given, the liability of the plaintiff must still depend upon the question whether or not he had performed his agency with reasonable skill and ordinary diligence."

The decision in *McBrady v. Monarch Elevator Co.* (1910) 113 Minn. 104, 129 N. W. 163, turned entirely on an interpretation of the contract of agency. It appeared that the plaintiff had been in the employ of the defendant in charge of its grain elevator. It was his duty to buy grain from the farmers, store it in the elevator, and ship it out in car lots, according to the directions of the defendant. The court did not discuss the legal rules of liability, but held that the contract of the parties was that the agent was responsible for differences in gross weight of grain received and grain shipped, but was not responsible for loss by dockage. The result of the decision was to hold him responsible for all shortages as shown by differences in gross weights, less averages as shown in the same way.

In *R. C. Stone Mill Co. v. McWilliams* (1906) 121 Mo. App. 319, 98 S. W. 828, the decision was apparently affected largely by the fact that the

principal, in order to sustain an attachment, sued for embezzlement. It appeared that the parties entered into an agreement whereby the defendants were to buy wheat for the plaintiff and ship as directed. Subsequently a settlement was had, and there was found to be a shortage between the amount claimed to have been shipped by the defendants and the amount actually received by the plaintiff. On the trial the court instructed the jury that the defendants did not have to account for the shortage, if there was any, but the burden was on the plaintiff to show by a preponderance of the evidence that there was a shortage of wheat, and that the defendants converted the same feloniously, wilfully, and unlawfully. The court held that this instruction was correct, saying: "The charge was that defendants had

been guilty of embezzlement. The instruction announced the proposition that they were not required to account for the shortage to clear themselves of the charge, but, admitting there was a shortage, still the burden was on plaintiff to show the shortage went into defendants' pockets with the guilty intent of converting it to their own use. We see nothing wrong in this. Defendants were not called upon to show their innocence of the charge. Mere shortage in the wheat did not prove them guilty of having embezzled it. To authorize a conviction, it was essential to show not only a shortage, but also that the shortage resulted from a wilful and felonious conversion of the wheat by defendants to their own use, and the onus was on plaintiff to prove these essential facts to entitle it to a verdict." E. C. B.

## UNITED STATES OF AMERICA, Appt.,

v.

## UNITED STATES STEEL CORPORATION et al.

*United States Supreme Court — March 1, 1920.*

(251 U. S. 417, 64 L. ed. —, 40 Sup. Ct. Rep. 292.)

### Monopoly — size of corporation — unexerted powers.

1. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act.

*[See note on this question beginning on page 1140.]*

### — under Anti-trust Act — dissolution — past and present corporate powers and acts.

2. A court, when asked to dissolve a corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing.

*[See 19 R. C. L. 91.]*

### — expectation or realization.

3. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization.

*[See 19 R. C. L. 54, 55.]*

### — steel trust — past practices — dissolution — public interest.

4. A holding corporation which by its formation united under one control

competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade.

(Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice Clarke, dissent.)  
8 A.L.R.—71.

**APPEAL** by plaintiff from a decree of the District Court of the United States for the District of New Jersey dismissing a bill filed to dissolve the defendant corporations as alleged violators of the Sherman Anti-trust Act. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. T. W. Gregory, Attorney General, John W. Davis, G. Carroll Todd, Henry E. Colton, and Robert Szold, for appellant:

It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 394, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376.

Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement.

United States v. American Tobacco Co. 221 U. S. 106, 176, 181, 55 L. ed. 663, 692, 694, 31 Sup. Ct. Rep. 632.

Where corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits.

Northern Securities Co. v. United States, 193 U. S. 197, 326, 327, 48 L. ed. 679, 695, 696, 24 Sup. Ct. Rep. 436; United States v. Reading Co. 226 U. S. 324, 352-363, 57 L. ed. 243, 252-256, 33 Sup. Ct. Rep. 90, 183 Fed. 470; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 619; Noyes, Intercorporate Relations, § 354; Eddy, Combinations, § 622.

The purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances.

Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 612, 58 L. ed. 1490, 1499, L.R.A. 1915A, 788, 84 Sup. Ct. Rep. 951; Reilly v. United States, 46 C. C. A. 25, 106 Fed. 896; United States v. Sacia, 2 Fed. 757; Reg. v. Murphy, 8 Car. & P. 297.

The union of so many previously independent business units, controlling

so great a proportion of the entire industry, approximately half, with the next largest competitor controlling less than 6 per cent, are factors from which this court has repeatedly inferred the existence of a specific intent to suppress competition.

Standard Oil Co. v. United States, 221 U. S. 1, 75, 55 L. ed. 619, 650, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; United States v. Reading, 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

In three leading cases in this court the holding company, as a means of combining able competitors, has been adjudged illegal.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Temple Iron Co. v. United States, 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90, 183 Fed. 427.

A transaction which the law prohibits is not made lawful by an innocent motive or purpose.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 148, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

A contract or combination by its own inherent nature or effect, without more, may restrain trade within the purview of the statute.

United States v. Trans-Missouri Freight Asso. supra; United States v. Joint Traffic Asso. 171 U. S. 505, 561, 43 L. ed. 259, 284, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 148, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 323, 331, 48 L. ed. 679, 696, 697, 24 Sup. Ct. Rep. 436;

**Harriman v. Northern Securities Co.** 197 U. S. 244, 291, 298, 49 L. ed. 789, 761, 764, 25 Sup. Ct. Rep. 498; **United States v. American Tobacco Co.** 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; **Standard Oil Co. v. United States**, 221 U. S. 1, 65, 55 L. ed. 619, 647, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; **Standard Sanitary Mfg. Co. v. United States**, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; **United States v. Union P. R. Co.** 226 U. S. 61, 92, 93, 57 L. ed. 124, 135, 136, 33 Sup. Ct. Rep. 53; **United States v. Reading Co.** 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; **United States v. Paten**, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A. (N.S.) 325, 38 Sup. Ct. Rep. 141; **International Harvester Co. v. Missouri**, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; **Chesapeake & O. Fuel Co. v. United States**, 53 C. C. A. 256, 115 Fed. 623.

Even if it would have been lawful for the many independent businesses combined through this holding company to unite to some extent to develop foreign trade—by joint selling agencies, for example—that cannot justify the complete and permanent suppression of competition between them in domestic trade.

**United States v. Corn Products Ref. Co.** 234 Fed. 1016; **United States v. Union P. R. Co.** 226 U. S. 61, 93, 57 L. ed. 124, 135, 33 Sup. Ct. Rep. 53.

In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

**United States v. E. C. Knight Co.** 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; **Chesapeake & O. Fuel Co. v. United States**, 53 C. C. A. 256, 115 Fed. 610.

The test of the legality of a combination is not its present effect upon prices, wages, etc., nor its present conduct toward the remaining competitors, but its effect upon competition. If its effect is unduly to restrict competition, then it is immaterial that for the time being the combination may exercise its power benevolently.

**United States v. Union P. R. Co.** 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53; **Northern Securities Co. v. United States**, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436; **Harriman v. Northern Securities Co.**

197 U. S. 244, 291, 49 L. ed. 789, 761, 25 Sup. Ct. Rep. 498; **Addyston Pipe & Steel Co. v. United States**, 175 U. S. 211, 238, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96; **United States v. Trans-Missouri Freight Asso.** 166 U. S. 290, 324, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; **Pearsall v. Great Northern R. Co.** 161 U. S. 646, 676, 677, 40 L. ed. 838, 848, 849, 16 Sup. Ct. Rep. 705; **United States v. Standard Oil Co.** 173 Fed. 196; **Atty. Gen. v. Great Northern R. Co.** 29 L. J. Ch. N. S. 799, 6 Jur. N. S. 1006, 8 Week. Rep. 556; **International Harvester Co. v. Missouri**, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859, 237 Mo. 394, 141 S. W. 672.

Mr. C. B. Ames also for appellant.

Messrs. Richard V. Lindabury, David A. Reed, Cordenio A. Severance, and Raynal C. Bolling, for appellees:

Competition depends not upon the manufacture of common products, but upon the extent of their sale in common territory.

**Addyston Pipe & Steel Co. v. United States**, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The mere combination of manufacturing concerns not in competition with each other is not a violation of the Anti-trust Act, no matter how large their percentage of the country's production may be.

**United States v. Winslow**, 227 U. S. 202, 217, 57 L. ed. 481, 485, 33 Sup. Ct. Rep. 253.

It cannot in reason be said that a combination of manufacturing concerns whose competition did not exceed that shown in this case, whose percentage of the production did not exceed 50.1, and whose acquisition of a raw material supply did not exceed its reasonable requirements, and did not approach to a monopoly, must necessarily have operated to restrain trade, or, in and of itself, must necessarily have amounted to a monopoly or an attempt at monopolization.

**Swift & Co. v. United States**, 196 U. S. 375, 49 L. ed. 513, 25 Sup. Ct. Rep. 276; **United States v. Standard Oil Co.** 173 Fed. 183, 221 U. S. 75, 55 L. ed. 650, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; **United States v. American Tobacco Co.** 164 Fed. 719, 221 U. S. 157, 55 L. ed. 685, 31 Sup. Ct. Rep. 662; **United States v. Reading Co.** 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90.

If the corporation was organized for legitimate business purposes and without intent to monopolize, then, even if it had power to monopolize (which the evidence shows it has not), still the mere incidental acquisition of such power constitutes no threat or offense under the Anti-trust Act.

*Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *United States v. Terminal R. Asso.* 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507.

It was the intent of Congress in enacting the Anti-trust Act to require that business should be conducted along normal lines with full opportunity for the play of competitive forces. When this situation exists, all of the public, whether producers, traders, or consumers, are protected.

*United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; *United States v. Union P. R. Co.* 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; *United States v. Reading Co.* 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 58 L. ed. 1490, L.R.A. 1915A, 738, 34 Sup. Ct. Rep. 951.

Mr. George Welwood Murray for appellee Rockefeller.

Mr. Justice McKenna delivered the opinion of the court:

Suit against the Steel Corpora-

tion and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-trust Act [Act of July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644].

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

Special charges of illegality and monopoly are made and special remedies and remedies are prayed; among others, that there be a prohibition of stock ownership and exercise of rights under such ownership and that there shall be such orders and distribution of the stock and other properties as shall be in accordance with equity and good conscience, and "shall effectuate the purpose of the Anti-trust Act." General relief is also prayed.

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel industry, twelve in number. There are, besides, other corporations and individuals more or less connected in the activities of the other defendants that are alleged to be instruments or accomplices in their activities and offendings; and that these activities and offendings (speaking in general terms) extend from 1901 to 1911, when the bill was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges, and we see at a glance what detail of circumstances may be demanded, and we may find ourselves puzzled to compress them into an opinion that will not be of fatiguing prolixity.

The case was heard in the district court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. 223 Fed. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson)

expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions,—practically a compulsion from "the metallurgical method of making steel and the physical method of handling it,"—this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action. And the concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed, an important purpose of the organization of the corporation was the building up of the export trade in steel and iron, which at that time was sporadic,—the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation, but concentration of efforts with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it was expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned; and, while conceding that the Steel Corporation, after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions,

and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion (by Judge Woolley, and concurred in by Judge Hunt, 223 Fed. 161), was, in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation became "a combination of combinations by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80 per cent or 90 per cent of the entire output of the country, and that its purpose was to secure great profits, which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.<sup>1</sup>

The organizers, however (we are still representing the opinion), underestimated the opposing conditions, and at the very beginning the corporation, instead of relying upon its own power, sought and obtained the assistance and the co-operation

<sup>1</sup> As bearing upon the power obtained and what the corporation did, we give other citations from Judge Woolley's opinion, as follows:

"The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been



of its competitors (the independent companies). In other words, the view was expressed that the testimony did "not show that the corporation, in and of itself, ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in co-operation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary dinners." The dinners were congregations of producers, and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but their potency being demonstrated, they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn, the corporation's prices were controlled by competition."

discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord."

"Further inquiring whether the corporation inherently possesses monopolistic power, attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent to 40.9 per cent, and its increase of business during that period was but 40.6 per cent of its original volume. Its increase of business, measured by percentage, was ex-

The corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees,—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors,—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed, it is said in

ceded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3,779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors."

"From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either."

many ways, and illustrated, that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning, sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs, and was distinguished from "theirs only in the leadership it assumed in promulgating and perfecting the policy. This leadership it gave up, and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers, and that their intent and unsuccessful attempt should not be attributed to it; that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, does not adequately represent their ability and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed. The opinions indicate that the evidence admits of different deductions as to the genesis of the corporation and the purpose of its organizers, but only of a single deduction as to the power it attained and could exercise. Both opinions were clear and confident that the power of the corporation never did and does not now reach to monopoly, and their review of the evidence, and our independent examination of it, enables us to elect between their respective estimates of it, and we concur in the main with that of Judges Woolley and Hunt. And we add no comment except, it may be, that they underestimated the influence of the tendency and movement to integration, the appreciation of the necessity or value of the continuity of

manufacture from the ore to the finished product. And there was such a tendency, and though it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. There was, therefore, much to urge it and give incentive to conduct that could accomplish it. From the nature and properties of the industry, the processes of production were something more than the stage and setting of the human activities. They determined to an extent those activities, furnished their motives, and gave test of their quality; not, of course, that the activities could get any immunity from size or resources or energies, whether exerted in integrated plants or diversified ones.

The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances. But what are such circumstances? We have seen that it was the view of the district court that size was such a circumstance and had no accusing or excusing influence. The contention of the government is to the contrary. Its assertion is that the size of the corporation, being the result of a "combination of powerful and able competitors," had become "substantially dominant" in the industry, and illegal. And that this was determined. The companies combined, is the further assertion, had already reached a high degree of efficiency, and in their independence were factors in production and competition, ceased to be such when brought under the regulating control of the corporation, which, by uniting them, offended the law; and that the organizers of the corporation "had in mind the specific purposes of the restraint of trade and the enormous profits resulting from that restraint."

It is the contention of the corporation opposing those of the government and denying the illegal purposes charged against it, that the industry demanded qualities

and an enterprise that lesser industries do not demand, and must have a corresponding latitude and facility. Indeed, it is insisted that the industry had practically, to quote the words of Judge Buffington, he quoting those of a witness, "reached the limit or nearly at which economies from a metallurgical or mechanical standpoint could be made effective," and "that instead, as was then the practice, of having one mill make ten or twenty or fifty products, the greatest economy would result from one mill making one product, and making that product continuously." In other words, there was a necessity for integration and rescue from the old conditions,—from their improvidence and waste of effort,—and that in redress of the conditions the corporation was formed, its purpose and effect being salvage not monopoly," to quote the words of counsel. It was, is the insistence, the conception of ability, "a vision of a great business which should embrace all lines of steel and all processes of manufacture, from the ore to the finished product, and which, by reason of the economies thus to be effected and the diversity of products it would be able to offer, could successfully compete in all the markets of the world." It is urged further that to the discernment of that great possibility was added a courage that dared attempt its accomplishment, and the conception and the courage made the formation of the corporation notable, but did not make it illegal.

We state the contentions; we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the district judges, and we may well despair to supplement the force of their representation of the conditions antecedent to the formation of the corporation, and in what respect and extent its formation changed them. Of course, in that representation and its details there is guidance to decision, but they must be rightly

estimated to judge of what they persuade. Our present purpose is not retrospect for itself, however instructive, but practical decision upon existing conditions, that we may not, by their disturbance, produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration should be not of what the corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced,—whether its dissolution, as the government prays, or the dismissal of the suit, as the corporation insists.

The alternatives are perplexing,—involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen that the judges of the district court unanimously concurred in the view that the corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed; not against an expectation of it, but against its realization; and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor,—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the corporation) until 1911; but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been

Monopoly—  
under Anti-trust  
Act—dissolution  
—past and  
present cor-  
porate powers  
and acts.

—expectation or  
realization.

resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the test for which *Swift & Co. v. United States*, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. And we may say in passing that the government cannot fear their resumption, for it did not avail itself of the offer of the district court to retain jurisdiction of the cause in order that, if illegal acts should be attempted, they could be restrained.

What, then, can now be urged against the corporation? Can comparisons in other regards be made with its competitors, and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the district court unanimously resolved against the existence of that power, and in doing so they but gave effect to the greater weight of the evidence. It is certain that no such power was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretense, and the corporation declined in productive powers,—the competitors growing either against or in consequence of the competition. If against the competition, we have an instance of move-

ment against what the government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the corporation under either illustration is an untenable accusation.

We may pause here for a moment to notice illustrations of the government of the purpose of the corporation; instancing its acquisition, after its formation, of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment. And he testified he was not deceived and that he believed that "the Tennessee Coal & Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it would be a guaranty that there was value to it." Such being the emergency, it seems like an extreme accusation to say that the corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards, and how? And what was the corporation to do with the property? Let it decay in desuetude, or de-

velop its capabilities and resources? In the development, of course, there would be profit to the corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.

From this digression we return to the consideration of the conduct of the corporation to its competitors. Besides the circumstances which we have mentioned, there are others of probative strength. The company's officers, and, as well, its competitors and customers, testified that its competition was genuine, direct, and vigorous, and was reflected in prices and production. No practical witness was produced by the government in opposition. Its contention is based on the asserted size and dominance of the corporation,—alleged power for evil, not the exertion of the power in evil. Or, as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the government, the offense against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the corporation. Competitors, it is said, followed the corporation's prices because they made money by the imitation. Indeed, the imitation is urged as an evidence of the corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the corporation,—"its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that

it extended practically to a war between the corporation and the independents. Counsel say, "They [the corporation is made a plural] called a few—they called two hundred witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the corporation was formed." And by "movement of prices," counsel explained, "as shown by the published prices . . . they were the ones that the competitors were maintaining all during the interval."

It would seem that "two hundred witnesses" would be fairly representative. Besides, the balance of the "forty thousand customers" was open to the government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the government asserts? At any rate, not one was called, but, instead, the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation,—something more than a deduction equivocal of itself, even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course, competition affects prices,

but it is only one among other influences, and does not, more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers, and customers of the corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices, and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power, not of weakness, and power exerted not only to suppress competition, but to compel testimony, is the necessary inference, shading into perjury to deny its exertion? The situation is indeed singular, and we may wonder at it,—wonder that the despotism of the corporation, so baneful to the world in the representation of the government, did not produce protesting victims.

But there are other paradoxes. The government does not hesitate to present contradictions, though only one can be true, such being, we were told in our school books, the "principle of contradiction." In one, competitors (the independents) are represented as oppressed by the superior power of the corporation; in the other, they are represented as ascending to opulence by imitating that power's prices, which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted. If it were, this suit would take on another cast. The competitors would cease to be the victims of the corporation, and would become its accomplices. And there is no other alternative. The suggestion that lurks in the government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The

government, therefore, is reduced to the assertion that the size of the corporation, the power it may have, not the exertion of the power, is an abhorrence to the law; or, as the government says, "the combination embodied in the corporation unduly restrains competition by its *necessary effect* [the italics are the emphasis of the government], and therefore is unlawful regardless of purpose." "A wrongful purpose," the government adds, is "matter of aggravation." The illegality is statistical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes would we be led? Competition consists of business activities and ability,—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

We have pointed out that there are several of the government's contentions which are difficult to represent or measure; and the one we are now considering, that is, the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme, but short of it the government cannot stop. The fallacy it conveys is manifest.

The corporation was formed in 1901; no act of aggression upon its competitors is charged against it; it confederated with them at times in offense against the law, but

abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted,—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers,—how can it be worked out of the situation and through what proposition of law? Of course it calls for nothing other than a right application of the law, and, to repeat what we have said above, shall we declare the law to be that size is an offense, even though it minds its own business, because what it does is imitated? The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the

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unexercised powers.

law, and the law does not make mere size an offense or the existence of unexercised power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the government, and in connection with them, we recall the distinction we made in the *Standard Oil Co. Case* (221 U. S. 1, 77, 55 L. ed. 619, 652, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734) between acts done in violation of the statute and a condition brought about which, “in and of itself, is not only a continued attempt to monopolize, but also a monopolization.” In such case, we declared, “the duty to enforce the statute” required “the application of broader and more controlling” remedies than the other. And the remedies applied conformed to the declaration; there was prohibition

of future acts and there was dissolution of “the combination found to exist in violation of the statute” in order to “neutralize the extension and continually operating force which the possession of the power unlawfully obtained” had “brought” and would “continue to bring about.”

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies, and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal, and became a “continually operating force,” with the “possession of power unlawfully obtained.”

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed; whatever there was of evil effect was discontinued before this suit was brought, and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies, and equally clear in its direction that the courts of the nation shall prevent and restrain them (its language is, “to prevent and restrain violations of” the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed, essential function—that makes its value in our jurisprudence,—value in this case as in others. We do not mean to say that the law is not its own measure, and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine; not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both, and it is certainly a matter for consider-

ation that there was no legal attack on the corporation until 1911, ten years after its formation and the commencement of its career. We do not, however, speak of the delay simply as to its time, or that there is estopped in it because of its time, but on account of what was done during that time,—the many millions of dollars spent, the development made, and the enterprises undertaken; the investments by the public that have been invited and are not to be ignored. And what of the foreign trade that has been developed and exists? The government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that under congressional legislation in the Webb Act the foreign trade of the corporation is reserved to it. And further, it is said, that the corporation has constructed a company called the Products Company which can be "very easily preserved as a medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act."

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world and its beneficence preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the corporation be sustained and its power of control over its subsidiary companies be retained and exercised in the foreign trade and given up in the domestic trade? The government presents no solution of the problem. Counsel realize the difficulty and seem to think that its solution or its evasion

is in the suggestion that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action under existing laws, not action under laws that have not been and may not be enacted. We must now decide, and we see no guide to decision in the propositions of the government.

The government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business. The companies are enumerated. They are the Carnegie Steel Company (a combination of the old Carnegie Company, the National Steel Company, and the American Steel Company), the Federal Steel Company, the Tennessee Company, and the Union Steel Company (a combination of the Union Steel Company of Donaro, Pennsylvania, Sharon Steel Company of Sharon, Pennsylvania, and Sharon Tin Plate Company). They are fully integrated, it is said, possess their own supplies, facilities of transportation and distribution. They are subject only to the Steel Corporation is, in effect, the declaration, in nothing, but its control of their prices. We may say parenthetically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expeditors of the law.

But let us see what guide to a procedure of dissolution of the corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the government calls for not only a disruption



of present conditions, but the restoration of the conditions of twenty years ago; if not literally, substantially. Is there guidance to this in the Standard Oil Co. Case and the American Tobacco Co. Case, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882, and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them, and this reference to them is enough. And of the practices, this court said, no disinterested mind could doubt that the purpose was "to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent . . . and impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how, in the case of the New Jersey corporation, the original wrong was reflected in and manifested by

the acts which followed the organization, as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.], since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted, by which the country was divided into districts and the trade in each district in oil was turned over to the designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The American Tobacco Co. Case has the same bad distinctions as the Standard Oil Co. Case. The illegality in which it was formed [there were two American Tobacco Companies, but we use the name as designating the new company, as representing the combinations of the suit] continued, indeed, progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion, if not its direct assertion, that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war, "inspired by one or more of the minds which brought about and became parties to that combination." In other words, the purpose of the combination was signaled to competitors, and the choice presented to them was submission or ruin, —to become parties to the illegal enterprise or be driven "out of the business." This was the purpose and the achievement, and the processes by which achieved, this court enumerated to be the formation of new companies, taking stock in oth-

ers to "obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants, not to utilize them, but to close them; by constantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the American Tobacco Co. Case, therefore, as in the Standard Oil Co. Case, the court had to deal with a persistent and systematic lawbreaker, masquerading under legal forms, and which not only had to be stripped of its disguises, but arrested in its illegality. A decree of dissolution was the manifest instrumentality, and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the Standard Oil Co. Case furnishes no example for a decree in this.

In conclusion, we are unable to see that the public interest will be served by yielding to the contention of the government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be, serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.

Mr. Justice McReynolds and Mr. Justice Brandeis took no part in the consideration or decision of the case.

Mr. Justice Day, dissenting:

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act [Act of July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. 644]. I am unable to accept the conclusion which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

It appears to be thoroughly established that the formation of the corporations here under consideration constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. I agree with the conclusions of Judges Woolley and Hunt, expressed in the court below (223 Fed. 161 et seq.), that the combinations were not submissions to business conditions, but were designed to control them for illegal purposes, regardless of other consequences, and "were made upon a scale that was huge and in a manner that was wild," and "properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them." Those judges found that the constituent companies of the United States Steel Corporation, nine in number, were themselves combinations of steel manufacturers, and the effect of the organization of these combinations was to give a control over the industry at least equal to that theretofore possessed by the constituent companies and their subsidiaries. That the Steel Corporation was a combination of combinations by which, directly or indirectly, 180 independent concerns were brought under

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dissolution—  
public interest.

one control, and in the language of Judge Woolley (p. 167) :

"Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or business values, as independent and separate producers, but upon their values in combination; that is, upon their values as manufacturing plants and business concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related, measured by the amount of production, extended in some instances from 80 per cent to 95 per cent of the entire output of the country, resulting in the immediate increase in prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.

"The immediate, as well as the normal, effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade."

The enormous overcapitalization of companies and the appropriation of \$100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the profits of the business. This record shows that the power obtained by the corporation brought under its control large competing companies which were of themselves illegal combinations, and succeeded to their power; that some of the organizers of the Steel Corporation were parties to the preceding combinations, participated in their illegality, and, by uniting them under a common direction, intended to augment and

perpetuate their power. It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. Nothing could add to the vivid accuracy with which Judge Woolley, speaking for himself and Judge Hunt, has stated the illegality of the organization, and its purpose to combine in one great corporation the previous combinations by a direct violation of the purposes and terms of the Sherman Act.

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called "Gary dinners," where the assembled trade opponents secured co-operation and joint action through the machinery of special committees of competing concerns, and by prudent provision took into account the possibility of defection, and the means of controlling and perpetuating that industrial harmony which arose from the control and maintenance of prices.

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. The power, thus obtained from the combination of resources almost unlimited in the aggregation of competing organizations, had within its control the domination of the trade, and the ability to fix prices and restrain the free flow of commerce upon a scale heretofore unapproached in the history of corporate organization in this country.

These facts established, as it seems to me they are by the record, it follows that if the Sherman Act is to be given efficacy, there must be a decree undoing, so far as is possible, that which has been achieved in open, notorious, and continued violation of its provisions.

I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital, and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 676, 677, 40 L. ed. 838, 848, 849, 16 Sup. Ct. Rep. 705; *Trans-Missouri Freight Asso. Case*, 166 U. S. 290, 324, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; *Northern Securities Co. Case*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96; *Harriman v. Northern Securities Co.* 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; *Union Pacific R. Co. Case*, 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53. While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business

and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which, from their nature or effect, have proved effectual to restrain interstate commerce. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; *United States v. Reading Co.* 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; *Straus v. American Publishers' Asso.* 231 U. S. 222, 58 L. ed. 192, L.R.A.1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 58 L. ed. 1490, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951.

This statute has been in force for nearly thirty years. It has been frequently before this court for consideration, and the nature and character of the relief to be granted against combinations found guilty of violations of it have been the subject of much consideration. Its interpretation has become a part of the law itself, and if changes are to be made now in its construction or operation, it seems to me that the exertion of such authority rests with Congress, and not with the courts.

The 4th section is intended to give to courts of equity of the United States the power to effectively control and restrain violations of the act. In none of the cases which have been before the courts was the character of the relief to be granted, where organizations were found to be within the condemnation of the act, more thoroughly considered than in the *Standard Oil* and *American Tobacco Co.* Cases, reported in 221 U. S. In the former case, considering the measure of relief to be granted in the case of a combination, certainly not more obnoxious

to the Sherman Act than the court now finds the one under consideration to be, this court declared that it must be twofold in character (221 U. S. 78): "1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In the American Tobacco Co. Case the nature of the relief to be granted was again given consideration, and it was there concluded that the only effectual remedy was to dissolve the combination and the companies comprising it, and for that purpose the cause was remanded to the district court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which should be in honest harmony with, and not repugnant to, the law." In that case the corporations dissolved had long been in existence, and the offending companies were organized years before the suit was brought and before the decree of dissolution was finally made. Such facts were considered no valid objection to the dissolution of these powerful organizations as the only effective means of enforcing the purposes of the Sherman Anti-trust Act. These cases have been frequently followed in this court, and in the lower Federal courts, in determining the nature of the relief to be granted, and I see no occasion to depart from them now.

As I understand the conclusions of the court, affirming the decree directing dismissal of the bill, they amount to this: that these combinations, both the holding company and the subsidiaries which comprise it, although organized in plain

violation and bold defiance of the provisions of the act, nevertheless are immune from a decree effectually ending the combinations and putting it out of their power to attain the unlawful purposes sought, because of some reasons of public policy requiring such conclusion. I know of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able to thus organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself.

There is no mistaking the terms of the act as they have hitherto been interpreted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. The remedy by injunction, at the instance of the Attorney General, was given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combinations, and contracts, and this court, interpreting its provisions, has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed. I am unable to see force in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination

has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of \$1,800,000,000; its outstanding capital stock was \$868,583,600; its surplus \$151,798,428. Its cash on hand ordinarily was \$75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and, with a single exception, the total capitalization and surplus of any one of them. That such an organization, thus fortified and equipped, could, if it saw fit, dominate the trade and control competition, would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength, and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past; that is, to effectually dominate and control the steel business of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation, and, when formed, to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute, and in most cases practicably impossible. As we said in dealing with the packers' combination in *Swift & Co. v. United States*, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276: "Where acts are not sufficient in themselves to produce a result which the law

seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute [Sherman Act] like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

It is affirmed that to grant the government's request for a remand to the district court for a decree of dissolution would not result in a change in the conditions of the steel trade. Such is not the theory of the Sherman Act. That act was framed in the belief that attempted or accomplished monopolization, or combinations which suppress free competition, were hurtful to the public interest, and that a restoration of competitive conditions would benefit the public. We have here a combination in control of one half of the steel business of the country. If the plan were followed, as in the *American Tobacco Co. Case*, of remanding the case to the district court, a decree might be framed restoring competitive conditions as far as practicable. See *United States v. American Tobacco Co.* 191 Fed. 371. In that case the subject of reconstruction so as to restore such conditions was elaborated and carefully considered. In my judgment the principles there laid down, if followed now, would make a very material difference in the steel industry. Instead of one dominating corporation, with scattered competitors, there would be competitive conditions throughout the whole trade which would carry into effect the policy of the law.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court,

should not be dismissed, and the cause should be remanded to the district court, where a plan of effective and final dissolution of the

corporations should be enforced by a decree framed for that purpose.

Mr. Justice Pitney and Mr. Justice Clarke concur in this dissent.

## ANNOTATION.

### The Steel Corporation Case and the Sherman Anti-trust Act.

The reported case (*UNITED STATES v. UNITED STATES STEEL CORP.* ante, 1121) settles authoritatively, and seemingly for all time, the proposition that the mere size of a corporation does not of itself make it a violator of the Sherman Anti-trust Act. The members of the court were agreed upon this, and, while the point does not seem to have been expressly passed upon in earlier Supreme Court cases, it has been adverted to in argument. For instance, in *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, Mr. Chief Justice White, in delivering the opinion of the court, stated its conclusion to be that the tobacco company was a monopoly and violative of the act, but in effect refused to place the decision upon the ground either of the size of the company or the actual control of the tobacco trade which it undoubtedly had. He said: "These conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device of another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because," etc. And the same point has been made in a number of Federal cases. Thus, in *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502, it was declared that the size and varied character of an enterprise do not in themselves violate the Anti-trust Act. And in *United States v. Eastman Kodak Co.* (1915) 226 Fed. 62, final decree entered in (1916) 230 Fed. 522, in assenting to the proposition that the size of a corporation and the extent of its business do not alone render it an

illegal monopoly, the court said that there is no limit in this country to the extent to which a business may grow, and that the acquisition of property in the case under consideration, standing alone, would not be deemed an illegal monopoly. Again, in *United States v. International Harvester Co.* (1914) 214 Fed. 987, appeal dismissed in (1918) 248 U. S. 587, 63 L. ed. 434, 39 Sup. Ct. Rep. 5, Smith, C. J., said: "There is no limit under the American law to which a business may not independently grow, and even a combination of two or more businesses, if it does not unreasonably restrain trade, is not illegal; but it is the combination which unreasonably restrains trade that is illegal." And see *Couquard v. National Linseed Oil Co.* (1898) 171 Ill. 480, 49 N. E. 563, where the Illinois supreme court, in answering the contention that the company under consideration was a trust formed in violation of law, held that the mere facts that the defendant, a linseed oil company, had acquired a great many oil mills and plants and was managing a large business did not itself render it illegal.

And the decision in the reported case (*UNITED STATES v. UNITED STATES STEEL CORP.* ante, 1140) on its face seems to eliminate from future cases another contention sometimes made, namely, that the court should consider what the enterprise under consideration has had power to do and has done in the past, by ruling that the test is what it has power to do and is doing at the time of the investigation. In other words, it has now been decided that even the existence of unexercised power unlawfully to restrain competition does not of itself make a company or corporation, which because of its size could exercise such a power, a violator

of the Anti-trust Act. (But see *United States v. Reading Co.* decided by the same court April 26, 1920, as set out *infra*.) This, of course, in effect overrules on this point cases to the contrary, such as *United States v. International Harvester Co.* (1914) 214 Fed. 987, appeal dismissed on appellant's application in (1918) 248 U. S. 587, 63 L. ed. 434, 39 Sup. Ct. Rep. 5, wherein it was held that a potential power to restrain competition through monopoly is sufficient to render a combination violative of the Sherman Act, although it may not have been exercised to any harmful extent. In fact the opinion of the majority in the *UNITED STATES STEEL CORP. CASE* squarely lays down the rule contended for in the dissenting opinion of Sanborn, J., in the *International Harvester Co. Case*, i. e., that the crucial issue was whether or not the *International Harvester Company* was, when the complaint was filed, then unduly or unreasonably restraining or monopolizing interstate or foreign trade, or threatening to do so, and not whether the company, years before, made a combination or an attempted monopoly in restraint of trade.

However, it cannot be said that the reported case (*UNITED STATES v. UNITED STATES STEEL CORP.*) to any great extent clarifies the confusion in the decisions under the Sherman-Antitrust Act, or points out any certain or definite rule by which the act may be applied. That the decision does not, as has been suggested, nullify the act, is evidenced by the decision in *United States v. Reading Co.* decided April 26, 1920 (U. S. Adv. Ops. 1919-20, p. 481) — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 425), rendered but a few weeks after that in the *UNITED STATES*

*STEEL CORP. CASE*, wherein it was held (Mr. Chief Justice White and Justices Holmes and Van Devanter dissenting) that the case not only fell within the scope of the Anti-trust Act, but was violative of the commodities clause of the Act of June 29, 1906, relating to interstate commerce. The opinions in the *Reading Co. Case* also aptly illustrate the different conclusions which may be reached under the act. For instance, in the dissenting opinion it was said that the opinion of the court below (226 Fed. 229) clearly and comprehensively sustained the correctness of the action which it took, and also demonstrated the error of the majority of the Supreme Court in reversing its action, while, on the other hand, Mr. Justice Clarke, in delivering the opinion of the majority, said that it was "difficult to imagine a clearer case," and that "in all essential particulars it rests on undisputed conduct and upon perfectly established law." The latter statement is of especial interest in connection with the reported case (*UNITED STATES v. UNITED STATES STEEL CORP.*) for the reason that the writer of the prevailing opinion stated that the dominating power of the defendant, obtained as it was for the purpose of domination, was, "regardless of the use made of it," violative of the Anti-trust Act (however, there actually was an unlawful exercise of power) and that the case was specifically and clearly ruled by *United States v. Union P. R. Co.* (1912) 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53, wherein it was said that "it is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act."

G. J. C.



PEOPLE'S BANK & TRUST COMPANY, Exr., etc., of R. M. Brown,  
Deceased, Appt.,

v.

UNITED STATES TRUST COMPANY.

*Kentucky Court of Appeals — November 21, 1919.*

(Brown v. United States Trust Co. 185 Ky. 747, 215 S. W. 815.)

**Executor and administrator — rent — as cost of administration.**

1. The rent paid by an administrator under a lease executed by deceased is not a cost of administration within the meaning of a statute giving such cost preference against funds in the hands of the administrator.

[See note on this question beginning on page 1146.]

**Landlord and tenant — right of executor of tenant.**

2. An executor of a tenant has the option to keep the property, thereby charging the estate with the rental; to sublet if the contract or statute permits; or to surrender the property to the landlord, thereby subjecting the estate to damages for breach of the contract.

**— effect of death of lessee.**

3. A lease is not terminated by the death of the lessee.

[See 11 R. C. L. 158; 16 R. C. L. 855.]

**Executor and administrator — costs of administration — what are.**

4. A statutory provision making

costs and charges of administration of an estate a preferred claim against funds in the hands of the administrator refers to such costs and charges as are necessarily incurred in the settlement of the estate.

**Landlord and tenant — lien on proceeds of leasehold in possession of administrator.**

5. A lessor should have a superior lien upon the net income received by the personal representatives of the lessee from the use or rental of the leased premises.

APPEAL by the executor of the estate of R. M. Brown, deceased, from a judgment of the Circuit Court for Shelby County in favor of claimant trust company, in a suit to settle the estate of deceased and to determine the rights of said claimant. *Reversed, with directions.*

The facts are stated in the opinion of the court.

Messrs. Beard & Pickett for appellant.

Mr. G. G. Sales, for appellee:

The executor having in good faith continued to occupy the premises for the benefit of the estate, the landlord is entitled to his rent, whether the business proves profitable or not.

Pepper v. Harper, 20 Ky. L. Rep. 837, 47 S. W. 620; 11 Cyc. 173; 18 Cyc. 239, 242, 312; 24 Cyc. 1340.

The landlord would be entitled to judgment and a declaration of privity, whether there are assets to pay or not; but there are assets to pay.

Masonic Sav. Bank v. Bangs, 84 Ky. 135, 4 Am. St. Rep. 197; Woolley v. Louisville Bkg. Co. 81 Ky. 527.

The sum spent to provide fire extinguishers, extra stairways, etc., to make the second floor a safe place for

moving picture theater crowds, is an expense of the estate, and not of the landlord.

Holzhauser v. Sheeny, 127 Ky. 28, 104 S. W. 1034; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113. 78 S. W. 1112; Altsheler v. Conrad, 118 Ky. 647, 82 S. W. 257; Miles v. Tracey, 28 Ky. L. Rep. 621. 4 L.R.A. (N.S.) 1142, 89 S. W. 1128; Thomas v. Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084.

Mr. Robert N. Miller also for appellee.

Carroll, Ch. J., delivered the opinion of the court:

R. M. Brown died testate in Shelby county in July, 1916. Shortly after this his will was probated, and the People's Bank & Trust Company

appointed executor. He owned considerable property, real and personal, but his estate was heavily encumbered with lien debts, aside from which there were many unsecured creditors, and it is conceded that the general creditors cannot be paid in full, nor will there be anything for the devisees.

In December, 1913, Brown leased for a period of ten years and thirteen days, or to December 31, 1923, a three-story building on Main street, in Shelbyville, Kentucky, from the United States Trust Company. Under the contract of tenancy Brown was to pay an annual rental of \$3,000, and in addition all taxes, insurance, and repairs, making the rental, in the aggregate, amount to about \$4,000 a year. To better secure the payment of the rent charges and other expenses, and protect the lessor against loss, Brown mortgaged to it certain real estate located in Shelbyville. When he died, in July, 1916, the lease had about seven years and five months to run.

In July, 1917, the executor brought this suit for a settlement of the estate, and in its petition asked the advice of the court concerning certain matters that had come up between it and the landlord, among which was the claim of the landlord that the executor must carry out all the terms and conditions of the lease made with Brown, and also its contention that the rentals and other expenses due and payable under the contract of lease were preferred claims, to be paid out of the general estate in the hands of the executor before the creditors received anything. Another question was whether the executor had the right to terminate the lease, which it expressed a willingness to do.

Other issues raised in the case relate to a controversy between the executor and the landlord as to which was liable for certain repairs and alterations made on the leased property after it came into the hands of the executor. The ques-

tion, however, as to whether the executor or the landlord should pay the expense of the alterations and repairs appears to have been adjudged to the satisfaction of both parties by the lower court. At any rate, neither of them is complaining on this appeal about the judgment in this respect. So that the only questions we need to consider on this appeal are, first, whether the executor, as tenant, may surrender the property to the landlord, thereby terminating the lease; or, second, if it may not do this, has the landlord a preferred claim for the rents and other charges that will be due and payable under the contract, and must these rents and charges be paid out of the general estate in the hands of the executor, as part of the costs of administration, before the creditors receive anything therefrom?

The lower court adjudged that the landlord had a preferred claim against the estate for rent and other obligations due under the rent contract, and that these amounts should be paid by the executor as a part of the cost of administering the estate for such time as the executor might hold the property under the lease. The judgment did not determine whether the executor could surrender the property and thereby cancel the lease; but, as this question is made in the case and discussed by counsel in their briefs, it should be settled on this appeal.

The executor took charge of the estate and the leased premises shortly after the death of Brown, and it appears from the judgment that there were due and unpaid rentals amounting on December 31, 1917, to \$2,500, which sum was adjudged to be a preferred claim and directed to be paid by the executor out of the estate in his hands, as a part of the cost of administration. As the lease by its terms did not expire until January 1, 1923, and the annual amount due for rent and other expenses was about \$4,000, it will be seen that the executor,

under the judgment, would be required to pay, in addition to the \$2,-500 mentioned in the judgment, \$4,-000 a year for five years, which sums under the judgment would be preferred claims, and payable out of the estate in the hands of the executor as part of the cost of administration.

It appears from the record that the gross annual income received by the personal representative from the leased property is about \$4,680, and that the yearly expense incurred by the personal representative in connection with the premises is \$1,215.87, leaving a net income from the leased estate of \$3,464.13. It also appears, as we have before said, that the annual rent and the other expenses stipulated in the contract amount to some \$536 more than the income derived from the property at the present rentals. Although it is conceded that the leased property has been well managed by the executor, it will be seen that it is a burden and not a benefit to the estate, and that if the lease is continued, with no increase in the income that has been derived from it thus far, there will be a yearly deficit that must be met by the executor out of the estate, aside from the fact that its continuance will delay a final settlement of the estate until the lease is terminated according to its terms.

There does not seem, however, to be any legal way through which the estate may be relieved of this expensive and embarrassing condition, without subjecting it to the damages that would accrue if the executor surrendered it to the landlord and refused to further perform its conditions, thereby in effect working, on his election, a cancellation of the lease, unless he could sublease it to persons under a contract that would satisfy the terms of the lease contract. In other words, when a lessee of property like this dies, the leased property comes into the possession of his personal representative, and he has only three

rights of election in respect to it: First, he may keep the property, thereby charging the estate with the performance of the terms and conditions of the lease. Second, he may, if the contract or statute permit it, sublease the premises; but this would not, of course, relieve the estate of its obligation to satisfy the terms and conditions of the lease, as between it and the landlord. Third, he may surrender the leased property to the landlord, and refuse to have anything further to do with it, thereby working a cancellation of the lease; but the doing of this would subject the estate to a suit for damages by the landlord for breach of the contract.

Landlord and tenant—right of executor of tenant.

We say this because, although we have not been able to find any cases from this court on the subject, it is well settled by the authorities that a contract of this character is not terminated by the death of the lessee, and that his estate continues liable for the performance of the conditions of the lease until it expires. It is also generally agreed that the obligation of a lessee under the contract passes on his death to his personal representative, who assumes in his fiduciary capacity the performance of the contract in the same manner that its performance could have been demanded of the lessee. 16 R. C. L. p. 855; Underhill, Land. & T. p. 619; 18 Cyc. 239-242, 312; 24 Cyc. 1340; Becker v. Walworth, 45 Ohio St. 169, 12 N. E. 1; Alsup v. Banks, 68 Miss. 664, 13 L. R. A. 598, 24 Am. St. Rep. 294, 9 So. 895; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968.

Effect of death of lessee.

Accordingly the personal representative can no more surrender or terminate the lease without the consent of the landlord than could the lessee himself, and if the personal representative does terminate the lease by refusing to perform its conditions, the landlord may bring a

suit against him and recover from the estate damages in the same amount that he could have recovered from the lessee, if he had broken or refused to perform the contract. In other words, the personal representative takes the place in the contract of his deceased lessee, and assumes in his fiduciary capacity all the liability that the lessee assumed in entering into the contract.

The rights, duties, and obligations stipulated in the lease having thus come to the executor to be discharged by him, the question is whether the rentals and other charges against the lessee were preferred claims against his estate, to be paid as a part of the costs of the administration, or, if not, what is their status, and out of what funds in the hands of the executor should they be paid? It is provided in § 3868 of the Kentucky Statutes that "if the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of, a decedent, shall be paid in full before any pro rata distribution shall be made; but this preference shall not extend to a demand foreign to this state. All other debts and liabilities shall be of equal dignity, and paid ratably in the administration of his estate, and should more than the ratable share of any debt be paid, his personal representative shall only receive credit for its proper proportion."

It will be seen that this statute makes no mention of rentals as a preferred claim, and so, unless the rents and other expenses the lessee assumed in the contract are properly be charged as a part of the cost of the administration of the estate of Brown, they are not entitled to a preference over other debts in the distribution of the estate; and whatever remains due

after applying to their payment the net income derived by the personal representative from the leased premises becomes an ordinary debt against the estate, to be paid ratably with other like debts of the decedent in the administration of the estate.

The provision in the statute that the "cost and charges of the administration" of an estate are a preferred claim refers

to such costs and charges as are necessarily incurred by the personal rep-

Executor and administrator --costs of administration --what are.

representative in the settlement of the estate, such as court costs, attorney's fees, the compensation of the personal representative, and other necessary incidental expenses that he may be put to in the discharge of his fiduciary duties, but do not, as we think, embrace ordinary contract obligations of the decedent that the personal representative is under a duty to satisfy out of the assets of the estate.

We therefore do not find any good reason why a contract of lease, which falls within the class of ordinary contracts, made by a decedent, that the personal

representative is under a duty to perform, should occupy a more favorable position in the distribution of the assets of the estate than any other contract made by the decedent that the personal representative, acting in his place, is under a duty to perform. Although the expense incurred by the personal representative in looking after leased premises that come into his possession as a personal asset of the estate would be a preferred claim, as a part of the cost and charges of the administration to the same extent as would expenses incurred by him in looking after any other business of the estate, this does not mean that the claim of the landlord or lessor must be given a preference in the distribution of the estate, further than is allowed by the statute, over the claim of any other creditor.

But of course what we have said

does not mean that in this case the landlord may not look for payment of the whole or any part of his debt to the statutory remedies and liens given a landlord against the property of the lessee and the subtenants on the leased premises, or that the lessor in this case may not look to his mortgage lien for the payment of the rentals and charges stipulated in the contract or any part thereof.

We think, however, that the landlord, aside from and independent of any other liens he may have under and by virtue of statutory provisions on property on the leased premises, should also have a superior lien on the net income received by the personal representative from

Landlord and tenant—lien on proceeds of leasehold in possession of administrator.

the use or rentals of the leased premises, and that the personal representative should pay

this income to the landlord in part or full satisfaction, as the case may be, of the obligations of the lease contract.

The statute, in § 2317, provides, in part, that "a landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease," and under this statute the landlord has a superior lien on the income derived by the lessee from the rented premises, as this income, less the necessary expense that the lessee must incur in maintaining the leased premises in a con-

dition suitable for their use and occupancy, or that he must incur or assume as a part of the contract of leasing them, if he does this, is a part of the "produce" of the leased premises.

But this superior lien of the landlord does not extend to other property of the tenant, and when the landlord has exhausted the property on which the statute gives him a superior lien, the remainder due on his claim, if any, becomes an ordinary debt against the tenant, to be paid ratably with other debts of like character. The death of the lessee should not put the landlord in any better position than he would have occupied if the lessee had not died; but if the whole of the rents and other obligations due under the lease contract should become a preferred claim against the estate of the decedent, independent of its preference under the statutory provisions giving the landlord a superior lien, it is evident that the landlord would be given a preference over unsecured as well as lien creditors on the whole estate of the decedent, when, as against the tenant, he would only have the superior lien and preferred claim given by the statute to landlords.

Having the view of the law applicable to the case as we set it out, it follows that the court erred in adjudging that the claim of the lessor must be paid as a part of the costs of administration.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

### ANNOTATION.

**Rent accruing under lease after death of lessee as preferred claim or cost of administration.**

Preference of payment out of the assets of a decedent has been claimed for rent due, because of the occupancy or use by the personal representative of premises leased by the decedent in his lifetime.

Thus, in the reported case (*People's*

*BANK & T. CO. v. UNITED STATES TRUST CO.* ante, 1142), it is held that though a lease does not terminate on the death of a lessee, and the duty of performance of the lease falls on the personal representative, rent charges are not preferred claims under a statute pre-

ferring "costs and charges of the administration." The landlord was, however, in that case, given a lien for his rent on the income derived by the personal representative from the leased premises.

In *Naftel v. Osborn* (1893) 96 Ala. 623, 12 So. 182, it appeared that an administratrix cultivated and gathered crops which were growing on leased property at the time of the death of the lessee. A statute provided that "any crop commenced by a decedent may be completed and gathered by the executor or administrator, and, the expenses of the plantation being deducted therefrom, is assets in his hands, and may be sold by him at private sale, either in or out of the state." It was held that the rent until the crop was gathered was part of the expenses, and that only the surplus of the value of the crop was available to general creditors.

The Maryland Act of 1836, applied in *Longwell v. Ridinger* (1843) 1 Gill (Md.) 57, gave a preference to "all claims for rent in arrear against deceased persons for which a distress may be levied by law, after the death of the deceased." The court said in that case: "This court is of opinion that the rent in arrear, due from Peter Ridinger to John McCaleb on the 1st day of October, 1842, could have been distrained for by the said McCaleb, who died on the 2d January, 1843, the administratrix of the said Peter Ridinger having continued the tenancy of her intestate up to the time of, and after, the death of the said McCaleb, the landlord and owner of the fee of the said demised premises."

In at least two jurisdictions, the question has arisen whether rent for occupancy of premises by the lessee himself, which did not accrue until after his death, is a preferred claim against his estate under a statute preferring claims for "rent."

Thus, the Pennsylvania Act of 1834 makes "rents not exceeding one year" a preferred claim of the second class, taking precedence of all debts except funeral expenses, etc. In *Re Ralston* (1844) 2 Clark (Pa.) 224, it was held that rent not accruing until after the

death of the tenant was not preferred. The court said: "If the question were put to a layman, he would unhesitatingly answer that rent is not a debt due or owing until the expiration of the term on which it is reserved, unless it be otherwise stipulated by the terms of the lease, and we have seen that, in legal intentment, the meaning of the words 'due and owing' is in accordance with this interpretation. Upon this point the learned and carefully prepared opinion of Kennedy, J., . . . [*Bank of Pennsylvania v. Wise* (1834) 3 Watts (Pa.) 394] saves us the necessity of any elaborate argument, and indeed proves that in no sense can rent be esteemed a 'debt owing' before it is payable. Nor is there anything in the spirit of the act which makes against this construction. The object is not to favor the landlord in every supposable case, or to the full amount of the claims he may have against the estate of his late tenant. The intent seems to be to give to the landlord a preference as to rent for which he might have distrained at the death of the tenant, not exceeding one year; and not to confer a greater right or larger title than he had at common law, and under our Act of 1772. The preference is in aid or perhaps in lieu of the distress, and not something beyond and of greater efficacy, as the argument submitted on the part of the landlord would make it. But it is urged that a broader meaning is to be assigned to the words 'debts owing,' as used in the act, than is their natural import, because they are used as applicable to 'funeral expenses,' equally with other debts; and as these expenses cannot be due from a deceased person prior to his death, the legislature must be taken as having employed the words in question as expressive of any debt for which the estate of the intestate would be eventually liable. It is, to be sure, a violation of propriety of expression to denominate a claim against the estate of a deceased person, which can only arise subsequent to his death, a debt owing by him, but still it is a debt due from his estate, and so the legislature simply intended to treat it. A

slip in calling it a debt owing from the deceased at the time of his death cannot operate to enlarge the terms used, so as to make that a debt due within the purview of the statute, which, both in technical and popular acceptation, sanctioned by reason and justice, is not so due. To produce such a result, something more strongly indicative of a corresponding legislative intention must be shown than mere inaccuracy of expression, employed in speaking of another and distinct subject. As, therefore, there was not a year's rent due and owing by the tenant to his landlord at the time of his death, the accountant is not entitled to the further credit claimed by him in this exception, and it must be overruled."

A different view, resting on cases which are outside the scope of this note, was taken in *Walker's Estate* (1889) 6 Pa. Co. Ct. 515, the court affirming an auditor's report wherein it was said: "The Act of February 24, 1834, makes rents not exceeding one year a preferred claim. The question is raised whether this prefers all rent accruing up to the death of the tenant, or only what may be actually due by the terms of the lease. The auditor is of opinion that the rent is to be apportioned to the date of the death of the tenant, and is to be allowed a preference to that extent. The language of the Act of 1834 is: 'All debts owing by any person at the time of his decease shall be paid in the order stated.

. . . (2) Rents not exceeding one year.' Under the Act of June 16, 1836, relating to executions, the language is that 'goods taken in execution and liable to distress shall be liable for the payment of all sums of money due for rent.' 1 *Purdon's Dig.* 752, p. 59. Under this act it has been repeatedly held that the rent is to be apportioned to the date of the levy, whether payable by the terms of the lease before that time or not. *Binns v. Hudson* (1813) 5 Binn. (Pa.) 506; *West v. Sink* (1797) 2 Yeates (Pa.) 274; *Morgan v. Moody* (1843) 6 Watts & S. (Pa.) 335; *Parker's Appeal* (1847) 5 Pa. 390; *Case v. Davis* (1850) 15 Pa. 39; *Wickey v. Eyster* (1868) 58 Pa. 501;

*Moss's Appeal* (1860) 35 Pa. 162; *Lewis's Appeal* (1870) 66 Pa. 312. Judge Bell, in *Re Rolston* (Pa.) *supra*, expresses doubt of the correctness of this construction, but it has become too firmly imbedded in our law to be overturned, and is consonant with reason. As the law takes away the right of distress, it ought to provide a substitute. The same construction, by reason and analogy, must be placed upon the language of the Act of 1834. The rent accruing to the landlord, up to the death of the tenant, will, therefore, be preferred."

The statute construed in *McEwen v. Joy* (1858) 41 S. C. L. (7 Rich.) 33, gave a preference generally to claims for "rent." The court held that the rent for the second quarter of a term in the course of which the lessee died was a preferred claim under the statute, saying: "If our Statute of 1789 (5 Stat. at L. 111, § 26), in settling the order for payment of the debts of an intestate, confines the precedence which is given to rent over bonds and other obligations, to the rent which was due at the death of the intestate, and that which would become due at the next day for payment after his death, then the plaintiff should recover no more than he has done; but if that precedence is extended to all rent which may accrue under a contract of the intestate, then the defendant here has assets to pay some, if not all, of the rent for the last two quarters, and the plaintiff is entitled to a new trial. . . . In the right of distress, difference may be made by the death of the lessee; but the preference given to rent seems not to depend on that right, but, like it, to have grown out of the preference yielded to landlords, partly from feudal reasons, and partly from consideration of the necessity of habitation for human beings. That assets which arose from other sources should be reserved to meet rent that may, long after the death of an intestate, become due upon a contract, perhaps improvidently made by him for a long lease, will, without doubt, be in some cases inconvenient and unjust; but the unex-

pired term is assets in the hands of the administrator, the profits it may yield are supposed to exceed the rent, and there is justice in the landlord's claim that those profits should not be directed to the payment of other debts,

in defeat of the rent. We conclude that there is no good ground for a distinction, with regard to precedence, between rent which was due at the death of the intestate, and that which became due afterwards." M. J. Q.

LAURA M. SMITH

v.

B. C. SMITH, Plff. in Err.

*West Virginia Supreme Court of Appeals—February 26, 1918.*

(81 W. Va. 761, 95 S. E. 199.)

### Judgment — alimony — enforcement.

1. Though a decree for alimony constitutes a lien on the real estate of the party against whom it is pronounced and may be enforced by execution, it is a decree not merely for the payment of money, but for the payment of money in discharge of the high marital duty of maintenance, wherefore it may be enforced by attachment for contempt also.

[See note on this question beginning on page 1156.]

### Appeal — judgment for contempt.

2. Section 4, chap. 160, Code (§ 5605), impliedly withholding or denying a writ of error to a judgment for contempt consisting of nonperformance of, or disobedience to, a judgment, decree, or order, is limited in its operation to judgments, decrees, and orders rendered, pronounced, and entered by courts having jurisdiction to render, pronounce, and enter them, and to such valid judgments, decrees, and orders as the court has jurisdiction and power to enforce by process of contempt.

[See 6 R. C. L. 538.]

### Equity — abrogation of remedy.

3. Statutory abrogation of a remedy afforded by general equity jurisprudence denies to courts of equity power and jurisdiction to adopt and use it.

### Contempt — denial of jurisdiction to punish.

4. Sections 1, 2, chap. 139, Code (§§ 5093, 5094), deny to courts of equity jurisdiction and power previously accorded them by general equity procedure to enforce decrees for the payment of money by process of contempt.

### Appeal — contempt.

5. A writ of error does not lie to a judgment of contempt for disobedience of a decree requiring payment of alimony.

[See 6 R. C. L. 538.]

### Judgment — coercing performance — commitment.

6. A court of chancery may, by proper procedure, commit a disobedient or recalcitrant litigant for refusal to perform an affirmative act lawfully required of him by its decree for the benefit of the opposite party to the suit, by an order entered upon its own records under the style of the cause in which such decree was pronounced, as a means of coercing performance of the act so required.

[See 6 R. C. L. 502; 10 R. C. L. 566.]

### Contempt — punishment — character.

7. In such cases, the committal is not deemed in law to be punishment for any criminal offense. The contempt for which it is inflicted is civil in its nature, and only incidentally involves an offense to the court or the public.

Headnotes by POFFENBARGER, P.

**ERROR** to the Circuit Court for Roane County to review a judgment of committal for contempt of court because of nonpayment of alimony in a proceeding to enforce its payment. *Writ dismissed.*

The facts are stated in the opinion of the court.



**Mr. Charles E. Hogg, for plaintiff in error:**

This court has jurisdiction to review the action of the court below.

*State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153; *State ex rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R. Co.* 73 W. Va. 1, 79 S. E. 834; *State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 442, 5 S. E. 194; *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73, 8 Ann. Cas. 53.

The circuit court was without jurisdiction to enforce a decree for the payment of money by means of a proceeding for contempt.

*Latham v. Latham*, 30 Gratt. 307; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1088; *Cariens v. Cariens*, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; *Stewart v. Stewart*, 27 W. Va. 167; *Rickard v. Schley*, 27 W. Va. 624; *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 442, 5 S. E. 194; *Staples v. Staples*, 87 Wis. 592, 24 L.R.A. 433, 58 N. W. 1036; *Andrews v. Andrews*, 69 Ill. 609; *Chapman v. Phoenix Nat. Bank*, 12 Jones & S. 355; *Haines v. Haines*, 35 Mich. 138; *Coughlin v. Ehlert*, 39 Mo. 285; *Segear v. Segear*, 23 Neb. 306, 36 N. W. 536; *Leeder v. State*, 55 Neb. 133, 75 N. W. 541; *Marsh v. Marsh*, 162 Ind. 210, 70 N. E. 154; *Baily v. Baily*, 69 Iowa, 77, 28 N. W. 443; *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73, 8 Ann. Cas. 53.

A final decree for alimony, payable by instalments, is one for the payment of money and enforceable by execution.

*Hall v. Harrington*, 7 Colo. App. 474, 44 Pac. 365; *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58; *Trowbridge v. Spinning*, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; *Barber v. Barber*, 21 How. 532, 595, 16 L. ed. 226, 230; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; *Livermore v. Boutelle*, 71 Am. Dec. 711, note; *Harding v. Harding*, 102 Am. St. Rep. 702, note; 1 R. C. L. 951; *Gaston v. Gaston*, 55 Am. St. Rep. 86, note; *Wetmore v. Wetmore*, 149 N. Y. 520, 33 L.R.A. 708, 52 Am. St. Rep. 752, 44 N. E. 169; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Brigham v. Brigham*, 147 Mass. 159, 16 N. E. 730;

*Dreyer v. Dickman*, 181 Mo. App. 660, 111 S. W. 616; *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705.

A proceeding for contempt is criminal in its nature, and the rules of evidence governing criminal trials are applicable.

*State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864; *Craig v. McCulloch*, 20 W. Va. 148; *Ruhl v. Ruhl*, 24 W. Va. 279; *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153; *Ex parte Mylius*, 61 W. Va. 405, 10 L.R.A. (N.S.) 1098, 56 S. E. 602, 11 Ann. Cas. 812.

The court should have discharged the rule awarded against the plaintiff in error to show cause why he should not be held for contempt of court.

*Western U. Teleg. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; 1 R. C. L. p. 962, § 105.

**Mr. Charles J. Hogg also for plaintiff in error.**

**Mr. H. C. Ferguson for defendant in error.**

**Poffenbarger, P., delivered the opinion of the court:**

A judgment of committal for a contempt of court, effected by non-payment of instalments of alimony decreed against the plaintiff in error, constitutes the subject-matter of this writ of error; and one very vital question arises on the motion to dismiss the writ as having been improvidently awarded.

A judgment for contempt of a trial court, consisting of disobedience of its judgment, decree, or order, is not reviewable in the appellate court if the trial court had jurisdiction of the cause in which it rendered, pronounced, or entered the violated judgment, decree, or order, and did not exceed its jurisdiction in doing so. *State ex rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R. Co.* 73 W. Va. 1, 79 S. E. 834; *Code*, chap. 160, § 4. Full acquiescence in the foregoing proposition is evidenced by the brief filed for the plaintiff in error; but it is earnestly insisted that the contempt procedure complained of was action in excess of the jurisdiction of the court, because, it is said, § 1

of chapter 139 of the Code has stripped courts of equity of their power to enforce decrees for alimony by such procedure. That section places a decree for land or personal property, or for the payment of money, on the same footing as a judgment for such property or money, and then proceeds as follows: "But a party may proceed to carry into execution a decree or order in chancery other than for the payment of money, as he might have done if this and the following section had not been enacted."

The next section makes the beneficiaries of decrees requiring the payment of money judgment creditors, and authorizes issuance of executions thereon. If the construction contended for should be conceded, it may not follow that a writ of error lies to a judgment in a contempt proceeding, for the statute expressly withholds a writ of error to a judgment, for a contempt effected by disobedience of a judgment decree or order. It reads: "To the judgment of a circuit court for a contempt of court other than for the nonperformance of, or disobedience to, a judgment, decree, or order, a writ of error shall lie from the supreme court of appeals." Code, chap. 160, § 4.

State, ex. rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R. Co. supra, recognizes an implied exception to this statute founded upon lack of jurisdiction in the circuit court, but the lack of jurisdiction constituting the ground of the exception, as defined in that case, pertains to the judgment or decree for enforcement of which the contempt proceeding is invoked. That decision necessarily denies to the statute in question a part of the force and effect literally imported by its terms. If an exception thereto can be validly founded upon lack of jurisdiction to pronounce the decree for enforcement of which contempt procedure is resorted to, it is difficult to see any reason why lack of jurisdiction in the process of enforcement would not constitute a sufficient basis for another or fur-

ther exception. In the latter case, the lack of jurisdiction would be more clearly and directly involved than in the former. In neither is there any foundation for it in the terms of the statute. At the same time it must be remembered that a judgment or decree rendered without jurisdiction is a nullity, wherefore it may be said there is no judgment or decree in such case to be enforced. On the other hand, when the judgment or decree is not questioned and its binding force is beyond doubt, there is an order of the court which the party proceeded against is bound to respect and obey. Nevertheless, if there is no jurisdiction or power to enforce obedience by the means adopted, the party proceeded against is under no duty to obey in the particular manner in which the contempt proceeding endeavors to make him perform. Obviously, therefore, there is lack of power or jurisdiction of the court in either case; and if proper construction results in an implied exception to the operation of the statute in the one instance, it must necessarily do so in the other. Properly read, therefore, the statute withholds a writ of error to a judgment, for contempt consisting of non-performance of, or

Appeal-judgment for contempt.

disobedience to, a judgment, decree, or order if the court rendering it had jurisdiction to pronounce it and has jurisdiction and power to enforce it by contempt procedure. All judgments, decrees, and orders are not enforceable in that way.

Every act of a court founded upon an erroneous interpretation of a statute or a misconception of the common law, and variant therefrom, is not void for want of jurisdiction. It is familiar law that a court has as much power to decide erroneously as it has to decide correctly. Mere errors in decisions upon questions of law are not acts in excess of jurisdiction. In some instances, however, they are. In the determination of the meaning of laws pertaining to their own power and ju-

risdiction, courts decide and act at their peril. On the other hand, in administering law applicable to the rights of the litigating parties, their acts founded upon erroneous interpretations of laws are ordinarily mere errors of judgment. These propositions are so self-evident and so thoroughly attested by the decisions of this and other courts that authority for them need not be cited.

Courts derive their authority and powers from the Constitution and laws of the state, and unless the power or authority of a court to perform a contemplated act is found therein, the act, if done, is *coram non iudice*. 7 R. C. L. p. 1030; *Norfolk & W. R. Co. v. Pinnacle Coal Co.* 44 W. Va. 574, 41 L. R. A. 414, 30 S. E. 196. In the absence of a statutory modification or abrogation, courts of general jurisdiction have all the powers conferred upon

Equity—  
abrogation of  
remedy.

them by the common law, but such remedies and powers as the Constitution or statutes have abrogated, they do not possess. Obviously, therefore, any effort on the part of a court to employ an abrogated remedy formerly permitted to it by the common law or general equity jurisprudence would be an act in excess of its jurisdiction.

The statute invoked in resistance of the contempt procedure manifestly deals with remedies as well as rights, and impliedly forbids enforcement of a decree or order in chancery for the payment of money otherwise than by execution. It makes the decree the equal of a judgment, and declares it shall be embraced by the word "judgment" whenever it is used in certain chapters. It also makes the person entitled to any decree or order requiring the payment of money a judgment creditor, even though the money may be required to be paid into a court, or a bank, or other place of deposit. In all such cases, it authorizes an execution on the decree or order. Furthermore, the decree becomes a lien upon the real estate of the party against whom

it is pronounced. Having done all this, it then declares that the party in whose favor it is may proceed to carry into execution a decree or order in chancery other than for the payment of money, as he might have done before the passage of the act. This necessarily implies that he cannot so enforce a decree for the payment of money. Manifestly, therefore, power to enforce such a decree by process of contempt has been <sup>Contempt—  
denial of juris-  
diction to  
punish.</sup> abrogated and no longer exists. When such remedy is available, it is the court's remedy or process. Denial thereof to a party necessarily carries denial of power in the court to award it. Jurisdiction formerly existing is, to that extent, abrogated or withdrawn by the statute.

An overwhelming weight of authority, however, makes a decree for alimony more than a mere decree for the payment of money. "It has frequently been insisted that a decree for alimony is in fact a debt, and therefore payment should not be enforced by attachment for contempt where the Constitution prohibits imprisonment for debt. But it is uniformly held, and such is the true doctrine, that the decree for alimony is an order of the court to the husband compelling him to support his wife by paying certain sums, and thus perform a public as well as a marital duty. Such decree is something more than an ordinary debt or judgment for money. It is a personal order to the husband, similar to an order of the court to one of its officers or to an attorney. The imprisonment is not alone to enforce the payment of money, but to punish the disobedience of a party; and the order is not, therefore, a debt, within the meaning of the Constitution." *Nelson, Div. & Sep.* § 939. "Objection has been raised to the enforcement of a judgment or decree for alimony by contempt proceedings, on the ground that alimony is a debt within the meaning of statutes or constitutions which prohibit imprisonment

for debt. By the great weight of authority, however, alimony is not considered a debt within such meaning." 3 Enc. L. & P. 181. "It is sometimes held that where the statute provides for execution and other processes for the collection of alimony, that imprisonment for contempt cannot be resorted to as an additional remedy. But the correct interpretation is that the statute conferring additional remedies did not deprive the courts of their inherent power to enforce such order." Nelson, Div. & Sep. § 939. These quotations from textbooks are sustained by abundant authority. In some of the states having statutes similar to ours, enforcement by attachment for contempt is limited to cases in which the decree cannot be otherwise enforced. In Illinois, it is not permitted if payment is secured. *Andrews v. Andrews*, 69 Ill. 609. In New York, the moving party is required to show not only that the husband has refused to comply with the order, but also that the payment cannot be enforced by execution or sequestration, or a resort to the securities. *Sandford v. Sandford*, 44 Hun, 563; *Isaacs v. Isaacs*, 61 How. Pr. 369; *Whitney v. Whitney*, 26 Jones & S. 335, 11 N. Y. Supp. 583; *Mahon v. Mahon*, 18 Jones & S. 92. In Iowa, Michigan, and Nebraska, the courts seem to hold that under no circumstances can a decree for alimony be enforced by process of contempt. *Baily v. Baily*, 69 Iowa, 77, 28 N. W. 443; *Segear v. Segear*, 23 Neb. 306, 36 N. W. 536; *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73, 8 Ann. Cas. 53.

Under our statutes, a decree for alimony is more than a mere decree for money. Upon decreeing the dissolution of a marriage or a divorce of either class, the court may make such further decree as it shall deem expedient, concerning the estate and maintenance of the parties, or either of them. Code, chap. 64, § 11 (§ 3646). The relation assumed or recognized by this statute, as constituting the basis of the right to be vin-

dicated by the decree, is not that of debtor and creditor. It is a duty of maintenance imposed by the marital relation, from which the divorce does not necessarily exonerate the parties. The statute empowers the court decreeing the divorce to enforce performance of the duty of maintenance after the separation or severance of the marriage relation. Authority is conferred upon the court, not merely to decree money as alimony, but to make any decree it may deem expedient concerning maintenance. Enforcement of the lien of the decree may involve ruinous delay, and execution may be unavailing, and yet the delinquent party may have it in his power easily to raise and pay the money. Power to make such decree as the court deems expedient concerning maintenance obviously goes beyond the mere award of money as a debt and reaches the case supposed. The decree is for maintenance, not mere money. The money decree is a means to an end; the real purpose of the decree, maintenance. Its pecuniary quality makes it a lien and the basis of an execution, as this court has held, but these characteristics do not necessarily imply absence of others. It may consistently be a decree for money, and, in addition thereto, a decree for support, not fully effectuated by execution and enforcement of the lien on real estate.

In view of this conclusion, warranted by the weight of judicial opinion and the liberal terms of the Divorce Statute, there

Judgment—  
alimony—  
enforcement.

is no lack of jurisdiction, and hence no right of review by writ of error. If the decree goes beyond the ability of the plaintiff in

Appeal—  
contempt.

error, in its requirements, an application to the court for relief by a modification of its terms and provisions would have forestalled and prevented the procedure for contempt. Error in the court's action upon that application could have been corrected on an appeal. When

the court has jurisdiction in all respects, the party subject to a decree enforceable by attachment for contempt must obey the decree or get rid of it. The statute gives him no right to withhold performance by disobedience and a writ of error to the judgment for contempt. The former is a contempt of the court and the statute denies him the latter. *State ex rel. Fortney Lumber & Hardware Co. v. Baltimore & O. R. Co.* cited *supra*.

A careful reading of the opinion in *Cariens v. Cariens*, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335, fails to disclose an assertion of lack of power in the trial court to modify a decree for alimony, entered contemporaneously with a decree of divorce, upon facts subsequently arising. Such a decree is declared to be conclusive upon the parties as to all facts existing at its date, but power in the court to discharge the husband from payment, for good cause subsequently accruing, is affirmed in unequivocal terms. As to the power of the court respecting alimony, the statute deals with both classes of divorce in exactly the same terms, wherefore the legislature cannot be deemed to have intended to withhold or deny right to modify the decree in one class any more than in the other. Moreover, in *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837, a majority of this court expressed the opinion that the statute does not deny such power.

Entry of the order complained of in the chancery order book, and under the style of the divorce suit, is relied upon as a fatal and jurisdictional departure in the proceeding. Our decisions uniformly say every contempt proceeding is criminal in its nature, and, after issuance of the rule, should be conducted in the name of the state and recorded in the law order book. *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Ruhl v. Ruhl*, 24 W. Va. 279; *Craig v. Mc-*

*Culloch*, 20 W. Va. 148; *State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864. In each of these cases, except *Ruhl v. Ruhl*, the alleged contempt consisted of the doing of a forbidden act, and the object of the proceeding was punishment. The contempts were primarily criminal, rather than civil, in their natures, and the purpose of the procedure was not mere enforcement of performance of an affirmative act or duty required by a decree. When the disobedience consists of failure to perform a decree in favor of the opposite party, the contempt is civil in its main features, though there is an incidental element of criminality in it. In *Ruhl v. Ruhl*, the defendant was proceeded against for failure to obey a decree for payment of money, but the decree was void for lack of jurisdiction in the court in which it was entered. The judgment of contempt was entered in the chancery order book, under the style of the main cause, and this court declared the contempt proceeding erroneous, not void, for that reason, but void and without foundation in law, because the decree violated was void. Point 3 of the syllabus in *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S. E. 413, seems to say a proceeding so entered is void for want of jurisdiction in the chancery court, and the opinion, at page 420, declares it irregular, and says the law side of the court only has jurisdiction. The alleged contempt in that case was primarily criminal, and the proceeding contemplated punishment only. In that decision the court, going far beyond the case presented by the record, asserted that all contempt proceedings must be conducted on the law side of the court, notwithstanding their differences in character and purpose. Under practically all of the earlier decisions here referred to lies the fallacious assumption of a right of review for errors in the sentence or order in all cases of contempt. From the lack of provision for review otherwise than by writ of er-

ror, the court inferred legislative intent to make all contempts criminal, to the end that they may be so reviewed. This process of interpretation completely overlooked plainly expressed legislative purpose not to allow review at all for mere error in certain classes of cases, namely, nonperformance of, or disobedience to, a judgment, decree, or order. Barnes's Code 1918, chap. 160, § 4. But for the statute, there would be no right of appeal in any contempt case. There was none at common law. 6 R. C. L. p. 538; Wells v. Com. 21 Gratt. 500. In these cases the statute does not give it. Plainly, therefore, it does not exist. It exists in other cases because the statute gives it. This oversight and erroneous assumption induced the adoption of a highly confused, illogical, and unnecessarily cumbersome procedure. As the construction has no foundation in law, fact, or reason, it must be rejected, and, in consequence of its rejection, the practice formerly existing, and recognizing the difference between civil and criminal contempts, is reinstated. Under it a court of equity could, by an order entered in its own records

Judgment—  
coercing per-  
formance—  
commitment.

under the style of  
the pending cause,  
commit a recalcitrant party to co-

erce him into the performance of a duty required of him by its decree in favor of the opposite party. Purcell v. Purcell, 4 Hen. & M. 507. Such an order is almost devoid of the element of criminality and almost wholly remedial. Without power and authority to make it, a court of equity would be unable in many instances to effectuate legal right and justice between the parties. To make such a proceeding purely criminal in legal contemplation, and limit the jurisdiction to the law courts, necessarily strips the courts of equity of power essential to the due and efficient exercise of their jurisdiction. An interpretation of a statute occasioning such results, and resting upon a mere unnecessary implication hardly more than a conjecture, is obviously un-

sound and indefensible. In so far as the decisions herein referred to deny to courts of equity jurisdiction over purely civil contempts, they are disapproved and overruled for the reasons here stated. And it follows from this conclusion that the decree complained of is neither void nor erroneous on account of the cognizance of the proceeding by the chancery court, its prosecution therein, and the entry of the decree in its records under the style of the divorce suit. It may be added that this procedure was impliedly recognized as valid in two cases recently decided by this court. Petrie v. Bufington, 79 W. Va. 113, 90 S. E. 557, and Ex parte Beavers, 80 W. Va. 34, 91 S. E. 1076.

The suggestion in argument that the imprisonment involved in the court's process of enforcement of obedience to its decree necessarily makes the proceeding criminal, and confers right of Contempt—  
punishment—  
character. trial by jury, wherefore it is one for the cognizance of a court of law only, is altogether untenable. Instancing the case of a refusal to pay alimony and imprisonment to coerce such payment, the Supreme Court of the United States, in Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N.S.) 874, 31 Sup. Ct. Rep. 492, speaking through Mr. Justice Lamar, said: "Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

It is unnecessary and would be improper here to attempt to indicate the class of cases in which the procedure should be on the law side of the court, or to say whether procedure in the wrong forum would be fatal to the judgment of contempt or committal for a civil contempt. Such a departure might be a mere

error, as to which there is no right to relief. *McGrew v. Maxwell*, 80 W. Va. 718, 94 S. E. 395.

For the reasons stated, the writ of error will be dismissed as having been improvidently awarded.

### ANNOTATION.

**Statute expressly or impliedly denying power to enforce by process of contempt, order, judgment, or decree, for money, as applicable to order or decree for alimony.**

- I. Introduction, 1156.
- II. Illinois, 1156.
- III. Michigan, 1157.
- IV. Missouri, 1157.
- V. Nebraska, 1159.
- VI. New Jersey, 1159.
- VII. New York, 1160.
- VIII. West Virginia, 1160.
- IX. Wisconsin, 1160.

#### *I. Introduction.*

In its origin, the jurisdiction of courts of chancery was exercised exclusively over the person of the defendant. The decrees of the court did not have the dignity of a judgment at law, and common-law process was not available for the enforcement of them. The payment of money could be enforced only by process of contempt. By statute in the United States, however, decrees in equity have been given the same force as judgments at law, and execution may issue thereon. See 10 R. C. L. 565. The statutes whereby such enforcement of decrees is permitted ordinarily prohibit, either expressly or impliedly, the enforcement by contempt proceedings of a decree or order in equity for the payment of money. From that situation arises the specific question with which this annotation is concerned, viz., whether that prohibition extends to orders or decrees for the payment of alimony. Whether alimony is a debt within a constitutional prohibition of imprisonment for debt is not discussed.

#### *II. Illinois.*

In Illinois, it has been held that a statute making a decree for money a lien on land to the same extent as a judgment at law does not affect the power of the court to punish, as for contempt, a husband's contumacious refusal to pay alimony. *Wightman v.*

*Wightman* (1867) 45 Ill. 167. That case was decided under the Chancery Code of 1845. The complainant was imprisoned for failing to make payments under a decree for alimony. A statute provided that "a decree for money shall be a lien on the lands and tenements of the party against whom it is entered, to the same extent, and under the same limitations, as a judgment at law." By another statute, the issuance of an execution was permitted, in certain cases, on a final decree, and the court was expressly empowered, if necessary, to "direct an attachment to be issued against the party disobeying such decree, and fine or imprison him, or both, in the discretion of the court," and also to direct a sequestration for his disobedience. It was also provided that the payment of alimony and maintenance could be enforced in any other manner consistent with the rules and practice of the court. Holding that the statute making the decree for alimony a lien on the lands of the defendant did not affect the power of the court to enforce the decree by process of contempt, the court said: "The nonperformance of the decree being adjudged a contempt, the power to attach for the contempt cannot be questioned. The order adjudging the nonperformance of the decree a contempt being a lawful order, the court was allowed the usual means to enforce the order, by issuing an attachment therefor, and committing him, on failure to purge himself of the contempt. . . . We have no doubt a court of chancery has power, in addition to making a decree for alimony a lien on the lands of a defendant, which it would be without a decree to that effect, to enforce the decree by attachment for contempt, and, if the defendant remains con-

tumacious, defying the court, may also sequester his estate, real and personal, as a means of enforcing performance of the decree."

In *Andrews v. Andrews* (1873) 69 Ill. 609, the court, making reference to the statute set out in *Wightman v. Wightman*, supra, said: "We think there can be no doubt of the power of the court to award an attachment for noncompliance, with an order for the payment of alimony."

The later case of *O'Callaghan v. O'Callaghan* (1873) 69 Ill. 552, was decided under the Chancery Code of 1871, which provided that "when any bill is taken for confessed, or upon hearing, the court may make such decree thereon as may be just, and may enforce such decree, either by sequestration of real and personal estate, by attachment against the person, by fine or imprisonment, or both, or by ordering the demand of the complainant to be paid out of the effects of the estate sequestered, or which are included in such decree; and by the exercise of such other powers as pertain to a court of chancery, and which may be necessary for the attainment of justice." Denying the contention that a proceeding to enforce the payment of a decree for alimony should have been against the defendant's property, since the decree was made a lien thereon, and not against his person, the court said: "The sequestration of property was not intended to supersede proceedings by contempt, but on the contrary it was in aid of it, and resorted to either where the contemnor could not be arrested upon process, or where, having been arrested, he remained in prison, without paying obedience to the court. . . . It is, therefore, . . . manifest that the mere fact that the decree is, in this case, made a lien upon appellant's property, is not a sufficient reason why the attachment should not issue against him, either by the old chancery practice, or under the provisions of our statute. The object of this attachment is merely to bring the appellant before the court, to show cause why he should not be adjudged guilty, and punished for contempt in refus-

ing to obey its order. . . . We are of the opinion, however, that, when brought before the court on attachment, it would be sufficient to entitle the party to be discharged, to show that his disobedience had not been wilful, but was solely on account of his pecuniary inability, or some other misfortune over which he had no control. The court is empowered to punish wilful obstinacy, in such cases, by imprisonment, but we think the spirit of our Constitution forbids that the pecuniary inability of the party, not resulting from his fraudulent conduct to produce that condition, cannot be punished as a contempt by imprisonment."

### III. Michigan.

In Michigan, under statutes permitting the enforcement of money decrees by attachment, "where by law execution cannot be awarded for the collection of such sum" (Comp. Laws, § 5689), and empowering the court to enforce the "performance of any decree, or obedience there by execution" (§ 5689), it has been held that, where the court ordered the defendant in a divorce suit to make certain payments for expenses of litigation and for temporary support, and he failed to do so, since an execution would not issue to enforce the order, process of attachment would lie. *Haines v. Haines* (1876) 35 Mich. 138, wherein the court said: "We have no difficulty in holding that the process of contempt to enforce civil remedies is one of those extreme resorts which cannot be justified if there is any other adequate remedy. The statutes have done away with the barbarous rules which made process of contempt the usual remedy for the enforcement of equitable rights. . . . [But] the nature and purpose of allowances to carry on litigation would not allow them to depend for enforcement on executions. Unless they can be enforced in some other way, they may be practically defeated."

### IV. Missouri.

In Missouri, the rule is well settled that an order for the payment of alimony is merely one for the payment of



money, collectable on execution, but not by a process of contempt. *Coughlin v. Ehlert* (1866) 39 Mo. 285; *Re Kinsolving* (1909) 135 Mo. App. 631, 116 S. W. 1068.

The case of *Coughlin v. Ehlert*, supra, was decided under the General Statutes of 1865 (chap. 114, § 6), which provided that, when a person neglected or refused to pay alimony as adjudged, the court should have the power "to award execution for the collection thereof, or to enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court." The petitioner was imprisoned for the failure to pay a decree for alimony. In ordering his release the court said: "The party here was under no other contempt than that of refusing to pay the money which the court had ordered to be paid as alimony. As process against the body for the nonpayment of a debt cannot now be issued, there would seem to be no means of putting a party in contempt for disobeying orders or decrees for the mere payment of money. . . . An order for the payment of alimony is simply an order for the payment of money. Imprisonment for debt is abolished in this state . . . [and since] this was an imprisonment for debt only, . . . the commitment was without authority of law."

And in the case of *McMakin v. McMakin* (1896) 68 Mo. App. 57, the *Coughlin Case*, supra, was accepted as an authoritative determination that a judgment or decree for alimony is one for money, and not enforceable by process of contempt.

In the case of *Re Kinsolving* (1909) 135 Mo. App. 631, 116 S. W. 1068, the petitioner was imprisoned for his failure to pay a decree for alimony. His release was sought on the ground that an order for the payment of alimony was an order for the payment of money in discharge of a debt, and could not be enforced by process of contempt. The case arose under the Revised Statutes of 1899, which re-enacted the Act of 1865, set out supra, and added two sections concern-

ing the payment of alimony. Section 2029 of the later Code gave a general lien on the realty of the party against whom the decree was rendered, "as in the case of other judgments," but provided that when alimony was decreed from year to year, the decree "shall not be a lien on the realty, as aforesaid, but an execution in the hands of a proper officer, issued for the purpose of enforcing such decree, shall constitute a lien on the real and personal property of the defendant in such execution, so long as the same shall lawfully remain in the possession of such officer unsatisfied." It was further provided in that section as follows: "In lieu of the lien of such decree for alimony from year to year, it is hereby provided that the party against whom such decree may be rendered shall be required to give security ample and sufficient for such alimony; but where default has been made in giving such security, the decree for alimony from year to year shall be a lien as in case of general judgments." Another section (4685) provided as follows: "No person shall be arrested, held to bail, or imprisoned, on any mesne process or execution founded upon any civil action whatsoever." An act of 1903 (Sees. Acts 1903, p. 240) added a new section (4827a) which provided that no property should be exempt from execution or garnishment or a decree of alimony. Ordering the release of the petitioner, the court said: "Consideration of these provisions leads us to the conclusion that, as regarded by our law-makers, a decree for alimony and maintenance, when made, is a judgment or decree for a debt—the amount fixed becomes a debt; it is a lien, as other judgments for debts are; it is collectable by execution; no property is exempt from levy under an execution to enforce it; and, under § 4685 of the Revised Statutes, to say nothing of § 16 of article 2 of our Constitution, there can be no imprisonment to enforce its payment."

But the conclusion reached in *Missouri* that a decree for the payment of alimony is but an order for the payment of money, and not punishable by

process of contempt, does not mean that a party may not be put in contempt for disobeying a decree for the performance of acts which are within his power, and which the court may properly order to be done. *Coughlin v. Ehler*, supra, wherein it was said: "If it were shown, for instance, that the party had in his possession a certain specific sum of money, or other things, which he refused to deliver up under the order of the court for any purpose, it may very well be that his disobedience would be a contempt for which he might lawfully be imprisoned. But the order must be for the performance of some specific act other than the mere payment of money. For such a contempt as this would suppose, the statute has made a special provision to the effect that 'where a judgment required the performance of any other act than the payment of money,' and the party neglects or refuses obedience, 'he may be punished by the court as for a contempt, by fine or imprisonment, or both, or, if necessary, by sequestration of property.'"

*V. Nebraska.*

In Nebraska, an order for the payment of alimony is, by statute, of the same character as a judgment at law, and its enforcement and collection are limited to the same means. *Segear v. Segear* (1888) 28 Neb. 306, 36 N. W. 536; *Leeder v. State* (1898) 55 Neb. 133, 75 N. W. 541.

The statute (Neb. Comp. Stat. chap. 25, § 4a, title, Divorces and Alimony), provides as follows: "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process as other judgments."

In *Segear v. Segear*, supra, wherein it appeared that the defendant was committed to jail for his failure to pay alimony, the court said: "The provisions of this section establish the character of an order for the payment of alimony with that of a judgment at law, and limit the enforcement and

collection to the same means. It is not in the nature of tort, and, in the absence of fraud by the defendant, he could not be subjected to a more summary method of collection than that of levy and sale of property as upon executions at law."

And in *Leeder v. State*, supra, the court, ordering the release of a defendant committed to jail for his failure to pay alimony, said: "It is true the order of commitment recites that he agreed to bring into court by a specified time, to apply on the decree for alimony, the sum of \$100, and that he failed to keep his promise in that regard; but this constituted neither an actual nor constructive contempt of court. The defendant could no more be adjudged guilty of contempt, and fined and imprisoned for failing to pay the \$100, than he could be punished as for contempt for a refusal to pay his grocery bill, or to pay an ordinary judgment. The proceedings under review were without jurisdiction and void, and the order and sentence are reversed and the proceedings dismissed."

*VI. New Jersey.*

While not involving alimony in the strict sense, the point under discussion was adjudicated in *Aspinwall v. Aspinwall* (1895) 53 N. J. Eq. 684, 38 Atl. 470, in regard to a separation agreement, the performance of which was decreed by the court. The respondent having failed to pay to the appellant the money decreed to be due under the articles of separation, application was made for an attachment for contempt to compel the performance of the decree. In New Jersey, a statutory provision empowered the enforcement of decrees for money by the sequestration of the estate of the defendant, and by the issuance of writs of *fi. fa.* and *ca. sa.* against him, and gave the decrees which directed the payment of a sum of money by one person to another the force, operation, and effect of judgments at law. Denying the enforcement of the decree by contempt proceedings, the court said: "In my opinion, the effect of this legislation was to do away with the process of contempt as a method of en-

forcing decrees for the payment of moneys due upon contracts between the parties, in cases where no special equities exist, and to substitute therefor sequestration of the defendant's estate, the writ of fieri facias against his real and personal property, and, in cases of fraud, the writ of capias against his person."

In the subsequent case of *Flower v. Flower* (1901) — N. J. Eq. —, 49 Atl. 158, the court, after citing the *Aspinwall Case*, supra, refused an attachment for contempt, it appearing that the complainant had been awarded an execution for unpaid alimony, which remained unexhausted.

#### VII. New York.

The early New York case of *Lansing v. Lansing* (1871) 4 Lans. 377, reversing (1871) 41 How. Pr. 248, held that a final judgment for alimony, being a judgment for money and enforceable by execution, could not be enforced by process of contempt. This doctrine found support in the later cases of *Howe v. Howe* (1878) 5 N. Y. Week. Dig. 460, and *Gane v. Gane* (1879) 13 Jones & S. 355, motion for reargument denied in (1880) 14 Jones & S. 218. The statute under consideration in those cases empowered courts of record to fine or imprison parties for the nonpayment of any sum of money ordered by the court, in cases where, by law, execution was unavailable for the collection of such sum.

Doubt was first cast on the correctness of the doctrine laid down in the foregoing cases by *Park v. Park* (1879) 18 Hun, 466, affirmed in (1880) 80 N. Y. 156, wherein the court said: "In regard to the collection of final alimony it was decided in *Lansing v. Lansing* (1871) 4 Lans. 377, that it was to be collected by execution. It is not explained, however, in that case, how a judgment for final alimony is to be docketed—whether or not a new docket is to be made every time the annual or semiannual alimony becomes payable. And as a judgment is made a lien only for ten years from the filing of the roll and docketing, it is not clear how, after ten years from the judgment, the amounts of alimony

are to be docketed so as to be lien on land. And docketing is necessary before the issue of execution. Code, §§ 287, 282. Besides, after the lapse of five years from the entry of judgment, execution is to issue only by leave of the court, granted on notice. §§ 283, 284." And the doctrine was seriously questioned, by way of dictum, in *Strobridge v. Strobridge* (1880) 21 Hun, 288, wherein it was said: "The extending of the use of the writ of execution to courts of equity did not deprive them of any remedy previously employed for the enforcement of their decrees."

Section 1773 of the Code of Civil Procedure now expressly authorizes attachment for contempt where alimony remains unpaid.

#### VIII. West Virginia.

The reported case (*SMITH v. SMITH*, ante, 1149) holds that the West Virginia statute, which impliedly denies the power to enforce a decree for the payment of money by process of contempt, is not applicable to a decree for alimony.

#### IX. Wisconsin.

In the Wisconsin case of *Staples v. Staples* (1894) 87 Wis. 592, 24 L.R.A. 433, 58 N. W. 1036, it was contended that, since under one statute a judgment for alimony could be enforced by execution, and under another statute contempt proceedings for the nonpayment of money were authorized only where an execution could not be awarded, a judgment for alimony, being capable of enforcement by execution, was unenforceable by process of contempt. Affirming the action of the lower court in committing the defendant for contempt, the court said: "Were the judgment here a judgment for a gross sum, payable at once, it might undoubtedly be docketed as a money judgment, and execution might issue to enforce it. . . . In that case the argument would be strong that contempt proceedings could not be resorted to, and the position would not be without authority. . . . But, conceding the correctness of the doctrine, it cannot apply to the present case. Execution can be issued only on

a judgment which has been docketed. Rev. Code, §§ 2968, 2969. It does not appear in the present case that any judgment has been docketed for any of the instalments of alimony. In fact, there seems to be no provision of law for such docketing. . . . And

docketing is necessary before the issue of execution. . . . Our conclusion is that contempt proceedings will lie to compel payment of instalments of alimony ordered to be paid in the future by a final judgment of divorce." A. S. M.

SAMUEL KUMIN

v.

IDA S. FINE et al.

SAME

v.

MAURICE FINE et al.

*Massachusetts Supreme Judicial Court — January 2, 1918.*

(229 Mass. 75, 118 N. E. 187.)

**Evidence — unanswered letter — new transaction.**

1. An unanswered letter written by the holder of a note to the indorser, stating that holder would look to indorser for payment, is not admissible in an action on renewal notes executed after receipt of the letter.

[See note on this question beginning on page 1163.]

— evidence of facts stated.

2. The addressee is ordinarily not required to reply to a letter, and his failure to do so is no evidence of the facts therein stated.

[See 10 R. C. L. 1150.]

— admissions.

3. Unanswered letters from the holder of a note to indorser, claiming liability on the part of the indorser, not part of a mutual correspondence

between the parties, or in reply to any communication by the indorser, and not referred to in any subsequent conversation between the parties, are not admissible as admissions in an action against the indorser on the note.

[See 10 R. C. L. 1150.]

**Appeal — exclusion of immaterial evidence.**

4. Exclusion of immaterial evidence is not reversible error.

**EXCEPTIONS** by plaintiff to rulings of the Superior Court for Worcester County (White, J.) made during the trial of consolidated actions brought to recover the amount of two promissory notes given by defendant Kaplan to plaintiff, and indorsed by the other defendants, which resulted in judgments for defendants Fine. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. George A. Drury, Fred A. Walker, and J. Fred Humes for plaintiff.

Messrs. Thomas H. Sullivan and George A. Gaskill, for defendants Fine:

The four letters sent to defendant Fine, to which he made no reply, by plaintiff, and offered in evidence, were inadmissible.

Fearing v. Kimball, 4 Allen, 126, 81 Am. Dec. 690; 2 Wigmore, Ev. § 1073

(3), p. 1263; 1 Greenl. Ev. 15th ed. § 198, p. 274; 16 Cyc. 960, note 59; Buffum v. York Mfg. Co. 175 Mass. 474, 56 N. E. 599; Thomas v. Wells, 140 Mass. 517, 5 N. E. 435; Smith v. Abbott, 221 Mass. 331, 109 N. E. 190; Com. v. Eastman, 1 Cush. 215; Percy v. Bibber, 134 Mass. 404; Callahan v. Goldman, 216 Mass. 287, 103 N. E. 687; Huntress v. Hanley, 195 Mass. 236, 80 N. E. 946; Pye v. Perry, 217 Mass. 68, 104 N. E. 460; Com. v. Kenney, 12 Met. 287, 46 Am. Dec. 672.

Crosby, J., delivered the opinion of the court:

These are two actions of contract, tried together, to recover the amount of two promissory notes given by the defendant, Barnard Kaplan, to the plaintiff, and indorsed by the other defendants. The notes were given in renewal of previous notes given by the defendants to the plaintiff.

The defendants Fine contended that when the original notes were given they indorsed them for the accommodation of the plaintiff, and that, in consideration of such indorsements of the notes and of the renewals, the plaintiff agreed that he would hold them harmless. The jury, in answer to a special question submitted to them, found that the notes declared on were signed by the defendants Fine at the request and for the accommodation of the plaintiff.

The plaintiff offered in evidence four letters written by him to the defendant Maurice Fine. They were excluded by the presiding judge, subject to the plaintiff's exception. It appeared that notes in renewal of previous notes indorsed by the defendants Fine were given to the plaintiff after the receipt of all the letters. It was agreed that no reply was made to any of the letters, each of which in substance stated that the plaintiff would look to the defendant Maurice Fine for payment of the note therein referred to, if it was not paid by Kaplan, the maker. These letters, written before the

Evidence—  
unanswered  
letter—new  
transaction.

notes declared on were indorsed by the defendants Fine, plainly were inadmissible, although we do not mean to intimate that they would have been competent if written afterwards.

The rule is well established that a person to whom a letter is addressed ordinarily is not required to make any reply; and failure to answer it is no evidence of the truth of the facts therein stated, because such evidence would

be in violation of the rule that a party cannot make evidence for himself by his own declarations. It was held in *Wiedemann v. Walpole* [1891] 2 Q. B. 534, 60 L. J. Q. B. N. S. 762, 40 Week. Rep. 114, that in an action for breach of promise of marriage the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not corroborative of the plaintiff's testimony in support of such promise.

In the case at bar, the letters offered in evidence were not a part of mutual correspondence between the parties relating to the notes, and were —admissions.

not in reply to any communications written by the defendant Maurice Fine; nor does it appear that the letters or their contents were ever referred to in any subsequent conversations between the parties. That such evidence is inadmissible has often been held by this court. *Smith v. Abbott*, 221 Mass. 326, 331, 109 N. E. 190; *Pye v. Perry*, 217 Mass. 68, 104 N. E. 460; *Callahan v. Goldman*, 216 Mass. 234, 103 N. E. 687; *Percy v. Bibber*, 134 Mass. 404; *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 690.

The plaintiff saved eleven exceptions to the exclusion of questions put to the defendant Maurice Fine in cross-examination, the first three of which are waived; we have examined the others in connection with all the evidence printed in the record—to consider them separately would serve no useful purpose—and we are satisfied that the questions called for evidence which would not have assisted the jury in deciding whether the defendants Fine were or were not accommodation indorsers, which was the only question in the case. The evidence therefore was

Appeal—  
exclusion of  
immaterial  
evidence.

immaterial, and besides would have had a tendency to raise collateral issues; it was excluded rightly.

Let the entry be, exceptions overruled.

Petition for rehearing denied.

—evidence of  
facts stated.

## ANNOTATION.

**Admissibility in favor of writer of unanswered letter not part of mutual correspondence.**

- I. Generally, 1163.
- II. Letter part of *res gestæ*, 1166.
- III. Letter relating to existing contract, 1166.
- IV. Letter containing demand or notice, 1168.

*I. Generally.*

As a broad general rule, subject to several exceptions hereinafter considered, it seems that a letter which is not a part of a mutual correspondence, and to which no answer is made, is not ordinarily admissible in favor of the writer as evidence of the statements therein contained, the failure to reply not being considered an implied admission by the addressee of the truth of the statements made.

**Alabama.**—*H. Curjel & Co. v. Hallett Mfg. Co.* (1917) 198 Ala. 609, 78 So. 988.

**Louisiana.** — *Porter v. Ledoux* (1851) 6 La. Ann. 377.

**Maryland.**—*Biggs v. Stueler* (1901) 98 Md. 100, 48 Atl. 727.

**Massachusetts.**—*Robinson v. Fitchburg & W. R. Co.* (1865) 7 Gray, 92.

**Michigan.** — *State Bank v. McCabe* (1904) 185 Mich. 479, 98 N. W. 20.

**Nebraska.**—*Kane v. Chicago, B. & Q. R. Co.* (1911) 90 Neb. 112, 36 L.R.A. (N.S.) 1145, 132 N. W. 920, Ann. Cas. 1913A, 764.

**New Jersey.**—*State, Hand, Prosecutor v. Howell* (1897) 61 N. J. L. 142, 38 Atl. 748.

**New York.**—*Levison v. Seybold Mach. Co.* (1898) 22 Misc. 327, 49 N. Y. Supp. 148; *La Bau v. Vanderbilt* (1879) 3 Redf. 399; *Learned v. Tilletson* (1884) 97 N. Y. 1, 49 Am. Rep. 508.

**England.**—*Fairlie v. Denton* (1828) 3 Car. & P. 103; *Draper v. Crofts* (1846) 15 Mees. & W. 166, 158 Eng. Reprint, 807, 15 L. J. Exch. N. S. 92.

The reason for this view was well stated, by way of dictum, in *Fenno v. Weston* (1858) 31 Vt. 345, wherein it was said: "Where there has been a correspondence between parties in re-

gard to some subject-matter, and one of the parties writes a letter to the other making statements in regard to such subject-matter, of which the latter has knowledge, and which he would naturally deny if not true, and he wholly omits to answer such letter, such silence is admissible as evidence tending to show the statements to be true. Still all such evidence is of a lighter character than silence when the same facts are directly stated to the party. Men use the tongue much more readily than the pen. Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling which readily prompts the verbal denial not infrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real cause of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence. Where the party replies to the letter, but says nothing upon points which he would naturally contradict if untrue, as, in this case, in *Weston's* reply to *Fenno's* first letter, the silence furnishes stronger proof of acquiescence in the alleged facts than the subsequent entire omission to reply." Compare *Hill v. Pratt* (1856) 29 Vt. 119.

So, in *Fairlie v. Denton* (Eng.) supra, the court said: "What is said to a man before his face, he is some degree called on to contradict, if he do not acquiesce in it; but the not answering the letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. I am of

opinion that this letter cannot be read. You may have that single line read, in which the plaintiff makes a demand of a certain amount, but not any other part which states any supposed fact or facts."

The plaintiff in *Learned v. Tillotson* (N. Y.) supra, demanded that the defendant account for all purchases and sales of certain stock under an alleged copartnership agreement. On the question whether a valid agreement existed between the parties the plaintiff sought to introduce in evidence an unanswered letter from him to the defendant, giving his version of the transaction from which he alleged the contract arose. The court held the letter not to be admissible, saying: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that, under most circumstances, what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another, and has no sanction in the law."

In *State, Hand, Prosecutor, v. Howell* (N. J.) supra, it appeared that Hand, a sheriff, took in execution the goods of one Elliott, a tenant of Howell, sold the same and paid the proceeds to the plaintiffs. On the trial Howell testified that before the sale he posted a letter to the sheriff, containing notice of his claim for rent, and that the letter was returned to him unanswered. The admission of

the contents of this letter was objected to. It was held that the objection was well taken, the court saying that it was no legal evidence, and had no relevancy in the case except to work an implied admission of notice of the claim on the part of the sheriff, and that the recipient was not called on to reply, or be considered as admitting what was written.

*State Bank v. McCabe* (1904) 135 Mich. 479, 98 N. W. 20, was a suit on a promissory note. Letters written by the cashier of the plaintiff bank, which were not answered by the defendant, were offered in evidence, in which the cashier referred to a promise claimed to have been made by the defendant. It was held that such letters were inadmissible, the court saying: "The authorities make a distinction between statements made orally and those contained in letters which are unanswered or not acted upon. In the former case, the party to whom statements hostile to his interest are made may, with much reason, be required to contradict, or be held to acquiesce in, their truth. In the latter case, he is not called upon to go to the trouble and expense of writing a denial, and silence cannot be construed into acquiescence in the truth of the written statements."

In *Robinson v. Fitchburg & W. R. Co.* (1856) 7 Gray (Mass.) 92, an action for personal injuries, the plaintiff sought to introduce in evidence a letter written by him to the defendant in which he claimed damages, which letter the defendant's directors voted to lay on the table. It was held that the letter was incompetent, not being connected with any act or omission of the defendant, and being, in effect, only a naked declaration.

In *Kane v. Chicago, B. & Q. R. Co.* (1911) 90 Neb. 112, 36 L.R.A. (N.S.) 1145, 132 N. W. 920, Ann. Cas. 1913A, 764, an action to recover sick benefits by a member of a railroad relief department, the defendant attempted to introduce in evidence a letter written by its superintendent to the plaintiff, stating that the plaintiff had resigned from the defendant's service. The letter was held to be inadmissible.

In *La Bau v. Vanderbilt* (1879) 3 Redf. (N. Y.) 384, a will contest, a son of the testator, against whom it was claimed the testator had unjustly discriminated, offered in evidence a letter written by him to the testator, in which he told the testator that he had reformed his habits, to which the testator had not replied. The proponents objected, first, because the facts in the letter could not affect the issue; and, second, because the receipt of the letter by the deceased neither imposed any obligation on him to answer, nor justified any inference that he acquiesced in the statements contained therein. It was held that these objections were well taken.

It appeared in *Biggs v. Stueler* (1901) 93 Md. 100, 48 Atl. 727, that a tenant, before his term expired, left the house and sent the keys to the lessor, who wrote to the tenant, saying that he received the keys under protest and would hold him liable for any loss he should sustain in not being able to rent the premises, since their contract provided for thirty days' notice. The tenant did not answer the letter. The court held that the failure to answer the letter could not be construed as an admission of the claim therein made, and that the letter was inadmissible.

Similarly, it appeared in *Draper v. Crofts* (1846) 15 Mees. & W. 166, 153 Eng. Reprint, 807, 15 L. J. Exch. N. S. 92, that the plaintiff had let premises to the defendants for a certain term. One defendant, who alone actually occupied the premises, held over after the period for which they were leased. There was no evidence that the defendant Crofts, who did not occupy the premises, had knowledge of the holding over on the part of his cotenant. A letter written by the plaintiff to Crofts, which was not answered, demanding rent for the extra period, was sought to be introduced in evidence, showing Croft's knowledge. The defendant objected to the admission of the letter on the ground that it furnished no evidence against him. It was held that, since the premises were held without Croft's assent, he stood in the position of a stranger

who was not bound to answer the letter, and that if not absolutely inadmissible it was of very little value.

So, it is held in the reported case (*KUMIN v. FINE*, ante, 1161) that an unanswered letter written to a person who was not legally liable on certain notes, stating that the writer would look to him for payment, was not admissible.

It has been said that a failure to answer a self-serving written communication is seldom to be regarded as an admission by the person addressed, but that exceptional circumstances may justify the court in submitting it to the jury with a proper caution. *Morris v. Nerton* (1896) 21 C. C. A. 553, 43 U. S. App. 789, 75 Fed. 912, wherein the court said: "The rule is well settled that conversations between parties to a controversy, in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiescence, of the truth of the statement. The weight of the admissions varies with the circumstances of the case and the strength of the probability that the statement, if untrue, would have evoked a denial, and is always for the jury, guided by a proper caution of the court as to the theory upon which such conversations are admitted. . . . With respect to written communications, however, the rule is different, because the failure of one receiving a letter to answer it may be attributed to many causes besides an acquiescence in the truth of what is written, and such a rule would furnish a dangerous weapon in the hand of an unscrupulous party to make evidence in his favor against a careless opponent. It cannot be said, however, to be an unvarying rule that an unanswered letter may not be evidence against the person addressed, because there are cases in which such letters have been admitted. *Fenno v. Weston* (1858) 31 Vt. 345; *Gaskill v. Skene* (1850) 14 Q. B. 668, 117 Eng. Reprint, 257, 19 L. J. Q. B. N. S. 275, 14 Jur. 597; *Gore v. Hawsey* (1862) 3 Fost. & F.



(Eng.) 509; *Lucy v. Moufflet* (1860) 5 Hurlst. & N. 229, 157 Eng. Reprint, 1168, 29 L. J. Exch. N. S. 110; *Roe v. Day* (1836) 7 Car. & P. (Eng.) 705. These authorities are explained—some of them—on the view that a demand by the plaintiff of the defendant was necessary to the plaintiff's case, and the letter unanswered was competent to show this, but it will be observed that even in those cases the jury was permitted to draw inferences from the failure to answer the demand. The better-supported rule, probably, is that unanswered letters are ordinarily not evidence against the person addressed, as admissions of the truth of statements contained therein."

But in *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.* (1901) 156 Ind. 665, 59 N. E. 995, an action to enforce a contract for a lease of water power, it was shown that the plaintiff wrote a letter to the defendant, inclosing a check for water rent and stating the terms on which the check was sent. The defendant kept the check, but made no answer to the letter. On the question whether the letter was admissible in favor of the plaintiff, to show the defendant's acceptance of the terms, the court held that the letter was competent, saying: "There are circumstances under which unanswered letters are competent evidence of admission, as when the party receiving the letters has in any way invited the same, or when there is any ground to infer that he acted on the letter by partially answering, or otherwise recognized the same, or when such letters, goods, or other articles are forwarded with bills, and received without return or protest."

#### II. Letter part of *res gestæ*.

Unanswered letters are admitted in favor of the writer when they form part of the *res gestæ*. *Murray v. East End Improv. Co.* (1901) 22 Ky. L. Rep. 1477, 60 S. W. 648; *Thorndike v. Boston* (1840) 1 Met. (Mass.) 242.

In *Murray v. East End Improv. Co.* (Ky.) *supra*, it appeared that a personal interview was had between the president of the defendant corporation and the president of a bank with re-

spect to the making of a loan to the defendant. The bank thereafter refusing the loan, the defendant's president wrote to the plaintiff, who had brought the parties together, informing him of the fact. The plaintiff failed to answer the letter, and remained silent until after the death of the defendant's president, and then sought to obtain a commission. It was held that the letter was admissible as part of the *res gestæ*, showing acquiescence on the part of the plaintiff in the view that he was not entitled to a commission since the loan was not made. The court said that letters which pass between parties to a contract immediately before or after a transaction may be so connected with and related to it as to become part of the *res gestæ*.

*Thorndike v. Boston* (Mass.) *supra*, was an action to recover the amount of a poll tax and a personal property tax. In order to show that he was not a resident of Boston, the plaintiff offered in evidence declarations he had made on leaving the country, of his intention to remain in Edinburgh, also an unanswered letter from him to his agent, declaring his intention to remain in Edinburgh. The letter was offered on the ground that it was a declaration of the plaintiff, accompanied by his act of removal from Boston to Edinburgh, and therefore was good evidence of his intention, connected with his acts, and admissible as part of the *res gestæ*. The court held that the letter was admissible on this ground.

See also *Learned v. Tillotson* (1884) 97 N. Y. 1, 49 Am. Rep. 508, stated at length, *supra*, in subdivision I., wherein the letter in question was held not to be part of the *res gestæ*.

#### III. Letter relating to existing contract.

Unanswered letters containing self-serving declarations may be admitted when they relate to an existing contract between the parties, though they are not part of a mutual correspondence. *Peninsular Naval Stores Co. v. Parrish* (1918) 18 Ga. App. 779, 80 S. E. 28; *Ross v. Reynolds* (1914) 112 Me. 228, 91 Atl. 952; *Keeling-Easter Co. v. R. B. Dunning & Co.* (1915) 113 Me. 34, 92 Atl. 929; *Dennis v. Water-*

ford Packing Co. (1915) 113 Me. 159, 93 Atl. 58, Ann. Cas. 1917D, 788; *Sturtevant v. Wallack* (1886) 141 Mass. 119, 4 N. E. 615; *Gore v. Hawsey* (1862) 3 Fost. & F. (Eng.) 509.

In *Ross v. Reynolds* (1914) 112 Me. 223, 91 Atl. 952, supra, an action for deceit in the sale of an automobile, the plaintiff was permitted to testify as to the contents of a letter which he wrote to the defendant. The letter was to the effect that the defendant had misrepresented the condition of the car, and that it was in bad condition, etc. It was held that this evidence was admissible, and, although in a sense self-serving, if the charge therein was untrue, it was calculated to evoke a reply, and since no reply was made, that fact might afford an inference that the charge was true.

To similar effect was *Keeling-Easter Co. v. R. B. Dunning & Co.* (1915) 113 Me. 34, 92 Atl. 929, an action of assumpsit to recover the price of 512 tons of crushed oyster shells. On receiving the shells the defendant, after discovering their inferior quality, wrote to the plaintiff, informing him that the shells were defective and not what had been contracted for. He wrote two letters to this effect, receiving no answer. The letters were admitted in evidence over the plaintiff's objection. The court said that letters written in the general course of business, and not specially to manufacture evidence, which by the character of their contents would call forth a reply denying the statements therein, were admissible, although they were self-serving and unanswered.

But in *Levison v. Seybold Mach. Co.* (1898) 22 Misc. 327, 49 N. Y. Supp. 148, an action to recover the price of a machine, the contract provided that the vendee might return the machine within thirty days if it proved to be unsatisfactory. The vendee sold it one week after purchasing it, and when sued for the price asserted that it was defective, putting in evidence an unanswered letter from him to the vendor in which he set out his version of the transaction. It was held that this method of making evidence,

by letters of the person who offered them in evidence, was not permissible.

In *Gore v. Hawsey* (1862) 3 Fost. & F. (Eng.) 509, an action for money expended by the plaintiff for the defendant at his request, it appeared that the plaintiff, at the request of her seducer, the defendant, had taken lodgings and incurred expenses for her confinement during childbirth. She wrote to the defendant saying: "I have been and taking the room. I will tell you all about it this evening when I see you." The defendant did not reply. The court held that the letter was admissible; since the action was founded on a contract with respect to the writer's expenses, and any letter from one of the parties to the other was admissible.

In *Peninsular Naval Stores Co. v. Parrish* (1913) 13 Ga. App. 779, 80 S. E. 28, the plaintiff sued on an oral agreement with the defendant, whereby the plaintiff was to receive \$25 per month for his services in assisting in the operation of certain turpentine "places," owned by the defendant, and that in case of sale of the places, the plaintiff should have half of the excess after debts were paid. Both parties agreed on the contract in these terms, but the plaintiff contended that the indebtedness on the places was fixed at \$18,000, whereas the defendant contended that no amount was specified, and that at the time of the agreement the debt was actually \$28,000. There was introduced in evidence an unanswered letter from the defendant to the plaintiff, written after the agreement, reading as follows: "We also agree to give you a half interest in the places at Adel and Greggs, after the debt they owe us, and interest on the same, is entirely worked out." The court held this letter to be admissible; since if it appeared thereby that the defendant was placing a different construction on the agreement than the plaintiff, it was the latter's duty to object to the construction; and his silence should be deemed acquiescence.

Self-serving letters written by the plaintiff after a transaction is closed, and which are not answered by the

defendant, are inadmissible, since there is no duty on the part of the defendant to reply, and it cannot be said that his failure to do so is an admission of the truth of the statements contained in the letters. *Barrow v. Newton* (1918) 55 Pa. Super. Ct. 387. See also *Holler v. Weiner* (1850) 15 Pa. 244.

So, in *Porter v. Ledoux* (1851) 6 La. Ann. 377, the plaintiff sued for breach of a contract to lease certain lands. The defendants, in attempting to prove that the contract between them and the plaintiff became void through a proviso therein, introduced the following letter written by them to the plaintiff: "Dr. Porter, Monroe, Ouachita. Dear Sir:—We leased you our Bry plantation with the condition, as you will recollect, that it was not already leased by Mr. Grammont Filhiol, whom we had requested to rent the said property for us. We had prepared the lease for you to sign, as also a writing, providing for the above conditions; when you came to the countinghouse, our Mr. Ledoux, who had made the agreement with you, was absent, and the lease was handed to you, but not the proviso. We hear that the property had been rented previously by Mr. Filhiol. We are sorry to say that the contract we had made with you becomes null and void. Yours respectfully, A. Ledoux & Co." The plaintiff never answered this letter. It was held that this letter was not admissible to vary the terms of the written contract. The court said that if caution is necessary in inferring acquiescence from silence, when declarations are made to a person face to face, it is still more so when declarations are made by letter, and added: "The plaintiff had a written contract, which had been defeated by the act of the defendants. When they in their letter declared the matter closed and the agreement null, and did not even ask a reply, it seems to us to be going too far to say that the plaintiff, by not answering this letter, is to be considered as admitting the truth of their declarations, and that his lease, absolute on

its face, was intended to be conditional."

Similarly, in *Wagman v. Ziskind* (1920) — *Mass.* —, 125 N. E. 633, it was held, following the reported case (*KUMIN v. FINE*, ante, 1161), that an unanswered letter, complaining of the breach of a contract by the addressee, was not admissible as evidence of self-serving statements therein.

*H. Curjel & Co. v. Hallett Mfg. Co.* (1917) 198 Ala. 609, 73 So. 938, was an action for breach of a contract to purchase logs from the plaintiff. The defendant, in attempting to prove that the plaintiff acquiesced in the cancelation of the agreement to furnish the first instalment, offered a letter written by himself to the plaintiff, in which he stated that, since no delivery had been made, he was obliged to ask that delivery of the first instalment be considered canceled, and requested delivery of the second. The plaintiff did not reply to the letter. The court held that the letter was inadmissible, since the plaintiff's failure to answer could not be treated as an admission of the cancelation of the first instalment.

#### IV. *Letter containing demand or notice.*

An unanswered letter is admissible on behalf of the writer, to show a demand made or notice given thereby. *Hays v. Morgan* (1882) 87 Ind. 231; *Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476; *State, Hand, Prosecutor, v. Howell* (1897) 61 N. J. L. 142, 38 Atl. 748; *Allen v. Peters* (1860) 4 Phila. (Pa.) 78; *Murphey v. Gates* (1892) 81 Wis. 370, 51 N. W. 573; *Keen v. Priest* (1858) 1 Fost. & F. (Eng.) 814.

*Allen v. Peters* (1860) 4 Phila. (Pa.) 78, was an action to recover the price of a horse. The defendant sold a pair of horses to the plaintiff, warning soundness. Later one of the horses took fright, and, at the instance of the plaintiff, was taken back by the defendant, who furnished the plaintiff another horse. The plaintiff alleged that this horse was not received as a permanent substitute for the horse which had taken fright, and that after the lapse of a month he

returned the horse, accompanied by a letter in which he stated that he was returning the horse which was loaned him until another horse could be furnished in place of the one which had taken fright, and that if another was not furnished within a certain time, he would sue for the price of the horse. The defendant read the letter, and sent the horse back to the plaintiff. The lower court admitted the letter in evidence. The court held that it was not necessary to decide whether the letter was properly admitted, and said: "We think this decision places the subject on its true grounds; and the result of the whole of the case seems to be that an unanswered letter, offered by the party by or for whom it was written, if it be restricted to making a demand where this is requisite, or giving a notice merely, is always admissible; that if it contain statements of a different nature, and evidently framed for a different purpose, and these derive no support from other evidence in the cause, it should be wholly excluded; but, if the statements do not go beyond what is necessary to render the demand or notice intelligible, or there is other contemporaneous evidence, the whole may be submitted to the consideration of the jury. But that it is the duty of the court, whenever such a letter is received, to scan its contents rigorously and make such discriminating observations to the jury that they may be prevented from giving undue weight to what has been so written." See also *State, Hand, Prosecutor, v. Howell* (1897) 61 N. J. L. 142, 38 Atl. 748, set out *supra*, I., wherein the court said that the letter in question was not evidence, except to show notice or demand.

*Keen v. Priest* (1858) 1 *Fost. & F. (Eng.)* 314, was an action for distraining sheep which were privileged from distress for rent. The plaintiff put in evidence a letter written for him by his attorney, which was an ordinary application for redress for "an illegal seizure of sheep" made by the defendant. The defendant never answered the letter. It was held that this letter was admissible; that it was

8 A.L.R.—74.

simply a demand, and that the defendant's silence was evidence against him.

In *Hays v. Morgan* (1882) 87 Ind. 231, the appellee sued the appellant on a note. The appellee offered in evidence a letter written by him to the appellant, informing him of the loss of the note, and requesting him to stop payment on it, if presented by anyone; that the loss had been advertised, and that he would forward an affidavit. The appellant did not answer this letter. It was held that the letter was competent testimony, the same as if the appellee had verbally spoken its contents to the appellant and the latter had remained silent; not that the appellant's silence in the matter of itself established his liability, but it was a circumstance which should be properly submitted to the jury for consideration, together with the other surrounding circumstances.

It has been held that when a demand or charge is of such a kind that, according to common experience, a man would naturally deny it, the fact that it is not denied is a matter for the consideration of the jury. *Sturtevant v. Wallack* (1886) 141 *Mass.* 119, 4 N. E. 615. That was an action to recover the price of certain machinery, constructed by the plaintiff and sent to the defendant by order of A, who was under a contract with the defendant to heat a certain building. On the question whether A had authority to order the machinery, the plaintiff offered in evidence a letter which he wrote to the defendant, making a demand for payment, which letter the defendant did not answer. On the admissibility of the letter in evidence, the court held that the letter was admissible to show that a demand was made and not repudiated, and that this fact, together with the surrounding circumstances, might be considered by the jury.

A letter making a demand for an amount claimed, and stating the ground for the demand, is admissible in evidence. *Sonnesyn v. Hawbaker* (1914) 127 *Minn.* 15, 148 N. W. 476, wherein it was said: "Where a demand is made upon a party under such

circumstances that he would naturally deny if he did not assent, the demand and failure to reply may be received as evidence in the nature of an admission tending to prove the justice of the demand."

So, in *Murphey v. Gates* (1892) 81 Wis. 370, 51 N. W. 573, the plaintiff, an attorney, brought an action before a justice of the peace to recover of the

defendant the unpaid balance of the plaintiff's fees and expenditures. The plaintiff wrote several letters to the defendant, demanding payment, to which no answer was made. The court said that these letters were admissible in favor of the plaintiff, and that failure to respond or deny the statements therein was a tacit admission of their contents. M. J. Q.

HELEN J. PETERS, Appt.,  
v.  
FARMERS' STATE BANK et al.

*Kansas Supreme Court—March 8, 1910.*

(106 Kan. 1, 185 Pac. 892.)

**Appeal — insufficiency of pleading — agreed facts — effect.**

1. A judgment will not necessarily be reversed on account of a defective pleading, where that pleading is not attacked before trial, and the action is tried on an agreed statement of facts, supplemented by oral evidence, and the statement of facts and oral evidence sustain the judgment.

[See note on this question beginning on page 1172.]

**— construction of pleading.**

2. The averments of an answer which was not attacked by the plead-

ings should be liberally construed to uphold a judgment based upon it.

[See 21 R. C. L. 467, 625.]

Headnote 1 by MARSHALL, J.

(Porter and Dawson, JJ., dissent.)

**APPEAL** by plaintiff from a judgment of the District Court for Washington County (Hogin, J.) in favor of defendants in an action brought to enjoin them from selling certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. R. Hyland, F. C. Baldwin, and Pulsifer, Hunt, & Short for appellant.

Messrs. Edgar Bennett, Frank H. McFarland, and Ivan A. Allen, for appellees:

The remedy by injunction is summary, peculiar, and extraordinary, and ought not to be issued except for the prevention of great and irreparable mischief.

14 R. C. L. 307.

Before plaintiff was entitled to relief by means of an injunction it was incumbent upon her to show that she had no adequate remedy at law.

14 R. C. L. 345; Kirby v. Union P. R. Co. 51 Colo. 509, 119 Pac. 1042, Ann.

Cas. 1913B, 461; Yount v. Hoover, 95 Kan. 752, L.R.A.1915F, 1120, 149 Pac. 408, Ann. Cas. 1918C, 148; McKeever v. Buker, 80 Kan. 201, 101 Pac. 991; 22 Cyc. 928.

Plaintiff never having acquired any title to her sister's interest in the land, the bank had the right to sell the same to satisfy its judgment.

Miller v. Dixon, 2 Kan. App. 445, 42 Pac. 1014; First Nat. Bank v. Livingston, 83 Kan. 120, 109 Pac. 987; McLain v. Parker, 92 Kan. 561, 141 Pac. 243; Travis v. Topeka Supply Co. 42 Kan. 625, 22 Pac. 991; 25 Cyc. 1460; 17 R. C. L. 1025; Thompson v. Baker, 141 U. S. 643, 35 L. ed. 389, 12 Sup. Ct. Rep. 89.

**Marshall, J.**, delivered the opinion of the court:

The plaintiff sought to enjoin the defendants from selling an undivided one-fifth interest in her land, under an execution issued on a judgment in the district court of Washington county, in favor of defendant, the Farmers' State Bank, and against Henry J. Schuette and Hannah Schuette. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

The action was tried on an agreed statement of facts, supplemented by some oral evidence on behalf of the plaintiff. This statement of facts and the oral evidence showed the following: On September 26 or 27, 1915, the plaintiff arranged with Hannah Schuette, who then owned the controverted interest in the land, to purchase that interest from her. The consideration given was a promissory note for \$3,200, about \$400 in cash, and indebtedness due the estate. Hannah Schuette had inherited her interest in the land from her father, who died on September 7, 1915. On September 29, 1915, the bank commenced an action against Henry J. Schuette and Hannah Schuette in the district court of Washington county to recover on a promissory note for \$3,000 and on that day caused an attachment to be levied on that interest in the land. The deed conveying the land to the plaintiff was dated October 5, 1915, but was not recorded until November 12 of that year. On November 1, 1915, the attachment was dissolved by the district court, and from the order dissolving the attachment the bank appealed to this court, where the judgment of the district court was affirmed on March 10, 1917. *Farmers State Bank v. Schuette*, 100 Kan. 45, 163 Pac. 1073. The November, 1915, term of the district court of Washington county began on November 15, and judgment was rendered in favor of the bank and against the Schuettes on December 16. On April 16, 1917, execution was issued on that judgment and

levied on the one-fifth interest in the land. This action was afterward brought to enjoin the bank and D. W. McLeod, as sheriff, from selling that interest under the execution.

The plaintiff argues that the bank obtained no right or interest in, or lien on, the land by virtue of the attachment proceeding. It may be conceded that the plaintiff is correct on this proposition, but it does not avail her, for the reason that the judgment against her must be affirmed on the ground that she obtained the deed to the land in fraud of the rights of the bank.

The judgment in favor of the bank became a lien on all the property owned by the Schuettes, or either of them, in Washington county, on the 1st day of November, 1915, term of court. Civ. Code, § 416 (Gen. Stat. 1915, § 7320). The deed to the plaintiff was executed and recorded before the judgment lien attached thereto. The plaintiff says: "There was no allegation in the answer that the transfer was for the purpose of hindering, delaying, or defrauding creditors."

That conveyance was attacked by the following allegations in the answer: That the plaintiff was not an innocent purchaser in good faith; that the land was not purchased by the plaintiff for a valuable consideration; that she paid nothing whatever for the deed; and that the plaintiff is not the owner of the undivided one-fifth interest in the land. These allegations charge that the plaintiff fraudulently obtained the conveyance.

The answer was not attacked; therefore its averments should be liberally construed to uphold the judgment. *Bailey v. Bayne*, 20 Kan. 657; *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941. Sometimes issues will be considered as enlarged by the consent of the parties. *Hartwell v. Equitable Mfg. Co.* 78 Kan. 259, 263, 97 Pac. 432; *Custer v. Royse*, 104 Kan. 339, 179 Pac.

Appeal—construction of pleading.

353. It has been held that the submission of a case on an agreed statement of facts waives all defects in pleading. *Brettun v. Fox*, 100 Mass. 234. In *Marts v. Newton*, 29 Kan. 331, 336, this court refused to consider objections made to the findings of the trial court on the ground that the findings were incompetent, irrelevant, and immaterial. The court there said: "We cannot discuss these objections, because the findings are based upon an agreed statement of facts, signed by the parties to the action."

In the present action, no special findings were made, but the court found generally for the defendants. That finding determined in favor of the defendants every issue necessary to uphold the judgment. The general finding determined that the conveyance to the plaintiff was made to hinder, delay, and defraud the bank of its just and lawful debts. That determination was sus-

tained by the agreed statement of facts and the oral evidence.

The defendants urge other propositions, which have become immaterial on account of the conclusion reached on the question discussed, and will not be further considered. The judgment is affirmed.

All the Justices concur.

A petition for rehearing having been granted, *Dawson, J.*, on January 14, 1920, handed down the following additional opinion:

For reasons which appeared sufficient at the time, a rehearing was granted in this case, and the court has been favored with additional oral arguments and new and carefully prepared briefs. A majority of the court, however, are still of opinion that the judgment of affirmance should stand; and that the court's opinion, as written by Mr. Justice Marshall, needs neither correction nor modification. Therefore the judgment is again affirmed.

*Porter and Dawson, JJ.*, dissent.

## ANNOTATION.

### Submission on agreed statement of facts or agreed case as waiver of defect in pleading.

- I. Distinction between stipulation as to facts and agreed case, 1172.
- II. Waiver:
  - a. In general, 1174.
  - b. Irregularities waived, 1176.
- III. Where pleadings included in statement, 1178.

#### I. Distinction between stipulation as to facts and agreed case.

It is to be noted that there is a difference between the submission of an action under a stipulation as to the facts, and the submission of what is generally termed an agreed case. A stipulation as to the facts in the case is made with reference to a pending action, and is intended to be evidentiary, to be used as a substitute for evidence of the facts to which it relates, thereby avoiding the necessity of proving such facts. An agreed case generally does not relate to a pending action, but it is a stipulation between

parties between whom there is a controversy, agreeing upon facts relating to the controversy, and that the same shall be submitted to the court without the formality of summons or pleadings, for a decision of the court thereon, as justice and equity may require under the facts stated.

This distinction is pointed out in *State ex rel. Webb v. McCune* (1908) 129 Mo. App. 511, 107 S. W. 1030, wherein the court said that "an agreed case, submitted by the parties without action, differs in essential features from an agreed statement of facts filed by the parties in an action brought in the ordinary way. In the latter case the agreed facts are regarded in the same light as facts settled by the verdict of a jury . . . and may constitute matter of exception. . . . But where the controversy is submitted by agreement without action, i. e., without

filing suit, having summons issued, and the defendant brought into court against his will and without formal pleadings, etc., the jurisdiction of the court over parties and subject-matter attaches only to the precise state of facts contained in the stipulation."

In *Clason v. Matko* (1909) 12 Ariz. 213, 100 Pac. 773, affirmed in (1912) 223 U. S. 646, 56 L. ed. 588, 32 Sup. Ct. Rep. 392, it appeared that a demurrer was interposed by the plaintiffs to the answer of the defendants, which was sustained by the trial court on the ground that the location certificate which was made part of the answer was void, and hence the answer constituted no defense. The defendants stood upon their answer, whereupon the court, upon a stipulation of facts which had been theretofore entered into and filed by the respective parties, entered judgment for the plaintiffs. It appeared that both parties, subsequently to filing this stipulation, had amended their pleadings without reference or regard to the stipulation. Under these circumstances, the court held that the stipulation of facts could not be regarded or treated as an agreed case. The court said that the obvious purpose of the parties in filing a stipulation was to have it in the place of testimony or other evidence on the trial, and not to supplant the pleadings in the action, and added: "Undoubtedly the parties might have come into court upon an agreed statement of the case without any formal pleadings, and under the provisions of § 1390, Civ. Code 1901, and have obtained such a judgment as the facts might warrant. Such was not the attempt in this case, as appears from the stipulation itself and the conduct of the parties in the proceedings subsequent to the entry of the stipulation. It appears by the record that, after the stipulation was entered into and filed, both parties amended their pleadings without regard thereto. It therefore appears that this was not an agreed case under § 1390, but a stipulation appertaining merely to the matter of evidence upon the trial. We hold therefore that the trial court did not err in sustaining the demurrer."

In *Rutter v. Carothers* (1909) 228 Mo. 631, 122 S. W. 1056, it is held that where the case is submitted upon an agreed statement of facts, the fact that there is no express statement therein of an adverse holding or claim on the part of plaintiffs in an action to quiet title, reference being had to the pleadings and the theory upon which the case was tried in the lower court, this deficiency may be supplied. The court said that the pleadings are necessarily a substantial part of the action submitted on an agreed statement, and the trial theory must be read into and illuminate the words of the stipulation. The court was here apparently referring to a stipulation of facts, as distinguished from a technical agreed case. The case itself is not within the scope of the note and the cases involving the point covered are not included herein.

In *Warrick Bldg. & L. Asso. v. Houghland* (1883) 90 Ind. 115, it is said that it was intended that the agreed statement of facts should serve the purpose of all the pleadings used in an ordinary action to form an issue for trial. It is to be construed to show the facts in the controversy and to constitute the different causes of action in favor of the plaintiff. If a complaint has been filed it performs no office in the case, and its insufficiency cannot affect the question, and cannot be assigned as error.

In *Weed v. Calkins* (1881) 24 Hun (N. Y.) 582, it is held that where the parties have agreed upon a statement of facts under the act, they thereby waive the formalities and technicalities of an action and seek the decision of the court on the facts stated. The court must declare their rights thereunder where they rest on an application of legal or equitable principles, hence the submission constitutes a waiver of all formalities and technical objections not material to the determination of the legal question referred to the court for decision.

In so far, however, as concerns the question of waiver, the distinction between a stipulation of facts and an agreed case is apparently frequently overlooked, although as a matter of



course the question of waiver of defects in pleadings cannot arise in an agreed case, as that term is technically used, since in such case there are no pleadings. It is, however, difficult in many cases to determine whether the case was submitted upon an agreed case or merely an agreement as to the facts, since the two terms are frequently regarded as synonymous.

The difficulty of undertaking to ascertain in many cases whether the court was considering an agreed case or a stipulation as to facts may be illustrated by reference to *Warrick Bldg. & L. Asso. v. Houghland (Ind.)* supra, wherein the court, after saying that the proceeding was an agreed case under the statute, and in such a case no pleadings are contemplated, pointed out that it was intended that the agreed statements of facts should serve the purpose of all the pleadings used in an ordinary action to evolve an issue for trial. It is to be noticed that the court used, apparently interchangeably, the terms "agreed statement" and "stipulation of facts." It is, however, clear that the court considered this particular case an agreed case.

As pointed out, the purpose of the submission upon an agreed case is to do away with the necessity of a summons, complaint, and answer. *McKethan v. Ray* (1874) 71 N. C. 165. And no pleadings are contemplated. *Donald v. St. Louis, K. C. & N. R. Co.* (1879) 52 Iowa, 411, 3 N. W. 462. All matters of pleading are disregarded, and there is a waiver of all irregularities and questions arising upon pleadings. *Chappell v. McIntyre* (1852) 9 Tex. 161.

In *Van Sickle v. Van Sickle* (1853) 8 How. Pr. (N. Y.) 265, it is held that, where an agreed case is submitted under a statute after an action has been commenced, this action will be presumed to be abandoned or suspended and the case will be considered and determined entirely independent of it. If the submission of the agreed case does not of itself work a discontinuance of the case, it must be so when followed by a judgment. In the meanwhile, the action was suspended;

hence, the court is not called upon to decide whether the action was properly brought or could have been maintained under the facts agreed upon by the parties.

In *Hamilton v. Cook County* (1843) 5 Ill. 519, it is held that the parties, by making an agreed case after the plea has been filed, virtually abandon their pleadings and submit the case to the court to be determined upon the question, not as to whether this plea is sustained by the evidence, but whether under the facts agreed upon the plaintiff is entitled to recover of the defendant.

## II. Waiver.

### a. In general.

It is the general rule that the submission of an action to the court upon a statement of facts agreed to by the parties under stipulation, for the rendition of such judgment as the facts may require, or the submission of what is generally termed an agreed case, constitutes a waiver of all questions relative to the sufficiency of the pleadings in matter of form or as to character of the action.

*United States.* — *Bond v. Dustin* (1884) 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Willard v. Wood* (1890) 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; *Saltonstall v. Russell* (1894) 152 U. S. 628, 38 L. ed. 576, 14 Sup. Ct. Rep. 733; *Re Blake* (1906) 80 C. C. A. 167, 150 Fed. 279; *Snow v. Miles* (1878) 3 Cliff. 608, Fed. Cas. No. 13,146.

*Delaware.* — *Beeson v. Elliott* (1831) 1 Del. Ch. 368.

*District of Columbia.* — *District of Columbia v. Lee* (1910) 35 App. D. C. 341, 21 Ann. Cas. 973; *Jefferson v. District of Columbia* (1913) 40 App. D. C. 381.

*Illinois.* — *Hamilton v. Cook County* (1843) 5 Ill. 519; *Sioux Valley State Bank v. Drovers Nat. Bank* (1895) 58 Ill. App. 396; *Gaines v. McAdam* (1898) 79 Ill. App. 201; *Smith v. Chicago* (1908) 107 Ill. App. 270, affirmed in (1903) 204 Ill. 356, 68 N. E. 395.

*Indiana.* — *Warrick Bldg. & L. Asso. v. Houghland* (1883) 90 Ind. 115.

*Iowa.* — *Donald v. St. Louis, K. C. &*

N. R. Co. (1879) 52 Iowa, 411, 3 N. W. 462; Baugh v. Barrett (1886) 69 Iowa, 495, 29 N. W. 425.

Kansas.—PETERS v. FARMERS' STATE BANK (reported herewith) ante, 1170; Reynolds v. Reynolds (1883) 30 Kan. 95, 1 Pac. 338; State Bank v. Norduft (1896) 2 Kan. App. 55, 43 Pac. 312.

Maine.—Gardiner v. Nutting (1827) 5 Me. 140, 17 Am. Dec. 211; Moore v. Philbrick (1850) 32 Me. 102, 52 Am. Dec. 642; Machias Hotel v. Fisher (1868) 56 Me. 321; Knight v. Ft. Fairfield (1880) 70 Me. 500; Pillsbury v. Brown (1890) 82 Me. 450, 9 L.R.A. 94, 19 Atl. 858.

Maryland. — American Coal Co. v. Allegany County (1882) 59 Md. 185; Bostick v. Blades (1882) 59 Md. 231, 43 Am. Rep. 548.

Massachusetts. — Johnson v. Shed (1838) 21 Pick. 225; Ellsworth v. Brewer (1831) 11 Pick. 316; Scudder v. Worster (1853) 11 Cush. 573; Kimball v. Preston (1854) 2 Gray, 567; Russell v. Loring (1861) 3 Allen, 121; Miner v. Coburn (1862) 4 Allen, 136; Cushing v. Kenfield (1862) 5 Allen, 307; Rogers v. Daniell (1864) 8 Allen, 343; Esty v. Currier (1868) 98 Mass. 500; Brettun v. Fox (1868) 100 Mass. 284; Merrill v. Bullock (1870) 105 Mass. 486; West Roxbury v. Minot (1874) 114 Mass. 546; Hutchinson v. Tucker (1876) 121 Mass. 402; Second Religious Soc. v. Harriman (1878) 125 Mass. 321; Smith v. Carney (1879) 127 Mass. 179; Cleaveland v. Boston Five Cents Sav. Bank (1880) 129 Mass. 27; Fay v. Duggan (1883) 135 Mass. 242; Fish v. Fiske (1891) 154 Mass. 302, 28 N. E. 278; Morse v. Natick (1900) 176 Mass. 510, 57 N. E. 996; Fay v. Locke (1909) 201 Mass. 387, 131 Am. St. Rep. 402, 87 N. E. 753.

Missouri.—Frank v. Frank (1879) 6 Mo. App. 589; Vanderline v. Smith (1885) 18 Mo. App. 55.

New York. — Van Sickie v. Van Sickie (1853) 8 How. Pr. 265; Weed v. Calkins (1881) 24 Hun, 582.

North Carolina.—McKethan v. Ray (1894) 71 N. C. 165; Foreman v. Hough (1887) 98 N. C. 386, 3 S. E. 912. And see Gerrish v. Johnson (1854) 46 N. C. (1 Jones, L.) 335.

Oklahoma. — Powell v. Crittenden (1910) 57 Okla. 1, 156 Pac. 661.

Pennsylvania.—Bixler v. Kunkle (1828) 17 Serg. & R. 298.

Texas.—Bates v. Republic (1847) 2 Tex. 616; Chappell v. McIntyre (1852) 9 Tex. 161; Parker v. Portis (1855) 14 Tex. 166; Aultz v. Zucht (1919) — Tex. Civ. App. —, 209 S. W. 475.

Virginia.—Sawyer v. Corse (1867) 17 Gratt. 230, 94 Am. Dec. 445.

Upon this point in Bixler v. Kunkle (Pa.) supra, it is said: "We are deciding upon a case stated. The declaration is not before us; it is waived and superseded; the parties have agreed to put, and actually have put before us, the facts of the case. True, the counsel did reserve their exceptions, but it is a reservation incompatible with the agreement; they cannot, at the very time they are placing all the facts specifically upon the record, object because the facts are not specifically upon the record. It is an attempt to mix a special demurrer with a case stated; it is without precedent; it can be subservient to no one purpose of justice or law, nor productive of anything but delay and vexation, thus to entangle the merits of a cause with points of form relative to the wording of a declaration which both parties have agreed to set aside."

In State Bank v. Norduft (Kan.) supra, the court said that "undoubtedly, after the submission of the case to the court upon the agreed statements of facts, an amendment would have been permitted if the attention of the trial court had been directed to the alleged defect, and it cannot be claimed that the defendant would have been in any manner prejudiced by such amendment. Such being the case, we feel that this court should treat the record as if such amendment was in fact made, and that the judgment ought not to be disturbed for this alleged error."

In McCombs v. Matney (1901) 23 Ky. L. Rep. 654, 63 S. W. 578, the court said that under all the circumstances of the case it had concluded to disregard the defects of the pleadings on both sides, and treat the case as an agreed case for the settlement, inas-

much as all the parties united in praying a reference to the commissioner.

In *Moore v. Philbrick* (1850) 32 Me. 102, 52 Am. Dec. 642, the rule is stated that if, in an agreed statement of facts, there is no special limitation, and the defendant is to have judgment on the facts, it would verify any plea which would be a bar to the action.

Any defects in the pleadings are not available to a party who pleads the merits of the case, where there is a judgment in his favor and he stipulates that the controversy shall be determined upon an agreed statement of facts, which he signed without making any objection to the pleadings or to the form of the proceeding. *Re Blake* (1906) 80 C. C. A. 167, 150 Fed. 279.

Where the parties agree on the facts and submit the case to the judgment of the court, such submission has the effect of curing any possible irregularities with reference to the bringing of the proceedings, and the pleadings and proceedings thereon. *Foreman v. Hough* (1887) 98 N. C. 386, 3 S. E. 912. Such judgment will be rendered as will conform to the legal rights of the parties, according to the agreed statement of facts. *Esty v. Currier* (1868) 98 Mass. 500. But the decision will be made with reference to the pleadings. *Miner v. Coburn* (1862) 4 Allen (Mass.) 136. The plaintiff is entitled to judgment, if the facts agreed upon establish a cause of action in his favor. The question of law, however, as to the right of the plaintiff to recover in any form of action, is not waived. *West Roxbury v. Minot* (1874) 114 Mass. 546.

*b. Irregularities waived.*

The general rule referred to, that the submission of a case upon an agreed statement of facts will waive any defects in the pleadings if the statement of facts will support a judgment, applies to and includes irregularities in the pleadings (*Gaines v. McAdam* (1898) 79 Ill. App. 201; *Morse v. Natick* (1900) 176 Mass. 510, 57 N. E. 996); or objections to the form thereof (*Baugh v. Barrett* (1886) 69 Iowa, 495, 29 N. W. 425; *Rogers v. Daniell* (1864) 8 Allen (Mass.) 343); or as to the sufficiency (*Bostick v.*

*Blades* (1882) 59 Md. 231, 43 Am. Rep. 548; *Enid City R. Co. v. Enid* (1914) 43 Okla. 778, 144 Pac. 617).

In *Bostick v. Blades* (Md.) *supra*, it is held that where there is no demurrer to the declaration, and no objections to the sufficiency of pleadings, and the case upon appeal is submitted upon an agreed statement of facts, it is merely the duty of the court to declare the law upon the facts thus submitted, and it is not called upon for a judgment as to the sufficiency of the pleadings.

Where the parties agree upon a case stated, to be considered as a special verdict founded upon declaration or pleadings filed, the defendant thereby waives all objections to the form or sufficiency of the declaration. *Bixler v. Kunkle* (1828) 17 Serg. & R. (Pa.) 298. In *Bates v. Republic* (1847) 2 Tex. 616, it is held that a submission upon an agreed statement of facts of the claims between the parties as to two different matters waives the objection that the pleadings do not justify a judgment except as to one of the matters. In this regard it has been held that the objection that a petition by a widow to have the homestead set off to her from her husband's estate should refer to the statute allowing the homestead is waived by submitting the case on an agreed statement of facts. *Brettun v. Fox* (1868) 100 Mass. 234. In *Reynolds v. Reynolds* (1883) 30 Kan. 95, 1 Pac. 388, it is held that, where a case is submitted upon an agreed statement of facts, it is immaterial whether the trial court erred in overruling a demurrer to the plaintiff's petition.

So, where there is an agreement by the parties to submit a case upon certain facts, all questions of the form of the pleadings are waived, unless the same are expressly reserved. The question then is whether the plaintiff, upon the agreed statement of facts, is entitled to recover in any legal form of declaration. *Ellsworth v. Brewer* (1881) 11 Pick. (Mass.) 316. For example, a motion to dismiss the action, upon the ground that the complaint did not state facts sufficient to constitute a cause

of action, is properly refused, where the material facts were agreed upon in writing and submitted to the court for its judgment. *Hines v. Wilmington & W. R. Co.* (1886) 95 N. C. 434, 59 Am. Rep. 250. It is pointed out in this case that the parties agreed that the court should make an order allowing the plaintiffs to amend their complaint so as to make it conform to the facts agreed upon. Where, however, a stipulation is made as to certain facts, but this stipulation by its express terms is made subject to any objection which might be raised as to the competency, relevancy, or materiality of any of the stipulated facts as testimony, the objection is not waived that the complaint does not state a cause of action. *Rogers v. St. Paul* (1902) 86 Minn. 98, 90 N. W. 155.

Such submission also waives any question as to the variance between the pleadings and the facts agreed upon. *Sioux Valley State Bank v. Drovers Nat. Bank* (1895) 58 Ill. App. 396; *Pillsbury v. Brown* (1890) 82 Me. 450, 9 L.R.A. 94, 19 Atl. 858. Even the lack of pleadings is waived, as, for example, the failure to file an answer (*Saltonstall v. Russell* (1894) 152 U. S. 628, 38 L. ed. 576, 14 Sup. Ct. Rep. 738); or a plea (*Sawyer v. Corse* (1867) 17 Gratt. (Va.) 230, 94 Am. Dec. 445); or a further plea or answer after the original answer was overruled (*Fay v. Locke* (1909) 201 Mass. 387, 131 Am. St. Rep. 402, 87 N. E. 753); or an objection as to the time of filing an amended pleading (*Aultz v. Zucht* (1919) — Tex. Civ. App. —, 209 S. W. 475); or as replication (*Vanderline v. Smith* (1885) 18 Mo. App. 55). And the objection is waived that no issue was raised by the pleadings. *Frank v. Frank* (1879) 6 Mo. App. 589.

A submission of this character also waives any objection to the form of the answer. *Snow v. Miles* (1873) 3 Cliff. 608, Fed. Cas. No. 13,146; *Folger v. Columbian Ins. Co.* (1868) 99 Mass. 267, 96 Am. Dec. 747; *Cushing v. Kenfield* (1862) 5 Allen (Mass.) 307; *Kimball v. Preston* (1854) 2 Gray (Mass.) 567. Or objections which

can be raised only by plea in abatement, such as the nonjoinder of parties plaintiff. *Fay v. Duggan* (1883) 135 Mass. 242. Or the question of the disability of an infant to bring the action. *Smith v. Carney* (1879) 127 Mass. 179. Objections to the service of process are also waived. *Second Religious Soc. v. Harriman* (1878) 125 Mass. 321. Or that the plaintiff has a plain, adequate, and complete remedy at law. *Russell v. Loring* (1861) 3 Allen (Mass.) 121. In *McRae v. Locke* (1873) 114 Mass. 96, it is held that where an action at law could not be maintained against the officers of the corporation to enforce their statutory liability for the corporation's debts, the objection that the action should have been planted in equity instead of at law is not waived by submission on an agreed statement of facts.

In *Beeson v. Elliott* (1831) 1 Del. Ch. 368, it is held that by joining in a case stated in a court of equity, and submitting the question of validity of an award in an amicable action at law, the parties do not waive the objection of lack of jurisdiction in the court, since the consent of the parties cannot waive jurisdiction, where none otherwise existed.

In *Fisher v. Knight* (1894) 9 C. C. A. 582, 17 U. S. App. 502, 61 Fed. 491, however, by the terms of a case stated, judgment was to be given in favor of the plaintiff if the opinion of the court upon the question of set-off was against the defendant. After thus submitting the case, the defendant sought to raise the objection that the plaintiff should have proceeded by a bill in equity, instead of a suit at law. After pointing out that this objection to the mode of procedure was not raised by the defendant in the court below, the court said that it should not avail him in that court, even if originally well founded, since there was a clear and binding waiver of all objections to the form of the proceedings.

A submission under the statute, of an agreed case, waives any irregularity in giving a bond. *Parker v. Portis* (1855) 14 Tex. 166.

The agreed statement of facts also

waives all questions of form in regard to the proceedings previously had and the manner of bringing the case upon appeal. *Fish v. Fiske* (1891) 154 Mass. 302, 28 N. E. 278.

In *Whiteside v. North American Acci. Ins. Co.* (1911) 200 N. Y. 320, 35 L.R.A.(N.S.) 696, 93 N. E. 948, the appellant originally answered in the action, but by stipulation this answer was withdrawn, and the case submitted on the facts stated in the complaint as upon application for judgment. The court said that, under such a stipulation, the question practically was whether the complaint set forth a cause of action in view of the facts appearing therein concerning the failure of the respondent to serve, or cause to be served, a certain notice which had been mentioned, being a notice which the insured was bound to serve on the insurance company as a condition precedent to any claim against the company for liability for loss.

### III. Where pleadings included in statement.

In *Esty v. Currier* (1868) 98 Mass. 500, holding that an agreed statement of facts waived all defects in the pleadings, even though the pleadings were referred to as part of the statement, the stipulation authorized the entry of such judgment on the merits as if the facts were duly presented upon proper pleadings.

And see *Com. v. Worcester & N. R. Co.* (1878) 124 Mass. 561, holding that the defendant was entitled to judgment where the declaration did not show a violation of the statute relied on, since the case stated, by its terms, limited the plaintiff's right to recover to the pleadings.

In *Merrill v. Bullock* (1870) 105 Mass. 486, the stipulation expressly provided for the waiver of all questions as to the sufficiency or character of the pleadings. A. G. S.

J. J. WEEKS, Respt.,

v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

*North Dakota Supreme Court — November 13, 1910.*

(— N. D. —, 175 N. W. 726.)

### Carrier — misleading passenger — liability.

1. Where a passenger sustains damages by reason of misinformation as to the time of the departure of trains, given by a carrier's employees, the carrier is liable for the actual damages sustained by the passenger, proximately caused by reason of the misinformation.

[See note on this question beginning on page 1183.]

### Damages — for causing passenger to miss train.

2. Where a passenger who has been misinformed as to the time of the departure of a train, and as a result thereof has missed his train, procures an automobile and, equipped with inadequate clothing, drives across coun-

try during a cold, stormy night, and as a result suffers discomfort and inconvenience, he is not entitled to recover damages for discomfort and inconvenience endured during such trip, as the negligence or wrongful action of the carrier was not the proximate cause thereof.

Headnotes by the COURT.

(Grace and Robinson, JJ., dissent.)

**APPEAL** by defendant from a judgment of the District Court for Bottineau County (Burr, J.) in favor of plaintiff in an action brought to recover damages sustained by reason of defendant misinforming him as to departure of its trains. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Murphy & Toner, for appellant:

The verdict was not justified by the law or the facts.

*Kinnonen v. Great Northern R. Co.* 34 N. D. 556, 158 N. W. 1058; *Ohio & M. R. Co. v. Allender*, 59 Ill. App. 620.

A person in the position that the plaintiff was in is not a passenger, and is not entitled to any of the rights under the law that are held to apply to a passenger.

*Hutchinson, Carr.* § 1006; *Southern R. Co. v. Smith*, 40 L.R.A. 746, 30 C. C. A. 58, 52 U. S. App. 708, 86 Fed. 292; *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 383; *Illinois C. R. Co. v. Laloge*, 113 Ky. 396, 62 L.R.A. 405, 69 S. W. 795, 12 Am. Neg. Rep. 288; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818; *Chicago & N. W. R. Co. v. Weeks*, 99 Ill. App. 526; *Devine v. Chicago City R. Co.* 162 Ill. App. 246; *Deatrick v. Lake Erie & W. R. Co.* 164 Ill. App. 36; *O'Donnell v. Chicago & N. W. R. Co.* 106 Ill. App. 292; *Lake Street Elev. R. Co. v. Gormley*, 108 Ill. App. 62; *Strong v. North Chicago Street R. Co.* 116 Ill. App. 250; *Illinois C. R. Co. v. McMillion*, 129 Ill. App. 33; *Radley v. Columbia Southern R. Co.* 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447, 15 Am. Neg. Rep. 659; *Metropolitan West Side Elev. R. Co. v. Sutherland*, 139 Ill. App. 88; *McCarty v. St. Louis & S. R. Co.* 105 Mo. App. 596, 80 S. W. 7; *Creech v. Charleston & W. C. R. Co.* 66 S. C. 528, 45 S. E. 86; *Gregg v. Northern P. R. Co.* 49 Wash. 183, 94 Pac. 911; *Chicago, R. I. & P. R. Co. v. Thurlow*, 30 L.R.A.(N.S.) 571, 102 C. C. A. 128, 178 Fed. 898; 6 Cyc. 536; *Fremont, E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 4 L.R.A.(N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 Ann. Cas. 1096; *Hicks v. Union P. R. Co.* 76 Neb. 496, 107 N. W. 798.

Exemplary damages were not recoverable.

*Parker v. Long Island R. Co.* 13 Hun, 319; *Louisville, N. A. & C. R. Co. v. Wurl*, 62 Ill. App. 381; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl.

1052; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25.

The verdict was excessive.

*Gulf, C. & S. F. R. Co. v. Gaedcke*, — Tex. Civ. App. —, 39 S. W. 312, 1 Am. Neg. Rep. 707; *Central of Georgia R. Co. v. Wallace*, 141 Ga. 51, 49 L.R.A.(N.S.) 429, 80 S. E. 282, Ann. Cas. 1915A, 1076; *Cooley v. Pennsylvania R. Co.* 40 Misc. 239, 81 N. Y. Supp. 692; *International & G. N. R. Co. v. Harder*, 36 Tex. Civ. App. 151, 81 S. W. 356; *Berley v. Seaboard Air Line R. Co.* 83 S. C. 411, 65 S. E. 456; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869; *Southern R. Co. v. Myers*, 32 C. C. A. 19, 58 U. S. App. 131, 87 Fed. 149; *Turner v. Great Northern R. Co.* 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243; *Southern R. Co. v. Marshall*, 111 Ky. 560, 64 S. W. 418; *Mobile & O. R. Co. v. Reeves*, 25 Ky. L. Rep. 2236, 80 S. W. 471.

Messrs. J. J. Weeks and John E. Martin, for respondent:

Plaintiff was a passenger, and as such entitled to his rights and privileges.

*Dieckmann v. Chicago & N. W. R. Co.* 145 Iowa, 250, 31 L.R.A.(N.S.) 338, 139 Am. St. Rep. 420, 121 N. W. 676; 2 *Hutchinson, Carr.* 3d ed. 1006; *Hayes v. Wabash R. Co.* 163 Mich. 174, 31 L.R.A.(N.S.) 229, 128 N. W. 217.

Defendant was liable in damages, and the amount allowed by the jury was not excessive.

*Dalton v. Kansas City, Ft. S. & M. R. Co.* 78 Kan. 232, 17 L.R.A.(N.S.) 1226, 96 Pac. 475, 16 Ann. Cas. 185; *Lilly v. St. Louis & S. F. R. Co.* 31 Okla. 521, 39 L.R.A.(N.S.) 663, 122 Pac. 502; *Louisville & N. R. Co. v. Sanders*, 7 Ala. App. 543, 61 So. 482; *St. Louis, I. M. & S. R. Co. v. Evans*, 94 Ark. 324, 126 S. W. 1058; *Schroeder v. Detroit, G. H. & M. R. Co.* 174 Mich. 684, 140 N. W. 968.

**Per Curiam:**

On the morning of October 19, 1917, the plaintiff, who lived at Bottineau, went to Rugby on defendant's passenger train, intending to return to Bottineau on the afternoon train. Bottineau is located on

a branch of the defendant's railway which connects with the main line at Rugby, and there is only one passenger train in each direction on each day. On October 19th the regular scheduled time for the departure of the train known as No. 213 from Rugby to Bottineau was at 4:15 P. M. At about 4 P. M. plaintiff, in company with one Thomas Hennessy, sheriff of Bottineau county, went to the defendant's depot at Rugby for the purpose of taking train No. 213 to Bottineau, but on examining a bulletin board in the depot they found that this train was marked to leave at 5:40 P. M. The plaintiff thereupon inquired at the ticket window, of the person in charge, if he was certain that the train would not leave before 5:40 P. M., and was answered in the affirmative. The plaintiff and Hennessy thereupon went uptown. They returned to the depot about 5:30 P. M., at which time they were informed that the train had left at 4:50, or about 50 minutes ahead of the time formerly announced. Plaintiff was therefore compelled either to remain in Rugby until the next day, or else drive to Bottineau, a distance of about 48 miles. The plaintiff and Hennessy engaged an auto livery, and made the trip to Bottineau that evening. They paid the driver \$20, the plaintiff and Hennessy each paying one half thereof.

The evidence adduced by the plaintiff tended to show that there had been quite a severe snowstorm a day or two before; that as a result the roads were in bad condition, and travel rendered difficult, and the telephone wires between Rugby and Bottineau broken down; that the night was cold, and that snow was falling to such an extent that it was necessary for the driver to stop at times and clean off the windshield and lamps in order to travel with safety. The plaintiff testified that he had on only a medium weight cloth overcoat, and that he became very cold on the trip to Bottineau. Hennessy testified that

the weather was so cold that he would not make the trip until he obtained a fur coat. There is some conflict as to the length of time required to make the trip. The plaintiff testified that it took about three hours, while the driver of the automobile claimed the trip was made in about two hours.

The plaintiff was state's attorney of Bottineau county, and he testified that a preliminary examination had been set for hearing in a justice's court that evening at 7 o'clock, and that he was caused considerable worry on account of his inability to telephone the justice of the peace and explain the reason of his failure to appear at the time set for the hearing. The plaintiff claimed that he was damaged in the sum of \$100, and made demand upon the defendant for payment. Payment was refused, and plaintiff brought this action, wherein he demanded judgment for \$300 treble compensatory and \$300 exemplary damages. The defendant denied all liability. The case was tried to a jury, which returned a verdict in plaintiff's favor for \$175 compensatory damages, no exemplary damages were allowed. Defendant has appealed from the judgment.

The evidence adduced by the plaintiff shows that plaintiff was misinformed as to the time when train No. 213 would depart, that such misinformation was conveyed both by what was written on the bulletin board and by what was said by the person in charge of the ticket office, and that such misinformation caused plaintiff to miss the train. It is true the testimony does not show that the plaintiff had procured a ticket at the time the information was received by him, but it does show that he came to the depot for the purpose of becoming a passenger upon that train. There is also evidence to the effect that the plaintiff was known to the operator, the person who wrote the statement on the bulletin board with respect to train No. 213, and that plaintiff talked with that person on the day

in question. We are of the opinion that the evidence considered as a whole justified the jury in finding that at the time the misinformation was given to the plaintiff he was in the position of a passenger. 10 C. J. p. 613, § 1040.

It is well settled that where a passenger sustains damages by reason of misinformation as to trains, given by the carrier's employees, the carrier is liable for the actual damages sustained by the passenger by reason of such misdirection. *Michie*, on Carr. §§ 2252, 2253; *Robertson v. Louisville & N. R. Co.* 142 Ala. 216, 37 So. 831; *Louisville & N. R. Co. v. Cannon*, 158 Ala. 453, 48 So. 64; *Wilcox v. Southern R. Co.* 91 S. C. 71, 74 S. E. 122.

The defendant contends that the verdict is excessive. We are of the opinion that this point is well taken. In his complaint, plaintiff avers "that the defendant on said 19th day of October, 1917, maliciously, unlawfully, and falsely reported that said train No. 213 would leave Rugby at 5:30 P. M., and thereafter caused said train to depart at 4:50 P. M., and that by reason thereof plaintiff was put to great annoyance, worry, and delay, and was compelled to travel by livery from the said city of Rugby to Bottineau during the nighttime over roads that were almost impassable on account of mud and snow, the said drive occupying about three hours and causing plaintiff considerable suffering on account of exposure to cold and a snowstorm prevailing at said time. That on said 19th day of October, 1917, plaintiff, as state's attorney of Bottineau county, represented the state of North Dakota in an action then pending in justice court for Bottineau county, in which action, hearing was set for 7 o'clock P. M., on the said 19th day of October, 1917, and that plaintiff was unable to communicate with the said justice of the peace by telephone from Rugby on account of the fact that said telephone lines

were down and out of service at said time, and that on account of said action pending and other business, plaintiff was compelled to travel by livery from Rugby to Bottineau in the evening and night of October 19, 1917, but was unable to reach Bottineau in time for said hearing in justice court, and was unable to reach Bottineau in time to attend to other matters of business requiring plaintiff's attention, and that by reason of all these facts, plaintiff has suffered damages in the sum of \$100."

This is the only allegation in the complaint alleging either the facts as to, or the amount of, damages. In his testimony the plaintiff admitted his inability to specify any damage by reason of the loss of time. And upon this feature of the case the trial court expressly instructed the jury as follows: "In finding the actual damages you cannot allow for loss of time as there is no proof of the value of any time lost. Find what actual damages the plaintiff suffered in money, actually and necessarily spent, and the amount which would fairly compensate the plaintiff for loss and harm suffered in personal property."

The defendant was liable to the plaintiff for the detriment which was proximately caused by the misinformation which its employees gave to him. Section 7165, Comp. Laws 1913. So far as the discomfort which plaintiff suffered on the trip from Rugby to Bottineau is concerned, this was, according to his own testimony, due to inadequate clothing. Neither Mr. Hennesy nor the driver of the automobile claimed that they suffered any particular discomfort. Manifestly the defendant cannot be charged with any detriment which plaintiff brought upon himself. In *Michie on Carriers* it is said: "In the absence of peculiar circumstances, a passenger is entitled only to reasonable compensation for the damages he has sustained by reason of fail-

Carrier—  
misleading  
passenger—  
liability.

Damages—for  
causing pas-  
senger to miss  
train.



ure to transport him to his destination promptly. The carrier in such case is liable for the damages actually sustained by the passenger as the direct and necessary result of its negligence. This includes the value of the time lost by the passenger, and the reasonable expenses to which he has been put, because of the delay. But the passenger is not entitled to actual damages, unless he shows some pecuniary injury or personal injury, and is not entitled to damages for inconvenience, loss of time, or fatigue, unless some pecuniary damage or personal loss has resulted therefrom. And no damages can be recovered for physical injuries which are not the proximate result of the carrier's negligence." Vol. 3, § 3386.

See also *International & G. N. R. Co. v. Addison*, 100 Tex. 241, 8 L.R.A.(N.S.) 880, 97 S. W. 1037; *Ingraham v. Pullman Co.* 190 Mass. 33, 2 L.R.A.(N.S.) 1087, 76 N. E. 237, 19 Am. Neg. Rep. 292; *Stephens v. Oklahoma City R. Co.* 28 Okla. 340, 33 L.R.A.(N.S.) 1007, 114 Pac. 611.

The verdict which the plaintiff recovered in this case was clearly in excess of what he was entitled to recover either under his pleading or his proof. The judgment must therefore be reversed, and the cause remanded for a new trial. In view of a new trial we deem it necessary to say that under the evidence in this case there was no occasion to submit to the jury the question of exemplary damages. Exemplary damages may be allowed in an action for the breach of an obligation not arising from contract only "when the defendant has been guilty of oppression, fraud, or malice, actual or presumed." Comp. Laws 1913, § 7145. In the case at bar, the undisputed evidence shows that, at the time the plaintiff was informed by the employees of the defendant that train No. 213 would depart at 5:40 P. M., that information was correct. The departure of the train before the time stated was occasioned by a

subsequent change of orders by the train despatcher. It appears that train No. 213 ordinarily made connections with train No. 9 on the main line of the defendant's railway. On the day in question train No. 9 was late, and the departure of train No. 213 was delayed in order to make the proper connection with train No. 9. About 4:50 P. M. train No. 9 was reported much later, and the train despatcher thereupon rescinded the former order relating to the departure of train No. 213, and fixed the time for the departure of that train at 4:50 P. M. After this order was received the defendant's employees in the depot at Rugby endeavored to communicate the change to the various persons intending to take passage on that train. They even went to the extent of telephoning the hotels and pool rooms. Manifestly there is no basis under this evidence for a finding that the defendant was guilty of oppression, fraud, or malice.

Judgment reversed, and the cause remanded for a new trial.

**Christianson, Ch. J., and Bronson and Birdsell, JJ., concur.**

**Robinson, J.:**

I think the action should be dismissed.

**Grace, J., dissenting:**

This case was, upon the issues formed, tried to a jury. The jury, under all the facts and circumstances of the case submitted to it, after due deliberation, returned a verdict in favor of the plaintiff for \$175. The verdict is not excessive; there is nothing to show passion or prejudice.

I dissent from the result arrived at by the majority opinion.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on December 9, 1919:

In a petition for rehearing it has been suggested that the court in its opinion overlooked § 7165, Comp. Laws 1913, which reads: "For the breach of an obligation not arising

from contract the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

This section was not overlooked. On the contrary, it was cited in the former opinion. We were of the opinion then, and are of the opinion now, that the acts of the defendant were not the proximate cause of whatever inconvenience or suffering the plaintiff endured on the automobile trip from Rugby to Bottineau. According to his own testimony, such discomfort was due to his own, and not to defendant's, acts.

Neither did we overlook §§ 6238, 7145, and 10,360, Comp. Laws 1913, in holding that the case did not present one for the allowance of exemplary damages. Giving full force and effect to these sections, the facts still remain as stated in the former opinion; and they furnish no basis for a finding that defendant was guilty of oppression, fraud, or malice, actual or presumed, and there could be no allowance of exemplary damages, unless there is evidence from which reasonable men, in the exercise of judgment and reason, could so find. That is the rule announced in the statute. See § 7145, *supra*.

Rehearing denied.

## ANNOTATION.

### Liability of carrier for giving misinformation to passenger as to running of train.

- I. Destination of train, 1183.
- II. Time of departure or arrival of train, 1186.
- III. Stopping of train at particular station, 1188.
- IV. Other matters, 1193.

#### I. Destination of train.

A carrier is liable for misinformation given to a passenger by an authorized employee as to the destination of a particular train.

**Alabama.**—Robertson v. Louisville & N. R. Co. (1904) 142 Ala. 216, 37 So. 881; Louisville & N. R. Co. v. Cannon (1908) 158 Ala. 453, 48 So. 64; Southern R. Co. v. Wooley (1909) 158 Ala. 447, 48 So. 369; Southern R. Co. v. Farquhar (1915) 192 Ala. 415, 68 So. 289.

**District of Columbia.**—Dye v. Virginia Midland R. Co. (1891) 9 Mackey, 63.

**Georgia.**—Atkinson v. Southern R. Co. (1901) 114 Ga. 146, 55 L.R.A. 223, 39 S. E. 888, 11 Am. Neg. Rep. 32.

**Kentucky.**—Cincinnati, N. O. & T. P. R. Co. v. Barkley (1891) 13 Ky. L. Rep. 331.

**New York.**—Martin v. New York C. & H. R. R. Co. (1886) 1 N. Y. S. R. 738; Elliott v. New York C. & H. R. R. Co. (1889) 53 Hun, 78, 6 N. Y.

Supp. 363. Compare Barker v. New York C. R. Co. (1862) 24 N. Y. 599.

**North Carolina.**—Bullock v. Atlantic Coast Line R. Co. (1910) 152 N. C. 66, 67 S. E. 60.

**Texas.**—International & G. N. R. Co. v. Gilbert (1885) 64 Tex. 536; International & G. N. R. Co. v. Smith (1886) — Tex. —, 1 S. W. 565; Davis v. Houston & T. C. R. Co. (1901) 25 Tex. Civ. App. 8, 59 S. W. 844; St. Louis Southwestern R. Co. v. Pruitt (1904) — Tex. Civ. App. —, 79 S. W. 598; Missouri, K. & T. R. Co. v. Humphries (1913) — Tex. Civ. App. —, 157 S. W. 1174.

Thus, where a ticket agent sells a ticket for a passage on a particular train and assures the plaintiff that the train will take him to his destination, the company is liable in damages for the expulsion of the plaintiff from the train designated because it is not bound for that destination. Atkinson v. Southern R. Co. (1901) 114 Ga. 146, 55 L.R.A. 223, 39 S. E. 888, 11 Am. Neg. Rep. 32, wherein the court said: "When a railroad company places an agent in charge of its business at a place where passengers are expected to board its trains, and authorizes such agent to sell tickets to passengers to be used when taking passage

upon its trains, one who purchases from such an agent a ticket upon which there is no statement as to what trains it will or will not be good for passage upon has a right to presume that the agent is authorized by the company to give him information on this subject. When, therefore, the purchaser of such a ticket applies to the ticket agent for information as to what train or trains the ticket will be good for passage upon, and the agent gives him this information, he has a right to act upon the information so given. If in so doing he boards a train of the company upon which the ticket is not good for passage to the point indicated thereon, and is for this reason expelled therefrom by the agent of the company in charge of the train, the company is liable to him for whatever damages he may sustain on account of such expulsion, notwithstanding there is in existence a rule or regulation of the company which prohibits the conductor from carrying passengers on the train thus boarded, or from carrying passengers to a given point along the line of road. The company can only avoid this liability by showing that the purchaser of the ticket knew, or had sufficient reason to believe, that the ticket agent was misinforming him, or that the purchaser knew of a rule of the company which made the agent incompetent to give the information, or forbade the recognition of the ticket by the conductor."

It has been held that the statement of a ticket agent misinforming a passenger that a certain train will take him to his destination without a change of cars may be relied on by a passenger unless a general announcement made on the train to a different effect is heard by the passenger, and if the statement of the agent is so relied on to the injury of the passenger, an action to recover damages may be maintained against the carrier. *Dye v. Virginia Midland R. Co.* (1891) 9 Mackey (D. C.) 63.

So, where a passenger was directed by a train employee to move into a car ahead, which was going to her destination, it was held that the defendant was liable where the plaintiff, acting

on the information given, failed to arrive at her destination. *Robertson v. Louisville & N. R. Co.* (1904) 142 Ala. 216, 37 So. 831.

A decision to the same effect was made in *Southern R. Co. v. Farquhar* (1915) 192 Ala. 415, 68 So. 289, wherein the plaintiff's evidence tended to show that when he presented his ticket to the gateman, he was misinformed as to which train he was to take, and therefore was not carried to his destination. It was held that the plaintiff was entitled to recover for the negligence of the defendant's servants in misinforming him, and a judgment in his favor was affirmed. See to the same effect *Louisville & N. R. Co. v. Cannon* (1908) 158 Ala. 453, 48 So. 64; *Southern R. Co. v. Wooley* (1909) 158 Ala. 447, 48 So. 369.

Likewise, where it appeared that a gateman in the defendant's employ punched the plaintiff's ticket and pointed out the train for him to board, it was held that the company was liable in damages for the resulting injuries where the train proved to be the wrong one. *Elliott v. New York C. & H. R. R. Co.* (1889) 53 Hun, 78, 6 N. Y. Supp. 363. See to the same effect *Crutcher v. Big Four* (1908) 132 Mo. App. 311, 111 S. W. 891; *Martin v. New York C. & H. R. R. Co.* (1886) 1 N. Y. S. R. 738.

In *Missouri, K. & T. R. Co. v. Humphries* (1913) — Tex. Civ. App. —, 157 S. W. 1174, it was shown that a gateman, employed in a Union depot, misdirected the plaintiff as to which train to board, and also that the brakeman of the train misinformed her that it was the train going to her destination. In an action to recover damages for being ejected from the train, it was held that the defendant was liable for the misinformation given by the gateman, the court saying: "We are inclined to believe in this case, under the evidence, that, so far as the general public was concerned, the gateman was the agent of appellant as well as of the Texas & Pacific Railway Company, and that appellant was responsible for his negligence. It is true that the evidence shows that he was employed by the former company,

and under its control; but it is also shown that appellant was entitled to his services, and that it was his duty to attend said gate, and direct passengers to their respective trains. He was therefore held out to the public by appellant as its agent in this respect, whereby appellant was responsible for his acts of negligence, if any, for which reason we think the court did not err in instructing a verdict in behalf of the Texas & Pacific Railway Company on said issue." See to the same effect *Davis v. Houston & T. C. R. Co.* (1901) 25 Tex. Civ. App. 8, 59 S. W. 844.

The abstract of the decision in *Cincinnati, N. O. & T. P. R. Co. v. Barkley* (1891) 13 Ky. L. Rep. 381, states the case as follows: "It is the duty of the agents of a railroad company who have charge of its passenger stations to know, when the inquiry is made of them, what train a passenger should take to reach his destination; and if a passenger takes the train he is directed by the agent to take, and it afterwards turns out that it was the wrong train, he is not a trespasser. The plaintiff, being on the wrong train through the mistake of one of defendant's agents in charge of its passenger stations, it was the duty of the conductor to politely inform him of his mistake and explain to him why he could not carry him to his destination; but as the conductor, instead of pursuing this course, humiliated the plaintiff by his abuse, the plaintiff is entitled to recover not only compensatory, but punitive, damages."

In *Bullock v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 66, 67 S. E. 60, it was held that where an employee of the defendant had directed the plaintiff to board a certain train, which, in fact, did not go to her destination, it was the duty of the defendant to put her off at a suitable and proper place either at a station or near a house. The court said: "The plaintiff was a passenger on the defendant's road, and continued to be such while on the platform at Parmele. . . . If the porter told her to get on this train, she had a right to presume that he knew what he was talking

about, and would properly discharge his duties, which by general knowledge and consent cover assistance to passengers."

A peculiar state of facts was disclosed in *International & G. N. R. Co. v. Gilbert* (1885) 64 Tex. 536. The plaintiff, on arriving at the station where she was supposed to change cars, inquired of the conductor of the defendant's train if she was in the right train, to which he replied by telling her to keep her seat. Because of this statement the plaintiff was carried to a point other than her destination and there ejected. It was held that the plaintiff was entitled to recover for the action of the defendant's employee, the court stating that the plaintiff was on the defendant's train through the fault and negligence of the conductor of the train, whose duty it was to see that she made no such mistakes, that it was the duty of the railroad company to return her in safety to the place where she took the wrong train through the fault of the conductor, and that when she was left at an improper, uncomfortable, and possibly an unsafe place, the company was liable for the resulting damages. See to the same effect *International & G. N. R. Co. v. Smith* (1886) — Tex. —, 1 S. W. 565.

In *St. Louis Southwestern R. Co. v. Pruitt* (1904) — Tex. Civ. App. —, 79 S. W. 598, it appeared that the plaintiff informed the conductor as to her destination and asked him if his train was the proper one for her to board, and the conductor replied in the affirmative. Subsequently the plaintiff discovered that she was on the wrong train and was ejected, although the conductor was informed that she had no money, but did have friends at the next station who would see that she was properly cared for. It was held that the defendant was liable for the conductor's conduct in ejecting the plaintiff, as he had failed to exercise that high degree of care which was due her under the circumstances, and a judgment for the plaintiff was affirmed.

But in *Barker v. New York C. R. Co.* (1862) 24 N. Y. 599, the evidence

showed that there were two trains, which ran an hour apart, the first of which went almost the entire distance to the plaintiff's destination and then branched off, making it necessary for the plaintiff to complete his journey on the second train. Shortly before the first train left the plaintiff presented himself at the defendant's station and inquired of an employee as to when he could board a train for his destination. The employee pointed out the first of the two trains, but did not explain the necessity for changing. In holding the action of the employee not to be negligent and affirming a judgment for the defendant, the court said: "Can the direction of the ticket agent at Albany be called a misdirection? I think it cannot. Passengers from Albany for Lyons could go by either the 6½ or 7½ o'clock train. If Page took the 7½ o'clock train, he had to wait in Albany an hour; if he took the 6½ o'clock train, he had to wait at Syracuse an hour and thirty-five minutes. How was the ticket agent at Albany to know that he did not prefer the delay at Syracuse? From his presenting himself and purchasing the ticket just before the 6½ o'clock train started, the agent had a right to presume that he preferred that train. Under these circumstances, I think the designation by the agent of the 6½ o'clock train as the train for Lyons cannot be called a misdirection or fault. It was natural and reasonable under the circumstances that he should tell Page that the 6½ o'clock train was the train for Lyons, for the ticket which he bought would take him there, if he took the 6½ o'clock train, in about the same time as the 7½ o'clock train, and the agent had a right to suppose that he preferred the 6½ o'clock train."

## II. Time of departure or arrival of train.

Where an employee of a railroad company misinforms a passenger as to the time of the departure of a train or of its arrival at destination, the carrier is liable for damages which are the direct result of the misinformation.

Massachusetts. — *Sears v. Eastern*

R. Co. (1867) 14 Allen, 433, 92 Am. Dec. 780.

Michigan.—*Van Camp v. Michigan C. R. Co.* (1904) 137 Mich. 467, 100 N. W. 771; *Geer v. Michigan C. R. Co.* (1905) 142 Mich. 511, 106 N. W. 72.

Mississippi.—*Wells v. Alabama G. S. R. Co.* (1889) 67 Miss. 24, 6 So. 757.

New York.—*Barney v. Delaware, L. & W. R. Co.* (1908) 61 Misc. 62, 113 N. Y. Supp. 138.

North Dakota. — See the reported case (*WEEKS v. GREAT NORTHERN R. Co.* ante, 1178).

South Carolina.—*Wilcox v. Southern R. Co.* (1912) 91 S. C. 71, 74 S. E. 122.

Texas.—*Texas & P. R. Co. v. Conway* (1915) — Tex. Civ. App. —, 180 S. W. 666.

Virginia.—*Fowlkes v. Southern R. Co.* (1899) 96 Va. 742, 32 S. E. 464.

Washington. — *Turner v. Great Northern R. Co.* (1896) 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243.

Thus, in *Sears v. Eastern R. Co.* (1867) 14 Allen (Mass.) 433, 92 Am. Dec. 780, it appeared that the plaintiff purchased a ticket from Boston to Lynn and return. The carrier published daily advertisements of its regular trains in papers published in Boston, and from one of these papers the plaintiff obtained the information that there was a train scheduled to leave Boston at 9:30 in the evening which was scheduled to stop at Lynn. The plaintiff presented himself at the station in due time to take the train, but was informed that it had been postponed to 11:15 for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Notices of the change had been given, printed handbills having been posted up in the cars and stations on the day of the change, but no notice of the change had been inserted in the daily papers. In holding the defendants liable the court said: "The defendants published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had

published a notice of the change in these papers, we think he would have been bound by it. For, as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So, if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations, which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own. . . . The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action."

Similarly, the plaintiff, in *Turner v. Great Northern R. Co.* (1896) 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243, was informed, when purchasing a ticket, that the train which he purposed taking would reach its destination on schedule time. He alleged that the defendant's agent knew that the train would not be able to complete its run owing to a serious break in the roadbed, which fact it negligently and fraudulently concealed from the plaintiff. After commencing his journey the plaintiff was

detained by reason of the condition of the roadbed for several days. The court held, in an action for damages for the delay, that evidence as to the conversation between the plaintiff and the ticket agent was admissible to show that the plaintiff was not in fault in taking the particular train on which he started. It was said that the ticket agent was the only person at a railroad station who could give travelers the necessary information as to the arrival, departure, and running of trains, and that passengers had a right, until otherwise informed, to rely on information received by them from a ticket agent, in answer to inquiries concerning those matters, provided they did not disregard other reasonable means of information.

In *Van Camp v. Michigan C. R. Co.* (1904) 137 Mich. 467, 100 N. W. 771, a suit to recover the penalty provided by statute for the failure of the defendant to transport the plaintiff, it appeared that the plaintiff purchased a ticket good for a continuous passage from Ypsilanti to Grand Junction. Her route was over the main line of the defendant railroad to Kalamazoo, from which place the defendant had a branch line to Grand Junction. She was informed by the ticket agent that she could make close connections at Kalamazoo for her train to Grand Junction, and he showed her a schedule stating that a train left the connecting station at 4:45 P. M., her train on the main line arriving at 4:25 P. M. On arriving at Kalamazoo she was informed that there was no train running on the branch line, and she was therefore obliged to remain overnight in Kalamazoo. The defendant introduced evidence to show that the time card showing a train scheduled to leave at 4:45 P. M. had been canceled by another one, eliminating such train from the schedule, but it was not shown that the cancellation of the time card had been brought to the attention of the ticket agent who misinformed the plaintiff. The court held that the defendant was liable for the statutory penalty, saying: "The undisputed facts are that the plaintiff applied two or more times to the au-

thorized agent of the defendant to ascertain about this train. She was shown a time-table issued by defendant and in the hands of its duly authorized agent. She was under no obligation to look for a schedule posted in the defendant's depot or published in the newspapers. She went to the proper place for the most reliable information. She obtained it by being shown a printed schedule. She relied on it as well as on the representation of the agent. This made her case, and entitled her to a judgment under the statute, unless the defendant showed 'a legal and just excuse' for not carrying her in accordance with her contract of carriage and printed schedule."

See to the same effect *Geer v. Michigan C. R. Co.* (1905) 142 Mich. 511, 106 N. W. 72; *Barney v. Delaware, L. & W. R. Co.* (1908) 61 Misc. 62, 113 N. Y. Supp. 138.

Likewise, it has been held that where the ticket agent of a railroad company informed a passenger that a certain train would make a close connection with the train of another railroad at a junction mentioned, when in fact no such connection was made, the giving of misinformation was negligence, for the direct consequences of which the railroad company was liable. *Fowlkes v. Southern R. Co.* (1899) 96 Va. 742, 32 S. E. 464.

In the reported case (*WEEKS v. GREAT NORTHERN R. Co.* ante, 1178) it appeared that the plaintiff was misinformed by a ticket agent in the employ of the defendant as to the time of the departure of a certain train. By reason of this misinformation the plaintiff missed the train and was compelled to motor to his destination in a snowstorm. The court holds the carrier liable for the actual damages sustained by the misinformation given out by its agent.

So, where misinformation was given by a ticket collector as to the time of trains, it was held that it was within the scope of the duty of that official, and that the defendant was liable for the injuries received by the plaintiff as a result of such misinformation.

*Wilcox v. Southern R. Co.* (1912) 91 S. C. 71, 74 S. E. 122.

But in a case where the plaintiff offered to introduce evidence of statements made by the defendant's policeman in its station as to the time of the departure of trains, it was held that the evidence was properly excluded, since the defendant was not liable for misinformation given by such an employee. *Wells v. Alabama G. S. R. Co.* (1889) 67 Miss. 24, 6 So. 737.

A passenger cannot recover for the failure of his train to connect with a train on another road, where the carrier sells tickets only to the point of transfer, although the employees of the carrier misinform the passenger as to the connection she can make. *Texas & P. R. Co. v. Conway* (1915) — Tex. Civ. App. —, 180 S. W. 666, wherein the court said: "Furnishing to persons appellant had undertaken to carry to points on its line information about the movement of trains on other lines of railway was outside the scope of the duties the porter and brakeman were employed to perform; and appellant should not, we think, be held bound to respond in damages to appellee for injury she suffered because she relied upon information they furnished her which turned out to be false. Legally she had no right to rely upon, as representations of appellant, statements made to her by its employees who were without authority, real or apparent, to act for it in making same."

### III. Stopping of train at particular station.

A carrier is liable for damages sustained as the result of misinformation given by one of its agents to a passenger as to whether a certain train will stop at his destination.

*Alabama.*—*Louisville & N. R. Co. v. Thomason* (1912) 6 Ala. App. 365, 60 So. 506; *South & North Ala. R. Co. v. Huffman* (1884) 76 Ala. 492, 52 Am. Rep. 349, 8 Am. Neg. Cas. 1; *Alabama G. S. R. Co. v. Heddleston* (1886) 82 Ala. 213, 8 So. 53.

*Georgia.*—*Central R. & Bkg. Co. v. Roberts* (1893) 91 Ga. 513, 18 S. E. 315.

**Indiana.**—Pittsburgh, C. & St. L. R. Co. v. Nuzum (1875) 50 Ind. 141, 19 Am. Rep. 708; Pennsylvania R. Co. v. Hoagland (1881) 78 Ind. 203. Compare Chicago, St. L. & P. R. Co. v. Bills (1888) 118 Ind. 221, 20 N. E. 775.

**Kansas.**—Kansas City, Ft. S. & M. R. Co. v. Little (1903) 66 Kan. 378, 61 L.R.A. 122, 97 Am. St. Rep. 376, 71 Pac. 820, 13 Am. Neg. Rep. 524.

**Kentucky.**—Louisville & N. R. Co. v. Scott (1911) 141 Ky. 538, 34 L.R.A. (N.S.) 206, 133 S. W. 800, Ann. Cas. 1912C, 547.

**Michigan.**—Lake Shore & M. S. R. Co. v. Pierce (1882) 47 Mich. 277, 11 N. W. 157.

**New Jersey.**—McDonald v. Central R. Co. (1905) 72 N. J. L. 280, 2 L.R.A. (N.S.) 505, 112 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378; Runyon v. Pennsylvania R. Co. (1907) 74 N. J. L. 225, 68 Atl. 107.

**New York.**—Miller v. King (1897) 21 App. Div. 192, 47 N. Y. Supp. 534.

**Ohio.**—Pittsburgh, C. C. & St. L. R. Co. v. Reynolds (1896) 55 Ohio St. 370, 60 Am. St. Rep. 706, 45 N. E. 712.

**Oklahoma.**—Chicago, R. I. & P. R. Co. v. Sheets (1916) 54 Okla. 586, 154 Pac. 550.

**South Carolina.**—Trapp v. Southern R. Co. (1905) 72 S. C. 343, 51 S. E. 919.

**Texas.**—Gulf, C. & S. F. R. Co. v. Moorman (1898) — Tex. Civ. App. —, 46 S. W. 662.

The plaintiff in *Central R. & Bkg. Co. v. Roberts* (Ga.) *supra*, bought of the defendant's agent a Sunday excursion ticket from Hatcher's station to Eufaula, with a return coupon attached, stating to the agent that he wished to return that night by a particular train known as the Cannon Ball, and that if he could not return on that train he did not want the ticket. The agent told him that the train specified would stop for him to get off at Hatcher's station. On boarding that train and presenting his return ticket, the conductor refused to take it for his passage, and ordered him, with others similarly situated, in the presence of the other passengers, to leave the train at a point 9 or 10 miles from Hatcher's station. The plaintiff was compelled to walk the rest of the dis-

tance through unpleasant weather. On the trial the court charged the jury as follows: "I charge you that when a party buys a ticket in this state over a railroad to go to a particular point and return, he has the right to return on the railroad if he perform all the conditions of the ticket. I charge you further, if the agent of the railroad told him that he could go to Eufaula and back upon this ticket, he had the right to presume that he could do so; and if in his effort to do so he was put off at any other station than Hatcher's, he would be entitled to damages." On appeal it was held that this charge was erroneous, since there was a conflict of evidence as to whether the agent told the passenger he could return on the fast train, and the charge as given would authorize the jury to find against the company without settling that conflict. In discussing the company's liability for misinformation given by its agent, the court said: "The agent who sold the Sunday excursion ticket represented the company in making the sale, and the information which he gave as to whether the ticket would afford a right to return on a particular train could be relied on unless it was known to be incorrect, or unless some known rule or order of the company made the agent incompetent to give such information or forbade the recognition of such a ticket by the conductor of the designated train, or of trains belonging to that class. The ticket being silent on its face as to trains, and one of the parts of the ticket being for a return passage, of course it would be proper for the company to authorize someone to answer questions when the ticket was sold, so that the buyer might know how to use it; and no other person would seem to be so proper for this purpose as the agent selling it."

Similar facts were involved in *Drew v. Wabash R. Co.* (1908) 129 Mo. App. 459, 107 S. W. 478, wherein the evidence showed that the plaintiff purchased a ticket for an excursion, and at the time of the purchase was informed by the ticket agent that he could come



back on another and different train than the excursion train. The plaintiff boarded this train, but his destination was not one of the regular stops, and he was accordingly ejected at a stop other than his destination. It was held that under the form of the plaintiff's petition he was not entitled to recover, but in reversing the judgment the court stated that if the plaintiff elected to amend, damages could be sought on the ground that the defendant's agent negligently misdirected the plaintiff.

Similarly, in *Kansas City, Ft. S. & M. R. Co. v. Little* (1903) 66 Kan. 378, 61 L.R.A. 122, 97 Am. St. Rep. 376, 71 Pac. 820, 13 Am. Neg. Rep. 524, the evidence showed that a ticket agent informed the plaintiff that a certain freight train due at a certain time would carry passengers, and sold him a ticket to his destination. Subsequently, as a train pulled into the station the agent informed the plaintiff that the train was coming. The plaintiff boarded the train, but after riding a few miles was ejected because the train was not scheduled to stop at his station. It was held that the railroad company was liable for the incorrect information given by the ticket agent, the court saying: "If all of these representations were untrue, and the train which plaintiff boarded was not, under the rules of the company, scheduled to stop at Hillsdale, there is nothing to show that he had knowledge of such fact. He made all reasonable inquiry of those whom the company had put there to furnish such information to ascertain if he might rightfully enter the train, and acted on the information thus received. He had a right to rely on all of these representations and assurances. They were made by the agents of the company within the scope of their agency, in the execution of their duties, and bound the company. Acting on them, the plaintiff had a right to go upon that train and be carried to the specified destination. To be ejected from the train before this was accomplished was a wrong for which a recovery might be had." See to the same effect *Alabama G. S. R. Co. v. Heddleston* (1886) 82 Ala.

218, 3 So. 53; *Louisville & N. R. Co. v. Thomason* (1912) 6 Ala. App. 365, 60 So. 506; *Pittsburgh, C. C. & St. L. R. Co. v. Nizum* (1875) 50 Ind. 141, 19 Am. Rep. 703; *Pittsburgh, C. C. & St. L. R. Co. v. Reynolds* (1896) 55 Ohio St. 370, 60 Am. St. Rep. 706, 45 N. E. 712.

So, where a passenger is informed by a ticket agent that a certain train will stop at his destination, which information is incorrect, the railroad company is liable in damages for the failure of the train to stop. *Lake Shore & M. S. R. Co. v. Pierce* (1882) 47 Mich. 277, 11 N. W. 157, wherein the court said: "Upon the question whether the company is liable for the action of the agent at Batavia, it is insisted by the plaintiff in error that the passenger is bound to ascertain for himself what trains stop at the place of his destination, and acts at his peril in boarding any others. It is undoubtedly true that where some trains make general and some only partial stoppages, the passenger should not disregard reasonable means of information in regard to his proper course. But he cannot be supposed to know that any such difference exists unless he has means of knowing the facts. Time-tables furnish one means of information, but they are not always accessible or intelligible to all classes of passengers, and the experience of all travelers is that they are sometimes not changed as soon as train changes are made, and are not always strictly adhered to. It is the business of the agents who contract with passengers for their fare to have the means of directing them safely, and such an agent is universally resorted to for such information by strangers who have occasion to obtain such guidance. When, as in this case, the attention of the agent was distinctly called to the desire of Pierce to know what trains he could rely on to bring him to Batavia in season for his purposes, we think he had a right to rely on the correctness of the information received, and to act on it, at least until informed to the contrary. It does not appear that any care was taken at Elkhart to warn passengers what trains

they must take for their several destinations, and there is nothing to show that Pierce had any reason to doubt the correctness of his course in going upon the train in question until after he had started and the conductor called for his ticket."

Where a passenger, before purchasing a ticket, inquires of the ticket agent whether the train stops at a certain station, and is answered in the affirmative and is given a time-table showing that the train is scheduled to stop, the passenger, by his contract, has a right to have the train stop at that station, and his ejection at the preceding station is wrongful. *McDonald v. Central R. Co.* (1905) 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378.

However, it may be noted that in *Runyon v. Pennsylvania R. Co.* (1907) 74 N. J. L. 225, 68 Atl. 107, the court held that where a ticket agent misinformed the plaintiff as to whether a train made a certain stop, he was not entitled to have the train make the stop. The court distinguished the *McDonald Case*, supra, on the ground that the furnishing of a time-table by the defendant's agent showing that the train was scheduled to stop at the station was a vital element in that case. In discussing the duty of the passenger under such circumstances, the court said: "It is the ordinary case of a passenger who has taken a train which is not scheduled to stop at the station for which he holds a ticket, by reason of misinformation received from the agent from whom he purchased his ticket, and who has been ejected at a regular station of the company after notification by the conductor that the train did not stop at the point to which he held a ticket, and a request from that official that he leave the train at a stopping point short of his destination, and refusal on his part to comply with the request. . . . The refusal of the plaintiff to leave the defendant company's train, when requested to do so by the conductor, constituted him a trespasser, and justified that officer in ejecting him from the train, using no more vio-

lence than was necessary to accomplish his removal."

In *Louisville & N. R. Co. v. Scott* (1911) 141 Ky. 538, 34 L.R.A.(N.S.) 206, 133 S. W. 800, Ann. Cas. 1912C, 547, it appeared that a ticket agent in the employ of the defendant company contracted with the plaintiffs to have a certain train stop at a station at which it was not scheduled to stop. On the faith of this information the plaintiffs purchased tickets and took passage on the train, but it failed to stop. The court held that the railroad company was liable in damages for the failure of the train to stop as agreed, saying: "It is elementary that an agent has no authority to bind his principal, unless he is acting within the apparent scope of his authority, but we think that when a railroad company has established a place on its line of railroad, or elsewhere, at which tickets may be bought for transportation upon its line of road, it thereby invests the agent in charge of its business, so far as the public is concerned, with the implied authority to furnish all reasonable information relating to the transportation of passengers, and concerning the movement of passenger trains, and with the power to bind it by any agreements made by him or information furnished by him, within the line of his duty. And we are also of the opinion that it is within the line of his duty to give information and make representations in reference to the rights of passengers holding tickets that he sells to them. The public has the right to go to such an agent for information concerning the movement of trains upon which they desire to take passage, and they have the right to rely upon the statements made by him concerning such matters. It would be a curious state of affairs if an agent having the express authority to sell tickets for transportation to and from different points did not also have the authority to give reasonable and proper information concerning the trains upon which such tickets might be used and the places at which trains would stop to receive and discharge passengers holding tickets sold by him. And so,

when the ticket agent of a railroad company agrees with, or informs, a person desiring to become a passenger that the ticket will be good on certain trains, or that certain trains upon which it may be used will stop at a designated place to let such person on or off, the company will be bound by his agreements or representations or by the information furnished by him, in the absence of knowledge upon the part of the purchaser of the ticket that the agent had no authority to make such an agreement or that the information given was incorrect, and when the ticket does not contain agreements or conditions by which the passenger's rights are to be determined. It may be true that the agent must submit the request for a change in schedules, or for authority to stop a train at a place it is not scheduled to stop, to his superiors and obtain their consent, but this is a matter between the railroad company and its agent. If its agent having the implied authority to act for it makes agreements or representations in violation of its rules, or in disobedience of its orders, or fails or neglects to procure the necessary authority to do what he agreed or represented should be done, it is the fault of the agent, and not the passenger, and the company, as between the passenger and it, must suffer the consequences of its agent's negligence or want of power."

So, the plaintiff, in *Gulf, C. & S. F. R. Co. v. Moorman* (1898) — *Tex. Civ. App.* —, 46 S. W. 662, purchased from a person in charge of the defendant's ticket office a return ticket and was informed that the return trip could be made at night, the train stopping at the point in question. On the return trip, after boarding the train, the plaintiff discovered that the train did not stop at his station, and he was forced to leave the train and complete his journey on foot. In holding the defendant to be liable for the misinformation given the plaintiff, the court said: "It is the duty of one in purchasing a ticket to inform himself as to the movements of trains over the lines of his proposed route; but we know of no better source of informa-

tion, so far as the public are concerned, than that of the ticket agent with whom the public must deal, and with whom the contract of transportation is made. He stands as the representative of the company, and is supposed to be able to correctly impart information to parties with whom he may contract for the right of transportation as to the movements of the trains over the route which he is expecting to travel. If the passenger knows that according to the rules of the company a certain train will not stop at a particular point, he would not be safe in relying upon information received from the ticket agent to the contrary; but where he does not actually possess such knowledge, he has the right to assume that the agent whom the railway company intrusts with the power to contract concerning his right of transportation possesses accurate knowledge as to the movements of trains over his prospective route, and he can safely rely upon the information received from that source. The charge of the court, as a whole, was correct upon this subject, and there was no error in refusing the charges requested by appellant."

The view maintained in the cases heretofore discussed apparently depends somewhat on the form of the action. Thus, in *Chicago, St. L. & P. R. Co. v. Bills* (1889) 118 Ind. 221, 20 N. E. 775, it was held to be reversible error to permit a passenger to testify as to the negligence of a ticket agent in misinforming him as to whether a train would stop at a certain station. It appeared that the passenger purchased a ticket and entered one of the company's through trains, which, according to the published schedule, did not stop at his station. He was ejected from the train because of his failure to pay his fare to the first station beyond his destination where the train stopped. He was permitted to testify, over objection, that before purchasing the ticket he inquired whether the train would stop at his destination, and that he was informed that it would. The court held that this evidence was improperly admitted, as the action was brought for an

unlawful invasion of the plaintiff's right of personal security, to recover for injuries sustained by being ejected from the train with needless violence. It was, therefore, wholly immaterial to any issue in the case to prove that he had acted with proper care in entering the train, or that he was brought into the situation in which he was found by the mistake of the ticket agent. The court said: "The passenger's right to recover damages which he may have sustained by being misled by the ticket agent is a right of action altogether different and distinct from one which arises out of an assault and battery committed upon him by the conductor in ejecting him from the train with needless violence. If the plaintiff was damaged by the misinformation negligently communicated to him by the defendant's ticket agent, he has his right of action for that yet, and it was therefore prejudicial error to permit him to prove the negligence of the ticket agent and get the benefit of that element in the present case, while the defendant was deprived of any right to insist that the plaintiff was guilty of contributory negligence. If the question had been upon the company's negligence, arising out of the conduct of its ticket agent, then the doctrine of contributory negligence would have been applicable. Possibly the plaintiff was negligent in not looking at a train schedule, which may have been at hand, or he may have known, for all that appears in this case, that the train did not usually stop at Curtisville. It cannot be said that the evidence was harmless."

Where it appeared that an employee of the defendant railroad company was stationed at the train for the purpose of inquiring the destination of each passenger attempting to go aboard, it was held that the question whether a passenger allowed to enter a train which did not stop at his destination was misinformed or misled through the fault of the carrier's servant, was for the jury. *Chicago, R. I. & P. R. Co. v. Sheets* (1916) 54 Okla. 586, 154 Pac. 550.

So, in *Trapp v. Southern R. Co.*

(1905) 72 S. C. 343, 51 S. E. 919, it appeared that the plaintiff was directed by a uniformed railroad attendant to board a certain train, which the passenger did, relying on the attendant's answer to his question as to a train for a certain point. The train which the plaintiff boarded did not stop at his destination, and in an action for damages for being ejected from the train, the court held that evidence was properly admitted to show the misdirection of the defendant's agent which caused the plaintiff to board the wrong train. See to the same effect *South & North Ala. R. Co. v. Huffman* (1884) 76 Ala. 492, 52 Am. Rep. 349, 8 Am. Neg. Cas. 1.

Where a passenger was informed by the conductor of a train that the next stop was her destination, and the train was unexpectedly stopped before arriving there, it was held that it was the duty of the conductor to inform the passenger that the train had not arrived at her destination, and his failure to do so entitled the plaintiff to damages for the injuries sustained. *Pennsylvania R. Co. v. Hoagland* (1881) 78 Ind. 203.

In *Miller v. King* (1897) 21 App. Div. 192, 47 N. Y. Supp. 534, it was held that where a passenger was misinformed by a ticket agent as to a train stopping at a certain point, he was not justified in remaining on the train after he was notified of the error, and that on his failure to leave the train, his expulsion was lawful. However, the defendant was held to be liable for the breach of the contract to carry, due to the ticket agent's misinformation, and a judgment for the defendant was accordingly reversed.

#### IV. Other matters.

In *Burnham v. Grand Trunk R. Co.* (1873) 63 Me. 302, 18 Am. Rep. 220, it appeared that the plaintiff desired to make a trip on the defendant's line, which necessitated a stop-over at an intermediate station. The plaintiff informed the defendant's ticket agent of his desire to stop over, and was told that it was necessary to purchase but one ticket, as the conductor would give him a stop-over check. On the second day his ticket was refused by

the conductor, as it was indorsed "good for this day only," and he was ejected from the train. The court held that the defendant was liable in damages for such ejection, saying: "It seems that before this the conductor had been permitted to give 'stop-over checks.' This custom had been abrogated but a few days previous, of which, so far as appears, no notice had been given. This is the very point upon which the plaintiff desires information. To whom shall he go to obtain it? To whom can he go but to the person appointed by the company for the purpose of giving such information, and selling the proper tickets? To that person he does go, and is informed that the custom of giving stop-over checks still continues, and that it is necessary to purchase but one ticket. Relying upon this information, as he was justified in doing, he purchased his ticket and paid the fare demanded for the whole distance.

. . . The conductor acted in obedience to orders from his superiors; the plaintiff, in obedience to information he had received from the ticket agent and upon which he had paid his money; surely, then, he was not in the wrong. But it is said the company were not bound by the contracts of the agent. Admit it. The conductor had proof from the ticket that the fare had been paid for the whole distance and from the statements of the plaintiff, which he had no reason to doubt, and which were confirmed by the custom so lately abrogated, that he had paid it upon the representations of the agent, that the ticket would carry him through. If, under these circumstances, the company, through the conductor, would repudiate or deny the contract, the least they could do would be to pay back the surplus money that they had received, or deduct it from the fare claimed, neither of which was done, or offered to be done, and this they were legally bound to do before refusing to execute the contract made by their agent, even if they were not bound by it."

In *Chicago, R. I. & P. R. Co. v. Floyd* (1914) 115 Ark. 607, 171 S. W. 913,

it was proved that the plaintiff was informed by a station agent in the employ of the defendant that a certain train would make connections with a motor car which was operated by the defendant railroad and which would carry the plaintiff to his destination. Relying on this information the plaintiff made the trip, but found that the motor-car service had been discontinued. It was held that the defendant was liable for the misinformation given by its agent, and a verdict for the plaintiff was affirmed.

Where an agent informs a passenger that a certain route is the proper and best one to take in traveling from one point to another, when in fact there is a shorter and more convenient route over the same company's line by which the passenger may travel, and by reason of such misinformation the passenger suffers damage, the company is liable therefor. *St. Louis Southwestern R. Co. v. White* (1905) 99 Tex. 359, 2 L.R.A. (N.S.) 110, 122 Am. St. Rep. 631, 89 S. W. 746, 13 Ann. Cas. 965.

So, in *Texas & P. R. Co. v. Armstrong* (1899) 93 Tex. 31, 51 S. W. 835, 6 Am. Neg. Rep. 721, wherein it appeared that the defendant's agent, on application by the plaintiff for information as to the best route to a certain place, misdirected the plaintiff, with the result that the plaintiff's wife and children were delayed for several days. The court held that the company was liable for the act of its agents in selecting the wrong route, and that the mental suffering, anxiety, and distress of the wife, caused by the delay, was a proper element of actual damage to be considered by the jury in arriving at the amount of the verdict.

In *Mace v. Southern R. Co.* (1909) 151 N. C. 404, 24 L.R.A. (N.S.) 1178, 66 S. E. 342, it was held that evidence was admissible to show that a passenger was erroneously informed by the defendant's station agent that his ticket was good over either of two routes, though the ticket showed on what route the plaintiff was entitled to travel. In affirming a judgment for the plaintiff, it was said: "The fact that the conductor did nothing wrong-

ful upon his part does not exculpate the defendant from liability for the negligence of its station agent in causing plaintiff to take the wrong route on his return home. This liability is upon the same principle that when a

passenger holds a ticket good on one train and one route, and by direction of the gatekeeper is made to take another train going in the wrong direction, the carrier is liable for the negligence of its agent." E. C. B.

RICHARDSON PRESS, Appt.,

v.

ANDREW ALBRIGHT, JR., Respt.

*New York Court of Appeals — November 10, 1918.*

(224 N. Y. 497, 121 N. E. 362.)

**Contract — to pay debt of corporation.**

1. A parol promise of a stockholder to pay the debt of the corporation is unenforceable under the Statute of Frauds.

[See note on this question beginning on page 1198.]

**Corporation — liability of stockholder to pay debt.**

2. That a stockholder of a publishing company is beneficially interested in having its publication continue without interruption will not render him liable upon his oral promise to pay an overdue printing bill and to pay cash for future issues, if the creditor continues to regard the corporation as the principal debtor and attempts to collect the bills from it.

[See 25 R. C. L. 494, 510.]

**Contract — collateral promise — Statute of Frauds.**

3. A promise may be collateral so

as to require writing under the Statute of Frauds, even though the new consideration moves to the promisor and is beneficial to him.

[See 25 R. C. L. 490.]

**— to pay another's debt — primary liability.**

4. The promise of a stockholder to pay the debt of a corporation, which debt continues to exist, is regarded as original, so as to dispense with the necessity of writing only when, within the intention of the parties, he becomes the principal debtor or primarily liable.

[See 25 R. C. L. 501, 510.]

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part XIV., dismissing an action brought to recover a balance alleged to be due for materials furnished to a certain publishing company for which defendant agreed to pay. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. George T. Hogg, for appellant:

The defendant had an interest of his own to subserve. His promises rested on a new consideration,—forbearance, or time to pay past indebtedness, and the publication of future issues of "Dogs in America," which moved toward him and was beneficial to him. They were original, therefore, and did not need to be in writing.

Faber v. New York, 213 N. Y. 411, 107 N. E. 756; Kraus v. Birnbaum, 200 N. Y. 130, 93 N. E. 474; R. & L. Co.

v. Metz, 165 App. Div. 533, 150 N. Y. Supp. 843, affirmed in 215 N. Y. 695, 109 N. E. 1091; A Schwoerer & Sons v. Stone, 130 App. Div. 796, 115 N. Y. Supp. 440, affirmed in 200 N. Y. 560, 93 N. E. 1116; Richardson Press v. Vandergrift, 165 App. Div. 180, 150 N. Y. Supp. 238; Davis v. Patrick, 141 U. S. 479, 488, 489, 35 L. ed. 826, 828, 829, 12 Sup. Ct. Rep. 58; Kelsey v. Munson, 117 C. C. A. 483, 198 Fed. 841; Guaranty Trust Co. v. Koehler, 115 C. C. A. 475, 195 Fed. 669; Choate

v. Hoogstraat, 46 C. C. A. 174, 105 Fed. 713.

There was a "note or memorandum" of the defendant's promise to pay the plaintiff, particularly for subsequent issues of "Dogs in America," and it was subscribed by the defendant. The requirements of the Statute of Frauds are fully met, if applicable.

Spiegel v. Lowenstein, 162 App. Div. 443, 147 N. Y. Supp. 655; Poel v. Brunswick-Balke-Collender Co. 159 App. Div. 365, 144 N. Y. Supp. 725; Guaranty Trust Co. v. Koehler, 115 C. C. A. 475, 195 Fed. 669; Choate v. Hoogstraat, 46 C. C. A. 174, 105 Fed. 713; Quaker Oats Co. v. North, 102 Misc. 108, 168 N. Y. Supp. 145; Brauer v. Oceanic Steam Nav. Co. 178 N. Y. 339, 70 N. E. 863; Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; San Remo Copper Min. Co. v. Moneuse, 149 App. Div. 26, 133 N. Y. Supp. 509.

The trial term erred in refusing to allow the plaintiff's treasurer to testify whether it relied on the promise of the defendant in getting out the work in question.

Thurston v. Cornell, 38 N. Y. 281; Noonan v. Luther, 206 N. Y. 105, 41 L.R.A. (N.S.) 761, 99 N. E. 178, Ann. Cas. 1914A, 1038.

Mr. Charles Thaddeus Terry, for respondent:

There is no evidence in the record sufficient to have warranted the submission to the jury of the question whether the defendant made an original promise.

White v. Rintoul, 108 N. Y. 222, 15 N. E. 318; Mallory v. Gillett, 21 N. Y. 412; Roscoe Lumber Co. v. Reynolds, 124 App. Div. 539, 108 N. Y. Supp. 1018; Mechanics & T. Bank v. Stettheimer, 116 App. Div. 198, 101 N. Y. Supp. 513; Halsted v. Pelletreau, 101 App. Div. 125, 91 N. Y. Supp. 927; Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; O'Brien v. Mendel, 132 N. Y. Supp. 426; Belknap v. Bender, 75 N. Y. 446, 31 Am. Rep. 476; Cardeza v. Bishop, 54 App. Div. 116, 66 N. Y. Supp. 408; Duffy v. Wunsch, 42 N. Y. 243, 1 Am. Rep. 514; Millard v. Steers, 9 App. Div. 419, 41 N. Y. Supp. 321; McRoberts v. Mathews, 18 App. Div. 624, 45 N. Y. Supp. 481.

Plaintiff cannot recover on the theory that the promise was a collateral one, because there was no note or memorandum in writing thereof,

signed by the defendant, sufficient to satisfy the Statute of Frauds. The letter signed by him was tentative, and not final; fails to express the terms of any agreement, and, in particular fails to show the consideration for any promise which it may be construed to contain.

Poel v. Brunswick-Balke-Collender Co. 216 N. Y. 310, 110 N. E. 619; Brauer v. Oceanic Steam Nav. Co. 178 N. Y. 339, 70 N. E. 863; Drake v. Seaman, 97 N. Y. 230; Barney v. Forbes, 118 N. Y. 580, 23 N. E. 890; Glens Falls Lumber Co. v. Joseph T. Ryerson & Son, 175 App. Div. 769, 162 N. Y. Supp. 427.

The plaintiff has been paid in full for all materials furnished and services rendered since March 4th, 1912.

Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618; Pfeiffer v. Adler, 37 N. Y. 164; Belknap v. Bender, 75 N. Y. 446, 31 Am. Rep. 476.

The court will not reverse the judgment appealed from, unless the evidence presented by the plaintiff is substantial, credible, and makes out a prima facie case.

Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; Re Case, 214 N. Y. 199, 108 N. E. 408; Jewell v. Parr, 13 C. B. 916, 138 Eng. Reprint, 1463.

Pound, J., delivered the opinion of the court:

Plaintiff declares on a balance of about \$4,000 alleged to be due on account for materials furnished to Oceanic Publishing Company, a corporation, for which it is alleged that defendant agreed to pay. The complaint was dismissed at the close of plaintiff's evidence, and the question is whether sufficient evidence was adduced to establish prima facie defendant's liability as a primary principal debtor.

Defendant was a large stockholder in Oceanic Publishing Company, which was publishing a semi-monthly periodical entitled "Dogs in America," which plaintiff was printing for it. On February 29, 1912, plaintiff brought to the attention of defendant by letter the fact that it had been carrying a large account with his company which was past due, and asked him to make some arrangement for the systematic payment of it. On March 1st defendant

answered, explaining that he had nothing to do with the direct management of the company; that the president, Vandergrift, conducted the business; that he expected that Vandergrift would soon resign and allow him to assume the management of the paper; and that he would be glad to meet the representative of plaintiff to make arrangements for the payment of the back account due it and for future issues. This letter contains no promise to pay plaintiff the debt of Oceanic Publishing Company, but it contains a personal assurance that defendant will furnish Oceanic Publishing Company money to pay for each future issue.

The parties met on March 4th, and Aberle, plaintiff's representative, testifies as follows: "I met Mr. Albright on that morning, and Mr. Albright stated to me in substance—at least he said directly: 'I am now in charge of the Oceanic Publishing Company. I will run it hereafter. Mr. Vandergrift has withdrawn.' He inquired about the size of the account, and I had a statement with me, which I showed him. The exact figure I haven't here now. It was something like \$3,000. We discussed the thing generally, and he said, 'Well, you can't expect me to pay all of this.' He says: 'I will agree to pay you \$1,500 in three payments, \$500 weekly. I will further agree to pay each issue hereafter in cash, before you send it out.' This I want to say, because we had notified the publishing company that we would not publish hereafter unless the cash was in evidence. That was really in answer to our request. Mr. Davidson, the treasurer of the company, was then present in the office. I asked Mr. Albright to give me this in writing, and he said: 'No, I am an honorable man; my word is my bond. Besides, you have Davidson here as a witness.' " It later appeared that the money was to be forwarded by defendant to Mr. Davidson, the treasurer of the Oceanic Company.

No other promise, original or col-

lateral, was ever made by defendant to plaintiff to pay the debt of Oceanic Publishing Company, and, if the promise is to answer for its debt, it is unenforceable, because no note or memorandum in writing was made, sufficient to satisfy the requirements of the Statute of Frauds.

Assuming that defendant, in the interview above quoted, was speaking for himself, and not merely as the representative of his company, it may be said that some of the elements of an original, enforceable, absolute promise on his part to pay \$1,500 of the back indebtedness and to pay for future issues unquestionably appear. Technically, at least, defendant had a substantial interest to subserve in making the promise. He had—or at least he said that he had—taken control of Oceanic Publishing Company, and was about to reorganize it. It was his desire to have the plaintiff continue to issue "Dogs in America," and perhaps it was a benefit to him to have the periodical appear regularly without a change of publishers. Thus the element of a new consideration moving to him was present. But his beneficial interest was at best remote. Unquestionably, the principal debt was not extinguished, and credit was still given and to be given to Oceanic Publishing Company.

On this evidence it is urged that defendant became a primary debtor with Oceanic Publishing Company (White v. Rintoul, 108 N. Y. 222, 15 N. E. 318; First Nat. Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331; A. Schwoerer & Sons v. Stone, 130 App. Div. 796, 115 N. Y. Supp. 440, affirmed in 200 N. Y. 560, 93 N. E. 1116; R. & L. Co. v. Metz, 165 App. Div. 533, 537, 538, 150 N. Y. Supp. 843, affirmed in 215 N. Y. 695, 109 N. E. 1091), and that plaintiff was entitled to recover.

But a promise may still be collateral, even though the new con-

Contract—  
to pay debt of  
corporation.

Corporation—  
liability of  
stockholder to  
pay debt.



consideration moves to the promisor and is beneficial to him. The elements of beneficial interest and new consideration must be present to take the case out of the statute; but the inquiry remains whether the consideration is such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. *White v. Rintoul*, supra, at page 227 of 108 N. Y. The implied consideration, as indicated by the subsequent dealings of the parties, is that plaintiff will continue to give credit primarily to Oceanic Publishing Company. Plaintiff was notified on March 14, 1912, that defendant admitted no responsibility as to its claim, and it is indisputable that plaintiff thereafter considered that the primary duty of payment remained with the original debtor. It continued to furnish materials and render services to Oceanic Publishing Company, publishing its periodical down to the issue of September 19th; it kept no account with defendant on its books; made but one demand on him to furnish money in advance of an issue of the periodical, and that was for the issue of March 7th, which brought forth the denial of responsibility; took assignments of accounts from Oceanic Publishing Company; took assignments of stock under an agreement

Contract—  
collateral  
promise—Stat-  
ute of Frauds.

which gave it control of Oceanic Publishing Company; took possession of all its personal property, books, and papers, and turned to defendant only when the resources of the original debtor had been completely exhausted. The tenor of the entire transaction was that defendant purposed to help out the Oceanic Company and verbally promised to pay its debts.

When the primary debt continues to exist, the promise of another to pay the debt may be original, or it may not be; but it is regarded as original only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable. If we pick a few phrases from the context, we may draw the conclusion that defendant intended to assume such a relation to plaintiff; but on all the evidence we find but one principal primary debtor, and that is Oceanic Publishing Company. The ancient purpose of the Statute of Frauds was to require satisfactory evidence of a promise to answer for the debt of another person, and its efficacy should not be wasted by unsubstantial verbal distinctions.

—to pay an-  
other's debt—  
primary  
liability.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Chase, Collin, Cuddeback, Cardozo, and Andrews, JJ., concur.

## ANNOTATION.

**Statute of Frauds: validity of oral promise by stockholder to pay debt of corporation.**

- I. In general, 1199.
- II. When promise is to secure benefit to promisor apart from interest as stockholder, 1202.
- III. Promise to secure continued performance of contract with corporation, 1203.
- IV. Promise to induce forbearance by creditor of corporation, 1206.
- V. Promise to induce further loans to the corporation, 1208.
- VI. Promise to induce compromise of claim against the corporation, 1208.
- VII. Where promisor owns substantially all the stock of debtor corporation, 1209.
- VIII. Promise by one stockholder to another, 1210.
- IX. Where promisor is substituted as debtor, 1210.
- X. Contemporaneous promise:
  - a. In general, 1211.
  - b. Where a charge is made against the corporation, 1212.

*I. In general.*

As indicated by the title, this note deals with cases involving that provision of the Statute of Frauds which, in effect, makes invalid all oral promises to answer for the debt, default, or miscarriage of another. Notwithstanding the general confusion existing among the courts with regard to the application of the statute to oral promises to pay another's debt, it is settled that an oral promise of this character is not within the statute if, in effect, it amounts to an original promise; while it is generally held to be within the statute if it is collateral. The question here raised is whether or not a promise by a stockholder to pay the debt of a corporation is original or collateral within the foregoing rule. An original promise is generally held to be one in which the primary object of the promisor is to subserve or promote some personal interest of his own rather than to become a surety or guarantor for another. In this regard a distinction is to be observed between a promise based upon a consideration sufficient to support a contract independently of the Statute of Frauds, and a promise, the consideration for which is of such a character as to make the promise an original one. The applicability of the statute to an oral promise does not depend upon the question as to whether there is a consideration for the promise which would be sufficient to support it if it were not for the Statute of Frauds. The real question is whether or not the consideration is of a character which stamps the promise as an original one. As applied to the question here raised as to oral promises by a stockholder or officer of a corporation, it may be said that a promise by such a person or persons to answer for the debt of the corporation is original where the primary object of the promisor is to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation, or from his refraining to exercise against the corporation some right existing in him by virtue of the contract. The benefit to the promisor is to be dis-

tinguished from the indirect benefit which would accrue to him merely as an officer or stockholder in the corporation. If the benefit accruing is direct and personal, then the promise is original within the rule, and the validity thereof is not affected by the Statute of Frauds.

**United States.**—*Emerson v. Slater* (1860) 22 How. 28, 16 L. ed. 360; *Davis v. Patrick* (1891) 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58 (rule recognized, but not applied).

**Alabama.**—*Cassels v. Alabama City, G. & A. R. Co.* (1916) 198 Ala. 250, 73 So. 494.

**Connecticut.**—*S. J. Cordner Co. v. Manevets* (1918) 92 Conn. 587, 103 Atl. 842.

**Illinois.**—*Donovan v. Purtell* (1905) 216 Ill. 629, 1 L.R.A.(N.S.) 176, 75 N. E. 834; *Brown v. Reinberger* (1913) 177 Ill. App. 297.

**Iowa.**—*Whinnery v. Cundiff* (1915) — Iowa, —, 150 N. W. 659.

**Kentucky.**—*Creel v. Bell* (1829) 2 J. J. Marsh. 309; *Grant v. Pearce* (1894) 16 Ky. L. Rep. 204.

**Missouri.**—*Beall v. Board of Trade* (1912) 164 Mo. App. 186, 148 S. W. 886; *Rubey Trust Co. v. Weidner* (1913) 174 Mo. App. 692, 161 S. W. 333.

**Montana.**—*Bennighoff v. Robbins* (1917) 54 Mont. 66, 166 Pac. 687.

**New Jersey.** — *Cortelyou v. Hoagland* (1885) 40 N. J. Eq. 1; *Fitzgerald Speer Co. v. Kelly* (1912) 83 N. J. L. 626, 85 Atl. 1134, affirming (1911) 81 N. J. L. 6, 83 Atl. 491.

**New York.**—*A. Schwoerer & Sons v. Stone* (1909) 130 App. Div. 796, 115 N. Y. Supp. 440, affirmed in (1911) 200 N. Y. 560, 93 N. E. 1116; *RICHARDSON PRESS v. ALBRIGHT* (reported herewith) ante, 1195; *Windsor Constr. Co. v. Ruland* (1916) 173 App. Div. 94, 159 N. Y. Supp. 446; *Levitt v. Griswold* (1914) 148 N. Y. Supp. 320.

**North Carolina.** — *Satterfield v. Kindley* (1907) 144 N. C. 455, 15 L.R.A.(N.S.) 399, 57 S. E. 145, 12 Ann. Cas. 1098.

**Oklahoma.** — *Kesler v. Cheadle* (1903) 12 Okla. 489, 72 Pac. 367; *Lindley v. Kelly* (1915) 47 Okla. 328, 147 Pac. 1015.

**Oregon.**—*Manary v. Runyon* (1903) 43 Or. 495, 73 Pac. 1028.

**Pennsylvania.**—*Maule v. Bucknell* (1865) 50 Pa. 39; *Jefferson County v. Slagle* (1870) 66 Pa. 202; *Thompson v. Hazelwood Sav. & T. Co.* (1912) 234 Pa. 452, 83 Atl. 286; *Burr v. Mazer* (1896) 2 Pa. Super. Ct. 436; *Goodling v. Simon* (1913) 54 Pa. Super. Ct. 125; *Shannon v. American Iron & Steel Mfg. Co.* (1917) 66 Pa. Super. Ct. 211.

**Rhode Island.**—*Whitaker v. Greene* (1918) — R. I. —, 103 Atl. 779.

**Texas.**—*Uvalde Nat. Bank v. Brooks* (1913) — Tex. Civ. App. —, 162 S. W. 957; *Enterprise Trading Co. v. Bank of Crowell* (1914) — Tex. Civ. App. —, 167 S. W. 296.

**Virginia.**—*Kanter v. M. Hofheimer & Co.* (1916) 118 Va. 625, 88 S. E. 60.

**West Virginia.**—*Hurst Hardware Co. v. Goodman* (1910) 68 W. Va. 462, 32 L.R.A. (N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218.

While all of the foregoing cases recognize the principle stated, and most of them apply it, as hereinafter shown they do not all apply it.

The test to determine whether or not a promise by a stockholder to pay the debt of a corporation is original or collateral has been said to be whether credit was given to the promisor or the corporation. *Brown v. Reinberger* (1913) 177 Ill. App. 297.

In *Davis v. Patrick* (1891) 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58, the court said: "The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance, and for the benefit, of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testi-

mony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

In *Emerson v. Slater* (1860) 22 How. (U. S.) 28, 16 L. ed. 360, the rule is stated that "cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the Statute of Frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the perform-

ance of it may incidentally have the effect of extinguishing that liability."

As to the confusion existing among the courts in the application of the statute to oral promises to pay another's debt in *Maule v. Bucknell* (1865) 50 Pa. 39, the court said: "It must be admitted that the cases respecting the application of the Statute of Frauds are greatly confused and irreconcilable with each other. Upon no subject, perhaps has there been more diversity of judicial decision. The value of the statute is everywhere admitted, and its language is plain, but in the supposed justice of a particular case, a court has often lost sight of the exact rule prescribed by the legislature. As much ingenuity has been expended in efforts to take individual cases out of the statute as was formerly devoted to avoiding the Statute of Limitations, and in these ingenious efforts, principles have been asserted which, if sound, practically deny all effect to the expressed will of the legislature. Happily, there are glimmerings of late, of a tendency to return to a plainer reading of the act, and to give to it a construction more consonant to the apparent mind of the legislature. In this state we have very few decisions upon the subject, for our statute has been in existence only since 1855, but as it is a substantial copy of the British statute, and those of other states, the judgments of their courts cannot be overlooked. Without attempting any extended review of them, we think certain principles may safely be considered as settled, or, if not settled, sustained by reason, and the authority of the best-considered adjudications. It is not true, as a general rule, that a promise to pay the debt of another is not within the statute, if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the statute amounts to nothing. Nor can it make any difference that the new consideration moves from the promisee to the promisor. The object

8 A.L.R.—76.

of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and to these all suits upon verbal contracts to answer for another's debt or default are equally exposed, no matter whence the consideration of the contract proceeded or to whom it passed. Indeed, many of the cases hold that the question always is, What was the promise? not, What was its consideration?"

And in *Enterprise Trading Co. v. Bank of Crowell* (1914) — Tex. Civ. App. —, 167 S. W. 296, it is said that "there is considerable loose language upon the question of a new contract taking a case out of the Statute of Frauds, because, forsooth, it is based upon a subsequent contract and a new consideration. Though the promise is new and original—original in the sense it had no original connection with the debt—does not take the case out of the statute; neither because you vary the form of the consideration to the promisee, though created subsequently, does it make the promise new and original, in the sense of taking it out of the statute, as long as the principal object in view is to stand good for another's debt."

It is clear that where the oral promise by a stockholder to pay the debt of the corporation is collateral in form and effect, and the consideration, therefore, is not to secure or promote some personal object or advantage of the promisor as distinguished from the indirect benefit to him from the mere fact of his being a stockholder of the corporation, the promise is collateral and within the Statute of Frauds.

Connecticut. — *Temple v. Bush* (1903) 76 Conn. 41, 55 Atl. 557.

Illinois.—*Home Nat. Bank v. Waterman* (1890) 134 Ill. 464, 25 N. E. 648, 29 N. E. 503; *Brown v. Reinberger* (1913) 177 Ill. App. 297.

Massachusetts. — *Free Schools v. Flint* (1847) 13 Met. 539; *Carleton v. Floyd, R. & Co.* (1906) 192 Mass. 204, 78 N. E. 126.

Missouri. — *Walther v. Merrell* (1878) 6 Mo. App. 371.

New York. — *Quin v. Hanford*

(1841) 1 Hill, 82; *Mechanics & T. Bank v. Stettheimer* (1906) 116 App. Div. 198, 101 N. Y. Supp. 513; *Winne v. Mehrbach* (1909) 130 App. Div. 329, 114 N. Y. Supp. 618; *Yracheta v. Stanford* (1909) 120 N. Y. Supp. 117.

North Carolina. — *Satterfield v. Kindley* (1907) 144 N. C. 455, 15 L.R.A.(N.S.) 399, 57 S. E. 145, 12 Ann. Cas. 1098.

Pennsylvania.—*Maule v. Bucknell* (1865) 50 Pa. 39; *Shannon v. American Iron & Steel Mfg. Co.* (1917) 66 Pa. Super. Ct. 211.

South Carolina. — *Turner v. Lyles* (1904) 68 S. C. 392, 48 S. E. 301.

Virginia. — *Friedlin v. Crockin* (1911) 122 Va. 521, 95 S. E. 432.

A mere promise by a stockholder to pay an existing debt of the corporation is collateral and within the Statute of Frauds. *Home Nat. Bank v. Waterman* (1890) 134 Ill. 464, 25 N. E. 648; *Brown v. Reinberger* (1913) 177 Ill. App. 297.

In *Free Schools v. Flint* (1847) 13 Met. (Mass.) 539, on the assumption that a trustee orally promised to pay the debt of the corporation, the court said that such a promise would be inoperative and void by reason of the Statute of Frauds.

In *Winne v. Mehrbach* (1909) 130 App. Div. 329, 114 N. Y. Supp. 618, in holding that an oral promise by a stockholder to pay the debt of a corporation was collateral, the court said that whatever may have been the interest of the defendant or the stockholder in the corporation, he was not individually liable for its debts. His assumption of liability upon the contract in question was only for a collateral liability as surety in case of the nonpayment by the corporation. The promise, therefore, was clearly one contemplated by the Statute of Frauds.

In *Quin v. Hanford* (1841) 1 Hill (N. Y.) 82, where the contractor for the construction of a church building gave an order upon the treasurer of the society to a subcontractor for the amount due the latter, and the treasurer, who was also a trustee of the church and a member of the building committee, orally agreed to pay the order within a few days, the agree-

ment was held to be collateral and within the Statute of Frauds. It is pointed out that the promisor held the church money as a bailee of the society and subject to its orders, and the church could not only direct him to pay any other creditor in preference to this particular one, but it could at its pleasure withdraw the fund and place the same in the hands of another agent.

*II. When promise is to secure benefit to promisor apart from interest as stockholder.*

It is obvious that there is a distinction between a promise by a stockholder of a corporation to pay a claim owing by it where the purpose is to promote or secure some benefit or advantage to himself individually, separate and distinct from any advantage or benefit which would accrue to him indirectly as a stockholder of the corporation, and a promise merely to promote the interest of, or secure some advantage to, the corporation from which he might benefit as a stockholder. It is reasonably clear that if the promise by a stockholder to pay a debt of the corporation is to secure or promote some interest or advantage for himself individually, rather than indirectly in the capacity of stockholder, the promise is original, and is not within the Statute of Frauds.

An illustration of a promise to pay the debt of a corporation for the direct purpose of promoting the promisor's interest is found in *Cassels v. Alabama City, G. & A. R. Co.* (1916) 198 Ala. 250, 78 So. 494. In that case it appeared that a corporation was indebted for the rental of a meter, and the creditor refused to move the meter to the works of a stockholder until this indebtedness was paid. A promise under these circumstances by this stockholder to pay the debt of the corporation in instalments on condition that the promisee remove the meter to the promisor's plant was held to be original, and not within the Statute of Frauds.

In *Satterfield v. Kindley* (1907) 144 N. C. 455, 15 L.R.A.(N.S.) 399, 57 S. E. 145, 12 Ann. Cas. 1098, a promise by the intending purchaser of the prop-

erty of an insolvent corporation, which was being sold at a public sale to pay its debts, that if permitted to purchase the property he would pay all of the debts of the corporation without reference to the price at which he might purchase the same, was construed as a promise to pay a given price for the property, that is, an amount sufficient to pay the debts of the corporation, rather than an agreement to pay the debts of another, and hence it was not a collateral promise within the Statute of Frauds.

But see *Maule v. Bucknell* (1865) 50 Pa. 39, which holds to be collateral a promise to pay the debts of a corporation, made to the majority of the directors on condition that such directors would transfer certain of their stock to the promisors and resign their office as directors, to the end that the promisors might become directors. The court said: "It was a promise to pay the debts of the 'Eastern Market Company.' It was strictly collateral to those debts, not a substituted obligation. Those debts still continued. The company remained the primary debtor, and had they paid, the defendants would have had nothing to pay either to the plaintiff or to the original debtor. The promise of the defendants was therefore in no sense a promise to pay their own debt, or a debt of their property. It was not in relief of any property they owned or upon which they held a lien. Nor was the consideration for the promise of a nature to take the case out of the statute. It was not a placing in the hands of the defendants, by the debtor or the creditor, funds, securities, or property of the debtor pledged or devoted to the payment of the debts. The transfer of the small number of shares of stock, and the resignation by the plaintiffs of their directorship, were to enable the defendants to become directors, not to place funds in their hands to pay the debts. The averment is, that it was their own money they promised to pay in discharge of the debts, and it is because they did not pay their own money that this action is brought."

*III. Promise to secure continued performance of contract with corporation.*

In many of the cases in which this question has been presented, and which have held that an oral promise by a stockholder to pay for goods or articles furnished a corporation was original, and not within the Statute of Frauds, on the ground that the primary object of the promisor was to receive some personal benefit from the performance of the contract, the promise was made by a stockholder to a contractor or materialman to induce him to continue performance of the contract after he had refused to perform on the ground of the failure of the corporation to pay him according to its contract. In these cases, as a rule, it is held that such a promise is original, and not within the Statute of Frauds, especially as to work performed or material furnished subsequently to the promise.

**United States.**—*Emerson v. Slater* (1859) 22 How. 28, 16 L. ed. 360.

**New Jersey.**—*Fitzgerald Speer Co. v. Kelly* (1912) 83 N. J. L. 626, 85 Atl. 1134, affirming (1911) 81 N. J. L. 6, 83 Atl. 491.

**New York.**—*A. Schwoerer & Sons v. Stone* (1909) 180 App. Div. 796, 115 N. Y. Supp. 440, affirmed in (1911) 200 N. Y. 560, 93 N. E. 1116; *Windsor Constr. Co. v. Ruland* (1916) 173 App. Div. 94, 159 N. Y. Supp. 446; *Levitt v. Griswold* (1914) 148 N. Y. Supp. 320.

**Oklahoma.** — *Kesler v. Cheadle* (1903) 12 Okla. 489, 72 Pac. 367.

**Pennsylvania.**—*Jefferson County v. Slagle* (1870) 66 Pa. 202; *Burr v. Mazer* (1896) 2 Pa. Super. Ct. 436.

In *Emerson v. Slater* (U. S.) *supra*, it appeared that the person contracting for the construction of bridges for a railway company, after the contract was partially performed, refused to proceed thereunder for the reason that the railway company failed to make the monthly payments according to the terms of the contract. To remedy this difficulty and insure the completion of the bridges so as to render the road available for use, the defendant contracted with the plaintiff for the completion of the bridges. This contract was held not to be within the statute.

It does not appear that the defendant was a stockholder in the corporation, but he was a creditor of the corporation, and held an assignment of the proceeds of the railroad for a certain period of time.

In *A. Schwoerer & Sons v. Stone* (1909) 130 App. Div. 796, 115 N. Y. Supp. 440, affirmed in (1911) 200 N. Y. 560, 93 N. E. 1116, a stockholder, in order to induce a construction company to perform a contract with the corporation, agreed that if the construction company went ahead and performed the contract, he would pay for everything done on the job. This promise was held to be original. The court said: "The promise sought to be enforced related to the indebtedness thereafter to be created. It was an original promise, founded upon a new consideration, which was work thereafter to be performed and materials thereafter to be furnished. . . . It was beneficial to the promisor by reason of his interest in the Wolff Construction Company or the Mannados Realty Company, or both. Thus, the case is brought within the rule laid down in *White v. Rintoul* (1888) 108 N. Y. 222, 15 N. E. 318, in which the court said: 'Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.'"

In *Windsor Constr. Co. v. Ruland* (1916) 173 App. Div. 94, 159 N. Y. Supp. 446, the court said that an agreement by stockholders in a realty company to pay a contractor for his work for the company, provided he completed the contract and did not file a mechanics' lien for the amount then due, was original as to money due and work thereafter performed, provided the work was performed in reliance upon the promise. It was held, however, that, as a matter of fact, the promise relied upon had not been made.

It has been held that where a con-

tractor released a mechanics' lien filed against property, and continued to perform the contract according to the direction of an officer of the corporation upon the agreement of the latter to pay the amount due under the contract and the amount thereafter to be earned thereunder, the promise was original, and not within the statute. *Levitt v. Griswold* (1914) 148 N. Y. Supp. 320; *Windsor Constr. Co. v. Ruland* (1914) 148 N. Y. Supp. 386.

In *Kesler v. Cheadle* (1903) 12 Okla. 489, 72 Pac. 367, the promise by an officer and stockholder of a corporation that he would see that the promisee was paid for all coal then delivered for the use of the corporation, and which should thereafter be delivered by him, was held to be original, both as to the coal already delivered and that subsequently delivered. In this case the evidence showed that after the promisee had delivered part of the coal to the corporation and had not been paid therefor, the bill was presented to the promisor and he was asked who was to pay it; the promisor did not at the time pay the bill, but said to bring the bill in at a later time and to go ahead and deliver more coal and he would see that it was paid. Under these circumstances it was held to be a question of fact for the jury as to whether or not the promise was original and not within the statute, or collateral and within it.

In *Winne v. Mehrbach* (1909) 130 App. Div. 329, 114 N. Y. Supp. 618, it appeared that a stockholder of a corporation which was indebted for ice theretofore furnished agreed to pay whatever amount the corporation was eventually short, including the amount then unpaid and the amount unpaid for ice thereafter furnished. The validity of this agreement was sustained as to the amount unpaid by the corporation for ice subsequently furnished, but as to the amount then unpaid the promise was held to be within the Statute of Frauds.

A case of interest on this point is *Davis v. Patrick* (1891) 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58. It

does not appear that the defendant, promisor, was a stockholder in the corporation; but it does appear that he represented to the promisee that he was practically the owner of the corporation, and, as a matter of fact, the corporation was largely indebted to him. Under these circumstances, in order to secure the payment of his debt from the corporation, it was to his interest that its product should be transported, and to secure such transportation, he promised the plaintiff that he would be personally responsible for his pay if he transported such product, and said that he would see him paid. Notwithstanding the form of the promise, it was held to be original. While conceding that in form this promise implied that someone else was also bound, the court said: "But the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. That Davis understood it in the same way is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes that he did. The plaintiff, believing that Davis was, as he said, practically the owner, the party primarily to be benefited by the conversion of the products of the mine into money, understood that Davis was making an original promise to pay for the work which he might do, and upon such promise he might surely rely as an original promise, at least for any work done thereafter."

Compare with the reported case (*RICHARDSON PRESS v. ALBRIGHT*, ante, 1195). In this case the facts were that a stockholder in a publishing company was asked by a creditor of the company to make some arrangement for the payment of its past-due

claim against the company. The defendant explained that he had nothing to do with the direction or management of the company, but expected subsequently to assume the management thereof, and that he would be glad to meet the creditor and make arrangement for the payment of the back account due it and for the performance of further work by it for the company. Subsequently the defendant agreed to pay a certain amount of the existing indebtedness of the company in instalments, and further agreed to pay for subsequent work by the promisee in cash, the promisee having notified the publishing company that it would not continue to do work for it unless the cash was in evidence. This promise was held to be collateral, and within the Statute of Frauds, even assuming that the promisor was speaking for himself, and not merely as representative of the company, and although there were some elements of an original promise in the agreement in question, and technically the promisor had a substantial interest to subserve in making the promise. The court said that the element of a new consideration moving to the promisor was present, but his beneficial interest was at best remote, and in this connection it is pointed out that the principal debt was not extinguished, and credit was still given, and to be given, to the publishing company.

In *Hurst Hardware Co. v. Goodman* (1910) 68 W. Va. 462, 32 L.R.A. (N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218, the facts were that the officers and stockholders of a corporation orally promised to pay for goods furnished the corporation. The promise was made after the corporation had failed to pay its bills promptly, and the sellers declined to fill further orders, whereupon the defendant made the promise relied upon to bind him personally, in which the promisor was to be personally responsible for amounts to become due on all further purchases by the corporation. This promise was held to be collateral and within the Statute of Frauds, upon the ground that it did not appear that



there was anything of advantage or personal benefit, which accrued directly and immediately to the promisor.

*IV. Promise to induce forbearance by creditor of corporation.*

In jurisdictions which adhere strictly to the rule that an oral promise to pay the debt of another is within the Statute of Frauds unless the primary purpose of the promisor was to secure some personal benefit or advantage for himself, it is held that an oral promise by a stockholder to pay a debt of the corporation, made to induce the promisee to forbear to press or prosecute his claim against the corporation, is within the Statute of Frauds and void, since the benefit accruing to the promisor from the mere fact of his being a stockholder in the debtor corporation is not a sufficient consideration to make the promise an original one.

In *Carleton v. Floyd, R. & Co.* (1906) 192 Mass. 204, 78 N. E. 126, the facts were that a stockholder was about to acquire the business of a corporation, and he orally promised to pay a debt against the corporation if the creditor would refrain from attaching its property. This promise was held to be within the Statute of Frauds. The court, in reaching this conclusion, quotes from the language by Morton, J., in *Ames v. Foster* (1871) 106 Mass. 400, 8 Am. Rep. 343, to the effect that "the defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. . . . When all these elements concur, we know of no case in this commonwealth which sanctions the doctrine that such promise loses its character as collateral, and be-

comes an original promise, because there is a consideration which is beneficial to the promisor."

In *Walther v. Merrell* (1878) 6 Mo. App. 370, an oral agreement by the president of a bank to a depositor to pay him the entire amount of his deposit if the bank should fail was held to be within the Statute of Frauds, although made for the purpose of, and actually resulting in, inducing the depositor to permit the deposit to remain with the bank. The court said: "In the case at bar, the promise was to pay the debt of another. Merrell was certainly not the bank. The promise was clearly collateral. Merrell was to pay the deposit to plaintiff if the bank should close; the indebtedness of the bank existed when the promise was made, and still subsisted. Here was no distinctly new consideration moving directly to the promisor, and substantial, so as to be a clearly sufficient motive for the transaction. The main object was forbearance to the bank, and any benefit to the promisor was merely incidental. It is true, defendant was an officer and shareholder of the bank, and might be benefited by the action of plaintiff in leaving the deposit; but that is not enough."

But in *Yracheta v. Stanford* (1909) 120 N. Y. Supp. 117, where goods were furnished a partnership which was subsequently succeeded by a corporation, a promise to pay for the goods by one who was a member both of the partnership and the corporation was held to be collateral, there being no question of forbearance by the promisee.

And in *Friedlin v. Crockin* (1911) 122 Va. 521, 95 S. E. 432, a promise by a stockholder of the corporation to pay the rental of property rented to the corporation was held to be collateral and within the Statute of Frauds, there being no evidence that the creditor released the corporation or waived any rights to subject the corporate assets to the payment of the indebtedness.

In some jurisdictions, however, on the theory that a consideration which is independent and sufficient to support a contract will take an oral prom-

ise out of the Statute of Frauds, forbearance by the creditor to press a claim against the corporation has been held to be a sufficient consideration to sustain as original a promise by a stockholder of the corporation to pay the debt in consideration of such forbearance.

Thus, in *Goodling v. Simon* (1913) 54 Pa. Super. Ct. 125, where a creditor of a corporation was threatening to sue it on a note, thereby forcing the company into a situation which would be dangerous to the interest of the promisor, a stockholder and creditor of the corporation, and he thereupon promised to pay the debt within a certain time if the creditor refrained from suing the corporation, the promise was held to be original. The court stated the rule to be that wherever the main purpose and object of the promisor was not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or loss to the other contracting party, his promise was not within the statute, although the promise to pay the debt of another, and this was true even though as a result the debt of the corporation was extinguished.

In *Enterprise Trading Co. v. Bank of Crowell* (1914) — Tex. Civ. App. —, 167 S. W. 296, it was held that a promise by a trustee for the sale of the goods of the corporation, who was also a stockholder, to pay a note against the corporation in consideration of forbearance by the creditor to press the claim, was original. The court pointed out that while there was not an agreement of forbearance directly in favor of the debtors owing the note to the bank, yet the effect of the agreement operated to that extent; "the agreement is to forbear the exercise of legal rights against a third person, a corporation, and its representatives interested therein. If the promise is collateral, and the original debt continues, and such promise is not one based upon some new consideration to the promisor so as to except it from the statute, of course it must be in writing." Upon this point it is said that the testimony shows that the

promisor was not only subserving a purpose of the corporation, but was also subserving a personal purpose.

In *Thompson v. Hazelwood Sav. & T. Co.* (1912) 234 Pa. 452, 83 Atl. 284, where an officer of a corporation agreed with the bank that if it would renew a note against the corporation, he would deposit in the bank a certain sum of money and would not withdraw this deposit till the note was paid in full, the agreement was held to amount to a pledge of the deposit, and hence not to be within the Statute of Frauds.

In *Creel v. Bell* (1829) 2 J. J. Marsh. (Ky.) 309, where a stockholder and director of a bank induced a depositor to permit the use of his deposit by the bank to discharge certain of its debts, by orally promising to pay the amount of the deposit, the court, in holding the promise to be original, and not within the statute, said: "The promise in this case (if there be one) may not be, and we would suppose is not, within the statute. It was made with approbation of the bank to pay to the Bells the debt which Creel owed the bank, in consideration that they would not draw their deposit, but let the bank use it. Here is a new contract, on a distinct consideration. It is not a collateral undertaking, barely to pay the debt of the bank. It is independent contract to pay the creditors of the bank the debt which Creel owed the bank. The consideration is the use of the deposit on one side, and the debt due by Creel on the other. Such a contract on a new consideration between the parties is not a contract merely to pay the debt of another, it is a contract on a sufficient consideration, unconnected with the liability of the bank to pay the debt of Creel himself. . . . And, therefore, it may be binding without being reduced to writing. . . . Where the promise is founded upon some new consideration sufficient in law to support it, and is, not merely for the debt, etc., of another, such an undertaking, though, in effect, it be to answer for another person, is considered as an original promise, and not within the statute; as where A promises B to

pay him a sum of money in case he will withdraw his record in an action of assault and battery (against C)."

*V. Promise to induce further loans to the corporation.*

In *Mechanics' & T. Bank v. Stettheimer* (1906) 116 App. Div. 198, 101 N. Y. Supp. 513; where the stockholders orally guaranteed the payment of all loans thereafter made to the corporation by a bank, the court, in holding that, although the bank continued to make loans to the corporation upon the faith of this agreement, the promise was nevertheless collateral, said that there was no distinction between a case "where an antecedent indebtedness existed at the time of the promise, and a case where the indebtedness is created subsequent to the promise. The liability of the promisor must in each case be determined by the nature of the promise, whether it was to answer for the debt of a third person or whether it was to answer for his own debt. In this case, was the note of the beer cask company that was discounted by the plaintiff, and the checks of the beer cask company which were paid by the plaintiff and which created the overdraft, a loan to the corporation which the defendant and his copromisors agreed to guarantee or pay if the beer cask company did not? It is undoubtedly true that the money was advanced to the beer cask company in reliance upon the promise of the defendant and his copromisors to be responsible for the loan, but it was clearly a loan to the company, and not to the promisors. Mr. Wallach testified to the offer made by the plaintiff's president, that he would 'advance the company whatever money the company required, provided that we who were there would be responsible for it.' The plaintiff's president testified that 'the conversation was about borrowing some money for the company, and I told them that the bank would not loan the American Beer Cask Company any money, as they do not loan money to corporations. Then they all agreed to loan this money, and each one would guarantee their proportionate share for the amount of that note,

or any moneys that would be wanted for the benefit of the American Beer Cask Company.' On cross-examination he said: 'The amount of money which I say Mr. Stettheimer, in common with others, guaranteed to make good to the bank, was such moneys as should be advanced by the bank on notes or overdrafts after that date;' and on the faith of this agreement the plaintiff advanced not to the promisors, but to the company, and the advances were used by the company in the transaction of its business. The subsequent transactions were all between the company and the plaintiff; its note was discounted by the plaintiff, and was renewed from time to time; its checks were paid by the plaintiff, as presented. The bank could not have collected from the defendant and his copromisors the amount of this note, which it had discounted, until the note became due. The whole course of business shows that it was the company to which the bank advanced the money, and it was the company that was primarily responsible for the amount of the note and of the overdrafts. The promise was to guarantee or be responsible for the amount of the note of the company that the bank discounted, or of the overdrafts made by the company. Within the rule established in this state, this was the company's debt, and the agreement sought to be enforced was an agreement to answer for the company's debt, and not for the debt of the promisors. I think this promise was within the statute and is, therefore, void."

*VI. Promise to induce compromise of claim against the corporation.*

The majority of the cases considering the point hold that where the purpose or object of an oral promise by a stockholder to pay a debt of the corporation is to induce the creditor to compromise or settle his claim against the corporation, the promise is original, and not within the Statute of Frauds.

Thus, in *Beall v. Board of Trade* (1912) 164 Mo. App. 186, 148 S. W. 386, the facts were that a creditor of a corporation agreed to release the

corporation from all claim against it on payment by it of a certain per cent of the indebtedness and the assumption by an officer of the corporation of the balance of the indebtedness. This agreement by the officer was held to be an original promise, and hence not within the Statute of Frauds.

In *Whitaker v. Greene* (1918) — R. I. —, 103 Atl. 779, it is held that the promise to the creditor of a corporation which was in financial difficulties that if he would settle his claim against the corporation on the basis of 50 per cent thereof, the promisor would pay the balance, was held to be original, and not within the Statute of Frauds. It appeared that the promisor had been a stockholder in the corporation, but it was not clear whether or not he was such stockholder at the time of making the promise in question. In reaching its conclusion, the court said: "This is not a case of a promise to pay the debt of another, but is a promise on the part of the deceased to pay to the plaintiff a certain specified sum in consideration of the surrender by the plaintiff to the corporation of the balance of his claim against the corporation and the evidence thereof in the form of notes. It does not appear exactly when [the promisor] ceased to hold an interest in the corporation, and there is some evidence to the effect that he still had a legal interest in the corporation at the time when this promise is alleged to have been made. If such was the fact, and the plaintiff in consideration of his promise refrained from bringing bankruptcy proceedings, this is a sufficient consideration for the new agreement; but if we assume that Mr. Greene did not have any legal interest in the corporation at the time this promise was made, if the plaintiff, acting in reliance upon this promise of Mr. Greene, surrendered the balance of his claim and the notes to the corporation, this would be a detriment to the plaintiff, and consequently a legal consideration for the promise of Mr. Greene, even although the latter derived no benefit from the performance of the promise."

According to the California Code,

the promise to answer for the obligation of another is to be deemed original where the promise is for an antecedent obligation, and it is made upon the consideration that the promisee will cancel such antecedent obligation and accept the new promise as a substitute therefor, or if there is a consideration beneficial to the promisor. In *Fairchild v. Cartwright* (1918) — Cal. App. —, 178 Pac. 333, applying this provision, it is held that an oral promise by the president of a corporation to pay certain obligations of the corporation in consideration of the promisee agreeing to take less than the whole amount of his claim against the corporation is original.

In *Temple v. Bush* (1903) 76 Conn. 41, 55 Atl. 557, the president and managing officer of an insolvent corporation, in making a settlement with its creditors, undertook and agreed to take the assets of the corporation and pay the claim of the plaintiff and certain other creditors in full, and a per cent of the balance of the claims, and further agreed that if the assets of the corporation were not sufficient for this purpose, he would pay the balance from his own money. This agreement was held to be within the Statute of Frauds.

*VII. Where promisor owns substantially all the stock of debtor corporation.*

It has been held that where the promisor owned substantially all of the stock of the corporation, and was transacting his own business in its name for personal convenience, his oral promise to pay a debt of the corporation is based upon a sufficient consideration running to him personally to make the promise original, and hence not within the statute.

For example, in *Donovan v. Purtell* (1905) 216 Ill. 629, 1 L.R.A. (N.S.) 176, 75 N. E. 334, it was held that where a person organized a corporation and used it for the purpose of transacting his private business, he is personally liable for the repayment of money which was owing by the corporation and which he orally promised to pay. And see *Davis v. Patrick* (1891) 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58, *supra*.

But in *Turner v. Lyles* (1904) 68 S. C. 392, 48 S. E. 301, it is said that the test to determine whether or not the promise to pay the debt of another is original or collateral is whether there is a new consideration given to the promisor. Applying this test, it was held that the fact that the promisor was the owner of 499 out of 500 shares of stock in a corporation was not a new consideration for his promise to pay a debt of the corporation, so as to make the promise an original one.

And in *Goldie-Klenert Distributing Co. v. Bothwell* (1912) 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D, 849, the seller of goods to a corporation, to be paid for in cash on delivery, having refused to deliver them until paid, a stockholder of the corporation represented to the seller that he was virtually the corporation, but for certain reasons operated the business in its name, and agreed to pay for the goods then delivered and goods thereafter to be delivered if the seller would deliver the goods in question and furnish other goods which should be ordered in the name of the corporation. This promise was held to be collateral and within the Statute of Frauds. The court said that the true import and meaning of the complaint as an entirety was that the promisor induced the promisee to forego its demand upon the corporation for immediate payment of the first account and to extend it further credit upon the promise to indemnify it against loss. This, the court remarked, was clearly the promise to answer for the debt of another. And see the reported case (*RICHARDSON PRESS v. ALBRIGHT*, ante, 1195).

*VIII. Promise by one stockholder to another.*

In *Cortelyou v. Hoagland* (1885) 40 N. J. Eq. 1, it appeared that one both a director and stockholder indorsed a note for the corporation upon the oral promise of other stockholders that if he would do so, they would jointly and severally save him from all loss incurred thereby. This promise was held to be original, and hence not within the Statute of Frauds.

In *Grant v. Pearce* (1894) 16 Ky. L. Rep. 204, an oral agreement by a stockholder of a corporation to advance his proportionate share of the money necessary to pay the debts of the corporation on condition that other stockholders did likewise was held not to be within the Statute of Frauds. The court said that while the money was advanced ostensibly to the corporation, it was in reality advanced for the purpose of putting the concern on a successful basis.

But in *Bennighoff v. Robbins* (1917) 54 Mont. 66, 166 Pac. 687, a promise by one stockholder to another that if the latter would pay the debts of the corporation and the corporation was eventually unable to repay the money advanced, he would pay one half thereof, was held to be collateral and within the statute.

*IX. Where promisor is substituted as debtor.*

Of course, where the promisor is substituted as a debtor in place of the corporation, the release of the corporation and the substitution are a sufficient consideration to support the promise, and being original in character it is not within the Statute of Frauds.

In *Hurst Hardware Co. v. Goodman* (1910) 68 W. Va. 462, 32 L.R.A. (N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218, the court remarked: "If, in substance, effect, and main purpose, the oral agreements were for his [the promisor's] benefit, the promises were original, and not collateral undertakings. It is not enough merely to say he was benefited by them. In ordinary contract law a benefit to the promisor or detriment to the promisee constitutes a sufficient consideration. The question we are called upon to determine goes beyond this. How far the policy which dictated the Statute of Frauds, and the terms in which the legislative will is expressed, must have weight in the solution thereof. In almost every instance of the assumption of one man's debt by another there is some reason for the promise, some benefit accruing to the promisor as well as the debtor. The acknowledged and expressly declared purpose of the stat-

ute is to preclude the establishment of rights by oral testimony, when the situation of the parties is such as to constitute a strong motive for perjury and fraud in establishing a liability, or the false extension or amplification of conversations and transactions so as to make them impose obligations lying beyond their real scope and effect. To this end, it ordains and declares that no action shall lie to charge any person upon a promise to answer for the debt, default, or misdoings of another, unless the promise or some memorandum or note thereof be in writing, signed by the party to be charged thereby or his agent. Tested by its letter, the statute inhibits proof of an oral promise to pay the debt of a third person. That some benefit accrues to the promisor for the service rendered, or the property sold and delivered, to such third person, does not necessarily make the debt that of the promisor or prevent it from being that of such third person. If the debt is that of another, and not of the promisor, the terms of the statute include it, and an incidental benefit accruing to the promisor cannot exclude it. If, on the other hand, the debt is that of the promisor, the promise is not within the statute, though a third person may be incidentally relieved of an obligation in consequence of payment. If, for a consideration, the promisor has assumed the debt of another and made it his own, the promise lies beyond the terms and policy of the statute. Neither its terms nor policy relate exclusively to the subject of benefit or detriment. The subject-matter is the mode of proof of the assumption by one man of another's debt. Therefore, whether the debt is that of another is the true test."

In *Maule v. Bucknell* (1865) 50 Pa. 39, the court said: "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an arrangement by which the debt of the other is extinguished, as where the creditor gives up his claim on his orig-

inal debtor, and accepts the new promise in lieu thereof, it need not be in writing. And as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for the payment of the debt. But except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated, that while the old debt remains, the new must be regarded as not an original undertaking, and that it is therefore within the statute. At least this may be stated as a principle generally accurate."

In *Fields v. Bullington* (1917) 20 Ga. App. 102, 92 S. E. 653, an oral promise by an officer of a corporation to pay a debt due from the corporation was said not to be within the Statute of Frauds if there was a substitution, but there was held to be no substitution where the corporation did not officially agree thereto, and hence the promise in question was held to be within the Statute of Frauds.

#### *X. Contemporaneous promise.*

##### *a. In general.*

It is obvious that where the promise is in form and effect an original promise to pay for goods or material to be furnished or work done for a corporation, the promisor is the original debtor, and he is not collaterally liable merely because the corporation receives the benefit of performance on the part of the promisee, hence the promise is not within the statute.

In *Rubey Trust Co. v. Weidner* (1913) 174 Mo. App. 692, 161 S. W. 333, it appeared that a bank upon which checks of a corporation were drawn refused to pay the same on the ground that there were no funds of the corporation on deposit to meet checks. Thereupon a stockholder and officer of the corporation offered to pay the amount of the checks to the bank if the latter would honor and

pay them. This promise was held to be original, not collateral.

In *Uvalde Nat. Bank v. Brooks* (1914) — Tex. Civ. App. —, 162 S. W. 957, it appeared that a bank refused to loan money to a corporation, but agreed to make a loan to certain directors. The loan thus made was held to be the original debt of the directors.

In *Whinnery v. Cundiff* (1915) — Iowa, —, 150 N. W. 659, the owner of property refused to lease it to a corporation upon its responsibility, whereupon an officer agreed to pay the rental, and the rent was charged to him and statement thereof sent to him. This promise was held not to be within the statute.

In *Kanter v. M. Hofheimer & Co.* (1916) 118 Va. 625, 88 S. E. 60, it appeared that a stockholder and manager of a corporation which was engaged in retail trade promised to pay for goods to be delivered to the corporation, the seller having refused to sell and deliver them to the corporation upon the order of the latter. This promise was held to be original.

In *Manary v. Runyon* (1903) 43 Or. 495, 73 Pac. 1028, the president of a corporation promised a person negotiating with the corporation for a certain contract that if the contract was not entered into, he would pay such person his expenses and attorney's fees incurred in the negotiations. This promise was held to be original, and not collateral.

*b. Where a charge is made against the corporation.*

A difference of opinion apparently exists among the courts as to the effect of the act of the creditor in charging to the corporation the price of goods he furnishes it upon the promise of a stockholder to pay therefor. This difference, however, is more apparent than real. Such a charge undoubtedly is evidence of an intent to look to the corporation as the primary debtor, and the language used in some of the opinions would indicate that such a charge is regarded as conclusive against the creditor. It is fair to assume, however, that the court had in mind only the facts of the particular case, and was merely referring to

the effect of the charge to the corporation as an evidentiary fact in view of the circumstances, without any intention of asserting a rule of law.

For example, in *Hurst Hardware Co. v. Goodman* (1910) 68 W. Va. 462, 32 L.R.A.(N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218, the court said: "By charging the goods to the corporation and demanding payment thereof from it, the vendors disclosed manifest, positive, and unequivocal intent to hold it a debtor to them. In seeking now to hold Goodman also, they are attempting to make him pay the acknowledged debt of the corporation. In such cases the decisive test is to whom credit was given, and it must have been given to the promisor alone. If the creditor relies upon the person to whom the property is delivered or for whom the service is rendered to any extent whatever, the promise is collateral and void, if not in writing. . . . Here the charging of the goods to the corporation, rendition of statements to it, and assertion of claims therefor against it in the bankruptcy proceeding, all admitted by the plaintiff, effectually preclude a finding in its favor. A verdict for it, on this theory of the case, could not be sustained."

In *Roscoe Lumber Co. v. Reynolds* (1908) 124 App. Div. 539, 108 N. Y. Supp. 1018, lumber was delivered to a third person for the construction of a building in which a corporation was interested, upon the promise of an officer of the corporation to pay for all the lumber delivered to this building. The promisee stipulated at the time that it would deal only with the promisor personally. A bill, however, was subsequently rendered to the principal debtor. Under these circumstances the promise was held to be collateral.

In *Shannon v. American Iron & Steel Mfg. Co.* (1917) 66 Pa. Super. Ct. 211, it appeared that certain officers of a corporation requested the dealer to furnish to a contractor anything he might need in the construction of a building for the corporation, and that such officers would see that he was paid. This promise was held to be

collateral. The court pointed out that the bills were made to the contractor, who was credited with payments made, and the whole transaction fairly raised the inference that the primary liability was that of the contractor, and that the defendants were looked to as guarantors of the debt. The court said: "We do not regard the arrangement as one in which the leading purpose and effect of the transaction were the benefit which the defendant derived, from which it might fairly be said that the debt was that of the latter rather than of Weller. The material furnished did not enter into the structure of the defendant's property, and was of a character which might have been obtained in other places in the open market. The purpose of the promise was to guarantee the payment of the bill which Weller contracted for the goods ordered by him. In such a case the promise is within this statute, and not enforceable in an action at law."

In *Searight v. Payne* (1874) 2 Tenn. Ch. 175, 13 Mor. Min. Rep. 401, a seller was denied the right to recover from certain officers of a corporation for goods sold the corporation, although such officers had promised to pay for the same. It is pointed out that the testimony showed that the sale was made and the credit given exclusively to the corporation, hence the promise to pay the debt was within the Statute of Frauds.

The distinction between the statement of the effect of the creditor charging to the corporation the price of goods furnished it as an evidentiary fact and as a rule of law is recognized in *S. J. Cordner Co. v. Manevetz* (1918) 92 Conn. 587, 103 Atl. 842. In this case the question was presented as to whether or not the oral promise of an executive officer of a corporation to pay for goods sold to and upon the credit of said corporation, to be charged in the bill to it, binds the officer individually. The court said that if this was the actual question presented, the trial court erred in holding that the promise was not within the statute. It is, however, pointed

out that it does not appear in the record that the goods were sold upon the credit of the corporation, although it does appear that the goods were charged to it and received and used by it for its benefit. The court said that these facts are indeed evidence, more or less convincing according to circumstances, tending to prove that the original credit was given to the corporation, but they are not conclusive, and added: "The promise required by the Statute of Frauds to be in writing is a promise to answer for the debt of another, not the promisor's own debt. The only question in the case is, Was this the defendant's own debt, which it is admitted he agreed to pay, or was it in a legal sense the Trucking Company's debt? To whom was the credit originally given? This is always a question of fact. Cases may be found where it has been held that the evidence does not justify the conclusion of the trier upon this question, but none that hold that it is a question of law. The finding in this case does not state in direct terms that the court finds as a fact that the original credit was given by the plaintiff to the defendant, but states that the court reached this conclusion: 'That the promise of the defendant to pay for the gas and oil . . . was an original undertaking, and not an undertaking to answer for the debt . . . of another.' Whether this conclusion be regarded, as intended by the court, as one of fact or of law, is of no importance in this case, because the facts detailed in the finding justify the conclusion, as a fact, that the credit was given to the defendant, and no other rational conclusion is possible."

In *Kesler v. Cheadle* (1903) 12 Okla. 489, 72 Pac. 367, the fact that the goods delivered were charged to the corporation, followed by a statement "guaranteed by the promisor," was held not to be conclusive upon the promisee as to the character of the promise, the promisee testifying that this charge merely signified that the articles were delivered to the corporation, and did not indicate the person to whom it was charged. A. G. S.



## STATE OF NORTH CAROLINA

v.

JIM COOPER, Appt.

*North Carolina Supreme Court—December 1, 1915.*

(170 N. C. 719, 87 S. E. 50.)

**Evidence — declarations to show insanity.**

1. Declarations of one accused of crime are admissible in evidence at the trial not only to show insanity, but also weakness of the mental faculties. [See note on this question beginning on page 1219.]

— statement to officer.

2. Statements to an officer by one in custody or even in jail are not incompetent evidence against him if they were voluntary.

[See 1 R. C. L. 472.]

— statements showing state of mind.

3. Statements by one under arrest for murder, to an officer, in response to a question as to why he killed deceased, are admissible as showing the state of his mind at the time of the homicide.

[See 8 R. C. L. 191; 18 R. C. L. 920.]

— insanity — observation of attendant.

4. Upon the question of insanity of one accused of murder the sheriff may give his opinion based on observation, although the observation was subsequent to the time of the killing.

[See 8 R. C. L. 189; 14 R. C. L. 620.]

— declarations showing state of mind.

5. Where a particular state of mind of a person is a relevant fact, declarations which indicate its existence are admissible and circumstantial evidence, and are considered as primary evidence notwithstanding declarant is available as a witness.

[See 1 R. C. L. 491.]

— proximity of declarations to crime.

6. To be admissible to show the state of mind of one who committed crime his declarations must have been made at a time sufficiently close to the commission of the crime to have some probative force in regard to the mental

condition at the time, of the one who committed the act.

[See 14 R. C. L. 620.]

**Criminal law — effect of insanity on responsibility for crime.**

7. One so insane as to be incapable of having a criminal intent is not, in law, responsible criminally for his acts.

[See 14 R. C. L. 598.]

— degree of insanity necessary.

8. To be a defense to crime, insanity must render accused incapable of understanding the nature and quality of the act he is about to commit, or of distinguishing between right and wrong either generally or with reference to the particular act.

[See 14 R. C. L. 599 et seq.]

**Appeal — omission in charge — effect.**

9. Omission, by the court in charging the jury that if accused has failed to satisfy the jury they must make a certain finding, of the words, "from the evidence," is not reversible error if the words had been used in an immediately preceding sentence so that the jury could not have been misled.

— charge correct as whole.

10. If when considered as a whole the charge presents the law fairly and correctly to the jury there is no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

[See 14 R. C. L. 817.]

**APPEAL** by defendant from a judgment of the Superior Court for Rowan County (Shaw, J.) convicting him of murder in the first degree. *Affirmed.*

Statement by Walker, J.:

The defendant was charged with the murder of Lucinda Price. It

appears that he had a wife, who lived in Charlotte, and that he had for some time previous to the homi-

cide been living in Salisbury with the deceased.

Lee Scott, a witness for the state, testified: "I am cousin to defendant James Cooper; saw him on 28 March, this year, at Leroy Lyerly's house; Rose Smith and Lucinda Price were there; it was about 7 or 8 o'clock in the evening; Rose Smith was sitting next to the fireplace in the back room. Lucinda Price, the deceased, asked Jim Cooper why he did not go home; Jim said nothing; in about fifteen minutes James Cooper left; did not say anything; was gone about twenty minutes, and came back; came in the front door with a shotgun; stepped up into the door behind me. Lucinda Price, deceased, was near the door and was just getting up; she hollered and Jim Cooper shot her; she tried to run from him and was on the right side, close to the door. He shot her once. He ran out of the door and said nothing. I saw him next, after he was arrested on Thursday; the killing was on Saturday. I never heard Jim Cooper and Lucinda Price talking together. I did hear him ask Lucinda if she was going to leave, two or three weeks before the killing. She lived about two or three minutes after he shot. I saw her after she died."

Claude Hoskin, witness for the state, testified substantially to the same facts.

The cross-examination of the witnesses for the state and the testimony of the defendant's witnesses indicated that the defense was insanity, and the prisoner was allowed the benefit of this plea.

The prisoner appealed from the judgment upon a verdict finding him guilty of murder in the first degree.

Messrs. A. H. Price and J. M. Waggoner for appellant.

Messrs. T. W. Bickett, Attorney General, and T. H. Calvert, Assistant Attorney General, for the State:

Statements made to an officer are not incompetent simply because the defendant was at the time in custody or in jail.

State v. Jones, 145 N. C. 466, 59 S.

E. 353; State v. Smith, 138 N. C. 700, 50 S. E. 859; State v. Bohanon, 142 N. C. 695, 55 S. E. 797; State v. Horner, 139 N. C. 603, 52 S. E. 136, 4 Ann. Cas. 841; State v. Exum, 138 N. C. 600, 50 S. E. 283.

On a prosecution for murder, which is defended on the ground of insanity, evidence of acts, conduct, and declarations of the accused before and after, as well as at the time of the commission of the act charged, is competent, provided the inquiry does not call for too remote evidence.

21 Cyc. 948; 12 Cyc. 403; 1 Whart. Crim. Ev. 10th ed. § 55, p. 236; Berry v. Hall, 105 N. C. 154, 10 S. E. 903.

The charge of the court must be construed as a whole, and if it presents the law fairly and clearly there is no error, even though certain expressions, standing alone, might be erroneous.

State v. Robertson, 166 N. C. 356, 81 S. E. 689; State v. Fowler, 151 N. C. 731, 66 S. E. 567; State v. Lance, 149 N. C. 551, 63 S. E. 193.

Walker, J., delivered the opinion of the court:

The first exception was taken to the testimony of the policeman, M. N. Earnhardt, who was allowed to state what the defendant said to him after he was arrested and when the officer asked him "what he wanted to kill the woman for."

The third exception was taken to the testimony of the sheriff, as to the statement made by the defendant to him after his arrest.

Statements made to an officer are not incompetent simply because the defendant was at

Evidence—  
statement to  
officer.

the time in custody or even in jail, if they are voluntary. State v. Exum, 138 N. C. 600, 50 S. E. 283; State v. Horner, 139 N. C. 603, 52 S. E. 136, 4 Ann. Cas. 841; State v. Bohanon, 142 N. C. 695, 55 S. E. 797; State v. Smith, 138 N. C. 700, 50 S. E. 859; State v. Jones, 145 N. C. 466, 59 S. E. 353. Besides, this testimony was competent as showing the state of the prisoner's mind at the time of the homicide, as words, acts, and conduct are competent for this purpose, they being natural evidence.

—statements  
showing  
state of mind.

The prisoner objected to a question asked the sheriff by the solicitor: "From what you have seen of the defendant while in jail, state whether or not, in your opinion, he knows right from wrong." The

—insanity—  
observation  
of attendant.

ground of the objection was that the inquiry as to the defendant's mind should be confined to the time of the killing. "On a prosecution for murder, defended on the ground of insanity, evidence of acts, conduct, and declarations of the accused before and after, as well as at the time of the commission of the act charged, is competent, provided the inquiry does not call for evidence which is too remote." 21 Cyc. 948; 12 Cyc. 403; 1 Whart. Crim. Ev. 10th ed. § 55, p. 236.

It is well settled that where the particular state of mind of a person is a relevant fact, declarations which indicate its existence are admissible as circumstantial evidence, and are considered as primary evidence, notwithstanding that the declarant is available as a witness. Within the bounds of relevancy, the declarations may precede, accompany, or follow the occurrence of the principal act. 16 Cyc. 1180-1182. Judge Brewer said in *Mooney v. Olsen*, 22 Kan. 69, 77: "A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances. So that it is generally true that whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evi-

dence." In *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, which presents a careful analysis of this matter, Justice Selden says: "The difference is certainly very obvious between receiving the declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject, while in the latter it is the most direct and appropriate species of evidence." Declarations are competent not only to show insanity, but also weakness

—declarations  
to show insanity,  
to show insanity.

of the mental faculties. 16 Cyc. 1181. This court, by Smith, Ch. J., in *McLeary v. Norment*, 84 N. C. 235, 237, states the rule very clearly and the reasons underlying it. It was there objected that an interested witness could not testify to such declarations, being excluded by Code Civ. Proc. § 343 (Code 1883, § 590; Rev. 1905, § 1631), and the court met the objection in this way: "The conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observations of the acts and utterances of a person, can you arrive at a knowledge of his health of body or mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must any conclusion of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. Would it not be competent to show an attempt at self-destruction? And do not foolish and irrational utterances equally tend to show the loss of reason when proceeding from the same person? In either case the conduct

and the language may be feigned and insincere; but this will only require a more careful scrutiny of the evidence, and does not require its total rejection."

How better can we judge of a man's physical or mental state than by what he says or what he does? Greenleaf on Evidence, Redf. ed. § 102, says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence; and whether they were real or feigned is for the jury to determine." Lord Justice Mellish held that such evidence was admissible, not under the *res gestæ* notion, nor as original evidence, but as a distinct exception to the hearsay rule. The subject is fully reviewed in *Jacobi v. State*, 133 Ala. at p. 14, 32 So. 158, by Chief Justice McClellan, who quotes the neat phrase of Lord Justice Bowen: "The state of a man's mind is as much a fact as the state of his digestion," and may be proved by any declarations indicative of mental or bodily health or infirmity. The exception to the hearsay rule is admitted, we presume, because of necessity in making proof of the fact and the difficulty of showing it otherwise, or because it may be considered as natural evidence, and reliable, if sincere and not feigned, of which the jury must judge. If it should appear that the declarations are not genuinely expressive of the mental or physical conditions, they would, of course, be disregarded.

The declarations must have been made at a time sufficiently close to the principal occurrence as to have some probative force in regard to the mental condition of the person who committed the act or whose sanity is in question.

There is some testimony in this  
8 A.L.R.—77.

case that the defendant had been having something like epileptic attacks and that he was subject to fits, which had weakened his faculties, and that just before he assaulted the woman with his gun and killed her he was not in his normal condition of mind, but was rather sullen and morose, acted "curiously," and was indifferent to his surroundings. There was also testimony, coming from his own witnesses, that after the intimacy between him and the woman had ceased, and they had stopped living together, he became silent, sullen, and indifferent, and that he killed her shortly after the two had fallen out with each other and just after the deceased had asked him why he did not go home.

One who is so insane as to be incapable of having a criminal intent, which is one of the essential ingredients of crime, is

*Criminal law—  
effect of  
insanity on  
responsibility  
for crime.*

not, in law, responsible criminally for his acts, want of sufficient mental capacity to form such intent being a complete defense, and not merely a mitigating circumstance; but in order to be available as a defense the insanity, or want of mental capacity, must exist at the time the act is committed. 12 Cyc. 164, 165. It is said at the latter page: "Where a person becomes insane after commission of a crime, he cannot be tried while in such condition, but such insanity does not exempt him from responsibility and prosecution if he afterward becomes sane again. The former insanity of the accused does not excuse his crime if it appears that he recovered from it previously to the commission of the crime; but in the absence of such proof it will be presumed to be continuous to the time of the crime. The law does not require that the insanity shall have existed for any definite period, but only that it shall have existed at the precise moment when the act occurred with which the accused stands charged." Again, the insan-

ity must render the person incapable of understanding the nature and quality of the act he is about to commit or of distinguishing between right and wrong, either generally or with reference to the particular act. 12 Cyc. 165. While a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment. *Taylor v. Com.* 109 Pa. 262, 271.

The court, in *State v. Brandon*, 53 N. C. (8 Jones, L.) 463, 467, after referring to the defense, set up by the prisoner in that case, that he was under the influence of a superior and irresistible moral power or supernatural force which destroyed his free agency, said: "It assumes that the accused knew the nature of his act, and that it was wrong. The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will, brought about by the seductions of the Evil One, but which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome; otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deeming themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. To excuse one from criminal responsibility the

mind must, in the language of the judge below, be insane. The accused should be in such a state from mental disease as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and, with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not undertake to lay down any rule of universal application."

The charge of the court upon this phase of the case—the insanity of the prisoner at the time he killed the woman—was clear and full, and conformed to the rule we have stated.

The prisoner excepted to an instruction of the court to the effect that if he had failed to satisfy the jury that he did not have mental capacity sufficient to commit a crime the verdict would be guilty, the particular objection being that the court should have said, if he had failed to satisfy the jury "from the evidence" of his mental incapacity he should be convicted; but, in the sentence immediately preceding, the court had instructed the jury that, "if the defendant has satisfied you *from the evidence* that he did not have sufficient mental capacity to commit a crime, he should be acquitted." The two instructions are so intimately connected with each other that no intelligent jury could have misunderstood what was meant, nor can we reasonably suppose that they would find the fact one way or the other without any evidence, or otherwise than "from the evidence." The charge of the court must be considered as a whole, in the same connected way as given to the jury, and upon the presumption that the jury did not overlook

Appeal—  
omission in  
charge—effect.

any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous. *Kornegay v. Atlantic Coast Line R. Co.* 154 N. C. 389, 70 S. E. 731; *State v. Robertson*, 166 N. C.

—charge correct as whole.

356, 81 S. E. 689; *State v. Lance*, 149 N. C. 551, 63 S. E. 198; *McNeill v. Atlantic Coast Line R. Co.* 167 N. C. 390, 83 S. E. 704; *Thomp. Trials*, § 2407.

We believe that this covers all the exceptions taken at the trial to the rulings of the court and the charge, and in none of them do we find any ground for a reversal.

No error.

## ANNOTATION.

### Evidence of declarations of accused on issue of insanity.

#### I. General rule, 1219.

#### II. Application of rule:

##### a. Verbal statement:

1. Before commission of act, 1221.
2. After commission of act, 1222.
3. Before and after commission of act, 1224.

##### b. Written statement, 1225.

##### I. General rule.

The general rule seems to be that, where the sanity of a person accused of crime is in issue, his declarations, whether written or oral, made at the time of the offense or at a time sufficiently close thereto to have some probative force in regard to his mental condition, are admissible in evidence.

**United States.**—*United States v. Holmes* (1858) 1 Cliff. 98, Fed. Cas. No. 15,382; *Guiteau's Case* (1882) 10 Fed. 161; *United States v. Chisholm* (1907) 153 Fed. 808; *Perkins v. United States* (1915) 142 C. C. A. 638, 228 Fed. 408.

**Alabama.**—*McLean v. State* (1849) 16 Ala. 672; *Kimbrell v. State* (1900) 130 Ala. 40, 30 So. 454; *Cawley v. State* (1901) 133 Ala. 128, 32 So. 227; *Porter v. State* (1902) 135 Ala. 51, 33 So. 694; *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Braham v. State* (1904) 143 Ala. 28, 38 So. 919; *Gilbert v. State* (1911) 172 Ala. 386, 56 So. 136; *Howard v. State* (1911) 172 Ala. 402, 34 L.R.A.(N.S.) 990, 55 So. 255; *Granberry v. State* (1913) 184 Ala. 5, 63 So. 975.

**Arkansas.**—*Ince v. State* (1906) 77 Ark. 426, 93 S. W. 65; *Reed v. State* (1912) 102 Ark. 525, 145 S. W. 206.

**California.**—*People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520; *People v. Brent* (1909) 11 Cal. App. 674, 106 Pac. 110.

**Colorado.**—*Bulger v. People* (1915) 60 Colo. 165, 151 Pac. 937.

**Delaware.**—*State v. Reidell* (1888) 9 Houst. 470, 14 Atl. 550.

**Indiana.**—*Blume v. State* (1900) 154 Ind. 343, 56 N. E. 771.

**Iowa.**—*State v. Wright* (1900) 112 Iowa, 436, 84 N. W. 541.

**Kentucky.**—*Abbott v. Com.* (1900) 107 Ky. 624, 55 S. W. 196; *Cogswell v. Com.* (1895) 17 Ky. L. Rep. 822, 32 S. W. 935.

**Louisiana.**—*State v. Hays* (1870) 22 La. Ann. 39.

**Massachusetts.**—*Com. v. Spencer* (1912) 212 Mass. 438, 99 N. E. 266, Ann. Cas. 1913D, 552.

**Missouri.**—*State v. Kring* (1877) 64 Mo. 591, 2 A'm. Crim. Rep. 313; *State v. Speyer* (1905) 194 Mo. 459, 91 S. W. 1075; *State v. Porter* (1908) 213 Mo. 43, 127 Am. St. Rep. 589, 111 S. W. 529.

**Montana.**—*State v. Leakey* (1911) 44 Mont. 354, 120 Pac. 234.

**Nevada.**—*State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574.

**New York.**—*People v. Nino* (1896) 149 N. Y. 326, 43 N. E. 853; *People v. Miles* (1894) 143 N. Y. 383, 38 N. E. 456; *Lake v. People* (1854) 1 Park. Crim. Rep. 495.

**North Carolina.**—See the reported case (*STATE v. COOPER*, ante, 1214).

**Pennsylvania.**—*Sayres v. Com.* (1879) 88 Pa. 291.

**South Carolina.**—*State v. Driggers* (1910) 84 S. C. 526, 137 Am. St. Rep. 855, 66 S. E. 1042, 19 Ann. Cas. 1166.

**Texas.**—*Burt v. State* (1897) 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 40 S. W. 1000, 43 S. W. 344; *Cannon v. State* (1900) 41 Tex. Crim. Rep. 467, 56 S. W. 351; *Reinhard v. State* (1907) 52 Tex. Crim. Rep. 59, 106 S. W. 128.

**Utah.**—*State v. Brown* (1909) 36 Utah, 46, 24 L.R.A. (N.S.) 545, 102 Pac. 641.

**Washington.**—*State v. Constantine* (1908) 48 Wash. 218, 93 Pac. 317.

**Wisconsin.**—*French v. State* (1896) 95 Wis. 325, 67 N. W. 706, 10 Am. Crim. Rep. 606.

**Wyoming.**—*Keffer v. State* (1903) 12 Wyo. 49, 73 Pac. 556.

The ground on which such testimony is admitted was stated in *State v. Leakey* (Mont.) *supra*, as follows: "It is well settled that the declarations of one accused of crime, made either before or after the criminal act, may be given in evidence on the question of sanity or insanity, for the purpose of enabling the jury to ascertain the condition of his mind. . . . Such declarations are not admissible as a part of the *res gestæ*, nor as self-serving declarations, but on the theory that, as substantive evidence, they reflect light upon the condition of defendant's mind at the time of the act in question, and aid the jury in determining the presence or absence of a particular purpose or intent which is a necessary element of the crime charged."

It has, however, been held in several cases that statements made by the accused to a physician as to his condition and symptoms are not admissible as bearing on an issue of prior or subsequent insanity.

Thus, in *People v. Hawkins* (1888) 109 N. Y. 408, 17 N. E. 371, it was held that statements made by the accused to a doctor prior to the homicide, outlining his condition previously to the time he made the declarations, were inadmissible as bearing on the condition of his mind at the time of the homicide, and such statements could not furnish a basis for an expert opinion. The court said; "The prisoner's

declaration in November as to his condition in September was not competent as evidence of his actual condition at that time, nor could it be the basis of a scientific opinion as to whether he was sane or insane at that period. Had the question related to his condition at the time of the interview, the result might be quite different. Everything said or done at a given period serves to disclose the mental state of the actor, but his narration as to what he said or did, or of his feelings or bodily ailments upon a former occasion, furnishes no foundation for an opinion as to his actual state or condition at that time. It is of no higher grade than the declarations of third persons as to a past transaction, and in like manner is inadmissible."

So, in *State v. Dunn* (1903) 179 Mo. 95, 77 S. W. 848, wherein the accused interposed the plea of insanity as a defense to a murder committed by him, the court refused to allow in evidence a statement made by him to a doctor several days before the homicide, to the effect that he believed he was going crazy. The court assigned as its reason that the declaration was self-serving, and no part of the *res gestæ*.

To the same effect was *People v. Strait* (1896) 148 N. Y. 566, 42 N. E. 1045, wherein the accused interposed his insanity as a defense to an indictment for wife murder. The court held that statements made by the accused to a doctor several months after the murder were inadmissible in evidence as a basis for a scientific opinion as to the mental condition of the accused at the time of the homicide.

Compare *Perkins v. United States* (1915) 142 C. C. A. 638, 228 Fed. 408, set out at length *infra*, II. a, 1.

In *People v. Ellsworth* (1900) 127 Cal. 595, 60 Pac. 161, it appeared that the accused was tried for murder and set up the plea of insanity. The court held that the statements of the accused made several months prior to the homicide, showing that he lived in great fear of his life, were inadmissible as tending to prove his insanity,

where this fear in no way partook of the character of a delusion.

In North Carolina, it has been held that in a prosecution for murder where insanity is relied on as a defense, the declarations of the prisoner after the homicide are not admissible in evidence to prove his insanity at the time of the trial, unless such declarations are part of the *res gestæ* and accompany the act. *State v. Vann* (1880) 82 N. C. 631. See to the same effect, *State v. Scott* (1820) 8 N. C. (1 Hawks) 24. These holdings, however, seem to be inconsistent with the later ruling in the reported case (*STATE v. COOPER*, ante, 1214) which attaches no limitation to the reception of prior and subsequent declarations of the accused, bearing on his sanity, except that they "must have been made at a time sufficiently close to the principal occurrence as to have some probative force in regard to the mental condition of the person who committed the act."

## II. Application of rule.

### a. Verbal statement.

#### 1. Before commission of act.

In *United States v. Holmes* (1858) 1 Cliff. 98, Fed. Cas. No. 15,382, a prosecution of a ship's captain for the murder of a seaman on the high seas, the accused urged his insanity at the time of the act, and in support of this contention introduced in evidence statements made by him not only throughout the voyage, but throughout his entire previous life. The court said that this was permissible; but held that it was also competent for the prosecution to introduce other declarations of the accused within the same period to show that he was sane.

*Perkins v. United States* (1915) 142 C. C. A. 638, 228 Fed. 408, was likewise a prosecution for murder committed on the high seas. The evidence showed that the accused appeared among the passengers in the saloon in his bare feet, clad only in pajamas and a raincoat. On being advised by the master to return to his room and clothe himself, the accused without notice or provocation discharged his pistol until the chambers were empty,

wounding the master and killing a passenger. The defense interposed was insanity, resulting from excessive drinking, and an overdose of chloral prescribed by a physician to alleviate the pain in his head. It was held that statements made by the accused to a doctor just before going aboard, to the effect that he had severe headaches and suffered great mental strain, nervousness, and insomnia, accompanied by hallucinations, were admissible in evidence to show his mental condition at the time of the homicide.

So, in *Guiteau's Case* (1882) 10 Fed. 161, the accused, being on trial for the murder of President Garfield, and interposing as a defense his insanity, the court admitted in evidence all the statements made and explanatory papers written by the accused before the homicide, which tended to show his morbid state of mind.

Likewise, in a prosecution for wife murder, the defense interposed being the insanity of the accused, the court held that declarations made by the accused before the trial to several persons, to the effect that his wife had placed bugs in his ears, tied his hands to prevent his working, and repeatedly tried to kill him, were admissible in evidence as tending to show the condition of his mind. *People v. Nino* (1896) 149 N. Y. 326, 43 N. E. 853.

In *People v. Miles* (1894) 143 N. Y. 383, 38 N. E. 456, it appeared that the accused was indicted for the murder of one whom he accidentally killed while attempting to shoot another. One of the defenses interposed was insanity, and to sustain it proof was offered of certain strange and inexplicable words uttered by the accused on an occasion when he was trying to settle his business difficulties with the deceased. The court admitted the words in evidence, but allowed evidence in rebuttal to show that on the occasion referred to the accused was intoxicated, and his words were explainable by that fact.

In *State v. Driggers* (1910) 84 S. C. 526, 137 Am. St. Rep. 855, 66 S. E. 1042, 19 Ann. Cas. 1166, the accused was charged with the murder of his sister. It appeared that the accused



and the sister had had an altercation over certain property, and that when she left for her home the accused followed her into the street and deliberately shot her. The defense set up was that the accused, at the time of the homicide, was in such a state of delirium from excessive drink that he was wholly irresponsible. In support of this defense, the accused introduced in evidence certain statements made by him previous to the homicide, showing his inability to recognize his own brother. The court held that the statements were admissible in evidence, and were not objectionable as declarations in his own favor, saying: "Wild, foolish, or irrelevant speech is as much evidence of most forms of insanity as violent or unreasonable actions and unnatural appearance. One may be feigned as well as the others, and there is no reason for the rejection of one that would not apply with equal force to the others. Such speech of a party is not subject to the objection that it is a declaration of the defendant in his own favor, for evidence of it is not received as tending to prove any act or intention of the party, but merely as an indication of mental aberration or condition."

The defendant in *Bulger v. People* (1915) 60 Colo. 165, 151 Pac. 937, shot and killed a hotel clerk on account of the latter's reluctance to give information as to the whereabouts of a certain guest at the hotel, with whom the accused had just had a quarrel. The defense offered was the insanity of the accused at the time of the commission of the act. It was held that, as indicating the mental condition of the accused at the time in question, it was competent to admit in evidence, for the prosecution, certain statements made by the accused to a stranger, about a week prior to the homicide, which apparently tended to show that the accused was sane, but of a quarrelsome disposition.

In *Cannon v. State* (1900) 41 Tex. Crim. Rep. 467, 56 S. W. 351, the accused, charged with murder, interposed insanity as a defense. Evidence of statements made by him to third persons, before the homicide, that his

wife was unchaste and his brother-in-law was familiar with her, and that various persons had formed a mob and were planning to kill him, was allowed as tending to show his mental derangement.

In *Abbott v. Com.* (1900) 107 Ky. 624, 55 S. W. 196, the accused was indicted for the murder of the seducer of his sister. The defense interposed was that, on receipt of the news of the ruin of his sister, the accused became temporarily insane and wholly irresponsible for his acts. The court held that the declarations of the accused while in bed the night before the homicide, continually calling his sister's name, were admissible in evidence, with other acts of his, to show his mental condition at the time of the homicide.

In a prosecution for forgery, where the sole defense relied on was insanity at the time of the act, the court admitted in evidence certain incoherent statements made by the accused before the crime, to the effect that he was making thousands of dollars a day, was a hypnotist, and was the reincarnation of a great lawyer, and other statements to like effect, since these statements tended to show the condition of the mind of the accused at the time of the forgery. *State v. Brown* (1909) 36 Utah, 46, 24 L.R.A. (N.S.) 545, 102 Pac. 641.

In *Porter v. State* (1902) 135 Ala. 51, 33 So. 694, the court allowed in evidence, to show insanity, certain extravagant statements, made by the accused about the value of certain dogs, but held that such evidence could be rebutted by evidence that the accused was a great hunter, so that his rash statement could as well have been attributed to that as to his insanity.

#### *2. After commission of act.*

In *McLean v. State* (1849) 16 Ala. 672, wherein the accused set up his insanity in defense to a prosecution for murder, the court held that the subsequent declarations of the accused were admissible as tending to show the state of his mind at the commission of the homicide.

See to the same effect, *Gilbert v.*

State (1911) 172 Ala. 386, 56 So. 136; *People v. Brent* (1909) 11 Cal. App. 674, 106 Pac. 110; *Com. v. Spencer* (1912) 212 Mass. 488, 99 N. E. 266, Ann. Cas. 1913D, 552.

In *State v. Leakey* (1911) 44 Mont. 354, 120 Pac. 234, a prosecution for murder, the court held that statements made by the accused, after the crime and before his incarceration in jail, that he remembered nothing about shooting a man, didn't know the name of the deceased, and had no motive for the act, were admissible in evidence as tending to show the condition of his mind.

So, in *State v. Wright* (1900) 112 Iowa, 436, 84 N. W. 541, the defense being insanity produced by epilepsy, it was held to be error to exclude certain statements made by the accused after the crime, to the effect that he remembered nothing about the shooting.

Similarly, the accused in *State v. Porter* (1908) 213 Mo. 43, 127 Am. St. Rep. 589, 111 S. W. 529, was indicted for the murder of his father. It appeared that the father was not on very friendly terms with his second wife, and on several occasions had threatened to kill her, and that the accused in these instances had saved her from harm and always deemed it his duty to protect her. On the day of the homicide the father and his wife had a violent quarrel, after which the father left the house, returning later with a shotgun. The accused opened fire on him with a shotgun, but the same being taken from him, he procured a pistol, rushed into the yard, and killed his father. The defense interposed was that the accused, after firing the shotgun, became temporarily insane and remembered nothing that transpired thereafter. On this issue the court held that the declarations made by the accused, shortly after the homicide, that the father "will kill us, he will kill us," were admissible in evidence as tending to show the condition of mind of the accused at the time of the crime.

Likewise, in *United States v. Chisholm* (1907) 153 Fed. 808, a prosecution for embezzlement of the funds of

a national bank, it was held that statements made by him subsequent to the commission of the offense were admissible in evidence as tending to show whether, at the time of the offense, he was suffering from an insane delusion to the effect that he had supernatural power to control the entire stock market.

In *Reinhard v. State* (1907) 52 Tex. Crim. Rep. 59, 106 S. W. 128, it appeared that the accused had been maintaining illicit relations with a woman, as a result of which he was compelled to marry her to save her from disgrace. A short time after the marriage he killed her, and then attempted to take his own life. On the issue of insanity the court held to be admissible in evidence, as tending to show the state of his mind, the following statement made by the accused after the crime, and while still suffering from a self-inflicted wound: "The wretch (meaning the deceased), she thought she could do with me as she wished; and if it was done over I would do it again."

In *State v. Constantine* (1908) 48 Wash. 218, 98 Pac. 317, wherein the accused was on trial for an assault with intent to kill his son-in-law, because of the latter's alleged mistreatment of the daughter of the accused, the court held that a statement made by the accused to his daughter after the shooting was admissible, on the issue of the insanity of the accused at the time of the shooting.

The accused in *Burt v. State* (1897) 38 Tex. Crim. Rep. 397, 89 L.R.A. 305, 40 S. W. 1000, 48 S. W. 344, was tried for the murder of his wife and two children. It was held that it was no error for the court, in order to ascertain whether the accused was simulating insanity, to allow the sheriff to give his opinion as to the sanity of the accused, it appearing that the sheriff's opinion was formed as a result of statements made by the accused to him while the latter was in custody, but after he had been warned by the sheriff that whatever he said would be used against him.

*Granberry v. State* (1913) 184 Ala. 5, 63 So. 975, was a prosecution for

homicide in which the accused interposed the plea of insanity. In order to negative this plea, and to show that the insanity of the accused was merely feigned, the state introduced a witness who testified that he overheard a conversation between the accused and a certain doctor, wherein the accused agreed to pretend insanity. It was held that the introduction of this evidence was permissible, and it was immaterial whether the conversation took place before or after the accused had interposed his plea in court.

So, in *Cogswell v. Com.* (1895) 17 Ky. L. Rep. 822, 32 S. W. 935, the accused, who was indicted for maliciously shooting at another without wounding him, defended on the ground of insanity, and in pursuance thereof introduced his father as a witness, with a view to establishing such facts as to his mental condition when the shooting took place, as would authorize the jury to acquit him on the ground of irresponsibility, resulting from disease or weakness of mind. The court held that it was competent for the state to rebut such defense by introducing witnesses to testify to statements made by the accused, soon after the shooting, that he was trying to imitate the actions of an insane person, but that he had to guess how one acted, as he had never seen one.

In *Ince v. State* (1906) 77 Ark. 426, 93 S. W. 65, the accused was charged with the murder of his wife. The defense interposed was hereditary insanity, and to establish this the accused introduced testimony showing that his father was insane, and also that his sister was insane and had committed suicide. To rebut this defense the state allowed in evidence statements made by the accused while confined in jail, to a third person, that "his father never was crazy, but that his grandfather's money sent him to the asylum," and that he didn't believe his sister was crazy, but "from what he had heard he believed her husband killed her."

In *Reed v. State* (1912) 102 Ark. 525, 145 S. W. 206, wherein the accused, who was on trial for the mur-

der of his wife, set up the plea of insanity, the court held that a statement made by him while incarcerated in jail after the killing, to the effect that he intended to feign insanity in order to get out on bond, was admissible in evidence for whatever the jury might consider it worth as tending to throw light on his mental condition at the time the killing occurred.

So, in *State v. Reidell* (1888) 9 Houst. (Del.) 470, 14 Atl. 550, it appeared that the accused, in a fit of despondency, shot and killed his wife and child. The defense relied on was insanity. The court held that a statement made by him to the sheriff after his arrest that he was perfectly sane at the time he committed the act was admissible in evidence, as it indicated the condition of his mind at the time of the shooting, it being a common delusion of insane persons to believe themselves sane.

In *Braham v. State* (1904) 143 Ala. 28, 38 So. 919, wherein it appeared that the accused had murdered his sweetheart because she refused to marry him, and then interposed insanity as a defense, the court held that, as indicating the condition of his mind at the time of the crime, a statement voluntarily made by him after the commission of the crime was admissible in evidence.

So, in *Parrish v. State* (1904) 139 Ala. 16, 36 So. 1012, a prosecution for murder, wherein the accused relied on his insanity at the time of the commission of the crime, it was held that statements voluntarily made by the accused to a police officer, after the commission of the crime and while the accused was in jail, were admissible in evidence as bearing on the question of his sanity and the condition of his mind.

### *3. Before and after commission of act.*

In *French v. State* (1896) 93 Wis. 325, 67 N. W. 706, 10 Am. Crim. Rep. 606, the accused was indicted for the murder of one whom he wrongfully suspected of ruining his home. The defense interposed was insanity. On this issue, the court held that evidence of statements made by the accused both before and a reasonable time

after the homicide, to the effect that he had been having great family troubles, that the deceased and another were conspiring to wreck his home and ruin his family, that he had been several times shot at, and was troubled with snakes, etc., was admissible to show the state of the mind of the accused at the time of the homicide, and further, that it was error to exclude such statements made by him subsequent to the fourth day after the homicide. The court said: "The exclusion of evidence offered on the part of the defendant, of his acts, conduct, and declarations occurring subsequent to the fourth day after the homicide, and offered as bearing upon the question of his insanity, was, we think, plainly erroneous. It is very generally agreed that evidence of the acts, conduct, and statements of the accused after, as well as before, the homicide, are admissible to show the mental condition of the accused, and as bearing upon the question of his sanity."

The defense in *People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520, was that the homicide was committed by the accused under a delusion, prompted by insane suggestions and voices to the effect that the act was necessary to save his own life. The court held that the declarations of the accused, made a reasonable time before and after the crime, were admissible in evidence if they tended to show the condition of his mind at the time of the homicide.

So, in *Cawley v. State* (1901) 133 Ala. 123, 32 So. 227, the defense interposed was that previous to and at the time of the killing the mind of the accused was materially affected with a mental disease produced by the information imparted to him of the illicit relations maintained between his niece and the deceased. The court held that the previous as well as the subsequent declarations of the accused were admissible in evidence, as tending to show the state of his mind at the time of the homicide.

Similarly, in *Kimbrell v. State* (1900) 130 Ala. 40, 30 So. 454, a prosecution for murder where the defense

was insanity, the court held that declarations made by the accused a few days before and a few days after the commission of the crime were admissible in evidence if they tended to show his mind was unsound.

In *State v. Hays* (1870) 22 La. Ann. 39, it was held that in a prosecution for murder, where the accused relied on insanity, all the declarations, conversations, and exclamations which the witnesses had with the accused, or heard him make at any time shortly before, at the time of, or after the killing, were admissible in evidence as tending to show the condition of the mind of the accused.

In *Lake v. People* (1854) 1 Park. Crim. Rep. (N. Y.) 495, affirmed in (1855) 12 N. Y. 358, the accused was tried for the murder of his wife and his two children. It appeared that, after the murder, the accused stood in front of his window, practically naked, uttering incoherent statements, flourishing a sword, and keeping a crowd which had assembled from arresting him, until he was eventually shot down. The defense offered was insanity at the time of the commission of the deed. The court held that, as bearing on that question, it was proper to admit in evidence the several irrational statements made by the accused, both before and after the commission of the crime.

In *Howard v. State* (1911) 172 Ala. 402, 34 L.R.A.(N.S.) 990, 55 So. 255, wherein it appeared that the accused shot and killed the deceased for the latter's failure to make reparation for numerous slanders he had uttered concerning the sister of the accused, the court held, in determining the insanity of the accused, that the statements made by him after the homicide were admissible in evidence to prove his state of mind.

#### *b. Written statement.*

In *State v. Speyer* (1905) 194 Mo. 459, 91 S. W. 1075, the accused, who was on trial for the murder of his son, relied on insanity, and as evidence thereof introduced in evidence letters written by him to his wife before the murder, containing words of love and affection for his son. The court held

these were inadmissible because having no tendency to prove insanity. The court said: "There is no dispute on the legal proposition that letters written by a defendant which show signs of mental weakness, upon an investigation of his mental condition, are competent evidence. Upon an investigation of the mental soundness of a person his oral declarations are frequently offered in evidence, and declarations made in letters may also be shown, but it must be remembered that the crucial test as to the admissibility of either oral declarations or declarations in the shape of letters written by a defendant is, whether or not they have any bearing upon the subject under investigation,—that is, the insanity or mental incapacity of the person undergoing investigation. The letters offered in evidence in this cause had no such tendency, hence there was no error in their exclusion."

In *Blume v. State* (1900) 154 Ind. 343, 56 N. E. 771, it appeared that the accused, a young man of dissolute habits, became attached to a prostitute. A loathsome disease rendered the accused a cripple, and the refusal of the woman to cohabit with him while in this condition excited his resentment and jealousy to such an extent that he shot her to death and attempted to take his own life. His defense was insanity. It was held that in deciding this issue the several letters written by him to the deceased were admissible in evidence, as a basis for the opinion of an expert. The

court said: "Written communications, as well as oral conversations, may afford evidence of the soundness or unsoundness of the mind of the writer, and may constitute a sufficient basis for the opinion of a skilled physician or alienist upon that subject. Indeed, evidence of this character is regarded as of especial value in many cases, and as furnishing important tests of insanity."

Letters written by the accused to his wife, prior to the homicide, were, in *State v. Kring* (1877) 64 Mo. 591, 2 Am. Crim. Rep. 313, held to be admissible in evidence to show the condition of his mind at the time of the commission of the offense, though not as evidence of the truth of the statements therein. And in the same case in (1881) 74 Mo. 612, it was held not to be error for the court to admit in evidence statements made by the accused, after the homicide, that he was sane when the crime was committed. The case was reversed on other grounds in (1888) 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

In *Sayres v. Com.* (1879) 88 Pa. 291, wherein the accused, who was on trial for the murder of his wife, interposed insanity as a defense, the court held that where the evidence introduced by the accused to prove his insanity extended over his lifetime, it was not error to receive in rebuttal evidence of letters written by him ten years previous to the commission of the crime.

M. J. McC.

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STATE OF MISSOURI EX REL. FRANK W. McALLISTER, Attorney General,

v.

JOHN G. SLATE, Judge of the Circuit Court of Cole County.

*Missouri Supreme Court (In Banc) — June 14, 1919.*

(— Mo. —, 214 S. W. 85.)

**Prohibition — to prevent judge sitting in case.**

1. Prohibition lies to prevent a prejudiced judge from sitting at trial of a case.

[See note on this question beginning on page 1238.]

**Definition — venue.**

2. Venue means the place where a trial is to take place.

**Judge — change — right of state.**

3. A change of judge by whom a case is to be tried is not a change of venue within the rule that the state is not entitled to change of venue.

**Reference — finding of commissioner — conclusiveness.**

4. The finding of a commissioner appointed by the court to determine the question of prejudice of a judge, while not conclusive, is persuasive.

[See 2 R. C. L. 210, 211.]

**Judge — bias — prejudice against state.**

5. A judge, incensed at the state's attorneys because of his belief that they instigated newspaper articles reflecting upon him, and ruling erroneously on their offers of evidence contrary to his rulings in other cases, is shown to be so biased as to be disqualified to sit in the case.

**— cause of prejudice.**

6. If a judge becomes prejudiced in a case, the cause of the prejudice, and whether it is warranted or not, are immaterial upon the question of his qualification to sit.

**— error in ruling — effect.**

7. Prejudice on the part of a judge cannot be deduced merely because of error in ruling against a party to a cause upon a question of law.

**— prejudice against state — effect.**

8. A trial judge may lose jurisdiction of a criminal case because of prejudice against the state.

**— evil arising from change.**

9. Since the objection of prejudice by a judge against the state must be raised, if at all, by the state's prosecuting officers, no evils are likely to arise by permitting change of judge for prejudice against the state.

**— provision for disqualification.**

10. Disqualification of a judge by prejudice against the state is provided for by a constitutional provision that, if a judge for any cause be unable to hold part of a term of court, such term may be held by a judge of another circuit, and in any case where a judge is unable to preside the general assembly shall make provision for holding court.

**— statutory incompetency.**

11. Prejudice by the trial judge against the state is within a statute providing that the judge shall be deemed incompetent to hear and decide the case when he is in any wise interested or prejudiced.

**— interest — own case.**

12. A case wherein a judge is interested is one wherein, to an extent and in effect, the case becomes his own.

[See 15 R. C. L. 527.]

**— absence of statute — right of judge to decide.**

13. Failure of the legislature to provide process for ascertaining the prejudice of a judge does not leave the fact of existence or nonexistence of prejudice entirely to his own conscience.

[See 15 R. C. L. 539; see note in 5 A.L.R. 1275.]

ORIGINAL proceeding to prohibit the respondent judge from further proceeding with the trial of a certain criminal case because of alleged prejudice against the state in said case. *Preliminary ruling for prohibition absolute.*

The facts are stated in the opinion of the court.

Messrs. Frank W. McAllister, Attorney General, John T. Gose and Shrader P. Howell, Assistant Attorneys General, and Lee B. Ewing, for relator:

Prohibition is the proper remedy where a court or judge assumes to exercise powers not granted by law, whether the exercise of the power is attempted in a case which the court is not authorized to entertain at all, or is merely an excessive and unauthorized application of judicial power

in a cause otherwise properly cognizable by the court or judge in question.

State ex rel. Judah v. Fort, 210 Mo. 525, 109 S. W. 737; State ex rel. Fenn v. McQuillin, 256 Mo. 703, 165 S. W. 713; St. Louis, K. & S. R. Co. v. Wear, 135 Mo. 256, 33 L.R.A. 341, 36 S. W. 357, 658; State ex rel. Hoffman v. Withrow, 135 Mo. 376, 36 S. W. 896, 1038; State ex rel. Renfro v. Wear, 129 Mo. 619, 31 S. W. 608.

The facts clearly show that respondent is prejudiced in the case of State v. Scott.

22 Am. & Eng. Enc. Law, 1173; Re Howell, 273 Mo. 96, 200 S. W. 65.

If a circuit judge is prejudiced in a cause, either for or against the state or the accused, he is incompetent to sit in said cause, and any exercise of jurisdiction therein by him, except to certify to his prejudice and take steps to call another judge, is beyond his power.

Re Howell, *supra*; Jim v. State, 3 Mo. 147; State ex rel. Sansone v. Wofford, 111 Mo. 526, 20 S. W. 236; State ex rel. Renfro v. Wear, 129 Mo. 619, 31 S. W. 608; People v. Connor, 142 N. Y. 130, 36 N. E. 807; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238; Com. v. Davidson, 91 Ky. 162, 15 S. W. 53; Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, 10 Eng. Reprint, 301, 17 Jur. 73.

The state has the right, when the judge is prejudiced, to a change of venue from said judge. This was a common-law right, and has never been taken away by any provisions of the Constitution or statutes of this state.

4 Bl. Com. 321; 2 Hale, P. C. chap. 27, p. 201; Rex v. Cowle, 2 Burr, 859, 97 Eng. Reprint, 601; Rex v. Harris, 3 Burr. 1333, 97 Eng. Reprint, 859, 1 W. Bl. 378, 96 Eng. Reprint, 213; People v. Baker, 3 Park. Crim. Rep. 181; Com. v. Balph, 111 Pa. 365, 3 Atl. 220; People v. Peterson, 93 Mich. 27, 52 N. W. 1039; Crocker v. Justices of Superior Ct. 208 Mass. 167, 94 N. E. 369, 21 Ann. Cas. 1061; People v. Webb, 1 Hill, 179; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; People v. Baker, 3 Abb. Pr. 42; Chitty, Crim. Law & Pr. (1847 ed.) p. 201; Com. v. Davidson, 91 Ky. 162, 15 S. W. 53; Barry v. Truax, 13 N. D. 181, 65 L.R.A. 762, 112 Am. St. Rep. 662, 99 N. W. 769, 3 Ann. Cas. 191; Hewitt v. State, 43 Fla. 194, 30 So. 795; State ex rel. Hornbeck v. Durlfinger, 73 Ohio St. 154, 76 N. E. 291; 1 Bishop, Crim. Proc. §§ 73, 113; Re Howell, 273 Mo. 96, 200 S. W. 65; State ex rel. Renfro v. Wear, 129 Mo. 619, 31 S. W. 608; State ex rel. Sansone v. Wofford, 111 Mo. 526, 20 S. W. 236; Jim v. State, 3 Mo. 147; State v. Gates, 20 Mo. 401; People v. Connor, 142 N. Y. 130, 36 N. E. 807; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238; State v. Holloway, 19 N. M. 523, L.R.A.1915F, 922, 146 Pac. 1066; Reg. v. Phelan, 14 Cox, C. C. 579; Reg. v. Conway, 7 Ir. C. L. Rep. 525.

Messrs. Irwin & Haley, A. T. Dumm, and Roy Williams, for respondent:

The only office of the writ of prohibition is to prevent a usurpation of jurisdiction by a subordinate court.

High, Extr. Leg. Rem. 3d ed. §§ 767b, 768; Spelling, Inj. & Extr. Rem. 2d ed. § 1725.

A subordinate court, having jurisdiction over the subject-matter, has the right to determine it, incorrectly as well as correctly; and its judgment will not be interfered with by a superior court through the writ of prohibition.

Missouri, K. & T. R. Co. v. Smith, 154 Mo. 321, 55 S. W. 470; State ex rel. Laclede Bank v. Lewis, 76 Mo. 370; State ex rel. Daugherty v. Hickman, 85 Mo. App. 198; State ex rel. Dawson v. St. Louis Ct. of Appeals, 99 Mo. 216, 12 S. W. 661.

The writ of prohibition is not a disqualifying writ. It leaves the court where it found it, either with or without jurisdiction.

Spelling, Inj. & Extr. Rem. 2d ed. § 1716; High, Extr. Leg. Rem. 3d ed. § 762; State ex rel. Morse v. Burckhardt, 87 Mo. 533; State ex rel. Ellis v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

The right to a change of venue is purely statutory, and unless some authority is given by statute for the change demanded, none exists.

State v. Anderson, 96 Mo. 247, 9 S. W. 636; State ex rel. Cottrell v. Wofford, 119 Mo. 408, 24 S. W. 1009; State ex rel. Kirn v. O'Hallaron, 144 Mo. App. 574, 129 S. W. 227; State ex rel. Bixman v. Denton, 128 Mo. App. 304, 107 S. W. 446; State v. Headrick, 149 Mo. 396, 51 S. W. 99; State v. Barrington, 198 Mo. 85, 95 S. W. 235; State v. Greenwade, 72 Mo. 298; State v. Sanders, 106 Mo. 188, 17 S. W. 223; State v. Witherspoon, 231 Mo. 716, 133 S. W. 323; State v. Dyer, 139 Mo. 209, 40 S. W. 768.

Sections 5198, 5201, Rev. Stat. 1909, relate to the same subject-matter, and should be construed together as being *in pari materia*.

State ex rel. Jones v. Mallinc-Krodt Chemical Works, 249 Mo. 702, 156 S. W. 967; Gantt v. Brown, 238 Mo. 560, 142 S. W. 422; Re Ryan, 174 Mo. App. 202, 156 S. W. 759; Hegberg v. St. Louis & S. F. R. Co. 164 Mo. App. 514, 147 S. W. 192; State ex rel. McClanahan v. De Witt, 160 Mo. App. 304, 142 S. W. 366; Eldon v. Phillips, — Mo. App. —, 180 S. W. 418.

Faris, J., delivered the opinion of the court:

This is an original proceeding in prohibition, whereby it is sought to prohibit respondent, as judge of the circuit court of Cole county, from taking further jurisdiction in the trial of the case wherein the state of Missouri is plaintiff and John W. Scott is defendant, said cause being No. 1,879 upon the docket of the Cole county circuit court.

Heretofore, upon the petition of relator by the attorney general of the state of Missouri, we issued our preliminary rule in prohibition, which rule it is now sought to make absolute.

The facts upon which it is sought by the state, through its attorney general, to prohibit respondent from taking further jurisdiction in the trial of the case of State v. Scott, as these facts are set forth in the petition for our writ, run briefly as follows: At and prior to the 2d day of February, 1918, which is the date upon which our preliminary rule herein was issued, there was pending against said John W. Scott, in the county of Cole aforesaid, an indictment in two counts, charging defendant therein with embezzlement and grand larceny. By virtue of an order made by the governor of the state of Missouri, pursuant to the statute in such cases made and provided, the assistant attorney general, together with special counsel for the state, appeared in the circuit court of Cole county and aided in the prosecution of said case of State of Missouri v. Scott. After the making of said order by the governor, and on the 27th day of November, 1917, the case of State v. Scott came on to be heard before respondent, and the state by Shraeder P. Howell, assistant attorney general, and Lee B. Ewing, as special counsel for the state, appeared and announced that it was ready for trial. Thereafter, but prior to the impaneling of the trial jury for the trial of the case, said Howell and Ewing became possessed, it is al-

leged, of information and knowledge of the existence of prejudice on the part of the respondent against the state of Missouri. The state thereupon, through its counsel, withdrew its announcement of ready for trial, and, having first obtained leave of court in that behalf, filed a formal, verified motion alleging the disqualification and incompetence of respondent to sit in the trial of the case of State v. Scott, on account of the alleged prejudice of said respondent against the state. Thereupon, on the ground of this alleged disqualification of respondent, the state moved that respondent proceed in accordance with the provisions of § 5201, Rev. Stat. 1909. The latter section makes provision for the calling in of a special judge to sit in the trial of any criminal case wherein the regular judge is disqualified.

This motion being overruled, relator made the allegations therein and the fact of overruling such motion the grounds of application for our writ. In the petition for our writ relator avers that respondent is prejudiced against the state in said case of State v. Scott, and by reason thereof that he is incompetent to hear and determine said case, and prays that we issue our writ of prohibition to prohibit respondent from taking further proceedings in, or holding further jurisdiction therein, and from taking further cognizance of, said case.

Our preliminary rule was, as above stated, issued, and for return thereto respondent admits all of the allegations of said petition except the fact of his prejudice in any degree in favor of the said Scott, or against the state of Missouri, which fact of prejudice he categorically denies. Respondent further denies that Messrs. Howell and Ewing, as assistant attorney general and special counsel as aforesaid, were legally in full charge of the prosecution in the case of State v. Scott, and avers the fact to be that their acts in that behalf are without authority and not warranted by the law of the state of Missouri. This latter



allegation is not referred to in the briefs, and we assume, therefore, that it has been abandoned.

The denial by respondent of the alleged fact of his prejudice raised an issue of fact in the case. Thereupon this court made an order appointing J. P. McBaine, Esq., of the Boone county bar, as commissioner to hear and see the evidence adduced, and to find, make, and return to us his findings and conclusions both of fact and of law.

In due course our learned commissioner performed the duties made incumbent upon him by our order, and, pursuant to the command thereof, has reported to us that he finds the issues joined, both of law and of fact, against the respondent, and accordingly recommends that the preliminary rule herein issued be made absolute. To this report respondent has duly filed his exceptions, wherein he takes issue both upon the facts and the law. The case is before us, therefore, upon both of these questions.

I. Regard being had to the briefs of able counsel, and to the positions assumed and the arguments made therein, it is apparent that some confusion exists as to the exact nature of the relief sought herein by relator. This thought obtrudes itself from the fact that the argument is in large part directed against assumed position that the relator is asking for prohibition, with the object of procuring a change of venue on the part of the state. From this assumption as a basis, it is strenuously urged that both the law and the Constitution forbid a change of venue to the state, and therefore no such change is permissible.

It may be wise, therefore, in passing, to dispose of this erroneous view by a brief recourse to the history of the law and to first principles; whereupon much that is urged against the state's position at once becomes wholly irrelevant. In the very twilight of the trial jury's origin, men of the vicinage who were witnesses, or recognitors, as

well as jurors, came up to the King's trial courts from the identical neighborhood in which the crime was committed for which accused was to be tried. They were brought up by a writ, which writ, from the command that it contained, came to be called a "*venire facias*," hence the word "*venire*," which, from being used as the name of the writ which brought the jurors up, has come to be used sometimes in the books as the name collectively of the jurors or those brought up by the writ. Whether we derive the word "*venue*" from the French as the Anglicized spelling of the past participle of "*venir*," to come, and thus it means "(those who) come," or from the modern French substantive, meaning "a coming," or whether it is derived from the Latin "*vicinitatum*," meaning "of the neighborhood," shortened by usage to "*vicinetum*," and again in law Latin to "*visnetum*," whence "*visne*," which in early days was used and written interchangeably for "*venue*" (10 Bacon, Abr. 364), we need not stop to ascertain; for the matter is one obscured by thick doubt. From meaning the place from which the jurors came, in course of time it came to mean the place to which the jurors came—i. e., the place of trial. According to the universal trend of modern authority, "*venue*" now means "the place of trial for an action." 40 Cyc. 11. In the true sense in which we are here compelled to consider it, the word does not mean the judge or the court before whom an accused is put upon his deliverance, but

Definition—  
venue.

which he is to be tried. Hence, if that place of trial is not to be changed, or sought so to be by this, or as a result of this, proceeding, the matter is one merely of a change of the judge before whom the trial is to be had, and not a change of the place—i. e., the venue whereat he is to be brought to trial. It follows that the expression "change of venue" is a misnomer, and all arguments against

the permissibility of a change of venue to the state have nothing to do with the case, enjoying in that behalf a condition bearing a striking similitude in all respects to that of "the flowers that bloom in the spring."

II. Upon the question whether prohibition is the proper remedy, the case of State ex rel. Renfro v. Wear, 129 Mo. 619, 31 S. W. 608, is upon principle conclusive. This is so apparent as scarcely to require exposition.

Prohibition—to prevent judge sitting in case.

The ultimate facts in the Wear Case were that Judge Wear, being concededly related to the defendant, and therefore biased and prejudiced, as the legislature had determined, by the very fact that it passed the statute disqualifying him and others similarly situated, yet persisted in sitting in the trial of the case, or in preventing another judge from taking jurisdiction therein. If the fact of the bias of Judge Wear had not been foreclosed by the legislative determination of the fact of prejudice from the fact of relationship, but had been left to be determined by evidence adduced, it is as plain as a pikestaff that the cases presented are precisely alike. Therefore, if the fact of respondent's prejudice and bias shall have been shown by the evidence in this case, he stands in a position in no wise different from that of Judge Wear, and so prohibition will lie.

Therefore, if we shall find as a matter of fact from the evidence in the case that respondent is prejudiced, we bring the case, as we look at it, precisely within the procedure successfully invoked in the Wear Case. How stands the evidence upon this question of fact? Our learned commissioner who heard the evidence, and who was by virtue of our order empowered to make and report to us his conclusions both of fact and of law, has found from the evidence that respondent was prejudiced. While we are not compelled to accept as final and binding upon us the con-

clusions of our learned commissioner, either upon the law or upon the facts [State ex rel. Major v. Arkansas Lumber Co. 260 Mo. loc. cit. 271, 169 S. W. 145], these conclusions are at least persuasive. We have gone

Reference—finding of commissioner—conclusiveness.

over the evidence and the divers exhibits forming parts thereof, and have reached the identical conclusion in regard to their weight and probative effect which was reached by our commissioner. Upon this point our commissioner, summing up, reports to us thus: "We conclude, therefore, that because of all Judge Slate had heard and surmised and had read that he was not in an unbiased frame of mind, and this we say without in any manner intending to reflect upon Judge Slate's honesty of purpose.

Judge—bias—prejudice against state.

"Summing up, the matter comes to this:

"Mr. Howell had conducted the investigation before the Cole county grand jury which resulted in these indictments. During the time of this investigation there were frequent controversies and disagreements between Judge Slate and Mr. Howell. The grand jury proceedings attracted public interest, and the newspapers of the state gave a great deal of space to the investigation. A reporter for one of the papers was sent to jail by Judge Slate for contempt of court, and two editors of papers in the state were cited for contempt of court. The newspaper articles were frequently uncomplimentary to Judge Slate, and he was no doubt quite exasperated by the many newspaper articles about the investigation. Judge Slate had concluded that many of the newspaper articles were inspired by Mr. Howell and others in the attorney general's office. Long before the cases came on for trial Judge Slate had developed strong ill feelings against Mr. Howell. He was convinced that the attorney general's office gave out information to various newspaper re-

porters upon which they based newspaper articles criticizing and reflecting upon him.

"Judge Slate's own testimony before the commissioner was also convincing that during the trial of these cases he had no little feeling of ill will for Mr. Ewing.

"There is nothing in the record that shows that Judge Slate had any reason for favoring or shielding the defendant, John W. Scott. While the testimony shows that they had known each other for a great many years, it also shows that their social and political relations were not very friendly. We are convinced, however, that the court's attitude as to Mr. Ewing and Mr. Howell had prejudiced his mind against the prosecution of these cases, including the case of *State of Missouri v. John W. Scott*, No. 1,879. We believe that because of this feeling that existed that he could not and did not view with equanimity propositions advanced on behalf of the state by the state's representatives in charge of the prosecution of this case. We feel that he did not possess that calm, dispassionate, and unbiased condition of mind essential in order that the trial judge shall conduct a trial with complete impartiality. We feel that because of this feeling against Messrs. Howell and Ewing that the interest of the state could not be sufficiently considered by Judge Slate. We think, for example, that had Judge Slate on the occasion in question possessed an open mind, that he would have listened to the argument of the attorneys for the state as to the admissibility of other offenses in the case of *State of Missouri v. John W. Scott*, and that he would not have ruled immediately without any argument when the matter was presented to him that such testimony was inadmissible.

"The decisions of this court, beginning with *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389, and ending with *State v. Patterson*, 271 Mo. 99, 196 S. W. 3, no doubt most strongly tend to support the view that evidence of other sales of coal

by Scott were admissible to prove his intent in selling the coal in question.

"Judge Slate admitted evidence of other offenses in the case of *State of Missouri v. James C. Welch*, No. —, and we confess we are unable to see any distinction whatever in principle between the Welch Case and the Scott Case. We of course recognize that it is not proof of prejudice to merely show that a judge has ruled incorrectly upon the admissibility of testimony. Our finding of prejudice is not based on these rulings alone. We think, though, that in view of all the circumstances, and particularly the manner in which the rulings were made, the rulings do show that Judge Slate did not maintain an open and unprejudiced mind."

To this summing up, and to the evidence upon which it is based, other facts shown by the record might have been added; particularly the facts found in the testimony of witnesses Mayhall and Adcock touching the expressed view of respondent that "there was nothing in these cases." This statement, it is fair to say, was denied by him as to its application to the pending case of *State v. Scott*.

III. We are constrained to agree also with the view of the commissioner that, if prejudice existed, it makes no earthly difference in the law of the case as to the manner in which that prejudice was engendered. Prejudice is the ultimate fact; its <sup>—cause of</sup> ~~prejudice.~~ origin is wholly im-

material. Likewise it is immaterial whether it was warranted or unwarranted, justified by the facts or not justified thereby. If in fact bias exists to an extent which will preclude a fair, unprejudiced, and unbiased weighing of the law and the facts on the state's side upon a trial of the case of *State v. Scott*, then prejudice is present to a degree forbidden to a judge by both the common law (*Massie v. Com.* 93 Ky. 588, 20 S. W. 704) and the statute (*Rev. Stat. 1909, § 5198*).

We are also constrained to agree that the record before us shows the existence of prejudice in the mind of the respondent. This appears not only from what we find and from what the commissioner finds, but, to use a homely expression from the vernacular, the fact of prejudice can be read from between the lines upon almost every page of the voluminous record before us. In so ruling we acquit the learned respondent of conscious knowledge of the fact of his bias. Regrettably the cases pending were such as naturally to create great public interest. They were, also regrettably, being tried beforehand by the press of the state in the forum of public opinion. In the search after sensational features which would catch and hold the public eye, and create public opinion, much was printed which was based upon bald surmise. Much also was deduced which had as its sole basis erroneous conclusions drawn from acts in themselves innocent, or acts done by respondent in the line of his official duty. From the latter acts, in some instances, deductions were printed which reflected upon him unjustly, and had the effect to distort respondent's enforced absence while holding regular terms of court in other counties of his circuit, into seemingly studied reluctance to continue the grand jury investigation.

IV. It is unquestionably true that from mere error in ruling against the state upon a question of law neither interest, nor bias, nor prejudice can be safely predicated. But if the proof show that upon a trial of a case wherein intent must be proven or deduced, if at all, from proof of the doing of other similar acts in the same neighborhood, about the same time, evidence of such similar acts was admitted in the trial of a case against A, but denied in the trial immediately thereafter of a case against B, such fact may be a circumstance which, added to other things, may tend to show prejudice in favor of B, especially if, as was the case pre-

sented, the reason and the law favoring the admissibility of the evidence of similar acts against B were by far more apparent and cogent in B's case than they were in the case of A. Moreover, such a ruling would afford a more cogent circumstance if it were announced that it would be made, as was the case here, before the trial of the case against B. We repeat, for emphasis' sake, that nothing is better settled in law than that mere error of the kind mentioned, when standing alone, disassociated from other facts and circumstances, does not afford the least evidence of bias or prejudice.

But, be all this as may be, we are convinced that, in the state of mind into which the learned respondent was driven by the matters and things mentioned, it was not possible for him to try the case before him without prejudice, and so, without more, we agree with the finding of the fact of prejudice as made by our commissioner. In so finding we pause in all fairness to disclaim the remotest reflection upon the motives of the able and learned respondent. His attitude may well be ascribed to the righteous exasperation of an honest and conscientious judge, driven to indignation and from judicial plumb by what he conceived to be unjust and unwarranted criticisms of his official conduct.

V. Which brings us to the point of law strenuously and most ably presented by respondent's learned counsel. This point, as forecast supra, is not whether the state is ever entitled to a change of venue. There is no question of a change of venue in this case. The question of law is: Can a trial judge, absent his own voluntary disqualification, lose jurisdiction of a criminal case because of his interest or prejudice therein against the state? We agree with the conclusion of law upon this point of our learned commissioner and are constrained upon

both reason and authority to hold the affirmative of the question stated.

Some settled propositions as fore-

—error in ruling  
—effect.

—prejudice  
against state—  
effect.

words are apposite. One of these is an axiom of the common law wholly applicatory by the closest analogy, which runs in substance that no man ought to sit in judgment in his own case. The other is that, if the objection of prejudice against the state be raised in a case, such objection must of necessity be raised by the sworn, elected, prosecuting officer of the state; that is, either by the prosecuting attorney of the county wherein the cause is pending, or by the attorney general of the state. Such prosecuting officers owe neither lesser nor greater duty, but precisely the same duty, to both state and defendant in the trial of criminal cases, as does the judge of the circuit court. It cannot be assumed that such prosecuting officer would act in such a case except from motives bottomed upon considerations of the very highest devotion to official duty. It cannot be urged,

—evil arising  
from change.

then, against the question propounded, that the taking of the affirmative thereof would open a Pandora's box of evils and make trials of criminal cases subject to captious objections of disgruntled prosecuting officers, with all the delays incident thereto.

For the reason forecast by us at the outset of this discussion, we need not consider whether that provision of our organic law which guarantees to the accused in criminal prosecutions "the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county." Const. § 22, art. 2, would or would not render invalid any legislative act which had for its object a trial by a jury of some other county than that wherein the alleged crime was committed. That question, upon a consideration of what the expression "change of venue" connotes, falls out of this

case. For upon the facts here, considered in the light of the relief sought <sup>—provision for disqualification.</sup> by this proceeding, this case comes precisely within another provision of our Constitution (Const. § 29, art. 6), which provides that "if there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, *and in all such cases, or in any case where the judge cannot preside, the general assembly shall make such additional provision for holding court as may be found necessary.*"

That part of the above provision which we italicize was added to an existing provision of the Constitution of 1865 (Const. 1865, § 17, art. 6) by the adoption of the Constitution of 1875. Pursuant to the permission granted by § 29 of article 6 of the Constitution of 1875, there are now divers sections of the statute affecting the matter of interest of the trial judge, and providing for his disqualification upon the grounds of interest, relationship, and prejudice. See §§ 3867, 5198, Rev. Stat. 1909. Likewise the legislature has passed divers statutes providing the details of calling in other judges, or of electing special judges. See §§ 5199–5201, Rev. Stat. 1909.

Some of the above sections antedated in their original provisions, at least, the adoption of the Constitution of 1875. But all these, where not in conflict with the provisions of the Organic Law of 1875, continued in force and are now in force, pursuant to the Constitution itself. Const. Schedule, § 1.

Learned counsel for respondent insist that § 3867, *supra*, is alone apposite, and that § 5198, *supra*, has no

application. We are constrained to hold to the contrary.

—statutory  
incompetency.

The legislative history of these two sections clearly shows the fallacy of this position. Section 5198 seems to have had its beginning and to have come into the statutes in 1835. Stat. 1835, § 15, p. 486. It was then a change of venue statute. Many changes and amendments have been made to it from time to time, till manifestly it has, so far as its own contents are concerned, long since ceased to be solely a change of venue statute. Section 5198 read at the time the matters and things here under discussion transpired, and now reads, thus: "When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in any wise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to, or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

The reason for the enactment of the original of said § 5198 is fairly obvious and historically interesting. In 1832, and at a time when all statutes providing details for the removal of cases by change of venue had been theretofore repealed, the case of *Jim v. State*, 3 Mo. 147, was heard by this court. The defendant, a slave, had been convicted of murder. The trial below was before Judge David Todd, whose slave the

defendant was. Defendant had applied for a change of venue which the trial court refused to grant. Upon defendant's appeal here the refusal to grant a change of venue was held to be error, notwithstanding the fact that all the statutes providing for the details of the practice in change of venue proceedings had been theretofore repealed. *Jim v. State*, 3 Mo. loc. cit. 177. There then existed no applicable statute from which the practice could be deduced. All there seems then to have been in our statutes at all applicable to the situation confronting this court was an extremely general statute found in the chapter on "Courts" (1 Mo. Rev. Laws 1825, § 23, p. 277), which statute, so far as pertinent, read thus: "That no judge of the supreme court, who is interested in any suit or related to either party, or who shall have been of counsel in any suit or action . . . pending in said court, shall sit on the determination thereof . . . nor shall any judge of the circuit or probate court sit on the determination of any cause or proceeding, either civil or criminal in which he is interested or related to either party, . . . but such cause or proceeding; if pending in the circuit court, shall be removed to some county where such objection does not exist, according to law: . . . Provided, that in no criminal cases shall the venue be changed without the consent of the defendant."

The above section has come down to us after many changes and amendments as § 3867, Rev. Stat. 1909. Following the decision in the case of *Jim v. State*, supra, the legislature amended the chapter on "Practice and Proceedings in Criminal Cases" by adding thereto a number of sections which set forth the grounds for granting changes of venue and provided for the details of the practice therein. Mo. Stat. 1835, §§ 15 et seq. p. 486. From § 15, supra, after being many times amended, we get § 5198. The fact

that said § 15 was passed by reason of the decision in the Jim Case is clearly indicated by one of its provisions, which is that if the defendant be a slave, and the judge of the circuit court be the owner thereof, a removal of the cause to another court shall be ordered.

It will be noted, however, that § 5198 now contains within itself no reference to any removal of the cause from the county of the venue. It merely deals with the incompetence of the circuit judge and sets forth the conditions or disabilities under which he shall be incompetent to try a given criminal case. Such judge is made incompetent to sit in the trial under four separate and distinct conditions: "First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in any wise interested or prejudiced, or shall have been counsel in the cause; or fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

The first of these creates an incompetence or disqualification in the judge for which the state may prevent the judge from sitting by our writ of prohibition. *State ex rel. Renfro v. Wear*, 129 Mo. 619, 31 S. W. 608. The second seems to constitute a status of incompetence whereby the accused, being prejudiced, might alone be interested in acting. The third (the existence of prejudice or interest, or the fact that the judge has been of counsel being granted or proved) will clearly serve as a basis of disqualification either for the state or for the defendant; for, under the reasoning in the Jim Case, supra, as found at

page 176 of 3 Mo., either of the above reasons could be urged by the accused as a ground for a change of venue. The fourth ground is clearly applicable to the accused. By virtue of it he may urge the specific ground set out in such fourth subdivision, namely, that the judge of the court "will not afford him a fair trial," or he may urge any other ground contained in this statute.

From the plain language of subdivision 3 of § 5198, supra, it will not do to say that interest or prejudice against the state, or what is tantamount thereto, bias and prejudice in favor of the defendant, or the fact that the trial judge had been of counsel for the defendant, cannot be taken advantage of by the state, or that such things are not disqualifications which produce, when the existence thereof is either admitted or proved, an incompetence to sit as trial judge, for which the judge may be prevented from sitting by the state's prosecuting officer. There is no manner of doubt that, if the circuit judge be in fact interested or prejudiced against the state, or shall have been of counsel for the defendant, he ought not to sit. This is obviously both the moral and ethical view, and the statute has enacted these moral and ethical views into a law. No man ought to be a judge

in his own case, and <sup>—interest—</sup>  
own case.

a case wherein a judge is interested is one wherein to an extent and in effect the case becomes the judge's own case. The latter is merely an evolution of the above fundamental maxim.

Neither will it suffice to say that the fact of the existence or non-existence of interest or prejudice must be left for determination to the automatus action of the trial judge's conscience, nor that some such intention in the legislature's mind is to be de- <sup>—absence of</sup>  
duced from the fact <sup>statute—right of</sup>  
that it has enacted <sup>judge to decide.</sup>

no law which provides details of the practice to govern cases wherein, though interest and prejudice exist,

the conscience of the trial judge has failed to move him aright. The case of *State ex. rel. Renfro v. Wear*, supra, was such a case, and this court took jurisdiction and prohibited the judge therein from holding further jurisdiction of a criminal case wherein the son of the judge was the defendant.

Our learned commissioner in his conclusions upon the law construing § 5196 says:

"It is contended by respondent's learned counsel that the terms and provisions of § 5198 are applicable only to the defendant, and that a circuit judge in a criminal prosecution cannot be disqualified at the instance of the state. We do not agree with this interpretation of the section. The language of the section is general, and there is nothing stated expressly or impliedly that limits the first three subdivisions of the section to applications on behalf of a defendant. It is remembered that the fourth subdivision expressly relates to application upon the part of the defendant. That subdivision provides, 'when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial,' that the regular judge shall be disqualified. This section, it will be noticed, is especially liberal in favor of the defendant, and provides that the regular judge shall not sit when two reputable persons not of kin or of counsel and the defendant himself will make an affidavit that the judge will not afford him a fair trial.

"The fact that the fourth section is by express provision applicable to the defendant, and that the other subdivisions do not mention the defendant, strengthens the conclusion that the first three subdivisions of the section are general provisions enumerating causes which shall disqualify a judge at the instance of either the state or the defendant.

"This section was under consideration by this court in *State ex rel. Renfro v. Wear*, supra, and while the facts in that case are not precisely the same as in this case, yet the principle of law to be deduced from that decision is controlling here. In that case Judge Wear was disqualified because of his relationship to the defendant on trial.

"This court called attention to §§ 3247 and 4174, Revised Statutes 1889, which are now §§ 3867 and 5198, Rev. Stat. 1909. Judge Gantt, however, in the opinion, quotes from § 4174, now § 5198, Rev. Stat. 1909, and concludes that 'from these provisions of the Constitution and statutes of this state it is plain that Judge Wear, by his relation to his son, the defendant, was disqualified, and, knowing this, it was his imperative duty to either order an election of a special judge, or request the judge of another circuit to sit in the trial of said indictment.'

"In that case, after Judge Wear had called in a special judge, he declined to permit the special judge to try the case, but attempted himself to exercise jurisdiction, and was prohibited from exercising jurisdiction by a writ of prohibition from this court.

"There are numerous decisions of this court sustaining the general principle that it is the policy of the law in this state that criminal trials shall be conducted by wholly disinterested judges. See *State v. Jim*, 3 Mo. 147; *State v. Gates*, 20 Mo. 401. In the latter case it was said: 'It was both the policy and intention of our legislature to have tribunals for the determination of criminal cases above all suspicion—courts upon whose disinterestedness not only the prisoner, but the whole community, can repose with entire confidence.'

"And § 5198, Rev. Stat. 1909, also indicates the policy of the state, for it will be noticed it is provided that the judge shall be incompetent to sit if he is in 'any wise interested or prejudiced.'

"There is no doubt but that it is



true that as strong reasons may exist why a prejudiced judge should not try a case when the suggestion comes from the state, as well as when the suggestion comes from the defendant. As was said by Walker, P. J., in *Re Howell*, 273 Mo. 96, loc. cit. 120, 200 S. W. 72: 'A condition of the public mind may exist in a locality which would impel a public prosecutor, in an honest effort to discharge his duty, to at least call the trial judge's attention to circumstances indicating that he had, although without corrupt intent, prejudiced the case, and that it should be tried by another. This would involve no question of personal integrity, afford at least a fair opportunity for the state to conduct the prosecution free from any possible ulterior influence, and in no wise interfere with any right accorded to the defendant.'

No difficulties or embarrassments can arise in the administration of the criminal law from the view that a circuit judge may be disqualified by reason of prejudice against the state from sitting in the trial of any criminal case, and that, being so disqualified, such judge may be, by our writ of prohibition, prevented from sitting therein. The situa-

tion thus brought about by a compulsory disqualification is in no wise different than the situation which would have existed had the learned respondent of his own volition declared his own disqualification. Automatically the applicatory statutes will, as in case of a voluntary disqualification, apply and solve all the problems presented, and thus the resultant situation presents no difficulties either insuperable or insolvable.

Being constrained by the record to the view that respondent does not possess that unprejudiced and disinterested state of mind in regard to the case of *State v. Scott* which is requisite under the statute, and which is essential and necessary as a matter of right in the proper administration of justice, and being fully convinced that this court has the power both at common law and by statute to prohibit him from further exercising his jurisdiction in the trial of said case, we are of the opinion that our preliminary rule in prohibition heretofore issued herein ought to be made absolute.

Let it be so ordered.

All concur, except *Woodson, Blair, and Graves, JJ.*, not sitting.

## ANNOTATION.

### Prohibition to prevent prejudiced judge from proceeding with case.

#### Generally.

In the absence of a statute expressly permitting it, the general rule is that prohibition, being an extraordinary writ, can be resorted to only when the ordinary and usual remedies provided by law are not adequate and available. See 22 R. C. L. 9. Applying this rule to the availability of prohibition as a remedy to restrain a prejudiced judge from proceeding further in a pending cause, it has been held in several cases that prohibition will issue where the remedy by appeal is inadequate. *North Bloomfield Gravel Min. Co. v. Keyser* (1881) 58 Cal. 815 (applying express provision of statute); *People ex rel. Brown v. District Ct.* (1899) 26

*Colo.* 226, 56 Pac. 1115; *Rush v. Denhardt* (1910) 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; *State ex rel. Jones v. Gay* (1911) 65 Wash. 629, 118 Pac. 830.

Thus, under the Kentucky statute (Stat. § 4211; Russell's Stat. § 6153), which provides that in a proceeding to cancel the license of a liquor dealer an appeal from an order of the county court shall not suspend the operation thereof, it has been held that the remedy by appeal from an order revoking a license is not adequate where it appears that the county judge is so prejudiced that a license holder cannot obtain a fair and impartial hearing, and a writ of prohibition will is-

sue to restrain the county judge from hearing or determining the proceedings for the revocation of the license. *Rush v. Denhardt* (1910) 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199, *supra*, wherein the court said: "As courts are established to administer justice, why should not the highest court in the state, when there is no other adequate remedy, in the exercise of the ample and unquestioned power conferred upon it, lay its superintending hand upon any inferior jurisdiction that is about to commit a judicial wrong, and compel it to administer justice according to the right of the case? However, it is not necessary to further pursue this line of thought. In the case before us, the legislature has given both to the commonwealth and the liquor dealer the right to appeal from the judgment of the county court to the circuit court, and from the circuit court to this court, thereby declaring that any decision entered by the county court should be subject to review and reversal by the circuit court, and any decision rendered by the circuit court should be subject to review and reversal by this court. Having granted the right of appeal, it seems manifest that the legislature did not contemplate that the licensee would be arbitrarily deprived of his license by the county court, but rather that he should have a fair hearing in that court, and after such a hearing his license, if revoked, would be suspended until a trial in the circuit court. But when it is made to appear, as in these cases, that the judge of the county court will not grant a fair hearing, but will cancel the license whether or no, then the licensee, without the statute so intending, is deprived of a privilege he had the right to enjoy. It therefore becomes important that an impartial trial should be had in the county court; and, when this cannot be had, this court in the interest of justice will exercise its power and grant relief from a condition not intending to exist by the statute."

So, in *State ex rel. Jones v. Gay* (1911) 65 Wash. 629, 118 Pac. 830, wherein prohibition was sought to pre-

vent a judge from proceeding with the trial of a criminal case, after he had denied a motion for a change of judge on the ground of prejudice, it was held that an appeal was not an adequate or speedy remedy, since the petitioner for the writ was in custody under a charge of having committed a felony, and was financially unable to furnish bail or prosecute an appeal. The court said: "He is entitled, under the Constitution, to 'a speedy public trial by an impartial jury' (art. 1, § 22) and an unbiased judge (*Laws 1911*, p. 617, § 1), which cannot be had in this case unless this writ is granted."

Likewise, in *North Bloomfield Gravel Min. Co. v. Keyser* (1881) 58 Cal. 315, it was held, under a statute expressly providing that prohibition might be issued "to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law," that a judge of the superior court was a "person," within the meaning of the statute, and that an appeal from a denial by such judge of a motion for a change of venue, on account of his interest in the subject-matter of the action, was not an adequate remedy in the ordinary course of law, and that consequently prohibition would issue. With respect to the second point decided, the court said: "A glance at the nature of the relief sought in this case is sufficient to show that the remedy by appeal is not a plain, speedy, and adequate one. If, as has already been determined, the respondent is so interested in the determination of the action before him as renders him disqualified to sit in the cause, the petitioner has the right to insist that he do not sit. Upon an application made for a change of venue, based in part on the disqualification of the judge, the latter decided that he was not disqualified, denied the motion, and will, as is alleged in the petition, continue to act as judge in the case. On an appeal from the order denying the motion, no stay of proceedings is allowed by statute, and, pending the slow process of appeal, other orders may be made, and possibly the cause

be tried before a judge disqualified to act. Under such circumstances, we are of the opinion that the petitioner has not a plain, speedy, and adequate remedy in the ordinary course of law." The following cases were decided on the authority of *North Bloomfield Gravel Min. Co. v. Keyser* (Cal.) *supra*; *Connolly & G. M. G. Co. v. Keyser* (1881) 58 Cal. 328; *Milton Min. Co. v. Keyser* (1881) 58 Cal. 328; *South Feather Co. v. Keyser* (1881) 58 Cal. 329; *Alpha Min. Co. v. Keyser* (1881) 58 Cal. 329; *Blue Tent Min. Co. v. Keyser* (1881) 58 Cal. 329; *Excelsior W. & M. Co. v. Keyser* (1881) 58 Cal. 329.

In *People ex rel. Brown v. District Ct.* (1899) 26 Colo. 226, 56 Pac. 1115, it was held that a writ of prohibition was properly issued by a district court to restrain a county judge from proceeding further in a matter wherein he was disqualified to act by virtue of his having previously been attorney for one of the parties, the decision being based apparently on the ground that the orders which it was sought to prevent the judge from making would not constitute final judgments from which an appeal would lie.

On the other hand, in *Talbot v. Pirkey* (1903) 139 Cal. 326, 73 Pac. 858, it was held that where a trial judge has jurisdiction to decide the question of his own bias, his error, if error there is, in denying a motion for a change of judge on account of bias and prejudice, can be reviewed only on appeal, and hence prohibition will not lie to restrain him from proceeding in the cause.

So, in *People ex rel. Deal v. Williams* (1900) 51 App. Div. 102, 64 N. Y. Supp. 457, it was held that a writ of prohibition will not issue to restrain a justice of the peace, on the ground of prejudice, from proceeding with the trial of a person for criminal contempt committed in the presence of the justice, since the matter is not triable before any other officer, and the petitioner has the right of review.

In a number of cases, however, the right to a writ of prohibition as against a prejudiced judge is not made to depend on the existence or nonexist-

ence of another adequate legal remedy, the decision in each case apparently turning on the sufficiency of a showing of disqualification. Thus, in the reported case (*STATE EX REL. MC-ALLISTER v. SLATE*, ante, 1226) it is held that prohibition is the proper remedy to restrain further action by a judge, if the court finds as a matter of fact, from the evidence in the case, that the judge is prejudiced.

So, in *State ex rel. Renfro v. Wear* (1895) 129 Mo. 619, 31 S. W. 608, followed in principle by the reported case, a writ of prohibition was issued without discussion of the propriety of the remedy, it appearing that the judge in question was disqualified by virtue of statute, because related to one of the parties.

And in *State ex rel. Lentz v. Fort* (1903) 178 Mo. 518, 77 S. W. 741, a writ of prohibition was issued to restrain a judge from proceeding further in a cause wherein he had entered an order disqualifying himself on the record, and then had made a subsequent order revoking the first one.

It has also been held, without reference to the existence of any other legal remedy, that the writ of prohibition lies to restrain a judge of a court from proceeding in a cause in which he is disqualified by reason of interest, though there is no statute prohibiting a judge from sitting in a case in which he is interested, and the case is one of which the court, as distinguished from the judge, has full jurisdiction. *Forest Coal Co. v. Doolittle* (1903) 54 W. Va. 210, 46 S. E. 238; *Grafton v. Holt* (1905) 58 W. Va. 182, 52 S. E. 21, 6 Ann. Cas. 403. See to the same effect, *Dimes v. Grand Junction Canal* (1852) 3 H. L. Cas. 759, 10 Eng. Reprint, 301, 17 Jur. 73. In *Grafton v. Holt* (W. Va.) *supra*, however, it was held that, while prohibition would issue to prevent a judge from acting further in the hearing and determination of a chancery suit to which he was a quasi party, the writ would not be granted to annul a merely voidable temporary injunction granted by him, or to prevent him from entering such orders as should be necessary to bring

the suit to a hearing and determination before a qualified court or judge. But a writ of prohibition will not issue to prevent a judge, on the ground of prejudice, from proceeding with the trial of a cause, where the application presents to the court no facts which will establish the disqualification. *Dakan v. Superior Ct.* (1905) 2 Cal. App. 52, 82 Pac. 1129. In that case it appeared that, after the filing of a notice of motion with affidavits annexed thereto for a change of the place of trial on account of the bias and prejudice of the judge, but before the hearing and determination of the motion, the judge commenced the hearing of the cause. Denying an application for a writ of prohibition, the court said: "There is no presumption that a judge is disqualified; and, if a party would seek a change of place of trial of the action upon that ground, the burden is upon him to present facts showing such disqualification. Whether it exists is a judicial question, to be determined by the tribunal before which it is presented, and an application for a writ of prohibition based upon this ground must present to the court facts which will establish the disqualification of the judge. Neither in the petition herein, nor in the affidavits which were attached to the notice of motion, is there set forth the existence of any bias or prejudice on the part of the judge, or any fact showing his disqualification to hear and determine the action before him. The statement in the notice of motion of the grounds upon which the motion would be made is not to be considered in determining whether such disqualification exists. Only the facts set forth in the affidavits in support of the motion can be considered for that purpose, and these are insufficient to show any disqualification of the judge, or that the defendant could not have a fair and impartial trial before him."

So, a writ of prohibition will not be granted to restrain a judge from proceeding in a cause where the contention that he is disqualified by reason of his interest in the suit as a former

stockholder in the corporation defendant is not sustained by the allegations or proof. *Favorite v. Superior Ct.* (1919) — Cal. —, ante, 290, 184 Pac. 15.

Likewise, prohibition will not issue to restrain a judge from taking any further proceedings in a cause on the ground that his son is the attorney for one of the parties, where there is no sufficient evidence to show that the son ever entered an actual bona fide appearance as attorney in the case. *Benton v. Budd* (1898) 120 Cal. 329, 52 Pac. 851.

In *People ex rel. Devery v. Jerome* (1901) 36 Misc. 257, 73 N. Y. Supp. 306, a writ of prohibition was denied, where it was claimed merely that the trial judge was "biased and prejudiced and inspired by partisan motives." The court said: "The rule must be deemed well settled that, in the absence of express statutory provisions, bias or prejudice or unworthy motives on the part of a judge, unconnected with an interest in the controversy, will not be cause for disqualification. While it might be indecorous and offensive to judicial propriety for a judicial officer to act where there were such impediments to impartial action, yet our statutes make no provision for disqualifying a judge for these causes."

See also *Bowman's Case* (1877) 67 Mo. 146, wherein a writ of prohibition was denied because, in the opinion of the court, the trial judge was not disqualified.

In Louisiana where a trial judge, whose recusation has been moved, refuses to recuse himself and to refer the issue to be tried in the manner provided by law, a writ of prohibition will be issued to restrain him from proceeding further in the cause. *State ex rel. Tyrrell v. Judge of Fifteenth Judicial Dist. Ct.* (1881) 33 La. Ann. 1293; *State ex rel. Segura v. Judge of Twenty-first Judicial Dist.* (1885) 37 La. Ann. 253; *State ex rel. Trimble v. Judge of Third Judicial Dist.* (1886) 38 La. Ann. 247. But where the issue of recusation is referred to a judge ad hoc, or to a neighboring judge, the latter has authority to determine the question of his own recusation, and a

writ of prohibition will not issue to restrain him from so doing. State ex rel. Ribbeck v. Foster (1904) 112 La. 533, 36 So. 554.

**Prohibition against member of special tribunal.**

It seems that prohibition will issue in a proper case against a member of a special tribunal having judicial functions. State ex rel. Barnard v. Board of Education (1898) 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317. In that case it appeared that a member of a board of school directors had been a prime mover in having charges preferred against a school superintendent, and had announced his intention to vote to remove the superintendent from office, no matter what the evidence might be. Holding that prohibition should issue to prevent the prejudiced member from sitting as a member of the board to hear and determine the charges, the court said: "It is stoutly contended by the respondents that this case does not fall under any of the disqualifications of the judge provided in subd. 4 of § 163 of the Code of Procedure (Bal. Code, § 4857), and that, outside of the provisions of the Code, a judge is only disqualified by having a financial interest in the result of the suit. We have examined with care all the authorities cited by the respondents to sustain this contention, but are of the opinion that they fail to do so. Most of the cases either fall within the doctrine of necessity, which is announced by some of the courts, where to challenge the judge successfully would prevent the hearing of the cause, as in cases where there was no other tribunal to try the case, or where the judge was sitting merely to declare the law, and the case was tried by jury; and in all the cases we think an appeal would lie. It may be said here that no appeal lies from the decision of the board of directors, and the judges act in the capacity of jurors; and, while some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet in a case of this kind, where the judges pass upon the facts, and it is a pure question of fact which

is presented for their consideration and for their determination, we see no good reason why the test of qualification should be different; for the judge in this case is in reality a juror passing upon questions of fact. . . .

The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is that it is to be presumed that self-interest or natural affection will unconsciously prejudice a judge, and deprive the litigant of a fair trial. This presumption in certain cases may or may not be justified by the truth, but so solicitous is the law to maintain inviolate the principle that every litigant shall be secure in his right to a fair trial that he is accorded the benefit of the presumption. But what does a presumption amount to compared with the admitted fact that the judge will not accord the litigant a fair trial,—that he will vote to remove him from his office, no matter what the evidence may be? And this, so far as this case is concerned, the demurrer to the affidavit having been sustained, must be considered the fact. To compel a litigant to submit to a judge who has already confessedly prejudiced him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression 'administration of justice.'

But it has been held that prohibition will not lie to prevent an attorney for one of the parties from sitting as a member of a special tribunal, constituted in accordance with statute, to hear and determine an election contest. McWhorter v. Dorr (1905) 57 W. Va. 608, 110 Am. St. Rep. 815, 50 S. E. 838, wherein the decision was based on the theory that the special tribunal in question was not a court, or part of the judicial department of the state, but was a subordinate legislative tribunal, and hence prohibition could not issue.

See also *Ex parte Medwin* (1853) 1 El. & Bl. 609, 118 Eng. Reprint, 566, 22 L. J. Q. B. N. S. 169, 17 Jur. 1173,

wherein the court refused to prohibit a cause before the chancellor of the consistory court of a diocese, it appearing merely that the bishop who had

appointed the chancellor was interested in the cause, to the extent of having guaranteed the costs.

M. J. Q.

J. S. MOODY

v.

GULF REFINING COMPANY.

J. M. HORN

v.

SAME.

*Tennessee Supreme Court — March 5, 1930.*

(— Tenn. —, 218 S. W. 817.)

**Proximate cause — fire from gasoline — ignition by stranger — act of child.**

1. Negligence of a dealer in oils in permitting the ground along the switch track where it unloads its material to become saturated with oil and gasoline is not the proximate cause of the destruction of neighboring property by fire caused by boys throwing lighted matches into the gasoline.

[See note on this question beginning on page 1250.]

**Negligence — unloading car of gasoline — permitting fluid to run out upon ground.**

2. The owner of a carload of gasoline is not guilty of negligence, if, after opening the discharge vent preparatory to unloading the car, a servant in charge of the work seeks a place of safety without closing the vent, upon receiving warning that a blast is to be shot in the immediate vicinity, thereby permitting the gasoline to overflow the tub set to catch the drip and run out upon the ground, where fire is subsequently set to it by boys, to the injury of property in the neighborhood.

[See 11 R. C. L. 662; 20 R. C. L. 29; see annotation in 5 A.L.R. 1376.]

— duty to anticipate that boys will set fire to gasoline.

3. One engaged in unloading a car of gasoline which has overflowed the tub set to catch the drip from the vent is not bound to anticipate that boys standing near by and knowing the character of the fluid will set fire to it if he momentarily leaves to secure assistance to empty the tub, so as to make such leaving negligence and render the owner liable for destruction of neighboring property by fire so set out.

[See 11 R. C. L. 664, 665.]

**PETITIONS for writs of certiorari to review a judgment of the Court of Civil Appeals affirming a judgment of the Circuit Court for Davidson County dismissing suits brought to recover damages for loss of property by fire alleged to have been caused by defendant's negligence. Affirmed.**

The facts are stated in the opinion of the court.

Messrs. C. H. Rutherford and W. H. Washington, for petitioners:

The proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent an injury.

Deeming & Co. v. Merchants' Cotton-press & Storage Co. 90 Tenn. 353, 13 L.R.A. 518, 17 S. W. 89; East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 699, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312; Anderson v.

Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Illidge v. Goodwin*, 5 Car. & P. 190; *Brown v. Standard Oil Co.* 159 C. C. A. 397, 247 Fed. 303; *Moore v. Jefferson City Light, Heat & P. Co.* 163 Mo. App. 266, 146 S. W. 825; *Quaker Oats Co. v. Grice*, 115 C. C. A. 343, 195 Fed. 441.

The proximate cause of an injury is the superior or controlling agency from which springs the harm, as distinguished from incidental or subsidiary causes.

*Stuck v. Kanawha & M. R. Co.* 76 W. Va. 453, 86 S. E. 13; *Missouri, K. & T. R. Co. v. Ryon*, — Tex. Civ. App. —, 177 S. W. 525.

Proximate cause means that which is the procuring and efficient cause of the accident, and indicates rather nearness in causal relation.

*Grigsby & Co. v. Bratton*, 128 Tenn. 597, 163 S. W. 804.

Where an original wrongful act supplies the condition by which a subsequent act is rendered injurious, the one committing the wrongful act is responsible.

*Peru Heating Co. v. Lenhart*, 48 Ind. App. 319, 95 N. E. 680.

Where there were two causes which proximately contributed to the injury, for only one of which the defendant was responsible and with the other of which neither he nor the plaintiff was chargeable, still the defendant must be held to answer for the injury inflicted.

*Columbia & B. B. Turnp. Co. v. English*, 139 Tenn. 638, 202 S. W. 925.

One may be liable for an injury resulting from his negligence, though he could not have reasonably anticipated the particular injury or that the particular person would be injured.

*Mitchell v. Schofield's Sons Co.* 16 Ga. App. 686, 85 S. E. 978; *Cummins v. Sanitary Dist.* 185 Ill. App. 639; *Greer v. St. Louis, I. M. & S. R. Co.* 173 Mo. App. 276, 158 S. W. 740.

While the negligent act or omission must be one of the essential causes producing the injury, it need not be the sole cause, nor the nearest cause; if it concurs with the other cause, such as an accident or the negligent act of a third person, which in combination with it causes the injury, it is sufficient.

*Casey v. Chicago R. Co.* 184 Ill. App. 439.

Where injurious consequences

might have been foreseen as likely to result from the first negligent act or omission, the act of a third person will not excuse the first wrongdoer.

*Jenkins v. La Salle County Carbon Coal Co.* 182 Ill. App. 36; *Gatliff Coal Co. v. Hohlman*, 157 Ky. 778, 164 S. W. 76.

Dangerous explosives in a public place contiguous to dwellings are a public nuisance.

*Cheatham v. Shearon*, 1 Swan, 214; *McAndrews v. Colliard*, 42 N. J. L. 189, 36 Am. Rep. 508.

The blast created no emergency, Porch was not in peril, and the only immediate danger was the presence of the boys, which Porch ignored.

*Chattanooga Electric R. Co. v. Cooper*, 109 Tenn. 308, 70 S. W. 72; *Mobile & O. R. Co. v. Ridley*, 114 Tenn. 738, 86 S. W. 606, 4 Ann. Cas. 925; 20 R. C. L. 29; *Lemay v. Springfield Street R. Co.* 37 L.R.A. (N.S.) 60, note; *Texas Midland R. Co. v. Booth*, 35 Tex. Civ. App. 322, 80 S. W. 121.

Mr. Charles C. Trabue, for defendant:

The spilling of the gasoline was not due to defendant's negligence, but was due solely to the conduct of its employee in a sudden emergency imperiling his safety, which conduct the law excuses.

20 R. C. L. p. 178; *Standard Oil Co. v. Swan*, 89 Tenn. 434, 10 L.R.A. 366, 15 S. W. 1068; *Lemay v. Springfield Street R. Co.* 37 L.R.A. (N.S.) 60, note; *Chattanooga Electric R. Co. v. Cooper*, 109 Tenn. 312, 70 S. W. 72; *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209; *Harrison v. Wisdom*, 7 Heisk. 116.

The spilling of the gasoline was not the proximate cause of the fire, but the proximate cause was the act of third persons igniting it.

*Sprankle v. Mathis*, 4 Tenn. C. C. A. 530; *United States Natural Gas Co. v. Hicks*, 23 L.R.A. (N.S.) 250, note.

The gasoline that was ignited and caused the fire was not "puddles and streams" of gasoline other than the gasoline from this particular tank car.

*Baird-Ward Printing Co. v. Fleming*, 137 Tenn. 356, 193 S. W. 115; *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 473, 78 S. W. 99; *Central of Georgia R. Co. v. Fuller Combing Gin Co.* 2 Tenn. C. C. A. 346.

The boys were trespassers or licensees, and defendant owed them no duty other than not to intentionally injure them.

*Westborne Coal Co. v. Willoughby*, 133 Tenn. 262, 180 S. W. 322; *Nashville, C. & St. L. R. Co. v. Lovejoy*, 138 Tenn. 506, 198 S. W. 61; *Clapp v. La Grill*, 103 Tenn. 174, 52 S. W. 134, 6 Am. Neg. Rep. 709.

Hall, J., delivered the opinion of the court:

These two actions were brought by the plaintiffs in error, who will be hereinafter referred to as the plaintiffs, to recover damages for loss of property growing out of a fire which is alleged to have resulted from defendant's negligence.

The suits, by consent, were tried together in the court below, and upon the conclusion of the evidence a motion for a directed verdict was made by the defendant, and was sustained by the trial judge, and the plaintiffs' suits were dismissed. From this judgment they appealed to the court of civil appeals, where both cases were, by consent, again heard together, and the judgment of the trial court was affirmed. The cases are now before this court upon petitions for writs of certiorari.

The material facts are undisputed, and, briefly stated, are as follows: The defendant is a wholesale dealer in oils and gasoline, and in conducting its business in the city of Nashville, Tennessee, maintained a large warehouse fronting on the Tennessee Central Railroad at a point near where said railroad crosses Twenty-fifth avenue, at which it received the commodities handled by it. It received large quantities of gasoline from railroad tank cars, the contents of which were pumped from the cars into storage tanks situated on the defendant's warehouse premises. These tank cars were delivered to its premises by the railroad company by means of a switch or sidetrack extending from its main line from a point west of where it intersected with Twenty-fifth avenue to and by the defendant's warehouse premises.

The fire that destroyed the property belonging to plaintiffs originated on this sidetrack in front of de-

fendant's warehouse, and destroyed defendant's warehouse and a large quantity of merchandise stored therein, and from the defendant's premises traveled or was carried by the wind to the premises of the plaintiffs, igniting the houses occupied by them, and destroyed the property, the value of which is sought to be recovered in these actions.

The declarations charged that the defendant maintained its premises in a negligent and dangerous condition, in that it permitted quantities of gasoline and oil to escape or to be spilled on such premises to such an extent that the floor and other timbers of the warehouse became soaked with oil and gasoline; that the ties of the sidetrack were also soaked with oil and gasoline and other inflammable substances, and that oil and gasoline and other inflammable substances were permitted by defendant to accumulate "in puddles and streams" on its said premises; that defendant negligently handled its stock of gasoline and spilled same adjacent to the public highway in a thickly populated part of the city of Nashville, where many men, women, and children were in the habit of playing; that the gasoline was left unguarded to such an extent that the public safety was endangered, and the premises of the defendant became a public nuisance; that on the date of the fire, while some boys were smoking and lighting matches on or near the premises of the defendant, which fact was known to defendant's employee, the gasoline took fire from the act of said boys in lighting matches, or some other act committed by them, "either accidentally or in play, or from some other cause;" and that the flames from same extended into the warehouse of the defendant, from which it was communicated from the premises of the defendant to the premises of the plaintiffs.

The evidence shows that at the time of the fire the defendant was engaged in unloading, or preparing



to unload, a tank car of gasoline, which stood on the sidetrack in front of its warehouse, which was located only a few feet from the sidetrack. These tank cars consist of large, long metal tanks built on railroad trucks, and are ——— feet in length, ——— feet in diameter, and some of them hold several thousand gallons of gasoline. On the top of these tanks, and about the center of the same, is what is called a dome, which is about 18 inches in diameter, and extends some distance above the top of the tank. In the top of this dome is an opening in which a large cap is fitted to close the opening, and at the bottom of the tank, and about the center of the same, is a spout or leg which extends below the body of the tank. The dome is used in loading the car with gasoline, and for any and all purposes where it is necessary to enter the tank, and the leg is used in unloading the car. On the inside of the tank, and just about the point where the leg connects with the bottom of the tank, is a valve, and from this valve a rod runs up into the dome, and to the top of this rod is attached an arm or lever, and when it is desired to prevent the gasoline from escaping through the leg, the valve, by means of this rod or arm, is tightly closed. When it is desired to empty the car through the leg, the valve is opened by means of the rod extending therefrom into the dome. The tank is unloaded by connecting a hose with the valve in the leg of the tank and pumping the gasoline from the car tank into the storage tank, which is located near by.

Two of the defendant's employees had gone on top of the tank car, removed the top from the dome, measured the distance between the bottom of the dome and the top of the gasoline in the car, and had taken the temperature of the gasoline, which was the usual and customary procedure before unloading it. The rod which led through the car to the valve over the leg was examined to ascertain if it were

properly seated or closed so as to prevent the passage of gasoline into the leg when it was opened for the purpose of attaching to the valve the hose preparatory to pumping the contents of the car into the storage tank.

The evidence shows that during the transportation of the car the movement of the gasoline on the inside of the tank washes the sides thereof, and any impurities that may be in the gasoline will, when the car is stopped and permitted to stand for a while, sink to the bottom of the tank, and if the valve in the leg is not tightly closed such impurities will escape into the leg, as will the gasoline. It further appears that, however much care is exercised in loading the tank car, and in closing the valve in the leg, foreign substances will sometimes get in the way of the valve and it will not close tightly, and gasoline will flow from the tank into the leg. In unloading it is the custom to open the leg by unscrewing and removing the plug in the lower end, and catch the contents of the leg into a vessel or tub, and then attach the hose, by means of which the gasoline is transferred to the storage tank.

At the time of the fire in question a colored employee of the defendant, who was experienced in unloading gasoline from the tank cars, went to the car in question, unscrewed the plug at the lower end of the leg, and placed under it a large tub for the purpose of catching whatever gasoline and other substance might flow from said leg; and about the time he placed the tub and unscrewed the plug an employee of the Nashville Railway & Light Company, who, together with other employees of that company, was digging a hole for an electric light pole across the main line of the railroad company, and about 30 feet from the tank car, informed the employee of the defendant that they were preparing to "shoot," meaning that they were going to set off a blast for the purpose of

breaking some rock in said post hole. The defendant's employee, believing that he was in dangerous proximity to the blast which was about to be fired, and having no other means of protection, left the leg from which gasoline was then flowing into the tub and ran around the end of the car to protect himself from the blast. Upon the blast being fired he returned to the leg and found that a sufficient quantity of gasoline had run into the tub to overflow it, and that some of the gasoline was running out of the tub onto the ground. He immediately replaced the plug in the leg to stop the flow of the gasoline. He says that while he was performing this operation some boys, who were standing upon the main track of the railroad about 6 feet away, asked him if it were gasoline or coal oil that was flowing into the tub, to which inquiry defendant's employee says that he told them that it was gasoline.

The undisputed evidence further shows that after defendant's employee had stopped the flow of the gasoline he went into the warehouse for the purpose of getting some buckets to dip some of the gasoline out of the tub so that it could be removed, and to secure the services of another employee in assisting him to remove the tub and empty its contents into the storage tank. He was gone for this purpose only a very short time, and upon his return the gasoline was on fire, the flames traveling at a rapid rate toward the warehouse, and were soon beyond control.

The uncontradicted evidence is that the fire was produced by these boys, who were standing on the railroad track when defendant's employee left the tub of gasoline and went into the warehouse for the purpose stated, throwing lighted matches into the gasoline in the absence of defendant's employee. This is admitted by one of the boys who indulged in throwing the matches, and is also proven by an-

other one of the plaintiffs' witnesses, a Mr. Cooper.

It is further uncontradicted that these boys were from twelve to fourteen years of age, and Charlie Reeves, one of the boys, testified that he knew gasoline was highly inflammable and would burn when it came in contact with fire.

It is further shown by the evidence that defendant's warehouse premises are not on a public street or highway, but that men, women, and children in the neighborhood do use the railroad track to a considerable extent in traveling to and from their homes and in going to and from school.

There was evidence tending to show that the defendant's premises had become more or less greasy or oily from gasoline, oils, and other substances which had been permitted to escape or leak from the receptacles in which they were contained, but the undisputed evidence is that the fire which occasioned the plaintiff's losses did not originate from this condition, but alone from the matches being thrown into the gasoline contained in the tub, or in that which had flowed from the tub onto the ground.

It is insisted by the plaintiffs that the court of civil appeals erred in not holding that the trial judge erred in directing a verdict in defendant's favor upon the foregoing facts. It is contended by the plaintiffs that the fire which caused the losses sustained by them was the direct and proximate result of the negligent manner in which the defendant maintained its premises, and undertook to unload the tank car in question, and in permitting the tub which was used to catch the gasoline that was being emptied from the car to overflow and run out on the ground, and in leaving the tub of gasoline unattended in close proximity to where the boys were, and without warning them away from the gasoline and of the danger of the situation, and in leaving them at that point "when it knew, or might have known, that

they were smoking cigarettes and striking matches."

The correctness of the plaintiffs' contention depends upon two propositions:

First. Was the fire which destroyed the property of the plaintiffs the result of the defendant's negligence?

Second. Was that negligence the direct and proximate cause of the plaintiffs' losses, or were their losses the result of an independent, intervening cause which could not have been reasonably anticipated by the defendant?

It was held by this court in *Southern R. Co. v. Pugh*, 97 Tenn. 624, 37 S. W. 555, that negligence is the want of ordinary care and caution in doing an act, or it is the failure or omission to do what a person of ordinary prudence or caution would do under the circumstances, or it is failure to perform a duty required by law.

In the case of *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120, it was said: "Negligence is a breach of duty. Where there is no duty or no breach, there is no negligence. An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act or omission is not actionable; and such an act or omission is either the remote cause or no cause whatever of the injury."

To the same effect is the holding of the court in *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676.

In *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658, the court held that, in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the injury,—such a consequence as, under the surrounding circumstances of the case, might and ought

to have been foreseen by the wrongdoer as likely to flow from his act.

In *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49, it was held that damages which were not the necessary or natural consequences nor the result ordinarily to be anticipated were not the proximate result of a negligent act.

In *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490, it was held that the negligence of a railroad company in storing oil upon its station platform, and in permitting it to remain there in violation of statute, was not the proximate cause of damage by a fire which was started by the careless dropping of a match by a teamster who came to the platform to deliver goods, and who was in no sense a servant, agent, or guest of the railroad company.

In that case and in the case of *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, it was held that the question was not one for the jury, but that as a matter of law the defendant's negligence could not be said to be the proximate cause of the plaintiff's injury.

In *Fanning v. J. G. White & Co.* 148 N. C. 541, 62 S. E. 734, the court held that, assuming the defendant, who was engaged in construction work, was guilty of negligence in storing a large quantity of dynamite in an old shanty on the railroad right of way, the plaintiff could not recover for an injury sustained by an explosion of the dynamite as the result of the plaintiff's companion shooting into the shanty, though ignorant of the presence of the explosive. The court was of the opinion that the shooting into the dynamite by the plaintiff's companion was the proximate cause of the explosion and injury which resulted therefrom.

In 22 R. C. L. § 8, at page 121, the rule is correctly stated as follows: "An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause

of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury."

We are of the opinion that the uncontradicted evidence fails to show any negligence on the part of the defendant in permitting the gasoline to overflow the tub and run out on the ground. The evidence indisputably shows that this was caused by the sudden emergency that arose by the notice being given to the defendant's employee by the employee of the Nashville Railway & Light Company of the impending blast, and which caused defendant's employee to believe that he was in immediate danger. The uncontradicted evidence shows that the car was being unloaded or emptied in the ordinary and usual manner, and in the manner that it was designed to be emptied, and by competent and experienced employees. It is undisputed that just at the moment, or just after the cap had been removed from the leg by defendant's employee, notice was given him that a blast was about to be discharged only a few feet away, and defendant's employee, being exposed to said blast, and realizing the dangers incident to the same, ran around the car for protection. It was while thus endeavoring to protect

himself from the dangers of the blast that the gasoline overflowed the tub. We are clearly of the opinion that the leaving of the tub under these circumstances was not an act of negligence.

In 20 R. C. L., p. 29, it is stated as follows: "One who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence."

This statement of the rule is supported by many cases in the note to the case of Lemay v. Springfield Street R. Co. reported in 37 L.R.A. (N.S.) 43.

But, even if it be conceded that the defendant was guilty of negligence in the manner in which it kept its premises and the manner in which it was unloading the gasoline in question, still we are of the opinion that such negligence was not the direct and proximate cause of the fire which destroyed the property of plaintiffs, but that said fire was the direct and proximate result of the independent intervening act of the boys in throwing lighted matches into the gasoline during the absence of defendant's employee, and that this act on the part of said boys was not such as could have been reasonably anticipated by defendant's employee. It is not shown that defendant's employee knew that the boys were smoking or that they had matches. The undisputed evidence is that the boys knew it was gasoline that was running into the tub, and knew its inflammable and dangerous qualities, and defendant's employee had no reason to anticipate that they would deliberately throw a lighted match into it during the short interval that he was absent on his errand to secure the buckets and

Negligence—  
unloading car  
of gasoline—  
permitting fluid  
to run out  
upon ground.

Proximate cause  
—are from gaso-  
lene—ignition  
by stranger—  
act of child.

Negligence—  
duty to antici-  
pate that boys  
will set fire to  
gasoline.

another employee to assist him in removing the tub from the tank car to the storage tank.

It results that we find no error in the judgment of the court below, and it is affirmed, with costs.

### ANNOTATION.

#### **Intervening act of child as affecting question of proximate cause of damage to the person or property of third person by fire or explosion.**

In treating the cases falling within the scope of the present annotation, little more can be done than to indicate the conclusions to which the courts have come under the particular facts involved in the respective cases. This is the difficulty usually confronted, and is, of course, due to the fact that there is but little disagreement as to the general principles governing the question of proximate cause. Generally speaking, it may be said that the answer to the question whether the act of a child may be an efficient, intervening cause between the negligence of one person and an injury to a third person so as to break the chain of causation and relieve the former from liability for his negligent acts, seems to turn upon the application to the facts of the particular case of the test, "Was the intervening, efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have furnished a condition by which the injury was made possible?" 22 R. C. L. p. 133.

The majority of the cases treat the question from the viewpoint as to whether or not the intervening act of the child must or ought to have been foreseen, recovery not being barred provided the act was reasonably to be expected, and the contrary where it could not have been reasonably expected.

For instance, in *Wichita Falls Traction Co. v. Hibbs* (1919) — Tex. Civ. App. —, 211 S. W. 287, where the defendant's servant negligently left a burning charcoal stove in a public street, and a five-year-old child's clothing caught fire while she was playing around it, it was held

that the negligence in so leaving the stove was the proximate and efficient cause of the mother's burns received in extinguishing the fire. The defendant contended that the injuries were not the direct and proximate result of its negligence, and that the damages claimed were too remote, and urged the proposition that "in order for damages to be recoverable for a negligent act, such act must be the direct and proximate cause of the injury complained of," and that "where a new or independent agency, which could not have been reasonably foreseen, intervenes and causes the injury, the alleged wrongdoer is not liable," but as above indicated the court arrived at a different conclusion, saying: "The finding of the jury that the act of the conductor in leaving the charcoal stove burning in front of appellee's home constituted negligence is amply supported by the evidence. That the child was too young to appreciate the danger, and was irresponsible, is not questioned. This being a fact, there was no intervening efficient or responsible cause to break the causal connection between the negligence of appellant's employee and the injury. While the injury may not be the usual, necessary, or inevitable result of the negligence, we think it is the natural and probable consequence thereof, and is one which an ordinarily prudent person ought reasonably to have anticipated as the result of his negligence."

And upon similar grounds it was expressly held in *United States Natural Gas Co. v. Hicks* (1909) 134 Ky. 12, 23 L.R.A. (N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166, that the negligence of a gas company in maintaining in a public highway a leaky gate valve in its main, inclosed by a cracked and decayed box, and not the

act of a four-year-old boy in throwing a lighted match through a crack in the box, was the proximate cause of an explosion of the gas to the injury of another boy playing in the street.

And in *Iamurri v. Saginaw City Gas Co.* (1907) 148 Mich. 47, 111 N. W. 884, the negligent leaving of a drip wagon containing explosive gases, with the vent open, upon a public street, in violation of municipal ordinance, was held to be the proximate cause of an injury to a child resulting from an explosion assumed to have been caused by another child dropping a lighted match into the open vent. In reaching this conclusion the court, in the prevailing opinion, said that there was no intervening, efficient cause because the intervening human agency, being a child of tender years, was irresponsible, and implied that to destroy the causal connection between a wrong and its consequences the intervention of "a responsible human agency" was necessary. The court also in terms approved the rule that the wrongdoer is responsible for all consequences naturally resulting from his wrong, whether he could have anticipated those consequences or not. It seems unnecessary, however, to have adopted this extreme rule, since the evidence showed that the danger of an explosion from leaving the vent of the wagon open was known. However, the dissent was mainly upon the ground that the injured child was a trespasser because he, as well as the intervening wrongdoer, had gone upon the wagon. The prevailing view was that the element of trespass was eliminated by the fact that the wagon was left in a public street.

And again in *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, where the servants of a railroad company negligently placed and left unexploded on a railroad track at a place commonly used by the public as a crossing, a signal torpedo which was picked up by a boy nine years old, carried away, and subsequently exploded in attempting to open it, to the plaintiff's injury, it was

held that the negligence of the defendant's servants, and not the act of the child in carrying the torpedo from where he found it and attempting to explode it, was the proximate cause of the plaintiff's injury, the theory being that the causal connection between the defendant's negligence and the plaintiff's injury was not broken by the intervening act of the third person, and that the defendant should have reasonably anticipated the result. In this connection, Williams, J., speaking for the court, said: "In this case the plaintiff, when injured, was free from fault, and where he might lawfully be. He was not instrumental in any way in bringing about the disaster, nor chargeable with Brown's conduct or agency therein. The defendant, by its negligent act and omission in placing and leaving the torpedo where it was found and picked up by Brown, rendered the plaintiff's injury possible and probable; and the danger of injuries resulting from someone picking up and handling an instrument of the kind described in plaintiff's amended petition, left upon the defendant's track at the place and under the circumstances therein stated, would have been reasonably anticipated by a person of ordinary care and prudence. The act of Brown, therefore, was but a contributing condition, which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission, while their negligence remained the culpable and direct cause of the injury suffered by plaintiff."

And in *Moore v. Jefferson City Light, Heat & P. Co.* (1912) 163 Mo. App. 266, 146 S. W. 825, where an employee of the defendant negligently placed dynamite left from his day's work under the plaintiff's porch and the same was exploded the following day by the shooting of Roman candles by plaintiff's little boy, it was held that the negligent placing of the dynamite was the proximate cause of the injury resulting to plaintiff's house from the explosion, the court applying the rule that "where the

negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was the proximate cause of the injury." It was also said in this case that under the undisputed evidence the act of the defendant's servant was the natural and proximate cause of the injury complained of.

And in *Mills v. Central of Georgia R. Co.* (1913) 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098, where it was alleged that the employees of the defendant railroad company negligently left an unexploded signal torpedo lying on the right of way, which torpedo was found by a boy and exploded by him to the injury of his boy companion, it was held that the petition was good as against a demurrer based on the contention that the petition showed that the injury complained of was not the proximate result of the defendant's negligence.

The reported case (*MOODY v. GULF REF. Co.* ante, 1243) is illustrative of those cases where, in applying rules and principles similar to those considered in the preceding cases, contrary conclusions have been reached. In this case, boys who knew the inflammable nature of gasoline threw lighted matches into pools of gasoline which had formed during the short absence of defendant's employee, who was engaged in unloading a tank car, by the overflowing of receptacles set to receive the gas it drained from the car spout at the bottom of the tank, and the fire thus started destroyed plaintiff's buildings. Under these facts, it will be recalled, the court held that the act of the boys was an independent intervening cause which broke the chain of causation between any negligent act of the defendant's servant and the burning of plaintiff's buildings.

So, in *Perry v. Rochester Lime Co.* (1916) 219 N. Y. 60, L.R.A.1917B, 1058, 113 N. E. 529, where defendant's employees left explosives stored in an unlocked chest in a public place, it was held that the wrongful leaving of the explosives was not the proximate

cause of the death of a child resulting from an explosion caused by boys who stole the explosives, attempting to make use thereof. In this case the explosives were evidently stolen with knowledge of the wrong and with intent to make some use of the same. The explosion occurred on the day following the theft and at a considerable distance from the place from which the explosives were stolen. These facts, the court said, constituted a series of intervening new and unexpected causes.

And in *Horan v. Watertown* (1914) 217 Mass. 185, 104 N. E. 464, in holding that the negligence of the defendant's servants in leaving dynamite in an unlocked and unguarded tool chest within the limits of a highway in violation of law was not the proximate cause of plaintiff's injuries, which resulted from the taking of such dynamite by young boys who threw it upon a bonfire, where it exploded, the court stated the test for intervening, efficient cause as follows: "Where as here the original negligence of the defendant is followed by the independent act of third persons which directly results in injurious consequences to the plaintiff, the defendant's earlier negligence may be found to be the direct and proximate cause of those injurious consequences, if, according to human experience and in the natural and ordinary course of events, the defendant ought to have seen that the intervening act was likely to happen. But if this is not the case, if the intervening act which was the immediate cause of the injury complained of was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, even though a high degree of caution would have shown him that it was possible, then he owed no duty to the plaintiff to anticipate such further acts, the chain of causation is broken, and the original negligence cannot be said to have been the proximate cause of the final injury"—and in applying the rule said: "Tested by this rule, the plaintiff's case fails. While the dynamite and the other contents of the box were left in such

a way that a thief might not find it very difficult to steal them, it cannot be said that the defendant was bound to anticipate that this might be done and to guard against the consequences that might follow if a thief should steal the dynamite and so use it as to do injury to others. The general presumption of innocence would be inconsistent with this. Still less was there reason to anticipate a series of thefts under the circumstances shown here, or to believe that such thefts would be committed in daylight, upon what seems to have been a pleasant Saturday afternoon, in so public a place. There is nothing to indicate that anything of the kind had ever before been done. We see no reason why the defendant should be held bound to have anticipated that at such a place and at such a time a gathering of boys, after some of them had stolen the dynamite, should engage in the dangerous sport which is shown by the testimony."

And again in *Affick v. Bates* (1899) 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539, where the defendant city left explosive caps in a tool chest on a vacant lot, and some unknown person removed a cap from the box and left it on the ground near by, where it was found by plaintiff's brother, aged eleven, who gave it to another boy, who exploded it by striking it with a stone to the injury of the plaintiff, aged nine, it was held that the negligence of the city, if any, was not the proximate cause of the injury, but that the act of the boy who exploded the cap was an intervening, proximate cause which broke the causal connection between the defendant's assumed negligence and the plaintiff's injury.

So, in *Betz v. Brooklyn* (1896) 10 App. Div. 382, 41 N. Y. Supp. 1009, applying the rule that a party is only liable for the natural and probable consequences of his wrongful act or omission, and that if the result is of such a character that reasonable prudence and foresight would not forecast its happening as a consequence of the act, it cannot be considered

as a proximate cause, it was held that the act of a boy in picking up quicklime negligently allowed to escape from barrels in a public street, where it was being used for building purposes, and putting it in water, was not the proximate cause of the blinding of another boy due to an explosion of the lime when it came into contact with the water. The court said: "There is nothing which appears in the case having a tendency to establish that the lime, if left alone in the street, as it was placed, would have inflicted injury upon any person, or that it would be likely to be so blown about as to inflict damage. Could the defendant, in reasonable contemplation, have supposed that children would carry this lime from the street to this vacant lot, and there attempt to make use of it in the manner described? We think to ask the question is to answer it. The lime was harmless as it lay upon the street. It was only made dangerous by the active intervention of two other agencies,—the boy who carried it, and its contact with water. It does not appear that there was any water near it, or anything connected with it, except the use to which it was commonly put, that would suggest to anyone that it could be carried away and mixed in this vacant lot. It is suggested that it was as dangerous as exposed gunpowder, and constituted a nuisance. We are not able to accept this view. It is as commonly in the streets for building purposes as is building stone, is placed therein and used therein daily without danger or serious inconvenience to the general public using the streets."

And in *Clark v. Wallace* (1911) 51 Colo. 437, 118 Pac. 973, Ann. Cas. 1913B, 349, where a large tract of standing peas was burned, and the owner sought to hold one who had hired plaintiff's herder, who, with his family, had charge of the peas, to come and help him dip sheep on a near-by place, on the theory that the proximate cause of the damage was the procuring of the herder to leave the field, it was held that there was



an efficient intervening cause after the absence of the herder, the fire having been started by the herder's boy or wife or both after the departure of the herder. It was said that such starting of the fire could not have been anticipated as a natural result of the absence, since it could not be said that the fire would not have

been started if the herder had not been called away. This decision attaches no importance to the fact that the intervening act was possibly that of a child, the court seemingly having assumed that it made no difference whether the fire was started by the boy or by the wife or by both.

G. J. C.

**BIG DIAMOND MILLING COMPANY, Appt.,**

v.

**CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Respt.**

*Minnesota Supreme Court — April 11, 1919.*

(142 Minn. 181, 171 N. W. 799.)

**Limitation of actions — new promise to public — effect.**

1. A new promise in writing made either before or after the debt is outlawed starts a new period of limitation. The new promise must identify the debt, but specific reference to it is not necessary if the language with certainty covers it. Language that would be sufficiently specific in a bond is sufficiently specific in a new promise. A promise to pay all claims of a class is sufficient. A letter to the public, signed by a railroad company, promising to refund the difference between a statutory freight rate and a higher rate collected on all shipments made during a period of litigation to determine the validity of the statutory rate, is sufficiently definite.

[See note on this question beginning on page 1258.]

**Statute — application — recovery of excessive freight charges.**

2. Chapter 195, Laws 1909 (Gen. Stat. 1913, §§ 4307-4309), authorizing the attorney general to sue for recovery of excessive freight charged by railway corporations, has no application to a suit by a shipper.

**Limitation of actions — conditional promise — meeting condition.**

3. A conditional new promise becomes effectual to revive a claim on fulfilment of the condition by the cred-

itor or on his readiness to fulfil. Where a promise was to pay properly supported claims, and the plaintiff submitted claims supported by proof, whereupon the defendant expressed regret that plaintiff had taken the time and trouble to furnish proof, and declined the claims for the sole reason that its own records had been destroyed so that it was unable to verify the claims, defendant will not be heard to complain that plaintiff's claims were not properly supported.

[See 17 R. C. L. 902.]

**APPEAL** by plaintiff from an order of the District Court for Ramsey County (Michael, J.) dismissing an action brought to recover alleged overcharges collected by defendant on separate shipments of grain. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Patrick J. Ryan, for appellant: Defendant in its letters to plaintiff acknowledged in writing its liability to pay the claims in question.

Saiborn v. School Dist. 12 Minn. 17, Gil. 1; Worth v. Worth, 155 Cal. 599,

102 Pac. 663; Willis v. Wileman, 53 Misc. 462, 102 N. Y. Supp. 1004; Shearlock v. Mutual L. Ins. Co. 193 Mo. App. 430, 182 S. W. 89.

Defendant agreed with plaintiff that it would not rely upon the Statute of

Limitations to defeat these claims, and is bound thereby.

Jordan v. Jordan, '85 Tenn. 561, 3 S. W. 896.

Defendant, by its agreement and dealings with the Railroad & Warehouse Commission, its conduct toward the plaintiff, and by its correspondence with the plaintiff, waived its right to plead or rely upon the Statute of Limitations.

Robinson v. Great Northern R. Co. 123 Minn. 495, 144 N. W. 220; Naumen v. Great Northern R. Co. 131 Minn. 217, 154 N. W. 1076; Coleman v. Pennsylvania R. Co. 242 Pa. 304, 50 L.R.A. (N.S.) 432, 89 Atl. 87, Ann. Cas. 1915B, 529; McAdams v. Wells, F. & Co. 139 La. 681, P.U.R.1916E, 464, 71 So. 945; Parsons, R. & Co. v. Lane, 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144; Gamble-Robinson Commission Co. v. Northern P. R. Co. 119 Minn. 40, 137 N. W. 19.

Messrs. F. W. Root, Nelson J. Wilcox, and J. N. Davis, for respondent:

The Statute of Limitations is a bar to the plaintiff's right to recover in this case.

L. Christian & Co. v. Chicago, St. P. M. & O. R. Co. 135 Minn. 45, 159 N. W. 1082; Anderson v. Nystrom, 103 Minn. 168, 13 L.R.A. (N.S.) 1141, 123 Am. St. Rep. 320, 114 N. W. 742, 14 Ann. Cas. 54; Smith v. Moulton, 12 Minn. 352; McManaman v. Hinchley, 82 Minn. 296, 84 N. W. 1018; Trask v. Weeks, 81 Me. 325, 17 Atl. 162.

There was no authoritative act of defendant's agent, or agents, whether by correspondence or otherwise, sufficient to revive the debts sued upon, under § 7712, Gen. Stat. 1913.

St. Paul v. Chicago, M. & St. P. R. Co. 45 Minn. 387, 48 N. W. 17; Redwood County v. Winona & St. P. Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Bell v. Morrison, 1 Pet. 351, 358, 7 L. ed. 174, 178; Brasie v. Minneapolis Brewing Co. 87 Minn. 456, 67 L.R.A. 865, 94 Am. St. Rep. 709, 92 N. W. 340; Russell v. Davis, 51 Minn. 482, 53 N. W. 766; Anderson v. Nystrom, 103 Minn. 168, 13 L.R.A. (N.S.) 1141, 123 Am. St. Rep. 320, 114 N. W. 742, 14 Ann. Cas. 54; Bell v. Morrison, 1 Pet. 351, 362, 7 L. ed. 174, 179; McCormick v. Brown, 36 Cal. 185, 95 Am. Dec. 173; Stout v. Marshall, 75 Iowa, 498, 89 N. W. 808.

The Statute of Limitations may not be waived by a carrier.

A. J. Phillips Co. v. Grand Trunk & W. R. Co. 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444; W. H. Ferrell & Co. v. Great Northern R. Co. 119 Minn. 302, 138 N. W. 284.

Hallam, J., delivered the opinion of the court:

In 1907 the Minnesota legislature fixed maximum rates of freight to be charged by railroad companies within this state.

From May 31, 1907, to July 21, 1913, the establishment of the rates and the enforcement of rights accruing under the statute were restrained by injunction issuing out of the United States circuit court. During this time defendant charged rates of freight in accordance with schedules theretofore existing, which were in excess of the rates prescribed by the Act of 1907. Plaintiff alleges that it paid these excessive rates on certain shipments of grain and asks judgment for the difference between the lawful rate and the rate charged. If plaintiff's allegations are true, it is entitled to recover unless its right of action is barred by the Statute of Limitations. The complaint alleges that the freight was paid between September 1, 1907, and April 5, 1909. The action was commenced September 10, 1917. The claims are therefore outlawed, unless the bar of the Statute of Limitations has been in some manner removed. L. Christian & Co. v. Chicago, St. P. M. & O. R. Co. 135 Minn. 45, 159 N. W. 1082. The trial court held the Statute of Limitations operative and dismissed the case. The propriety of this ruling is the question presented on this appeal.

1. Plaintiff makes the claim that chapter 195, Laws 1909 (Gen. Stat. 1913, §§ 4307-4309), which authorized the attorney general to sue for the recovery of excessive freight charged during the pendency of the injunction, and permitted shippers to participate in the funds recovered on presentation of their claims to the state, superseded the Statute of Limitations. We do not sustain

this contention. The statute, whether valid or not, has no application to a suit brought by a shipper, nor to the time within which such a suit shall be brought.

2. Plaintiff contends that the bar of the Statute of Limitations was removed by a new promise to pay. A claim may be revived by a new promise "contained in some writing signed by the party to be charged thereby." Gen. Stat. 1913, § 7712. And where the new promise is made before the claim is outlawed, the period of limitation thereafter runs from the date of the new promise. 25 Cyc. 1328; *Dern v. Olson*, 18 Idaho, 358, L.R.A.1915B, 1016, 110 Pac. 164, Ann. Cas. 1912A, 1; *Pickering v. Frink*, 62 N. H. 342; *Carlton v. Coffin*, 27 Vt. 496.

The Act of 1909 provided that within sixty days after the judicial proceedings were ended, unless said rates should be found to be unlawful, every common carrier should pay to the Railroad & Warehouse Commission for the benefit of the parties entitled thereto "all sums so charged and collected by it on the business to which such rates apply in excess of the rates so prescribed," and authorized the attorney general to bring suit therefor against any carrier failing or refusing to so pay. On June 9, 1913, the United States Supreme Court held the rates valid. *Minnesota Rates Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. On June 24, 1913, representatives of various railroad companies, including defendant, gathered at the office of the Railroad & Warehouse Commission. A statement was issued "to the public," signed by the Commission and by each railroad company. This statement recited the United States Supreme Court decision and recited an opinion of the attorney general that chapter 195, Laws 1909, was invalid and that the legislature had no power

to compel a railroad company to pay to the state the excessive amounts collected by the companies for freight rates, and then contained this language: "In view of this opinion, and after conference between the Railroad & Warehouse Commission and by undersigned railway companies, it is hereby announced that such railway companies are prepared to immediately entertain properly supported claims for the period during which the rates were enjoined, and to make prompt payment thereof, shortly following the dissolution of the several injunctions. It is suggested that the attached sheet be used by claimants in submitting their claims. . . . The expense bill or prepaid bill of lading should accompany the claim. If the original expense bill or prepaid bill of lading has previously been presented to any railway company supporting a claim for loss, damage, or overcharge, such reference as is possible should be made to the claim in question so that the original expense bill or prepaid bill of lading may be located."

This letter, construed in the light of the language of the Act of 1909 to which it refers, may fairly be regarded as a promise to pay all sums charged and collected on the business to which such rates apply in excess of the rates so prescribed.

The question is, Does this constitute a new promise sufficient to remove the bar of the Statute of Limitations? The trial court held not. In our opinion this was error.

One reason urged in support of the court's ruling is that the writing does not identify the plaintiff's claims and promise to pay them. It must, of course, do so in order to constitute a "new promise." *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766; *Anderson v. Nystrom*, 103 Minn. 168, 13 L.R.A.(N.S.) 1141, 123 Am. St. Rep. 320, 114 N. W. 742, 14 Ann. Cas. 54. But specific reference to a particular claim is

Statute—  
application—  
recovery of  
excessive  
freight charges.

Limitation of  
actions—new  
promise to  
public—effect.

not necessary. If the language would be sufficiently specific in a bond to pay claims, surely it is sufficient in a new promise by the debtor. A general admission of unsettled matters of account between the parties is not sufficient. *Conway v. Reyburn*, 22 Ark. 290, 292. But if the general language refers, with certainty, to the debt, that is sufficient. A promise to pay "every cent he owed him," it is held, sufficiently identifies the debt sued on. *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081. It is not necessary that the new promise should state the amount of the debt. *Conway v. Reyburn*, 22 Ark. 290; *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, 62 N. W. 28; *Wetz v. Greffe*, 71 Ill. App. 313; *Kincaid v. Archibald*, 73 N. Y. 189, 192; *Abrahams v. Swann*, 18 W. Va. 274, 280, 41 Am. Rep. 692. Nor even that the amount should have been fixed. "We owe you for three years' salary" is held sufficient though the salary had never been fixed. *Schmidt v. Pfau*, 114 Ill. 494, 502, 2 N. E. 527. An admission of some balance due, the amount to be ascertained by arbitration, is held sufficient. *Cheslyn v. Dalby*, 10 L. J. Exch. in Eq. N. S. 21. A promise to pay if the debt is established is held a good new promise. *Stanton v. Stanton*, 2 N. H. 425; *Shaw v. Lambert*, 14 App. Div. 265, 43 N. Y. Supp. 470; *Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11,611; *Heylin v. Hastings*, 12 Mod. 223, 88 Eng. Reprint, 1277. So is a promise to pay if the debtor cannot prove payment. *Richmond v. Fugua*, 33 N. C. (11 Ired. L.) 445; *Sweet v. Hubbard*, 36 Vt. 294; *Sothoron v. Hardy*, 8 Gill. & J. 133. And a prediction that nothing will be found due, it is held, does not vitiate the promise. 25 Cyc. 1343; *Bliss v. Allard*, 49 Vt. 350; *Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11,611.

A promise to pay all claims of a definite class is in our opinion sufficiently definite. The language of

the letter "to the public," promising to pay all claims of the class to which plaintiff's claims belong, sufficiently identified plaintiff's claims. This is in accordance with the decision of the Washington supreme court, in *Belcher v. Tacoma Eastern R. Co.* 99 Wash. 34, 168 Pac. 782, a case so similar to this one that, as to matter of identification of the claim, we cannot distinguish it.

3. Respondent contends that the promise to entertain "properly supported" claims and "to make prompt payments thereof" was a conditional promise, and that the condition was not complied with. What is meant by "properly supported" is not very clear. It is "suggested" in the letter that a certain sheet be used in submitting the claims. The letter said the expense bill "should accompany" the claim, but if it had previously been presented in support of a claim of some kind, then "such reference as is possible should be made so that it may be located." We are not at all satisfied that there was any purpose to except from this promise any just claim, or to make the form of proof suggested or any other preliminary proof a condition to payment. Defendant did not so treat its promise. The correspondence in evidence shows that it entertained claims that were not supported by preliminary proof.

If it can be said that this is a promise to pay only "properly supported" claims, and if proper "support" is a condition to the operation of the promise, this does not avail defendant. A conditional promise becomes effectual to remove the bar of the statute on fulfillment of the condition by the creditor or on his readiness to fulfil. 25 Cyc.

1348. See *McNab v. Stewart*, 12 Minn. 407, Gil. 291. After considerable negotiation, defendant's freight claim agent wrote to plaintiff April 7, 1916, as follows: "We regret exceedingly the fact that you took the time and trouble to furnish us with the sheet showing the

—conditional  
promise—  
meeting  
condition.

amounts actually collected in the various claims presented by you, for the reason that we will be unable to handle the claims in question, as the shipments moved during the period of 1907-8-9, and for which period all our records have been destroyed."

And on July 25, 1916, defendant's "commerce counsel" wrote: "None of the claims . . . was rejected on the theory that the Statute of Limitations had run against them. None . . . was rejected on any proof in our possession that such claim is not legitimate. The sole reason for declining each of the claims above referred to was and is that we were and are unable to verify its correctness. . . . The reason that we were not able to verify them or check their regularity lay in the fact that the account-

ing department records more than six years old have been destroyed."

Surely after this "regret" that the plaintiff took the time and trouble to "support" its claims by proof and after these and other requested avowals that the sole reason for refusal to pay the claims was the destruction of its own records, defendant will not now be heard to complain that plaintiff's claims were not "properly supported."

We are of the opinion that the letter, "to the public" of June 24 1913, was sufficient as a new promise and that it started a new period of limitation. It is proper to say that in *L. Christian & Co. v. Chicago, St. P. M. & O. R. Co.* 135 Minn. 45, 159 N. W. 1082, *supra*, this letter was not called to the attention of the court nor was any new promise pleaded or proved.

Order reversed.

### ANNOTATION.

#### General acknowledgment or promise in statement addressed to public as removing bar of limitation.

Apparently there is but one case in addition to the reported case passing directly on the question whether a general acknowledgment or promise in a statement addressed to the public is sufficient to remove the bar of the Statute of Limitations. In *Belcher v. Tacoma Eastern R. Co.* (1917) 99 Wash. 34, 168 Pac. 782, it appeared that the defendant railroad company had applied to the Public Service Commission to obtain permission to cancel admittedly unjust switching charges exacted of the St. Paul & Tacoma Lumber Company. The defendant confessed at that time that the lumber company had been a favored shipper and had operated under a preferential tariff in shipping its logs. As a means of inducing the Commission to allow it to absorb the switching charges, the railroad imposed on itself an obligation to "remove any suggestion of discriminatory charges or violation of the long and short haul provision of the Public Service Commission Act, and as to charges in excess of those

collected under T. E. R. R. G. F. D. No. 76, and succeeding issues, refund will be made by the Tacoma Eastern Railroad to all claimants down to the basis prescribed in that tariff." Action was brought by the plaintiff to recover excess payments arising out of the claim that the defendant had charged the plaintiff's assignor, the Tidewater Lumber Company, a higher rate, based on a higher minimum load per car, for transporting its logs a lesser distance on the same line and in the same direction than it had charged the St. Paul & Tacoma Lumber Company for performing a like and contemporaneous service. The defense was interposed that the claims of the Tidewater Lumber Company were barred by limitation at the time the defendant filed its petition with the Public Service Commission. In holding to the contrary the court said: "The petition was a recognition of all claims arising out of the discriminatory tariff under which the St. Paul & Tacoma Lumber Company had operated, and

amounted to an express promise to pay all claims of that class, and this, we think, revived the claims which theretofore had been barred by lapse of time. It is true, the promise was not made directly to the shippers, but it was made to the Public Service Commission, which was exercising official functions in the interest of all persons engaging in shipping, and was made for the express purpose of inviting an order which would redound to the benefit of appellant's assignor and to other shippers similarly situated. The petition therefore amounted to a new promise, supported by the moral obligation to pay, and revived the claims."

It will be noted that the essential difference between the Belcher Case and the reported case (*BIG DIAMOND MILL CO. v. CHICAGO, M. & ST. P. R. CO.* ante, 1254) was that in the latter the promise was made in the form of a statement issued to the public and signed by the Commission and the railroad companies, while in the former the promise was made to the Commission.

The cases hereinafter cited, while not involving the precise question under consideration in the reported case, are in some respects similar thereto, and are considered to be of sufficient importance to appear in this annotation.

In *Adams v. Orange County Bank* (1837) 17 Wend. (N. Y.) 514, it appeared that a bank, in pursuance of a statute, published a list of unclaimed deposits remaining in the bank. It was held that this was an acknowledgment of indebtedness to the several

persons named in the publication as depositors, sufficient to remove the bar of the Statute of Limitations.

In *Ft. Scott v. Hickman* (1884) 112 U. S. 150, 28 L. ed. 686, 5 Sup. Ct. Rep. 56, it appeared that the finance committee of a city council, in a report on the city indebtedness, recommended that a circular letter offering a compromise be sent to persons holding city bonds other than "Macadam bonds," as to which the committee made no report further than to include them in its statement of liabilities. The city council adopted the report of the committee, and the circular letter, addressed to "each person holding bonds of the city," was sent to each holder of city bonds except the holders of the "Macadam bonds." It was held that neither the report of the committee nor its adoption by the council, nor the circular letter, was such an acknowledgment of the debt evidenced by the named issue of bonds as to take them out of the bar of the Statute of Limitations.

In *Houston v. Jankowskie* (1890) 76 Tex. 368, 18 Am. St. Rep. 57, 13 S. W. 269, it appeared that the secretary of a municipality in his annual report, in which he estimated the bonded indebtedness of a city, included as a valid claim bonds which were on their face barred by the Statute of Limitations. It was held that these bonds were not relieved from the bar of the statute, as the acknowledgment, in order to be effective, must be made by the debtor, or someone authorized to make it, and must be made to the creditor or his agent. W. F. F.

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RE THOMAS T. KERL.

*Idaho Supreme Court—March 6, 1920.*

(— Idaho, —, 188 Pac. 40.)

**Attorney and client — conviction of crime involving moral turpitude — interference with military forces — conclusiveness.**

1. When an attorney at law, admitted to practise in Idaho, has been convicted of a crime involving moral turpitude (such as attempted inter-

ference with military forces), and a certified copy of the record of his conviction has been filed in this court with a view to bringing about his disbarment, his guilt or innocence is not in issue. The question is, Has he been convicted of such offense? Comp. Stat. 1919, § 6578, makes the record of his conviction conclusive evidence of that fact, and Comp. Stat. 1919, § 6590, prescribes the judgment which must be entered.

[See note on this question beginning on page 1262.]

— purpose of disbarment.

2. The purpose of disbarment is not the punishment of the attorney, it is to protect the public and those charged with the administration of justice from the misconduct of persons who have found their way into the legal profession and who are unfit to perform the duties of an attorney at law.

[See 2 R. C. L. 1088.]

**War — interference with — moral turpitude.**

3. If a citizen of the United States of America, at a time when our country is at war, knowingly and wilfully makes false statements with intent to interfere with the success of its mili-

tary and naval forces and with intent to promote the success of its enemies, or wilfully attempts to cause disloyalty, insubordination, mutiny, and refusal of duty in its military and naval forces, or wilfully obstructs its recruiting and enlistment service, his conduct involves moral turpitude.

[See 2 R. C. L. 1100.]

**Attorney and client — power to revoke license.**

4. The legislature may provide that the conviction of an attorney in any jurisdiction of a felony or misdemeanor involving moral turpitude, whether his acts are so designated by local laws or not, should be sufficient cause for revoking his license.

**PROCEEDINGS for the disbarment of Thomas T. Kerl. *Judgment of disbarment ordered.***

The facts are stated in the opinion of the court.

Mr. Oliver O. Haga, Chairman of Grievance Committee of the Idaho Bar Association.

Mr. Thomas T. Kerl, in propria persona.

Morgan, Ch. J., delivered the opinion of the court:

Thomas T. Kerl, an attorney at law admitted to practise in the courts of Idaho, was, on December 12, 1918, in the district court of the United States in and for the Omaha division of the district of Nebraska, convicted of violating the portions of United States Statutes at Large, vol. 40, chap. 75, p. 553 (Comp. Stat. § 10,212c, Fed. Stat. Anno. Supp. 1918, p. 122), which are as follows: "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, . . . and whoever, when the United States is at war, shall wilfully cause

or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

The acts of which Kerl was convicted consisted of certain statements which he was alleged to have made to a number of persons when the United States of America was at war with the Imperial German government, with the unlawful intent and purposes above indicated. He was sentenced to pay a fine of \$2,000 and costs, which he paid.

An accusation, accompanied by certified copies of the indictment, verdict, and sentence, was filed in this court, and it was therein charged that Kerl had been convicted of a crime which involved moral

turpitude, being the offense above mentioned. A citation was thereupon issued, directing him to show cause, if any he had, why he should not be disbarred. He answered the accusation, both orally and in writing, admitting the conviction and denying that the acts and statements of which he had been accused and convicted involved moral turpitude. He also denied that he made the statements, or that he entertained the views therein expressed, and he insists he is now and always has been a patriotic citizen of the United States of America.

The statutes of Idaho applicable to this case are as follows:

Comp. Stat. § 6578. "An attorney and counselor may be removed or suspended by the supreme court and by the district courts for either of the following causes, arising after his admission to practise: (1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence."

Comp. Stat. § 6580. "The proceedings to remove or suspend an attorney and counselor under the first subdivision of § 6578 must be taken by the court on the receipt of a certified copy of the record of conviction."

Comp. Stat. § 6590. "Upon conviction, in cases arising under the first subdivision of § 6578, the judgment of the court must be that the name of the party must be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practising as such attorney or counselor in all the courts of this state."

The supreme court of North Carolina, *Re Ebbs*, 150 N. C. 44, 19 L.R.A. (N.S.) 892, 63 S. E. 190, 17 Ann. Cas. 592, construing a statute similar to ours, held it did not confer power to disbar an attorney because of his conviction in the courts of another state, or of the United States, and the supreme court of

Oregon, in *Ex parte Biggs*, 52 Or. 433, 97 Pac. 713, construing a like statute, held that, because there was no offense known to the law of the state as "conspiracy to suborn perjury," an attorney's conviction of that crime in a Federal court would not warrant his disbarment. In view of the purpose of the law the opinions in these cases are not persuasive.

A certificate of admission to the bar is a pilot's license which authorizes its possessor to assume full control of the important affairs of others and to guide and safeguard them when, without such assistance, they would be helpless. Moreover, in Idaho, it is a representation made by this court that he is worthy of the unlimited confidence which clients repose in their attorneys; trustworthy to an extent that only lawyers are trusted, and fit and qualified to discharge the duties which devolve upon members of his profession.

The purpose of disbarment is not the punishment of the attorney, it is to protect the public and those charged with the administration of justice from the misconduct of persons who have found their way into the legal profession and who are unfit to perform the duties of an attorney at law. *Re Wourms*, 31 Idaho, 291, 170 Pac. 919.

It is competent for the legislature to provide that conviction of an attorney in any jurisdiction, of a felony or misdemeanor involving moral turpitude, whether his acts are so designated by the laws of this state or not, shall be deemed to be sufficient ground for revoking his license. The Idaho legislature so provided by enacting § 6578, subd. 1, above quoted, and by not limiting its scope. *Re Shepard*, 35 Cal. App. 492, 170 Pac. 442; *Re Thompson* (Cal. App.) 174 Pac. 86; *Re Kirby*, 10 S. D. 322, 39 L.R.A. 859, 73 N. W. 92, 907.

Attorney and client—purpose of disbarment.

—power to revoke license.



If a citizen of the United States of America, at a time when our country is at war, knowingly and wilfully makes false statements with intent to interfere with the success of its military and naval forces and with intent to promote the success of its enemies, or wilfully attempts to cause disloyalty, insubordination, mutiny, and refusal of duty in its military and naval forces, or wilfully obstructs, or attempts to obstruct, its recruiting and enlistment service, his conduct involves moral turpitude. *Re Hofstede*, 31 Idaho, 448, 173 Pac. 1087.

When an attorney at law, admitted to practise in Idaho, has been convicted of a crime involving moral turpitude and a certified copy of the record of his conviction

has been filed in this court with a view to bringing about his disbarment, his guilt or innocence is not in issue. The question is, Has he been convicted of such offense? Comp. Stat. § 6578, makes the record of his conviction conclusive evidence of that fact, and Comp. Stat. § 6590, prescribes the judgment which must be entered.

In conformity to the requirements of the section last mentioned the name of Thomas T. Kerl will be stricken from the roll of attorneys and counselors of this court, and he will be precluded from practising as such attorney or counselor in all the courts of this state. The clerk is directed to enter judgment accordingly.

Rice and Budge, JJ., concur.

### ANNOTATION.

#### Disloyal acts or political opinions as ground for disbarment or suspension of attorney.

It will be seen that it is held in the reported case (*RE KERL*, ante, 1259), under the Idaho statute providing that an attorney may be removed or suspended for conviction of a felony or misdemeanor involving moral turpitude, that it was ground for disbarment, that an attorney had been convicted under the United States statute imposing a punishment for wilfully making or conveying false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or for wilfully inciting disloyalty, etc., or attempting to obstruct the recruiting or enlistment service of the United States, etc.

It was held in *Re Hofstede* (1918) 31 Idaho, 448, 173 Pac. 1087, under the same Idaho statute, that an attorney convicted under the United States statute of the crime of aiding another to avoid registration under the Selective Service Law of the United States

(Act of May 18, 1917), and more particularly of counseling and advising young men of registration age not to register as required by that law, thereby seeking to interfere with the government of the United States in its efforts to raise an army in time of war, is convicted of a crime "involving moral turpitude," and should be disbarred.

In *Re Arctander* (1920) — Wash. —, 188 Pac. 380, the court disbarred an attorney who assisted some 400 persons from thirty-one to forty-six years of age in the preparation of their war questionnaires, charging them \$5 apiece, and who also assisted 200 registrants in the preparation of affidavits on the government blank form to withdraw intention of becoming citizens of the United States, charging them \$10 apiece therefor. It appeared that the legislature had adopted the Code of Ethics of the American Bar Association as the standard of ethics and guide by the

Attorney and client—conviction of crime involving moral turpitude—interference with military forces—conclusiveness.

members of the bar, and that it had authorized the board of examiners to recommend for disbarment all persons whose conduct was in violation of the purpose and spirit of the statute, and that canon 32 of such Code stated: "But, above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." The rules and regulations prescribed by the President under the authority of the Selective Service Law stated that all lawyers and physicians should regard it as their duty to identify themselves with the advisory board, and freely and without compensation to give their best service to the nation, and that it is inconsistent with this duty for lawyers to seek clients for the purpose of urging and advocating individual cases in any other way than as disinterested and impartial assistants of the selective service system. As to the preparation of the questionnaires, shortly after the attorney had begun the work the government appeal agent of the city called his attention to the fact that he was at least violating the spirit of the selective service regulations, and his partner and other friends advised him to desist. The opinion of the board of examiners, which was adopted by the court, stated: "He resented the President's call to the lawyers to serve the nation and its registrants voluntarily, freely, and without charge. He did just what the regulations asked the lawyers not to do. He became the advocate for the man who was seeking to escape military service. He refused to make out questionnaires for registrants who had no claim for exemption. He refused to perform services whereby the War Department could obtain the information which it needed for the classification of registrants for military and industrial service. He became the advocate, and not the disinterested adviser, of the slacker and of men who were even willing to renounce their intentions to become American citizens,—men whom he himself called sneaks. . . . From the respondent's own admissions and

actions, we are regretfully forced to the conclusion that his conduct in performing services for registrants under the Selective Service Law was disloyal, mercenary, unethical, and unprofessional. Had the bar of the United States assumed the same attitude in response to the President's call to duty that respondent did, it would have called down upon itself the reprobation of the nation. It would have been disgraced to eternity. It is the duty of the lawyer, above all others, to serve his country, and his services should always be at his country's call in times of need. We feel that the respondent should not be allowed to practise law before the courts of this state, and we therefore respectfully recommend his permanent disbarment." (But it was further held in the same case that it was not unethical or disloyal for an attorney to prepare petitions to be presented to the Norwegian embassy in asking the State Department of the United States for the release of Norwegian subjects from military service, under the provisions of the treaty of the United States with Sweden and Norway, and to charge for such services.)

In *Re Wiltsie* (1920) — Wash. —, 186 Pac. 848, the court disbarred an attorney for soliciting the employment of claiming exemptions for persons subject to the operation of the Selective Service Act, and for suggesting, encouraging, and assisting in the preparation of false affidavits looking to the improper exemption of his clients, saying: "The charges of solicitation of business, . . . and the filing of false claims of exemption, are so well proved and so flagrantly unethical, as well as disloyal, as sufficiently to evidence that degree of moral turpitude unfitting the practitioner to continue the practice of law in this state."

In *Cohen v. Wright* (1863) 22 Cal. 293, in upholding the constitutionality of a statute that provided that no attorney should be permitted to practise in any court until he should have taken and filed the oath of allegiance, the court said: "The public have a

right to demand that no person shall be permitted to aid in the administration of justice whose character is tainted with dishonesty, corruption, crime, and, we will add, disloyalty, or treasonable acts. And his name will be stricken from the roll by the court, by a summary proceeding, in such cases, whether provided for by statute or not, as it is a duty which the court owes to the public."

"The courts will . . . strike attorneys off the rolls . . . after being convicted of seditious practices." Merrifield, Attys. p. 90, citing *Ex parte Frost* (1830) 1 Chitty (Eng.) 558, note.

In *Dormenon's Case* (1810) 1 Mart. (La.) 129, the court disbarred an attorney who, in 1793, when a municipal officer in San Domingo, aided and assisted the negroes in murdering and massacring the whites.

But it was held in *Lotto v. State* (1919) — Tex. Civ. App. —, 208 S. W. 563, that it was not "dishonorable conduct," under the Texas statute prescribing the offenses for which an attorney may be disbarred, for an attorney to say to another person that "Germany is going to win the war and I hope she will," referring to the war then pending between the United States and Germany, the statute having been re-enacted after the court construed the words "dishonorable conduct" as meaning conduct as an attorney, and only official conduct as such.

It may be noted that in *Ex parte Garland* (1867) 4 Wall. (U. S.) 333, 18 L. ed. 366, the petitioner, who had been a member of the so-called Confederate Congress during the secession of the South, but had been pardoned by the President of the United States, applied for a license to practise law in the United States courts without first taking an oath to the effect that he had never voluntarily given aid to any government hostile to the United States, etc., as required by statute. It was held, by a divided court, that to exclude petitioner from the practice of law for that offense would be to enforce a punishment for the offense, notwithstanding the pardon, which the court had no right to do; and the petition was granted. *Ex parte Law* (1866) 35 Ga. 285, Fed. Cas. No. 8,126, was a similar case, in which the same doctrine was laid down.

But it is stated in Merrifield's *Law of Attorneys*, page 55, that where an attorney who had been struck off the roll upon a conviction for seditious practice was afterwards pardoned, "the court refused to readmit him, stating that the want of experience arising from his having discontinued practice was, independently of other circumstances, a sufficient ground for not acceding to the motion," citing *Ex parte Frost* (1830) 1 Chitty (Eng.) 558, note.

Sometimes the statutes expressly provide that no person convicted of treason shall be permitted to practise in any court. B. B. B.

WILLIAM STEIN, Sole Trader under the Name of Stein Brothers, Resp.,  
v.

SOL SCHAPIRO, Appt.

*Minnesota Supreme Court — January 30, 1920.*

(*Stein v. Shapiro*, — Minn. —, 176 N. W. 54.)

**Sale — effect of custom.**

Previous dealings, or a well-established usage or custom of a trade, cannot inject into a sales contract an obligation on the part of the seller to deliver the goods sold, upon being tendered a draft drawn by the buyer's agent upon the buyer.

[See note on this question beginning on page 1268.]

Headnote by HOLT, J.

**APPEAL** by defendant from a judgment of the District Court for Morrison County (Roeser, J.) in favor of plaintiff and from an order denying a new trial in an action brought to recover damages for failure of defendant to deliver goods which he had contracted to sell plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Mr. E. A. Kling, for appellant:

The verdict was in clear violation of the instructions given to the jury, and is void.

Standiford v. Green, 54 Neb. 10, 74 N. W. 263; Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276; Crane v. Chicago & N. W. R. Co. 74 Iowa, 330, 7 Am. St. Rep. 479, 37 N. W. 397; Bushnell v. Chicago & N. W. R. Co. 69 Iowa, 620, 29 N. W. 753; Soderburg v. Chicago, St. P. M. & O. R. Co. 167 Iowa, 123, 149 N. W. 82; Freil v. Pietzsch, 22 N. D. 113, 132 N. W. 779; King v. Lincoln, 26 Mont. 157, 66 Pac. 886; Darlington Oil Co. v. Pee Dee Oil & Ice Co. 68 S. C. 46, 46 S. E. 720; Aguirre v. Alexander, 58 Cal. 30; Lynch v. Snead Iron Works, 132 Ky. 241, 21 L.R.A. (N.S.) 852, 116 S. W. 693; Rogers v. Murray, 3 Bosw. 357; Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

The offering of the draft in question did not constitute payment.

State Bank v. Byrne, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008; 30 Cyc. 1187; Goenen v. Schroeder, 18 Minn. 66, Gil. 51; National Bank v. Wisconsin C. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; Buffalo Center Land & Invest. Co. v. Swigart, 176 Iowa, 422, 156 N. W. 701; Seattle v. Molin, 99 Wash. 210, 169 Pac. 318; Townsend v. Swallow, 91 Neb. 564, 136 N. W. 730.

Mr. David London for respondent.

Holt, J., delivered the opinion of the court:

Damages were awarded for defendant's failure to deliver goods he had contracted to sell plaintiff. Defendant appeals from an order denying a new trial.

Both parties deal in hides, plaintiff buying from the smaller dealers. Plaintiff's place of business is at Rice Lake, Wisconsin, and defendant's at Little Falls, this state. Jack Stein was plaintiff's traveling agent, who, on December 21, 1918, made a contract to purchase, at prices specified, all the hides that defendant might have on hand be-

tween the 15th and 25th of January following. A draft for \$300, to apply on the purchase, was given when the contract was made. On January 23d Jack Stein came to Little Falls to inspect, bundle, and weigh the hides that defendant had on hand. Before the work was completed Stein found some fault with the condition of the hides, and defendant stated that he would not deliver them except upon receipt of the balance of the purchase price in cash. Stein drew a draft on plaintiff for \$2,114.77, the balance of the purchase price, and gave to defendant. Stein claims the draft was accepted. Defendant claims it was left on his desk against his protest that he would not accept it, or ship the hides until he obtained his pay in money. At any rate, while Stein was at the depot waiting to depart, he telephoned defendant that if he, defendant, thought he could get away with the dirty trick of soaking the hides before they were weighed he was mistaken. Stein admits that there was a demand for cash, and that he telephoned plaintiff to arrange with the Little Falls bank to cash the draft. The hides were not shipped, and on January 27th, the draft was returned to plaintiff, with a notice that defendant would not be bound by the sale because the full purchase price was not tendered in cash within the time set for the delivery of the hides.

The answer admitted the contract of sale set forth in the complaint, but alleged its breach by plaintiff in failing to tender the price within the stipulated time. The reply alleged that payment was to be made by draft as in former similar transactions between the parties and in accordance with the custom of the trade, and that "it is the custom of the trade in which both plaintiff and defendant are en-

gaged, and of which both had notice, to pay for merchandise sold under this and similar contracts by drafts."

The jury were instructed that a recovery could be had for failure to deliver if they found that defendant accepted the draft in payment of the hides. No such issue was tendered by the pleadings; but evidence directed thereto was offered by both sides, was received without objection, and no fault was found with its submission to the jury. Hence if it could be ascertained that the jury solved this issue in favor of plaintiff, the verdict should stand. But that cannot be done, for the court also left to the jury two other issues, either of which, determined in plaintiff's favor, would also entitle him to a verdict. If either of the two issues thus submitted do not warrant such a verdict there must be a new trial. In regard to the two issues referred to, the charge was: "If you find that by previous dealings there had been established a course of dealings between the parties whereby the defendant had previously accepted the draft of plaintiff in payment for purchases made, or if you find that there is a custom of the hide business, in this locality, of which both parties had notice so as to bind them, that payment for the purchase of hides by hide dealers is made by draft and not by cash, then it was the duty of defendant to accept plaintiff's draft on January 24th."

Error is assigned upon this instruction. It is well settled that where a contract for the sale of goods is silent as to the manner of the purchase price, payment in money or legal tender must be made or offered before delivery of the goods can be demanded. And § 42, chap. 465, Laws 1917 (Gen. Stat. Supp. 1917, § 6015-42), the Uniform Sales Act, provides: "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions."

Payment of the price was here

necessary before the seller could be placed in default, for there is no contention that the sale was on credit. Nor is there any claim that there was a tender of the purchase price in money. Unless the draft drawn upon plaintiff by his agent Stein was either accepted in payment, or unless a provision may be incorporated into the contract of sale that such draft should be accepted in payment because of the evidence received of prior use of drafts in the deals between the parties, or because of the usage or custom of the trade testified to, defendant must be conceded the right to have the balance of the purchase price in cash before he could be required to deliver the hides. It would seem entirely clear that the fact that defendant had, in prior deals with plaintiff, accepted such drafts, cannot inject into all subsequent contracts of sale an agreement to accept drafts in lieu of money, unless some new principle of contracts is furnished by § 71 of chapter 465 (Gen. Stat. Supp. 1917, § 6015-71), which provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

We do not think this section adds, or was intended to add, anything new to sales contracts, but is rather in recognition of existing contract law. The duty or liability to pay the price for goods purchased can hardly be said to arise by implication, for it is the essence of every sale. The same is the fact that the purchaser is entitled to the stipulated price in money or in legal tender.

We think neither previous dealings nor the custom testified to should be held to import into a sales contract an obligation on the seller to accept an order

Sale—effect of custom.

or draft drawn by the buyer's agent upon the buyer as payment. As long as the seller has possession of the goods he has a seller's lien thereon, and may retain possession until the price is paid or tendered in money. It is true that it has been held that, where a general well-established custom prevails in a trade, contracts pertaining to such trade are made with reference to such custom. *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305; *McDonald v. Union Hay Co.* — Minn. —, 172 N. W. 891. But such custom or "usage cannot be allowed to subvert a well-settled rule of law." *Globe Mill. Co. v. Minneapolis Elevator Co.* 44 Minn. 153, 46 N. W. 306. "Custom will not be allowed to vary or contradict the plain expressed terms of a contract, or to imply from these terms an obligation different from what the law would imply, or to imply an obligation in the absence of any contract on the subject." *E. L. Welch Co. v. Lahart Elevator Co.* 122 Minn. 432, 142 N. W. 828. In *Southwestern Freight & Cotton Press Co. v. Stanard*, 44 Mo. 71, 100 Am. Rep. 255, the court said: "But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law."

Nor will evidence of an unreasonable usage or custom be permitted to inject an obligation into a contract. *Byrd v. Beall*, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749. And it might well be held that a custom which requires the delivery of goods sold upon the mere receipt of an order or draft, like the one in this case, is unreasonable and contrary to the well-settled rule of law which assures to the seller the price in money and gives him a lien upon the goods therefor, and possession to enforce it. Many things may happen between the making of a

contract for the sale of goods and the time set for payment and delivery, such as insolvency of the buyer or disputes which might culminate in a lawsuit, which the seller might be forced to bring in a foreign jurisdiction if he be denied his right to payment in money concurrent with delivery.

The custom proven should hardly amount to more than this: In transactions between dealers the convenience of the buyer, and perhaps the seller also, is usually served by using the buyer's checks or drafts drawn on him by his agent to settle for purchases, but, although so used, both parties understand that the check or draft is accepted from choice in the particular case, and not from an obligation of the contract, and only as conditional payment. Nearly all large transactions between dealers of good repute are by checks or drafts. The risk of carrying large sums of money to pay for goods purchased in businesses carried on in the manner which plaintiff was doing is so apparent that no one attempts it. But, notwithstanding this manner of using checks or drafts, it should be, and we think it is, well understood that a seller is free to insist on cash when to him it seems best to have it, unless there is a specific agreement in the contract to accept something else in lieu thereof. It might well be that the course of dealing or this custom might avail to avoid a default of forfeiture. That is, when defendant refused the draft, their previous dealings or the custom to settle with drafts might have given plaintiff a reasonable time to produce and tender the balance of the purchase price in money. But that question is not involved and is not decided, for there was no tender of money at any time.

Our conclusion is that there should be a new trial.

Order reversed.

## ANNOTATION.

**Custom or previous dealing as imposing an obligation upon party to contract to accept something else in lieu of cash.**

The annotation does not cover the question as to what money is legal tender, nor generally as to what kinds of money a creditor, or one entitled by contract to payment, may be obliged to take. Nor does it cover cases which turn on the interpretation of the particular wording of the contract, such as a contract for payment in "currency." Some cases which are of these classes are cited, however, partly for illustrative purposes, and partly because the particular case is of value on the present question by reason of the method of treatment of the questions involved.

The reported case (*STEIN v. SCHAPIRO*, ante, 1264) in holding that previous dealings, or a well-established usage or custom of trade, cannot inject into a sales contract an obligation on the part of the seller to deliver the goods sold, upon being tendered something else in lieu of cash, such as a draft drawn by the buyer's agent upon the buyer, seems sound in principle, although no case precisely similar has been found. It is supported by a number of cases cited in the present annotation, arising, however, under somewhat different circumstances. It will be observed that, in the *STEIN CASE*, the court stated that it might well be that a course of dealing, or custom, might avail to avoid a default or forfeiture; that is, when the seller refused the draft, the previous dealings of the parties, or custom to settle with drafts, might have given the buyer a reasonable time to produce and tender the purchase price in money. And there are several decisions to the effect that custom or usage may be shown for the purpose of proving the readiness of the buyer to comply with the terms of the contract, where he went to the seller's place of business to take possession of the goods and had only commercial paper as payment. But in these cases the refusal on the part of the seller to perform the contract was not placed on the ground

that payment was not offered in cash. Such cases, however, are distinguishable from *STEIN v. SCHAPIRO*, ante, 1264, and apparently should not be construed as supporting the view that custom or previous dealing may impose an obligation on a party to a contract to accept something else in lieu of cash.

Thus, in *Hughes v. Knott* (1905) 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903, holding that evidence of a general custom in the tobacco trade to accept checks in payment of tobacco sold was admissible in an action by the buyer against the seller for the possession of the property, the question arose in connection with that as to the alleged readiness of the buyer to perform the contract, he having testified that on the day for performance he had a check and other collateral which could be promptly converted into cash, and did not ask the seller to take his check, but told him that he would get the money the next day and pay him. The court said that evidence of such custom was admissible not for the purpose of varying the contract, but of interpreting its terms; and that if on the day for performance the buyer went to the warehouse of the seller during business hours for the purpose of paying for the tobacco, and had available funds for that purpose, either in money or checks, which he could have promptly converted into money, and the seller was not at its place of business, the buyer must be relieved of the duty of converting the checks into currency on that day, and carrying the same about on his person until he could find the seller; that, if the buyer's view of the entire transaction was correct, he should have been allowed a reasonable time, after the refusal of the seller to deliver the tobacco, to convert his funds into currency, and, if the funds were available for that purpose, the jury would be justified in finding that he was ready, able, and

willing, within the terms of the contract.

"We have held," said the court in *Hughes v. Knott* (N. C.) *supra*, "that testimony tending to show a custom among cotton dealers to accept checks in payment for cotton sold in large lots was competent." This proposition is supported by *Blalock v. Clark* (1904) 137 N. C. 140, 49 S. E. 88, where, in an action by the buyer of cotton against the seller for breach of contract, it was held that, the contract being silent as to the mode of payment for the cotton, it was competent for the buyer to show a general commercial custom and usage among cotton dealers as to the method of paying for cotton in large lots, and that evidence was admissible of a well-established custom to pay therefor by check. In this case also the admissibility of evidence of the custom arose in connection with the question of the buyer's readiness to perform.

Ordinarily, however, it seems clear that the rule of law by which parties entitled by contract to payment are entitled to payment in legal tender currency cannot be changed by custom or prior dealings of the parties.

It was held in *State ex rel. News Pub. Co. v. Park* (1917) 166 Wis. 386, 165 N. W. 289, that the terms of a definite and unambiguous contract of sale, to make payment monthly "by cash payable in funds current in Chicago or New York," could not be varied by evidence that the seller had been in the habit of receiving personal checks of the buyer in payment of instalments due under previous contracts, the court stating that at most this seemed to have been a mere indulgence, and, even if it rose to the dignity of custom, could not vary the terms of the contract.

And the rule that a creditor cannot be compelled by custom to receive anything in payment of his debt except legal tender currency is supported by the case of *Marine Bank v. Chandler* (1862) 27 Ill. 525, 81 Am. Dec. 249, holding that a custom by business men of a particular place to receive depreciated paper money in payment of their debts would not, in the absence

of a special agreement, bind a depositor in a bank to accept payment in such money, especially where he did not reside in that place. The court said: "That parties may contract to receive any commodity in lieu of money, in payment of indebtedness, is undeniably true. This can only be done by special agreement, and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of the particular place have been in the habit of receiving depreciated paper money in payment of their demands by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect, a special agreement must be proved."

To the same effect is *Marine Bank v. Birney* (1862) 28 Ill. 90, holding that a bank which credited a depositor's account with a certain number of dollars, received in Illinois currency, could not, when sued by the depositor, prove a custom of the banks in the city in question to pay deposits in depreciated Illinois bank bills. The court referred to the fact that the letter of advice acknowledging the deposit did not state that it was payable in the kind of funds deposited, but stated that a certain number of dollars had been received, and the court said that "whether that amount was received in bank paper, in cattle, horses, grain, or other commodity, could not change the liability to pay the number of dollars received. . . . The liability is for money, and not for bank bills. . . . The evidence as to custom of Chicago bankers was properly rejected. Appellant had no right to alter, change, or modify the agreement by the proof of a custom. . . . The credit was given for dollars, and proof could not be heard to show that it could be paid in something else."

And in *Howes v. Austin* (1864) 35 Ill. 396, the court instructed the jury, in an action on a check, that the word "dollars" in the check "means dollars in the lawful money of the United



States, and it cannot be explained, either by verbal agreement, or by custom, or any mercantile or other usage, to have any other or different meaning than that, and all evidence given to establish such custom or usage should be rejected." The instructions given were assigned as error, and the judgment for the plaintiff affirmed on appeal, although the particular question here under consideration is not discussed in the opinion.

So, it was held in *Buford v. Tucker* (1870) 44 Ala. 89, that, in an action on a note given in 1865 for the hire of a slave, evidence was inadmissible of a custom at the time the note was given, in the county where the parties resided, that in the case of a contract employing the word "dollars," without designating the kind of dollars, the contract was to pay in Confederate money. The court said that, Confederate money having been first issued about 1862, the alleged custom wanted antiquity and other elements requisite to a good custom.

The annotation does not cover in general the question of the right to discharge in Confederate money an obligation incurred during the Civil War. See, for example, *Austin v. Kinsman* (1867) 84 S. C. Eq. (13 Rich.) 259, and *Bryan v. Harrison* (1877) 76 N. C. 360, on the question whether parol evidence is admissible to explain the use of the term "dollars" in a note given in 1862, for the purpose of showing that payment was contemplated in Confederate money. In *Taylor v. Bland* (1883) 60 Tex. 29, where this question was involved, the court stated that after the close of the Civil War many contracts made during its existence, payable in "dollars," came before the state and Federal courts for construction, and that the construction finally settled upon was that where the contract is payable in "dollars," without designating the kind of money meant, the presumption is that the contract called for legal tender "dollars;" but that the facts and circumstances attending the transaction were admissible for the purpose of rebutting that presumption and of showing

that in fact the term meant Confederate "dollars."

A custom in 1863 or 1864, in a southern state, to pay debts in Confederate money, was held invalid in *Williamson v. Richardson* (1867) Fed. Cas. No. 17,754.

The holder of a promissory note, it was held in *Lord v. Burbank* (1841) 18 Me. 178, is not bound by a usage to accept payment in common paper currency instead of specie.

In *Thompson v. Riggs* (1866) 5 Wall. (U. S.) 663, 18 L. ed. 704, the question arose as to whether a bank which had received a general deposit in specie could discharge the obligation in treasury notes, which were legal tender, but of depreciated value as respects specie. It was held that, as the deposit was general and title to the money deposited had passed to the bank, the general rule of law by which the debt could be discharged by such money as was legal tender could not be controlled by evidence of a local custom of bankers to distinguish between deposits in specie and in depreciated paper money, and to pay the former in coin.

It was held also in *Veeche v. Grayson* (1823) 1 Mart. N. S. (La.) 133, that in an action on a note payable in dollars, parol evidence was inadmissible to prove that the currency and medium of exchange in Kentucky, where the note was executed, consisted of notes of the bank of Kentucky, and that, according to the custom and usage of trade, notes of individuals to pay money were payable in such bank notes, unless the contract expressly provided for payment in specie.

The proposition that a custom cannot be shown to discharge by payment in kind an obligation to pay damages for breach of a contract of warranty finds support in *Johnson v. Gilfillan* (1863) 8 Minn. 395, Gil. 352, although stress is laid in the opinion on the fact that antiquity, one of the essential elements of a valid usage, was wanting in this case, the business of dealing in land warrants, which formed the subject-matter of the sale in this instance, and which was formerly not assignable at law, being of recent date.

Although not strictly in point, attention is called to *Pilmer v. Bank of Des Moines* (1864) 16 Iowa, 321, holding that, in an action on a draft payable in "currency," evidence is admissible of the general and customary meaning of the term "currency" at the place of payment.

And on the question whether a contract made at Ceylon to pay for goods deliverable at New York, "in cash," meant a payment in specie,—gold or silver,—it was held in *Gladstone v. Chamberlain* (1867) Fed. Cas. No. 5,469, that the meaning of the phrase "to be paid in cash" might be explained by the usage and custom of the trade, if any existed.

But see *Marc v. Kupfer* (1864) 34 Ill. 286, construing the term "funds current" in a draft, and holding that in an action on the draft evidence was inadmissible that the term had a local meaning at the place where the draft was payable, and was understood there, and throughout the state, to mean Illinois bank notes, which were then greatly below par.

There are a number of cases involving the question of forfeiture of an insurance policy for nonpayment of the premium, as affected by the custom of the company to accept checks or other negotiable paper in payment of premiums. But these cases, which turn on the principle of estoppel or of waiver of the company to insist on a strict compliance with the contract, constitute a distinct class, affected by

special considerations, and no attempt to cover them is made in the present annotation. It will be observed that the question in these cases is distinctly different from that involved in the reported case (*STEIN v. SCHAPIRO*, ante, 1264), where the question was whether the seller was obliged to deliver the goods on being tendered a draft. In the latter case, if the draft was not paid, the seller would have only his right of action, while in the insurance cases referred to it seems clear that nonpayment of the check or draft would be a good defense in an action on the policy. As illustrative of the class of cases referred to, involving the question of forfeiture of an insurance policy for nonpayment of the premium, as affected by the custom of the company to accept checks or other negotiable paper in payment of premiums, attention is called to the following: *Krebs v. Security Trust & L. Ins. Co.* (1907) 156 Fed. 294; *Travelers Ins. Co. v. Brown* (1903) 138 Ala. 526, 35 So. 463; *Continental Ins. Co. v. Hargrove* (1909) 131 Ky. 837, 116 S. W. 256; *Hartford Life & Annuity Ins. Co. v. Eastman* (1898) 54 Neb. 90, 74 N. W. 394; *Kenyon v. Knights Templar & M. Mut. Aid Asso.* (1890) 122 N. Y. 247, 25 N. E. 299; *Van Bokkelen v. Massachusetts Ben. Asso.* (1895) 90 Hun, 330, 35 N. Y. Supp. 865; *Hollowell v. Life Ins. Co.* (1900) 126 N. C. 398, 35 S. E. 616; *Texas Mut. L. Ins. Co. v. Munson* (1882) 2 Posey, Unrep. Cas. (Tex.) 649. R. E. H.

JOSIE TREBOWOSKI, Resp't.,

v.

TOWN OF RINGLE et al., Appts.

*Wisconsin Supreme Court—June 12, 1917.*

(165 Wis. 637, 163 N. W. 165.)

#### Highway — defect on town line — liability.

In case of injury because of a defect in a highway at the point where it crosses the boundary line between two towns, the towns are liable jointly and severally under a statute providing that if any damage shall happen by reason of want of repair of any road in any town the person injured shall have a right to sue and recover against any such town.

[See note on this question beginning on page 1274.]

**SEPARATE APPEALS** by defendants from an order of the Circuit Court for Marathon County (Reid, J.) overruling demurrers to the complaint in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. *Affirmed.*

**Statement by Marshall, J.:**

The appeals are from an order overruling demurrers to the complaint for insufficiency and misjoinder of defendants. The allegations of the complaint were sufficient to constitute a cause of action against each and both of the defendants, if there can be a joint statutory liability for a personal injury against two towns under the circumstances stated, which were to this effect: The towns of Ringle and Pike Lake adjoin, with a north and south highway crossing the boundary between the two. At a point on the ground in the town of Ringle, about 5 rods north of such boundary and 1 rod east of the center of the traveled way, a telephone wire was extended southwesterly to the top of a telephone pole located in the town of Pike Lake, about 4 rods south of such boundary and 1 rod west of such center line so that, at the point where such way crossed such boundary, the wire was about 7 feet from the ground. Plaintiff, while traveling with ordinary care south on such way, seated in a top wagon to which a team of horses was attached and being driven with ordinary care, was severely injured by the top coming in contact with the wire at such point, causing the horses to become frightened and the wagon to be upset. In due time notice of the injury and claim for damages were served on the proper officers of both towns. As to the place of injury, the complaint stated this: "When said plaintiff reached the intersection point where said highway intersects said town line, the said telephone wire extending across said highway caught the top of the wagon in which plaintiff was seated, and thereby caused said horses to become frightened, upsetting said wagon, throwing said plaintiff from said wagon onto the ground and thereby seriously injuring and

bruising said plaintiff's head, face and body, compelling her to be confined to her bed for some time."

The notice of injury, served as aforesaid, contained substantially a like statement.

The defendants separately demurred to the complaint upon the grounds before indicated, and separately appealed from the decision in respect thereto.

Messrs. Brown, Pradt, & Genrich and M. W. Sweet, for appellants:

The complaint does not state a cause of action against either of the defendant towns.

*Stilling v. Thorpe*, 54 Wis. 532, 41 Am. Rep. 60, 11 N. W. 906; *Reed v. Madison*, 83 Wis. 177, 17 L.R.A. 733, 53 N. W. 547.

Messrs. Regner & Ringle, for respondent:

Defendants were jointly liable.

*Sutherland*, Damages, § 140; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Curtis v. Rochester & S. R. Co.* 9 Am. Neg. Cas. 618, note; *Reynolds v. Metropolitan Street R. Co.* 180 Mo. App. 138, 168 S. W. 221; *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744; *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 129 N. W. 401; *Glettler v. Sheboygan Light, P. & R. Co.* 130 Wis. 137, 109 N. W. 973; *Geuder, P. & F. Co. v. Milwaukee*, 147 Wis. 491, 133 N. W. 835; *Coel v. Green Bay Traction Co.* 147 Wis. 229, 133 N. W. 23; *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871; *Clapp v. Ellington*, 87 Hun, 542, 34 N. Y. Supp. 283, affirmed in 154 N. Y. 781, 49 N. E. 1095; *Hawxhurst v. New York*, 43 Hun, 589; *Oakley v. Mamaroneck*, 39 Hun, 448; *Boyd v. Watt*, 27 Ohio St. 259.

**Marshall, J.**, delivered the opinion of the court:

True, as suggested by counsel for appellants, liability for injuries to persons or property caused by defective highways is wholly statutory. It rests in the duty, created by the written law, of every town, city, or village to keep its highways, including bridges, in a reasonably

safe condition for public travel, and the responsibility thus created for damages happening by reason of failure to perform such duty. Stat. § 1339. Such failure is deemed to be negligence as a matter of law, and hence a wrong of tortious character. *Jaquish v. Ithaca*, 36 Wis. 108; *Fehrman v. Pine River*, 118 Wis. 150, 95 N. W. 105. True, also, the statute does not make any express provision respecting liability for damages where the defect causing the damage is at a point common to two towns, as in this case. The language of the statute is as follows: "If any damage shall happen to any person, his team, carriage, or other property by reason of the insufficiency or want of repairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town," etc., subject to a requirement for giving notice within a specified time and in a specified way to the municipality "against which damages are claimed," and stating, among other things, where such damage occurred.

Is the language of the statute, "in any town," etc., as to the place of a defective highway causing injury to a person using the same, and the language as to service of notice on the municipality against which the damage is claimed, stating "where such damage occurred," confined to events characterized by a defect at a point in a highway wholly within one municipality? Counsel for appellants contend for the affirmative. If that should prevail, the result would be that the statute leaves a person remediless who suffers damage from a defective highway at a point which is common to two towns. That the legislature did not intend such an absurdity seems quite clear. By a familiar principle, if the language of the written law can reasonably be read so as to avoid such absurd result, it should be presumed that it was intended to

be so read, and effect be given thereto accordingly.

It is considered that a point which is common to two towns, as the boundary line between them, in a proper sense, may be said to be within either or both, and so that the words of the statute, "in any town," apply to such point as regards either municipality. It follows that a defective highway at such a point answers to the call of the statute for "any town," as applied to each or both of the municipalities, and that both are in duty bound to maintain the highway at such point in a reasonably safe condition for public travel. Failure to do so is a joint and several liability, in case of damage to anyone in his person or property, happening thereby.

Highway—  
defect on town  
line—liability.

Our attention is called to the fact that § 1339, Stat., in effect provides that in case of damage to person or property happening from a defective bridge, erected and maintained at the joint expense of two towns, the sufferer may maintain an action against the two, it being immaterial on which side of the boundary between them the accident occurred. From that counsel draw the inference that the legislature deemed it necessary to specially provide for an action against two towns for damages caused by a defective highway, in order for competency to maintain such an action to exist. It does not seem so. The statute deals with the subject of joint liability of two towns in the special circumstance of damage occurring from a defective highway at a point which may be wholly within one of them. Such special circumstance required supplementary to the general language referring to damage happening from a defective highway in any town, or else a town jointly liable with an adjoining town for the maintenance of a bridge might be held solely responsible for damages happening on the bridge because of a defect on its side of the boundary. In case of a

defect which is common to two towns, hence within one as much as the other, no special provision, as that in respect to joint liability in case of bridges jointly constructed and maintained, was required.

From the foregoing it would seem that both of the defendants are liable, if, as alleged, the injury to plaintiff was caused by a defect in the highway at a point which was common to both, and, being so liable, and the nature of the wrong being of a tortious character, it seems that the elementary principle applies that an action may be maintained against either or both, as the trial court held.

The foregoing is in harmony with *Clapp v. Ellington*, 87 Hun, 542, 34 N. Y. Supp. 283, affirmed in 154 N. Y. 781, 49 N. E. 1095, cited to our

attention by counsel for respondent. It was there held that an action of this nature is for tort; that in case of a defect in a highway at a point where each of two towns is in duty bound to maintain the same in a reasonably safe condition for public use, such defect is in each of the towns, and the principles as to remedies for damages for wrongs of a tortious character apply. The remark of Barnard, J., in *Oakley v. Mamaroneck*, 39 Hun, 448, "When an accident results from joint negligence, all or either of the towns may be sued," in harmony with the general rule in actions not on contract was approved.

The order appealed from is affirmed, respondent to have costs against each appellant.

## ANNOTATION.

### Liability for injury on highway or bridge at town, municipal, or county line.

- I. In general, 1274.
- II. Roads, 1274.
- III. Bridges:
  - a. Counties, 1276.
  - b. Towns, 1277.
  - c. Cities and villages, 1280.
- IV. Miscellaneous, 1281.

#### I. In general.

Some statutes contemplate a joint duty and a joint responsibility on the part of both political divisions in respect of the entire line road or bridge. Others contemplate an allotment of different parts to the respective political divisions and a responsibility upon the part of each limited to its allotment. The cases for the most part deal with the application of one or the other of these forms of statute to varying situations. It may be said generally that under either form of statute the responsibility for injuries follows the duty to repair, and that except as it may affect that duty the mere locus in quo of the accident is not controlling.

#### II. Roads.

It will be seen that in the reported case (*TREBOWOSKI v. RINGLE*, ante,

1271), where the plaintiff was injured because a telephone wire, crossing diagonally a town line road, was struck by her buggy top at a point in the highway common to both towns, it was held on demurrer that the towns were jointly and severally liable for the injury under the statute referred to in the opinion, creating a liability for damage, by reason of insufficiency or want of repair of any road in any town, "against any such town." The court repeated its ruling on an appeal from the trial of the case in (1919) — *Wis.* —, 174 N. W. 915, where it appeared that the wire was 8 feet high, and that a statute required the wire at this crossing to be 24 feet above the surface.

Where an injury happened on a line road between the townships of S and E, the place, though in S township, being, under the statutes and a township agreement, under the care and control of E, it was held that E township was "liable to this plaintiff for any injury she may have received, without her fault, in consequence of the neglect of said township or its commissioner to keep the same in good

repair;" the statutes giving a right of action for injuries on a public highway against the town whose corporate authority extended over it and whose duty it was to keep the same in repair. *Sharp v. Evergreen Twp.* (1887) 67 Mich. 443, 35 N. W. 67.

Where there was a statutory liability upon counties for insufficiency or want of repair of highways which they were required to keep in repair, it was held, in *Ewh v. Otoe County* (1915) 98 Neb. 469, 153 N. W. 509, that "where a public road is established and opened upon the line between two counties, part of such road having been established by each county, it is the duty of each to use reasonable diligence to keep such road in a reasonably safe condition for the use of the traveling public, and for a failure to perform this duty such counties are jointly and severally liable."

In *Jones v. Utica* (1879) 16 Hun (N. Y.) 441, it was held that a city was not liable to the plaintiff for damages for injuries to his horse, due to stepping into a hole on the city's side of a highway between the city and a town, but within the portion of the highway allotted by agreement to the town, under the statute providing that "each district shall be considered as wholly belonging to the town to which it shall be allotted, for the purpose of opening and improving the road, and for keeping it in repair." The city under the charter was considered as a town under the statute, and the main question in the case was as to the validity of an unrecorded allotment, the court stating: "No question is made by the appellant's counsel but that an agreement made and recorded, as provided by the statute, is valid, and has the effect to make each town liable to third persons for injuries caused by the negligent condition of those portions of the road allotted to it, although not lying within the boundaries of such town, and to exempt it from liability in respect to the portion allotted to the other contracting party."

Where the statute provided that, when a highway is laid out upon the line between two towns, the super-

visors of each adjoining town shall determine what part of the highway shall be made and kept in repair by each town, and each town has all the rights and is subject to all the liabilities in relation to the part which is apportioned to it to be repaired, as if the same were wholly located in such town, it was held that it was sufficient to show that the supervisors of the two towns had agreed that the defendant should put in repair the part of the highway where the plaintiff was injured, and such town was liable, although there was no order of the supervisors affecting the highway between the two towns. *Montgomery v. Scott* (1874) 34 Wis. 338.

In *Wolfgram v. Schoepke* (1903) 119 Wis. 258, 96 N. W. 556, a joint town road, by order of the supervisors, under statute, was apportioned as to its west 80 rods to G township, and as to its east 80 rods to S township, to be made and kept in repair, a little of the east part not running on the line; thereafter S township reconstructed the east part, building it on the line, and shortly afterwards an act was passed increasing the boundaries of G township, and providing: "That part of the order fixing their liabilities shall be deemed vacated, and a majority of the supervisors of each of such towns shall, before the time for making the next subsequent tax roll, meet together and make a new order apportioning their liabilities on account of such highway." Nine days after the passage of the act the plaintiff was injured by reason of a hole in the new part of the road. The court said: "It is obvious that the time for a reapportionment of this highway by the supervisors of such towns had not yet arrived when the accident occurred. To construe the statute as contended for would, in effect, cast the burden of appellant's default, incurred prior to the time of such legislation, upon the town of Gagen. No such result can be said to have been reasonably contemplated by the statute. It fails, in terms and by implication, to impose such a liability on the town of Gagen; nor does it seem to contemplate a release of the appellant from the conse-

quences of its default in performing a legal duty."

### III. Bridges.

#### a. Counties.

It is a general rule that counties are not liable for damages for injuries owing to defects in a bridge between them, unless the statutes expressly make them so. *Paxton v. Berrien County* (1903) 117 Ga. 891, 45 S. E. 266.

It was held in *South v. San Benito County* (1919) — Cal. App. —, 180 Pac. 354, that, where counties formerly maintaining a bridge over a creek between them suffered it to go out of existence, a traveler falling into the creek had no cause of action against them in the absence of a statute making them liable.

A county is not made liable for the negligent exercise of the duty of maintaining bridges between it and another county, imposed on it by the state, by a general statute declaring that a county is a municipal corporation, "and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs, conferred upon it by law," which statute provides further that actions for damages for any injury to any property or rights for which it is liable shall be in the name of the county. *Markey v. Queens County* (1898) 154 N. Y. 675, 39 L.R.A. 46, 49 N. E. 71.

In *Brooks County v. Carrington* (1909) 7 Ga. App. 225, 66 S. E. 625, it was held that a bridge, all of which was in B county except what was necessary for the purpose of safe abutment and approach on one end, was a county line bridge,—that is, a bridge over a watercourse dividing one county from another,—although the boundary line was the bank of the river, and that, therefore, an action for injuries would not lie against B county except in the case provided for in the statute, relating to county line bridges.

Where a statute required that if a county did not take a bond from a bridge contractor it should be liable for damages, and that bonds of contractors should make them bound to

keep the bridge in good repair for seven years, it was held that if a county causes a bridge to be constructed, under a contract, over a watercourse dividing it from another county which refuses to contribute, and the building county fails to take the bond required by law, the building county will, for seven years thereafter, be liable for injuries in place of the contractor. *Cook v. Dekalb County* (1894) 95 Ga. 218, 22 S. E. 151, further appeal in (1895) 97 Ga. 415, 24 S. E. 157. Followed in *Willingham v. Elbert County* (1901) 113 Ga. 15, 38 S. E. 348.

(It seems that in Iowa, Maryland, and Pennsylvania, and possibly in Canada, counties are liable at common law for injuries due to neglect of their bridges.)

Where the whole of a bridge between two states, with the possible exception of one abutment, was within the corporate limits of a town in Maryland, and the hole which caused the injury was in Maryland, it was held that the Maryland county, which built the bridge under an agreement with the adjoining West Virginia county that such county would pay one half of the cost of the construction, was liable for the injury, and that such Maryland county could not "be absolved from any possible liability for conditions which may render it unsafe, merely because it is located within the bounds of a municipal corporation, invested with a general power of control over its own streets and highways." It appeared that the agreement between the two counties provided that the expense of keeping the bridge in repair should be chargeable to the counties and adjoining municipal corporations in proportion to the amounts paid by each towards its erection, that the board of directors of the Maryland county had had control of the bridge and assumed the duty of making the necessary repairs, and that they had been reimbursed to the extent of one half of the cost of this work by the West Virginia county, and that neither of the municipalities had made any payments on account of the repairs. *Allegheny County v. Seaber* (1904) 123 Md. 527, 91 Atl. 702.

**Bethel v. Pawnee County** (1914) 95 Neb. 203, 145 N. W. 363, was an action for damages for the death, from the giving way of a bridge built on a state line road, half of which road was in Nebraska and the other half in Kansas; part of such public road had been established by each of the adjoining counties, but the bridge was built by the Kansas county. The action was brought against the Nebraska county, and there was a statutory liability upon counties for injuries due to defects in bridges which they were liable to keep in repair. It was held that it was the duty "of each county to use reasonable diligence to keep such bridge in a reasonably safe condition for the use of the traveling public, regardless of the fact that such bridge may have been built by and at the separate expense of one of the counties; and for a failure to perform this duty such counties are jointly and severally liable." The court said: "If the evidence had shown that defendant county had used reasonable diligence to keep that portion of the bridge located within its boundaries in safe condition, there are authorities which hold that that would have relieved it of liability, but that is not this case. If defendant county had made proper inspection of this bridge, it would have discovered its dangerous condition, and if it had placed proper supports under that portion of the west end of the bridge within its boundary it is difficult to see how this unfortunate accident could have occurred."

Compare, in this connection, **Brown v. Fairhaven** (1875) 47 Vt. 386, *infra*, b.

It has been held in Pennsylvania that where a person injured by the fall of a bridge between two counties, maintainable at their joint expense, recovered judgment against one of the counties, it could have contribution against the other county. **Armstrong County v. Clarion County** (1870) 66 Pa. 218, 5 Am. Rep. 368.

It has been held that the defendant county could not escape liability for personal injuries due to a defect in a bridge, because—under authority of a statute providing for the construction

of county bridges on county line roads wholly within one of the two counties interested where a suitable site could not be obtained on the county line—in order to secure a better bridge site and one that would require a shorter bridge than would be necessary on the county line, the bridge in question was built entirely within the limits of another county, though but a short distance from the county line, which the highway followed except at the crossing of the stream. **Casey v. Tama County** (1888) 75 Iowa, 655, 37 N. W. 138. No question seems to have been raised as to the liability of the other county.

In **Harrold v. Simcoe County** (1868) 18 U. C. C. P. 9, it was held that both counties were liable in an action by a person injured by reason of the draw being left open in a bridge connecting the counties, the statute providing that, where a bridge lies wholly or partly between two counties, the councils of such municipalities shall have joint jurisdiction over it.

For cases between counties and cities, see *infra*, c.

#### b. Towns.

In **Brown v. Fairhaven** (1875) 47 Vt. 386, where a bridge over a stream separating two states was maintained by an agreement, one half by a town in the other state, and one fourth each by two towns in Vermont, the Vermont half of the bridge being built on the dividing line between the two Vermont towns, and they were sued jointly for an injury which happened on a part of the bridge beyond the limits of Vermont—it was held that there could be no recovery, the statute only making a town liable for want of repair of any bridge which such town was liable to keep in repair.

Compare, as to liabilities of counties for defects in state line bridges, cases in *supra*, a.

Where an injury happened on a bridge on a line road running between two townships, on a part of the road which, under statute, had been allotted to the defendant township to repair, as appeared by an agreement signed only by the defendant's commissioner and recorded in the office



of the clerk of such town, the defendant could not object that the agreement was not signed by the commissioners of both towns. The statute gave a cause of action for injuries due to neglect to keep a bridge in repair, against the township whose duty it was to keep it in repair. *Hunter v. Dwight Twp.* (1909) 157 Mich. 634, 123 N. W. 267.

Where, under statute, county commissioners decreed that a city and town should each maintain and keep in repair one half of a county bridge between them, and one half of the draw, each maintaining that part contiguous to the highway leading onto the bridge from their own city and town, it was held that the town was liable for an injury on that part of the bridge which, by the said decree, it was bound to keep in repair, although the place was not within such town. *Whitman v. Groveland* (1881) 131 Mass. 553. The court does not give the terms of the statute imposing a liability upon towns for injuries due to defects in bridges.

In *Perkins v. Oxford* (1877) 66 Me. 545, it was held that a town was solely liable for injuries due to a defect on its side of a bridge over a stream dividing it from another town, as "towns are severally responsible under the statute, for injuries suffered by reason of defects that are within their limits."

Two towns, as was their statutory duty, built and maintained a succession of bridges over a river between them, at their joint expense, the original length of which was 150 feet, but this length was successively reduced to about 65 feet by extending the abutments into the river. It was held that both towns were jointly liable for an injury to a traveler from omission of a proper railing on the solid part of the bridge, but within the original space of 150 feet. *Tolland v. Willington* (1857) 26 Conn. 578. The court does not refer to the terms of the statute making towns liable for injuries due to defective bridges.

In *Bryan v. Landon* (1875) 3 Hun (N. Y.) 500, 5 Thomp. & C. 594, the commissioners of two adjoining towns

in different counties were held jointly liable for damages sustained by the plaintiff through their negligence in the breaking down of a bridge over a creek which formed the boundary between such towns, erected and maintained as a joint bridge between said towns, the statute providing that "commissioners of said towns so liable,"—that is, liable to make and maintain highway bridges crossing a stream between two towns, at the joint expense of said towns,—“may be proceeded against jointly, for any neglect of duty in reference to such bridges.” The court said: “The same liability which, under the statute and at common law, would attach to these defendants for neglect to repair roads and bridges in their respective towns, we think, under this statute, attaches to them jointly for any neglect in keeping in repair any highway bridge between said towns, constructed at the joint expense of said towns, and thus, by said act, made a joint bridge. As was held in *Beckwith v. Whalen* (1872) 5 Lans. (N. Y.) 376, the law imposes an obligation upon two towns, separated by a creek, to build and maintain at their joint expense a bridge over said creek, when such bridge is necessary to connect two highways in the towns respectively.”

Where, supposedly, the bridge where the injury occurred was between the two defendant towns, the court said: “The liability to keep and maintain the bridge is a joint one imposed on the defendant towns. Chapter 225, Laws of 1841, as amended by chap. 383, Laws of 1857. When an accident results from joint negligence all or either of the towns may be sued. The law which permits towns to be sued for negligence, when its commissioner of highways is negligent, is broad enough to support a joint action against two towns when both are negligent.” *Oakley v. Mamaroneck* (1886) 39 Hun (N. Y.) 448.

In *Shaw v. Potsdam* (1896) 11 App. Div. 508, 42 N. Y. Supp. 779, it was held, as the duty of repairing a bridge over a brook between two towns was imposed upon the commissioners of highways of both towns, that “for

damages resulting from a negligent omission to perform that duty an action could be maintained jointly against them."

In *Theall v. Yonkers* (1880) 21 Hun (N. Y.) 265, where the point was not necessary to the decision, it was held that, where the statute declares only a joint liability in case of neglect of duty by the commissioners of highways in relation to bridges connecting two towns, a city which succeeded one of such towns is not liable alone for an injury happening on a part of the bridge beyond its limits. But this case was disapproved in *Hawxhurst v. New York* (1887) 43 Hun (N. Y.) 588, *infra*, c, and in *Clapp v. Ellington* (1895) 87 Hun, 542, 34 N. Y. Supp. 283, affirmed in (1898) 154 N. Y. 781, 49 N. E. 1095, *infra*.

A bridge on a line road between two towns in different counties, the center of the bridge being the boundary line, is a bridge in each of such towns, within the statute providing that "the several towns in this state shall be liable to any person suffering the same, for all damages to person or property by reason of defective highways or bridges in such town, in cases in which the commissioner or commissioners of highways of said towns are not by law liable therefor," and either town may be sued for an injury on such bridge. The court said: "The liability of the two towns to maintain it was joint, and each of them was chargeable with one half of the expense of its maintenance. . . . The remedy by action was not necessarily against both towns jointly. The action is in its nature for tort. In such case parties chargeable may be sued severally, as well as jointly, by the person aggrieved. . . . In *Theall v. Yonkers* (N. Y.) *supra*, there was an expression, not necessary to the result, that the defendant was not liable because the accident occurred on the portion of the bridge outside of the city of Yonkers and within the limits of East Chester. That view was not adopted by the court in *Hawxhurst v. New York* (1887) 43 Hun (N. Y.) 589. And by the court in the department where the *Theall* Case was de-

cided, it was said, obiter, by Mr. Justice Barnard, in *Oakley v. Mamaroneck* (N. Y.) *supra*, that "when an accident results from joint negligence, all or either of the towns may be sued." But the nonjoinder of the other town was not pleaded as a defense. *Clapp v. Ellington* (N. Y.) *supra*, cited in the reported case (*TREBOWSKI v. RINGLE*, ante, 1271).

Where a bridge ran from S town in S county on the west bank of the river, to an island in the middle of the river, and another bridge ran from the island to E town, on the east side of the river, in W county, a highway running across the island, about 200 feet long, connecting the two bridges, an injury happened by reason of a defect in the first-mentioned bridge. It was held that both towns were jointly liable therefor, although the island was all in the town of S, as both spans of the bridge were to be considered as one bridge, under the statute requiring towns jointly to pay the expense of boundary bridges. *Lee v. Saratoga* (1914) 160 App. Div. 112, 145 N. Y. Supp. 106, affirmed in (1915) 214 N. Y. 617, 108 N. E. 1099.

In *Sheridan v. Palmyra Twp.* (1897) 180 Pa. 439, 36 Atl. 868, 1 Am. Neg. Rep. 521, where two townships in different counties bridged the stream between them, each building to a pier recognized as the boundary in the middle of the stream, it was held that the township on whose part of the bridge an injury occurred, was liable therefor, and that the statute providing a mode for building county bridges over streams upon the line between two counties did not apply. The court said: "It is competent for the people of the respective townships to build the bridge themselves, and when they divide the bridge at a fixed point, each may build and keep in repair so much of the structure as lies within the township, as any other township road or bridge is built and repaired. Where this is done, as in the case before us, each township would be liable for the negligence of its own authorities in the care of its own end of the bridge. If this was not so, it might be important for every traveler, when-

approaching such a bridge, to leave his team and make a journey to the county seat to examine into the legality of the proceedings under which the bridge had been erected, before venturing himself upon it."

In *Haley v. Calef* (1907) 28 R. I. 332, 67 Atl. 323, the court construed the Rhode Island statutes as limiting the liability of the respective towns for injuries on bridges between them to those injuries happening on a part of the bridge within the town.

In *Powers v. Woodstock* (1865) 38 Vt. 45, the question was whether the place where the accident happened was on the bridge approach or not, where a bridge was built near the corner of four towns, and the expense was laid by statute upon them, and an accident occurred on an adjoining road. It was held that, as the accident did not happen on the approach to the bridge, the town in which it occurred was liable.

Where a person was killed through the nonrepair of roads in a township, at a place where they crossed each other, within 100 feet of a bridge crossing a river bounding the county and city, and required by law to be maintained by the councils of the city and the county, it was held that the township was liable. The court considered that the township, while entitled to enforce against the bridge owner the provisions of the statute, was not relieved from liability to repair by its provision that "the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by such municipality or municipalities; the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate." It was further held that the meaning to be attached to "approaches" in the statute was "such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road to the bridge, and from the bridge to the road," the court saying: "If no such

artificial structures are required for that purpose, there is, in my opinion, no ability to keep up and maintain any. If such artificial structures are required, but not to the extent of 100 feet, the liability is only to keep up and maintain them to the extent to which they are required." *Traversy v. Gloucester* (1888) 15 Ont. Rep. 314.

Under the Quebec statutes, one injured by the bad condition of a road lying between two local municipalities, but wholly in one of them, cannot recover of such municipality, as the road is a county road, where the statute provides that "(1) every municipal road, or every part thereof, wholly situate in one local municipality, is a local road; (2) every municipal road, or every part thereof, lying between two local municipalities, or partly in one municipality and partly in another, is a county road." *Walsh v. St. Anicet Parish* (1903) Rap. Jud. Quebec 25 C. S. 319.

Where an injury occurred on a bridge on a line road between two townships, over a stream crossing the line, and the statutes provided that "it shall be the duty of the county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities," and that in case a road lies wholly or partly between two townships, the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the road shall include a bridge forming part of the road, it was held that, as the stream was a river, an action would not lie against the townships, as the liability was on the county councils. *McHardy v. Ellice Twp.* (1877) 1 Ont. App. Rep. 628.

#### *c. Cities and villages.*

It was held in *Nand v. Newton* (1897) 58 Kan. 229, 48 Pac. 852, where a city took in land including half of a highway lying along the new boundary, that it became liable to repair a bridge built by the township, located in the half of the highway taken in by the city, and was liable for injuries suffered by falling from the bridge, as the legislature intended that, in case of a road located on the line of

a city, the part established within the city should be a city street.

In *Hawxhurst v. New York* (1887) 43 Hun (N. Y.) 588, where a city and an adjoining county had jointly employed a contractor to repair a bridge over a river between them, and the plaintiff claimed that through the negligence of such contractor, he had suffered injury, owing to insufficient barriers on the county side approach, it was held that the city was liable in an action against it alone. The court said: "In *Theall v. Yonkers* (1880) 21 Hun (N. Y.) 265, the injury was sustained on the East Chester end of a bridge between East Chester and Yonkers, maintained by both the town and the city, and the court declared that, by reason of the place where the accident happened, the city was not liable. The expression of this opinion, however, does not seem to have been necessary to the decision, and furthermore, it is apparently based upon the view that, under the general statute relating to bridges between towns (Laws 1841, chap. 225), the duty of each town to maintain the bridge does not extend beyond its own limits. We construe the special statute applicable to this case differently." The statute made the expense of repairing the bridge a joint charge on the city and county of New York and the county of Westchester.

For other cases between cities and towns, see *supra*, b.

Where a toll bridge connecting two towns was bought by the towns, a village at one end of the bridge contributing money to its town for the purchase, and thereafter the repairs of the bridge being made by such town, it was held that the village was liable for an injury caused by a defect in the bridge within its limits, its charter conferring upon it "the power to regulate, grade, pave, and improve the streets and alleys in the town, and to levy taxes and borrow money to improve the streets." The court said: "Under the powers conferred by the charter, it was the duty of the village to keep all the streets and highways in the corporation in a reasonably safe condition for the use of the public.

8 A.L.R.—81.

No importance is to be attached to the fact that the commissioners of highways of the town of Rutland assumed to control and repair the bridge after the purchase from the bridge company. Commissioners of highways have no jurisdiction whatever over highways or bridges within an incorporated city, town, or village located within their town. They cannot levy a tax to build or repair bridges within an incorporated town, and they have no right to exercise any control or supervision over such bridges." *Marseilles v. Howland* (1888) 124 Ill. 547, 16 N. E. 888, affirming (1887) 23 Ill. App. 101. Followed in *Marseilles v. Kiner* (1889) 34 Ill. App. 355.

In *Reid v. New York* (1898) 68 Hun, 110, 22 N. Y. Supp. 623, 5 Am. Neg. Cas. 547, affirmed in (1893) 139 N. Y. 534, 34 N. E. 1102, 5 Am. Neg. Cas. 551, it was held that a statute making the trustees of a bridge between two cities liable for all claims and demands growing out of the bridge was not retroactive, and that the two cities were jointly liable for injuries received by the plaintiff when alighting as a passenger from a railroad car operated by the defendants upon the bridge, and alleged to have been caused by the negligence of the defendants and their servants.

Where a county purchased a bridge, one end of which touched a city, and an injury happened in the city upon a sidewalk which was an approach to the bridge, and not a public highway of the city, it was held that the city was not liable for the injury, as the county owned the bridge. The court said: "The liability for injuries resulting from the want of repairs to a bridge or other highway, under our statute, rests alone upon the municipality upon which the law casts the duty of making the repairs, and not upon the mere fact that the highway is within the bounds of the municipality." *Bishop v. Centralia* (1880) 49 Wis. 669, 6 N. W. 353.

#### IV. Miscellaneous.

Where an injury occurred on a bridge which was being renewed or newly built by the county at the junction of a city, borough, and town, the

place of the accident being in the borough, it was held that an action would not lie against the city, borough, and township jointly. The court said that "a joint judgment against the three defendants here cannot be maintained, first, because there was no evidence whatever of any independent negligence on the part of Plains township and Parsons borough which contributed to the accident; second, there was no joint obligation on their part to maintain a barrier across the sidewalk on the part and within the limits of the city of Wilkes-Barre, even if there was such an obligation on the part of the city; and, third, a joint judgment cannot, in any event, be sustained." *Skadra v. Plains Twp.* (1911) 45 Pa. Super. Ct. 87.

In *Weightman v. Washington*

(1861) 1 Black (U. S.) 39, 17 L. ed. 52, it was held that an action would lie against the city of Washington for injuries due to the breaking of a bridge between that city and Georgetown, it being conceded that Washington was bound by its charter to maintain the bridge and keep it in repair.

In *Curtiss v. Bovina* (1909) 138 Wis. 660, 120 N. W. 401, it was held that the bridge in question was not a public highway.

In *Woods v. Wentworth County* (1856) 6 U. C. C. P. 101, it was held, under complicated facts of location and history, that the bridge in question was not one lying between city and county so as to create the joint liability to repair under the statute.

B. B. B.

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NEIL GUINEY, Appt.,

v.

R. P. BONHAM, United States Inspector of Immigration.

*United States Circuit Court of Appeals, Ninth Circuit—December 1, 1919.*

(261 Fed. 582.)

#### **Aliens — deportation — time limitation.**

1. An alien found advocating or seeking the unlawful destruction of property may be deported at any time after his entering the country, under a statute providing that if at any time within five years after entry an alien who at the time was one of the classes excluded by law, and any alien who at any time after entry shall be found advocating or seeking the unlawful destruction of property, may be deported.

[See note on this question beginning on page 1286.]

— warrant for deportation — applicability of statutes.

2. That a warrant for arrest and deportation of an alien is based upon one statute does not make inapplicable a later statute providing for deportation, which was passed before the warrant was issued.

— sufficiency of warrant.

3. A warrant for arrest and deportation of an alien is sufficient if it give him adequate information of the acts relied upon to bring him within the excluded classes and to enable him to offer evidence to refute the same at the hearing.

Habeas corpus — disposal of person — time.

4. A statute requiring the court, in a habeas corpus proceeding, to dispose of the party as law and justice require, means as law and justice require at the time of the hearing.

Alien — deportation — hearing without counsel — effect.

5. That, at the hearing before the immigration inspector of an alien for deportation, he was not represented by an attorney or informed of his right to be so represented until most of the testimony had been taken, does not render the hearing unfair.

— *ex parte* evidence — effect.

6. That the record sent to the inspector of immigration by the Department of Labor, in a proceeding to deport an alien, contains letters and clippings which had been introduced *ex parte* and without the knowledge of the alien, does not render the proceeding unfair if the deportation was not based upon anything contained in them.

— power of court to weigh testimony.

7. The court cannot, in a habeas corpus proceeding to review the action of the Department of Labor in ordering deportation of an alien weigh the testimony upon which the order is based.

[See 1 R. C. L. 831; 12 R. C. L. 1213.]

APPEAL by petitioner from an order of the District Court of the United States for the District of Oregon (Wolverton, J.) discharging a petition for a writ of habeas corpus to secure his release from custody, to which he had been committed for deportation for violation of the Immigration Act. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Gilbert, Ross, and Hunt, Circuit Judges.

Messrs. George F. Vanderveer and Ralph S. Pierce for appellant.

Messrs. Bert E. Haney and Barnett H. Goldstein for appellee.

Gilbert, Circuit Judge, delivered the opinion of the court:

The appellant, a native of British Columbia, entered the United States in February or March, 1913. In 1916 he became a member of the Industrial Workers of the World, in which he has held the offices of standing delegate, branch secretary, and traveling delegate. In September, 1918, he became secretary of Lumber Workers' Industrial Union, a branch of the I. W. W. having 35,000 members. In February, 1919, he opened an office for said union in the city of Portland. On February 18, 1919, the Department of Labor issued its warrant of arrest, charging that the appellant had been found advocating or teaching the unlawful destruction of property, in violation of the Immigration Act of February 5, 1917. On this warrant he was granted three hearings, which resulted in an order for his deportation. On appeal to the Department of Labor, the order of deportation was affirmed. The appellant presented to the court below his petition for a writ of habeas corpus. On the hearing the writ was discharged and the appellant was remanded to custody. The appellant appeals.

The appellant contends that deportation under § 19 of the Act of February 5, 1917 (39 Stat. at L. 889, chap. 29, Comp. Stat. § 4289<sup>1</sup>jj, Fed. Stat. Anno. Supp. 1918, p. 212), was barred after five years from the date of his entry into the United States. We do not so read the statute. It provides: "Sec. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing, . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

It is plainly the intention of the statute to provide for the deportation of any alien who, at "any time

after entry," shall be found advocating or teaching the unlawful destruction of property. The five-year limitation expressed in the first clause of the statute is not to be read into the clause under which the appellant is ordered deported.

Again, the order of deportation does not depend upon the Law of 1917. Act Oct. 16, 1918, chap. 186, 40 Stat. at L. 1012, Comp. Stat. § 4289½b(1), authorizes the deportation of aliens who advocate or teach the unlawful destruction of property, and declares: "The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States."

The Law of 1918 was in force prior to the institution of proceedings against the appellant. The fact that the warrants of arrest and of deportation are, in terms, based upon § 19 of the Act of February 5, 1917, does not render the Act of 1918 inapplicable to the case. The principle involved is similar to that which obtains in criminal cases, in which it is held that the statute on which an indictment is founded must be determined as a matter of law from the facts charged, which facts may bring the offense within an existing statute, although the indictment in terms bases the charge upon another statute. *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92; *United States v. Nixon*, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; *Vedin v. United States*, 168 C. C. A. 534, 257 Fed. 550.

It has been repeatedly held that the warrant of arrest for deportation of an alien is sufficient if it give him adequate information of the acts relied upon to bring him within the excluded classes, and to enable him to offer testimony to refute the same at the

hearing, and that it need not have the formality and particularity of an indictment. *United States v. Uhl*, 128 C. C. A. 560, 211 Fed. 628; *United States ex rel. Rosen v. Williams*, 118 C. C. A. 632, 200 Fed. 538; *Healy v. Backus*, 137 C. C. A. 166, 221 Fed. 358; *Ex parte Hamaguchi (C. C.)* 161 Fed. 185; *Siniscalchi v. Thomas*, 115 C. C. A. 501, 195 Fed. 701; *Toy Tong v. United States*, 76 C. C. A. 621, 146 Fed. 343.

It is to be observed also that, this being a habeas corpus proceeding, § 761 of the Revised Statutes, Comp. Stat. § 1289, 3 Fed. Stat. Anno. 2d ed. p. 469, requires the court, justice, or judge granting the writ "to dispose of the party as law and justice require," which

Habeas corpus—disposal of person—time.

means as law and justice require at the time of the hearing. *Iasigi v. Van de Carr*, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; *Motherwell v. United States*, 48 C. C. A. 97, 107 Fed. 437. In *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336, the court said: "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

The appellant contends that the hearing before the immigration inspector was unfair, in that he was not represented by an attorney nor informed of his right to counsel until three fifths of the testimony had been taken. This does not render the hearing unfair. In *Low Wah Suey v. Backus*, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734, it was held that the preliminary examination of an alien without counsel is permitted, and that it is sufficient if at subsequent stages the alien has counsel. That case was followed by

—warrant for deportation—applicability of statutes.

Alien—deportation—hearing without counsel—effect.

—sufficiency of warrant.

this court in *Mok Nuey Tau v. White*, 137 C. C. A. 190, 244 Fed. 742. The appellant, on being told that he was entitled to counsel to represent him, stated that he did not desire to avail himself of the privilege.

It is said that the hearing was unfair, in that the record which was sent from the Department of Labor in answer to the writ contains ten letters and one newspaper clipping which were on file in the Department, and which had been introduced ex parte and without the appellant's knowledge, and the appellant cites the decision of this court in *Chew Hoy Quong v. White*, 162 C. C. A. 103, 249 Fed. 869, in which the hearing on an application of an alien for admission into the United States was held unfair for the reason that the decision was based in whole or in part on confidential communications received by the immigration officers, the source, motive, or contents of which were not disclosed to the applicant or his counsel, and no opportunity was offered to cross-examine or to present testimony in rebuttal thereof. The appellant's case does not come within that ruling. It is clear that

the order for his deportation was not based upon anything contained in the letters, and there is nothing in them tending to sustain the charge on which the appellant was arrested or ordered to be deported, and in fact those papers are not properly a part of the record.

Nine of the letters consisted of correspondence which the appellant had with fellow workers of the I. W. W. after his arrest, and while he was in jail. One of the letters was a communication from the Department of Justice to the Commissioner General of Immigration, and is no part of the evidence upon which the report of the inspector at Portland was based, and it has no proper place in the record. It contains the erroneous statement that in 1917 the appellant had been ar-

rested in Idaho on a charge of criminal syndicalism, and had been convicted and imprisoned in the Idaho state penitentiary; whereas, in fact, the appellant had been acquitted of that charge. But the memorandum of the Commissioner General of Immigration contains the statement that the department knew that the appellant had been acquitted of the charge of criminal syndicalism in Idaho, and the decision of the Commissioner General shows by its terms that the judgment of deportation was based wholly upon the activities of the appellant in the various offices which he held in the I. W. W., and his distribution of literature which advocated the doctrine of sabotage, or the unlawful destruction of property.

The newspaper clipping, originally found in the appellant's possession, contains a list of men in Benewah county, Idaho, "known as aliens, or alien enemies, who have either revoked their first papers, or who have claimed exemption from military service on the ground that they were aliens," and in the list is the name of the appellant. The appellant could not have been injured by anything contained in the clipping. He admitted that he was an alien, and that as such he had claimed exemption from military service. In *Tang Tun v. Edsell*, 223 U. S. 673, 681, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 363, the court, answering the contention that certain papers, in addition to the record on the hearing, had been forwarded to the Secretary on the appeal, said: "The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary, indeed, to impute bad faith or improper conduct to the executive officers because they examined the records, or acquainted themselves with former official action."

In *Re Jem Yuen* (D. C.) 188 Fed. 350, it was contended that the hear-



ing on the appeal was unfair, because of alleged improper additions made to the record submitted to the Secretary. The court said: "As to the hearing at Boston there is no complaint that the applicant was in any way hindered in submitting such evidence as he desired, or of any refusal to hear what was submitted. . . . It is well settled that officers of the government, to whom the determination of questions of this kind is intrusted under statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. . . . I am unable to believe that the duty of the officers to give a fair hearing required them to shut their eyes to the contents of this former record, or to do so without formal or independent proof of its contents."

It is contended that the order of deportation is void, for the reason that there is no evidence in the record to sustain it. It is true that the appellant testified that he did not advocate, nor to the best of

his knowledge did the organization to which he belonged advocate, the unlawful destruction of property in any way whatsoever, and said: "I do not believe in sabotage, whether as a weapon used by the working class or used against them."

But it appears without dispute that in his connection with the organization to which he belonged he had been actively engaged in distributing to others the literature published and issued under the sanction of that organization. In that literature are to be found expressions directly and unmistakably inculcating the unlawful destruction of property. It was on the nature of that literature and the appellant's activities in disseminating the same that the order of deportation was based. It is not our province to weigh the testimony. We can go no further —power of court to weigh testimony. than to determine whether or not the

officers to whom is intrusted the enforcement of the law have in this instance abused the discretion which was placed in them. We find no abuse of discretion, nor absence of evidence to sustain the order which is appealed from.

The order is affirmed.

## ANNOTATION.

### Limitation of time for deportation of alien.

#### Generally.

The right of a nation to deport aliens who have not been naturalized is absolute and unqualified. It rests on the theory that a foreigner is no part of the nation, and that his reception into its territory is a matter of permission or tolerance, and creates no obligation. 1 R. C. L. 830. So, in a case involving the validity of the repeal of all limitations on the time for the deportation of a certain class of aliens, the Federal Supreme Court said: "The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country

it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want." *Bugajewitz v. Adams* (1913) 228 U. S. 585, 57 L. ed. 978, 33 Sup. Ct. Rep. 607.

Limitations on the time for the deportation of aliens from the United States exist, therefore, only as Congress has imposed them (*Bugajewitz v. Adams* (U. S.) *supra*), and their extent is to be determined entirely from a construction of the several acts of Congress on the subject. It is to be noted that nearly all of the cases cited

in this note were decided under the Immigration Act of 1903, and the Immigration Act of 1907 (see 3 Fed. Stat. Anno. 2d ed. pp. 637 et seq.), and that those acts have been superseded by the Immigration Act of February 5, 1917 (Fed. Stat. Anno. Supp. 1918, pp. 212 et. seq.), which contains provisions distinctly at variance with those of the former acts with respect to the time for the institution of deportation proceedings. Section 19 of the Act of 1917, which deals with the time limited for deportation, states in successive clauses the classes of aliens subject to deportation, some of the clauses containing a time limit and others making no reference to time for proceeding. The only two cases which have passed on that act seem to warrant the general statement that limitations contained in one clause are not to be read into any other, so that, with respect to the deportation of aliens described by a clause of the Act of 1917 containing no limitation, deportation proceedings may be begun at any time. See *Lopez v. Howe* (1919) — C. C. A. —, 259 Fed. 401. And see the reported case (*GUINEY v. BONHAM*, ante, 1282).

The time limit, if any, fixed by Congress for deportation proceedings, having been uniformly made to run from the entry of the alien into the United States, some uncertainty at one time existed as to whether an alien who left the United States with intent to return started the running of a new period of limitation on his re-entry. In two cases it was held that under those circumstances the period was to be computed from the first entry. *Redfern v. Halpert* (1911) 108 C. C. A. 262, 186 Fed. 150; *United States v. Tsuji Suekichl* (1912) 118 C. C. A. 188, 199 Fed. 750.

It is now established, however, that the re-entry of an alien into the United States after an absence, however short, from its territory, fixes the date from which the limitation on subsequent deportation proceedings runs. *Lapina v. Williams* (1914) 232 U. S. 78, 58 L. ed. 515, 34 Sup. Ct. Rep. 196; *Lewis v. Frick* (1914) 233 U. S. 291, 58 L. ed. 967, 34 Sup. Ct. Rep. 488, af-

firming (1912) 115 C. C. A. 493, 195 Fed. 693; *Ex parte Petterson* (1908) 166 Fed. 537; *United States ex rel. White v. Hook* (1908) 166 Fed. 1007; *Ex parte Hoffman* (1910) 103 C. C. A. 327, 179 Fed. 839; *Sibray v. United States* (1911) 107 C. C. A. 483, 185 Fed. 401; *United States ex rel. Ueberall v. Williams* (1911) 187 Fed. 470; *United States v. Sprung* (1910) 110 C. C. A. 37, 187 Fed. 903; *Siniscalchi v. Thomas* (1912) 115 C. C. A. 501, 195 Fed. 701; *United States ex rel. Bauder v. Uhl* (1914) 128 C. C. A. 560, 211 Fed. 628; *United States v. Tsurukichi Nakao* (1914) 133 C. C. A. 49, 217 Fed. 50.

The strictness with which this rule is applied is illustrated by the case of *Lewis v. Frick* (1914) 233 U. S. 291, 58 L. ed. 967, 34 Sup. Ct. Rep. 488, supra, wherein, as appears from the opinion of the lower court (1912) 115 C. C. A. 493, 195 Fed. 693), the alien in question was absent from the United States but one hour, after several years' residence therein. It was held that deportation proceedings might be brought within three years after his re-entry into the United States. A similar holding was made in *United States ex rel. Ueberall v. Williams* (1911) 187 Fed. 470, supra, with respect to an alien who, after residing in the United States several years, visited Niagara Falls, and while there went to the Canadian side for about an hour.

The deportation provision of the Immigration Act of 1907 (3 Fed. Stat. Anno. 2d ed. p. 673, § 20) was to the effect that an alien, within its terms, might "be taken into custody and deported to the country whence he came at any time within three years after the date of his entry." Similar phraseology was used in the Act of March 3, 1903, which was superseded by the Act of 1907. The cases arising under those acts are in conflict as to whether the deportation must be completed within the three-year period. In *Botis v. Davis* (1909) 178 Fed. 996, it was held that there must be an actual deportation within three years, or the power to deport will be lost. So, in *International Mercantile Marine Co.*

v. United States (1912) 113 C. C. A. 365, 192 Fed. 887, reversing (1911) 186 Fed. 669, it was held that the alien must be actually delivered on board ship for deportation within three years after his entry. On the other hand, it was held in *United States ex rel. Calamia v. Redfern* (1910) 180 Fed. 506, that it was sufficient if deportation proceedings were begun within three years, the court saying: "I consider the government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation." The last decision was followed in *Bun Chew v. Connell* (1916) 147 C. C. A. 226, 238 Fed. 220, wherein the court said: "We think the statute should be construed in analogy with Statutes of Limitation in criminal cases, the requirement of which is answered if prosecution is begun within the time limited. It does not seem reasonable to suppose that Congress intended that, before ordering the arrest of an alien believed to be unlawfully in the country, the Secretary must take into account the probable time that must ensue between the arrest and the warrant of deportation, and compute the time of all possible delays in obtaining testimony, and possible delays to be caused by appeals or writs of habeas corpus." In a brief opinion in the case of *Re Rusomanno* (1904) 128 Fed. 528, it was said that since the alien in question was not "seized even, for purposes of deportation," before the expiration of the time limited, the authority to deport was lost. In *Matsumura v. Higgins* (1911) 109 C. C. A. 431, 187 Fed. 601, it was held that, where a warrant was issued in deportation proceedings within three years, the fact that the alien was thereafter imprisoned under conviction of crime did not prevent a deportation after his release from that imprisonment, though the alien had then been in the United States more than three years, the court saying that no domiciliary rights could be acquired during incarceration for crime.

While the Immigration Act of 1917 (Fed. Stat. Anno. 1918 Supp. pp. 212 et seq.) does not plainly solve this doubt, the provisions of § 20 of that act, with respect to charging the cost of deportation on the person by whom the alien was procured to immigrate, or on the owners of the vessel bringing him to the United States, "if deportation proceedings are instituted" at any time within five years, would seem to indicate an intention that the institution of the proceedings, rather than the actual deportation, shall be regarded.

**Limitation applicable to particular classes of aliens — Chinese.**

The right to deport a Chinese person under § 20 of the Immigration Act of 1907 (3 Fed. Stat. Anno. 2d ed. p. 673), and the Act of March 3, 1903, which it superseded, providing that any alien who entered the United States in violation of law might be deported within three years, was lost with the expiration of the three-year period. *United States ex rel. Ng. Sam v. Redfern* (1914) 210 Fed. 548; *Wong Yuen v. Prentis* (1916) 148 C. C. A. 44, 234 Fed. 28; *Backus v. Owe Sam Goon* (1916) 149 C. C. A. 159, 235 Fed. 347; *Mok Nuey Tau v. White* (1917) 157 C. C. A. 190, 244 Fed. 742; *Quan You v. White* (1917) 157 C. C. A. 194, 244 Fed. 746.

After the lapse of that period, the remedy was under the Chinese Exclusion Act (2 Fed. Stat. Anno. 2d ed. p. 92), no time limit being attached to that proceeding. *Moy Wing Sun v. Prentis* (1916) 148 C. C. A. 40, 234 Fed. 24; *Wong Chung v. United States* (1917) 157 C. C. A. 36, 244 Fed. 410.

While there appears to be no reported decision on the subject, it would seem that proceedings to deport Chinese under the first clause of § 19 of the Immigration Law of 1917 (Fed. Stat. Anno. Supp. 1918, p. 230) must be begun within five years.

**— prostitutes and the like.**

Section 3 of the Immigration Act of 1907 provided for the deportation of any alien woman found practising prostitution, within three years after her entry into the United States. That section was amended by the Act

of March 26, 1910 (3 Fed. Stat. Anno. 2d ed. p. 649), so as to provide for the deportation of any alien found to be an inmate of a house of prostitution, owning or employed in such a house, subsisting on the earnings of a prostitute, etc., "after such alien has entered the United States." Under that amendment it was held that no time limit attached to the deportation of an alien prostitute, the provision that the alien shall be deported "in the manner provided in" § 20 of the Act of 1907 (3 Fed. Stat. Anno. 2d ed. p. 673) being held not to adopt the three-year limitation contained in that section. *Bugajewitz v. Adams* (1913) 228 U. S. 585, 57 L. ed. 978, 33 Sup. Ct. Rep. 607; *Schwartz v. Adams* (1913) 228 U. S. 592, 57 L. ed. 980, 33 Sup. Ct. Rep. 609; *United States ex rel. Mango v. Meis* (1910) 181 Fed. 860; *United States ex rel. Brion v. Prentis* (1910) 182 Fed. 894; *United States ex rel. Dickman v. Williams* (1910) 183 Fed. 904; *Sire v. Berkshire* (1911) 185 Fed. 967; *Ladaux v. Berkshire* (1911) 185 Fed. 971; *United States v. North German Lloyd S. S. Co.* (1911) 185 Fed. 158; *Chomel v. United States* (1911) 112 C. C. A. 461, 192 Fed. 117; *Ex parte Cardonnel* (1912) 197 Fed. 774; *Choy Gum v. Backus* (1915) 189 C. C. A. 85, 223 Fed. 487, writ of certiorari denied in (1916) 239 U. S. 649, 60 L. ed. 485, 36 Sup. Ct. Rep. 284.

The same rule was, of course, applied to a male alien falling within the terms of the Act of 1910. *Ex parte Garcia* (1913) 205 Fed. 53; *United States v. Czeslicki* (1913) 209 Fed. 496; *Oceanic Steam Nav. Co. v. United States* (1916) 146 C. C. A. 549, 232 Fed. 591, Ann. Cas. 1917C, 248.

The removal of the time limit on deportation proceedings in the Act of 1910 was held to be valid, even as to aliens who entered the United States before that date. *Bugajewitz v. Adams* (1913) 228 U. S. 585, 57 L. ed. 978, 33 Sup. Ct. Rep. 607; *United States ex rel. Mango v. Weis* (1910) 181 Fed. 860; *United States ex rel. Dickman v. Williams* (1910) 183 Fed. 904.

The Act of February 5, 1917 (Fed. Stat. Anno. Supp. 1918, p. 212), apparently affixes no time limit on the deportation of prostitutes and the like.

—anarchists and the like.

It is held that the five-year limitation attached by the first clause of § 19 of the Act of February 5, 1917 (Fed. Stat. Anno. Supp. 1918, p. 230), to the deportation of an alien who was, at the time of his entry, a member of one of the classes excluded by law, is not to be read into the second clause of the same section, relating to the deportation of an alien who "at any time after entry" is found advocating or teaching anarchy or the like. Accordingly, in *Lopez v. Howe* (1919) — C. C. A. —, 259 Fed. 401, it was held that a "philosophical anarchist" might be deported after more than five years' residence in the United States. The court said: "Because he is a philosophical anarchist, and is opposed to the overthrow of government by force or violence, the relator claims he is not within the provisions of § 19 of the act of Congress, except in the five-year class, and that, as he has been in this country for fifteen years, he cannot be deported. From what has been said in an earlier part of this opinion, it appears that the relator's understanding of the statute differs from the understanding of this court. That section deals with a number of different classes of aliens, and provides that certain classes may be deported at any time within five years after entry, but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported, irrespective of the time of their entry into the United States. An alien at the time of his entry may not be an anarchist, and therefore may be entitled to enter. But if, at any time after his entry, he is found 'advocating or teaching anarchy,' he may be deported."

In the reported case (*GUINEY v. BONHAM*, ante, 1282) a like ruling is made with respect to a member of the I. W. W., shown to have advocated the unlawful destruction of property. In that case the court calls attention to

the Act of October 16, 1918 (Fed. Stat. Anno. Supp. 1919, p. 71), § 2 of which authorizes the deportation of sedi-

tious aliens, and attaches no limitation to proceedings therefor.

W. A. S.

## JAMES E. QUERY

v.

### POSTAL TELEGRAPH-CABLE COMPANY, Appt.

*North Carolina Supreme Court — December 10, 1919.*

(178 N. C. 639, 101 S. E. 390.)

**Easement — additional burden — telegraph line on railroad right of way.**

1. A telegraph line constructed along a railroad right of way imposes an additional burden on the fee, entitling the owner of the fee to compensation.

[See note on this question beginning on page 1293.]

**Limitation of action — when statute begins to run — construction of telegraph line on railroad right of way.**

2. The limitation period against a right of action for damages for imposing an additional burden on the fee by constructing a telegraph line along a railroad right of way begins to run only when the line is constructed.

**Damages — for telegraph line on railroad right of way.**

3. Permanent damages may be assessed to the owner of the fee for the construction of a telegraph line along a railroad right of way.

[See 10 R. C. L. 152, 153.]

**— effect of possible interference with easement.**

4. The allowance of full damages to the owner of the fee for placing a telegraph line on a railroad right of way is not affected by the fact that the construction of additional tracks by the railroad company may impair the full enjoyment of the telegraph company, at least if there is nothing to show that enlarged occupation by the railroad company was likely to occur.

**Appeal — eminent domain — review of damages.**

5. The supreme court cannot review an award of damages in an eminent domain proceeding.

[See 10 R. C. L. 222, 223.]

**APPEAL** by defendant from a judgment of the Superior Court for Cabarrus County (Harding, J.) in favor of plaintiff in an action brought to recover damages for an additional burden imposed upon the fee by the construction of a telegraph line along a railroad right of way. *Affirmed.*

**Statement by Walker, J.:**

The plaintiff alleges that the defendant erected certain poles on his land, within the right of way of the North Carolina Railroad Company, and strung wires thereon for the purpose of using the same in its business of telegraphy, and the defendant admits the other allegation that the plaintiff is the owner of the land, "subject to the right of way of the said railroad company;" it being 100 feet wide on each side from the center of the railroad

track. The court charged, among other things, as follows: "The contention of the plaintiff is this: That those under whom he claims and he himself were and are the owners of the land in fee; that the railroad company entered upon the land by reason of the grant of a right of way from the grandfather of the plaintiff; that after the railroad company had taken the right of way the Postal Telegraph Company went upon the right of way and put up poles, and thereby imposed an

additional burden upon the fee; and that the plaintiff is entitled to recover damages for such additional burden. If you answer the first issue 'Yes' and the second issue 'No,' and you find that after the railroad company took possession of the property the defendant Postal Telegraph Company entered upon the property and erected additional poles thereon and strung wires on the poles, you will then find that the entry of the Postal Telegraph Company imposed upon the fee such additional burden as would entitle the plaintiff to recover, and in that event the question would be: What amount is the plaintiff entitled to recover by reason of such wrongful entry on the part of the defendant?"

Under the evidence and charge of the court the jury returned a verdict for the plaintiff, assessing his damages at \$350. Judgment thereon, and appeal by the defendant.

Mr. J. Lee Crowell for appellant.  
Messrs. L. T. Hartsell and M. H. Caldwell for appellee.

Walker, J., delivered the opinion of the court:

The case turns principally on the question of damages, although defendant moved for a nonsuit, which was refused, and, as we think, properly so. There was no dispute as to the defendant's entering upon the land and erecting the poles and stringing the wires; the only issues being as to the ownership, the Statute of Limitations, and the damages. The first was answered "Yes," and the ownership was admitted for the purpose of the appeal. The Statute of Limitations does not apply, or, more accurately speaking, is not

Limitation of action—when statute begins to run—construction of telegraph line on railroad right of way.

a bar; for the jury found, as is shown by the evidence and the charge of the

court, that the defendant entered upon the land in 1915, erected the poles, and strung the wires. The action was commenced on May 11, 1917. This court said in Teeter v. Postal Teleg.-Cable Co. 172 N. C. 783, 90 S. E. 941: "It

is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden, which entitled the owner to compensation

Easement—additional burden—telegraph line on railroad right of way.

(Hodges v. Western U. Teleg. Co. 133 N. C. 225, 45 S. E. 572; Phillips v. Postal Teleg.-Cable Co. 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022); but objection is made to the validity of plaintiff's recovery on the ground, chiefly, that his Honor should have held as a conclusion of law that, on the facts in evidence, plaintiff's cause of action is barred by the three-year Statute of Limitations Revisal, § 395, subsec. 3, the language being as follows: 'Actions shall be brought within three years for trespass on real property. When the trespass is a continuing one, within three years from the original trespass, and not thereafter.' Speaking to this section in Sample v. John L. Roper Lumber Co. 150 N. C. 165, 166, 134 Am. St. Rep. 902, 63 S. E. 731, an action for wrongful entry and cutting timber on another's land, the court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass, and not thereafter; but this term, "continuing trespass," was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature, and made by companies in the exercise of some quasi public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong."

Referring to the language of subsec. 3, above mentioned, and the meaning of it, as suggested in Sample v. John L. Roper Lumber Co.,

it is further said by Justice Hoke: "The court is inclined to the opinion that this is a continuing trespass within the meaning of the law, and for damages incident to the original wrong, and for that alone, no recovery could be sustained. But this is a suit for permanent damages, and on recovery and payment, so far as plaintiff is concerned, confers on the defendant the right to maintain its line on plaintiff's land for an indefinite period, and to enter on the same whenever reasonably required for the 'planting, repairing, and preservation of its poles and other property.' *Caveness v. Charlotte, R. & S. R. Co.* 172 N. C. 305, 90 S. E. 244. It is a suit to recover for the value of the easement, which can pass to defendant only by grant or by proceedings to condemn the property pursuant to the statute (Revisal, §§ 1572, 1573), or by adverse and continuous user for the period of twenty years."

The defendant, therefore, is entitled to an easement for an indefinite period of time, and the plaintiff to permanent damages as compensation therefor, which are to be

**Damages—for  
telegraph line  
on railroad  
right of way.**

assessed according to the rule stated in the Teeter Case. See also *Hodges v. Western U. Teleg. Co.* 133 N. C. 225, 45 S. E. 572, and *Phillips v. Postal Teleg.-Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022, citing the well-known cases of *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528, as to the right of the abutting owners to compensation for the additional burden imposed upon the streets by the elevated railways. *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330, is also a well-considered case in our own reports.

We now come to the real question in the case—the measure of damages. The defendant requested the

court to instruct the jury to take into consideration the fact that, when these poles were erected and the wires were strung, the land was already subject to the burden of the North Carolina Railroad Company's right of way, and this was given by the court. The court charged the jury, as we have seen, that the defendant, by the erection of its telegraph line, had imposed an additional burden upon the land—in other words, a new one, in addition to that of the railroad right of way, already resting upon it—and that for this additional burden the defendant was under obligations to pay, and the plaintiff had the right to receive, reasonable and just compensation.

The principle of *Virginia & C. R. Co. v. McLean*, 158 N. C. 498, 74 S. E. 461 (an action between the railroad company and the landowner), as to the probability of an appropriation by the railroad company of its entire right of way being considered in assessing permanent damages against it, does not apply to a case like this where the defendant's right of way is essentially of a different kind, and does not call for any such further appropriation, or any widening of its right of way, the boundaries of which are now fixed and fully occupied, and there is nothing to show that the railroad company can deprive the defendant of its rights in respect to the maintenance and operation of its present line. Whether it could do so must depend upon the right and easement, which was acquired by the defendant from the railroad company, whether by contract, condemnation, or in some way equivalent to the latter method. If the railroad company should extend the occupation of its right of way further from the center of the track, it would not affect the question of damages in this case, unless it had the right to deprive the defendant of its right of way, or some part of it, which does not appear in this record. We do not know what their contractual relations are. We

think, though, that in any view the court adequately responded to the defendant's request for instructions as made, and the jury must have understood that the assessment of damages should be made upon the basis of the right which the railroad company had already acquired in respect to the land, and its privilege of enlarging, under proper circumstances, the actual occupation of the right of way, even if that enlargement would impair the full enjoyment by

—effect of possible interference with easement.

defendant of its easement, which is not at all probable.

The amount awarded in the verdict does not appear to be excessive, when all the facts are taken into account, and, even if so, we cannot re-view it. Phillips v. Postal Teleg.-Cable Co. 180 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022. We affirm the judgment, finding no material error in the proceedings.

Appeal—eminent domain—review of damages.

No error.

## ANNOTATION.

**Right and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway.**

### I. Railroad right of way:

- a. Operation for exclusive use of railroad, 1298.
- b. Operation for commercial purposes, 1294.
- c. Measure of compensation, 1296.

### II. Highway:

- a. City or village street:
  1. View that telephone or telegraph is added burden, 1296.
  2. View that telephone or telegraph is not added burden, 1301.

#### *I. Railroad right of way.*

##### *a. Operation for exclusive use of railroad.*

Telegraph or telephone lines constructed along a railroad right of way and used exclusively by the railroad company for the transmission of information incident to the general business of the company are not an additional burden on the fee, but are within the purposes of the original easement, and the fee owner is not entitled to additional compensation therefor. Western U. Teleg. Co. v. Rich (1878) 19 Kan. 517, 27 Am. Rep. 159; American Teleph. & Teleg. Co. v. Pearce (1889) 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910; St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co. (1908) 134 Mo. App. 406, 114 S. W. 586; Hodges v. Western U. Teleg. Co. (1903) 133 N. C. 225, 45 S. E. 572.

### II.—continued.

#### b. Rural highway:

1. View that telephone or telegraph is added burden, 1304.
2. View that telephone or telegraph is not added burden, 1306.

#### c. Rule in New York, 1308.

#### d. Measure of compensation, 1310.

### III. Effect of act of Congress relative to post roads, 1311.

In American Teleph. & Teleg. Co. v. Pearce (1889) 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910, the court said: "We entertain no doubt whatever as to the right of a railroad company to construct on and over its right of way a telegraph or telephone line, for its use in the operation of its road and despatch of its business; and it may do this by itself, or may employ another company to do it, or may do it conjointly with another company. If, then, this line is in process of construction, or is about to be constructed, over the right of way of this railway company, in good faith, for the use and benefit of the latter in the operation of its road and to facilitate its business, or is reasonably necessary for that purpose, the landowners have no ground of complaint, because such use of their land is within the



scope of the original easement, for which they have already received compensation."

The language of the foregoing case was quoted with approval in *Hodges v. Western U. Teleg. Co.* (1903) 138 N. C. 225, 45 S. E. 572.

So, in *Western U. Teleg. Co. v. Rich* (1878) 19 Kan. 517, 27 Am. Rep. 159, an action by the fee owner for additional compensation by reason of the construction of a telegraph line, the telegraph company called a witness and attempted to prove by him that the line of telegraph was built jointly by the railroad and telegraph companies, for the use of the railroad company in the moving of its trains and the transaction of its business, and that it was a part of and necessary to its business. The court refused to receive this testimony. *Brewer, J.*, said: "In this we think the court erred. A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon, to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable, that it may cut down every tree and bush on the right of way, if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water tank or a station house. . . . By so doing it gives the adjacent landowner no claim for damages. Such use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the assessment therefor."

The same view was taken as to a line jointly built in *St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co.* (1908) 134 Mo. App. 406, 114 S. W. 586, wherein the court said: "The railroad company may construct and maintain such telephone or tele-

graph line on the right of way for its own purpose, or it may take a partner into the enterprise, or contract with another to erect and maintain the line and furnish the required telephonic or telegraphic service, to the end of transmitting intelligence with respect to the operation of its trains, carriage of traffic, passengers, and other needs of its calling. In such circumstances, the telephone is not an additional servitude upon the fee of the adjacent owner, but, on the contrary, it is viewed as a legitimate development of the easement acquired for railroad purposes."

In *Prather v. Western U. Teleg. Co.* (1883) 89 Ind. 501, it was held to be competent for a railroad company to erect a telegraph line along its right of way. The decision, however, was based on the fact that the railroad company owned the fee to the land embraced in the right of way.

#### *b. Operation for commercial purposes.*

Where a telegraph or telephone line constructed along a railroad right of way is to be used for general commercial purposes, it is an additional burden on the fee, for which the landowner is entitled to compensation.

**Kansas.**—*Western U. Teleg. Co. v. Rich* (1878) 19 Kan. 517, 27 Am. Rep. 159.

**Maine.**—*Canadian P. R. Co. v. Moosehead Teleph. Co.* (1910) 106 Me. 363, 29 L.R.A.(N.S.) 703, 76 Atl. 885, 20 Ann. Cas. 721.

**Maryland.**—*American Teleph. & Teleg. Co. v. Pearce* (1889) 71 Md. 585, 7 L.R.A. 200, 18 Atl. 910.

**Missouri.**—*St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co.* (1908) 134 Mo. App. 406, 114 S. W. 586.

**New Jersey.**—*Nicoll v. New York & N. J. Teleph. Co.* (1899) 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583.

**North Carolina.**—*Teeter v. Postal Teleg.-Cable Co.* (1916) 172 N. C. 783, 90 S. E. 941; *Hodges v. Western U. Teleg. Co.* (1903) 133 N. C. 225, 45 S. E. 572; *Phillips v. Postal Teleg.-Cable Co.* (1902) 130 N. C. 513, 89 Am. St. Rep. 368, 41 S. E. 1022, on rehearing (1902) 181 N. C. 225, 42 S. E. 587.

And see the reported case (*QUEBY v. POSTAL TELEG.-CABLE Co.* ante, 1290).

In *Nicoll v. New York & N. J. Teleph. Co.* (1899) 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583, the court, in holding that the construction of a telephone line along a railroad right of way imposed an additional burden on the land, said: "The argument to support the proposition that the right to construct and maintain a telephone line for common public use is within this easement is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway. But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage. It uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses. The highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. . . . We therefore think that the right now under consideration is not within the public easement, and can be acquired, against the consent of the private owner of the fee, only by condemnation under the power of eminent domain."

Similarly, in *Hodges v. Western U. Teleg. Co.* (1908) 133 N. C. 225, 45 S. E. 572, an action against a telegraph company by an adjacent owner of land to recover damages for the erection of telegraph poles along a railroad right of way, the court said: "We cannot construe this into a reasonable use of the easement granted by the plaintiff to the railroad company, but as an additional burden placed upon the plaintiff's land. It is clear that the railroad company could not grant to the defendant company an easement. This could be done only by the owner of the soil."

A telephone line was held in *Teeter v. Postal Teleg.-Cable Co.* (1916) 172 N. C. 783, 90 S. E. 941, to impose on a railroad right of way an additional

burden, entitling the owner to compensation.

So, in *Canadian P. R. Co. v. Moosehead Teleph. Co.* (1910) 106 Me. 363, 29 L.R.A. (N.S.) 703, 76 Atl. 885, 20 Ann. Cas. 721, an action in equity to enjoin a defendant telephone company from maintaining its line of poles and wires on the plaintiff's right of way, it was held that the location of a telephone line on a railroad right of way imposes an additional burden, for which the owner of the fee is entitled to compensation.

To the same effect is *Phillips v. Postal Teleg.-Cable Co.* (1902) 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022, an action to recover damages caused by the appropriation by the defendant of a portion of the plaintiff's land, which was subject to a railroad right of way, for the purpose of erecting and maintaining a telegraph line. It was not contended that this telegraph line was in any degree essential to the operation of the railroad, but, on the contrary, the railroad company, in the proceeding under which the telegraph company claimed to have acquired its easement, claimed that no benefit or advantage could accrue to it from the erection of the telegraph line. "Under the circumstances," the court said, "it is clear that the additional easement claimed by the defendant is an additional burden upon the land, for which the owner is entitled to just compensation." On rehearing ((1902) 131 N. C. 225, 42 S. E. 587) a new trial was granted for error in the admission of incompetent evidence, which affected the amount of damages. The judgment, however, was re-affirmed in all other respects.

Likewise, in *American Teleph. & Teleg. Co. v. Pearce* (1889) 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910, in an action brought by abutting landowners to restrain the defendant company from erecting poles and stringing wires on a railroad right of way, it was held that if the main object in constructing the telegraph line was to establish an extensive line of telegraph and telephone communication for the use and benefit of the company, and such line was not reasonably necessary for the

purposes of the railroad, it was a new easement, and placed a new and additional burden on the land, for which the owners were entitled to compensation.

Where the railroad right of way consists of an easement only, the fee thereto residing in the adjacent landowner, and a telegraph or telephone line is constructed thereon under a contract with the railroad company, for the purpose of serving the railroad in its operations and also to serve the general public as a commercial enterprise, so far as the telegraph or telephone company serves the general public as a commercial enterprise, distinct from the vocation of the railroad, it constitutes a use of the right-of-way easement other than for railroad purposes, and is, therefore, a servitude not contemplated in the original grant, and a burden on the fee, of which the adjacent owner may rightfully complain. *St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co.* (1908) 134 Mo. App. 406, 114 S. W. 586.

So, in *Western U. Teleg. Co. v. Rich* (1878) 19 Kan. 517, 27 Am. Rep. 159, wherein it appeared that the telegraph line was built for the joint use of the railroad and the telegraph company, it was held that the telegraph company was liable in damages to the owner of the fee to the extent of the additional burden cast on the land by the independent use of the line by the telegraph company.

If a railroad company owns its right of way in fee simple, the construction by another of a telegraph or telephone line thereon constitutes a burden on the fee, which amounts to a taking of private property without compensation. *St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co.* (Mo.) *supra*.

#### *c. Measure of compensation.*

Where a telephone or telegraph line is constructed along a railroad right of way for other than railroad uses, it has been held that the owner of the fee is entitled to recover the difference between the value of the fee before the construction of the line and its value after the construction. *Chicago, M. & St. P. R. Co. v. Snyder* (1903)

120 Iowa, 582, 95 N. W. 183; *Teeter v. Postal Teleg.-Cable Co.* (1916) 172 N. C. 783, 90 S. E. 941; *Phillips v. Postal Teleg.-Cable Co.* (1902) 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022. And see *Hodges v. Western U. Teleg. Co.* (1903) 133 N. C. 225, 45 S. E. 572.

In *Teeter v. Postal Teleg.-Cable Co.* (1916) 172 N. C. 783, 90 S. E. 941, the court, in ruling on the measure of damages, held that the inquiry should not be confined to the diminution in the value of the land as farming land, but that it was proper to consider its availability for factory sites, since the compensation was to be estimated by reference to the uses for which the property was suitable, having regard to the business and wants of the community as they existed, or might reasonably be expected to exist in the immediate future. And see the reported case (*QUERY v. POSTAL TELEGRAPH-CABLE Co. ante*, 1290).

But in *Chicago, M. & St. P. R. Co. v. Snyder* (1903) 120 Iowa, 582, 95 N. W. 183, it was held that, although the construction of a telegraph line along a railroad right of way might impose an additional servitude on the land, the landowner had no right to an accounting of the rents and profits received by the railroad from the telegraph company.

## *II. Highway.*

### *a. City or village street.*

#### *1. View that telephone or telegraph is added burden.*

In some jurisdictions the courts have taken the view that a telephone or telegraph line constructed along a city or village street, is not within the purposes of the original easement, and is not a proper street use, but is an added burden on the fee, for which an abutting landowner is entitled to compensation.

*Illinois.*—*De Kalb County Teleph. Co. v. Dutton* (1907) 228 Ill. 178, 10 L.R.A.(N.S.) 1057, 81 N. E. 838, 10 Ann. Cas. 464; *Union Electric Teleph. & Teleg. Co. v. Applequist* (1902) 104 Ill. App. 517. See also *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (1895) 156 Ill. 255, 29 L.R.A. 485, 40 N. E. 1008.

**Kentucky.**—East Tennessee Teleph. Co. v. Russellville (1899) 106 Ky. 667, 51 S. W. 308.

**Maryland.**—Chesapeake & P. Teleph. Co. v. Mackenzie (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

**Mississippi.**—Stowers v. Postal Telegr.-Cable Co. (1891) 68 Miss. 559, 12 L.R.A. 864, 24 Am. St. Rep. 290, 9 So. 356.

**Nebraska.**—Bronson v. Albion Teleph. Co. (1903) 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201, 2 Ann. Cas. 639.

**New Jersey.**—Nicoll v. New York & N. J. Teleph. Co. (1898) 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583. See also Halsey v. Rapid Transit Street R. Co. (1890) 47 N. J. Eq. 380, 20 Atl. 859; State, Winter, Prosecutor, v. New York & N. J. Teleph. Co. (1888) 51 N. J. L. 83, 16 Atl. 188. Compare Roake v. American Teleph. & Teleg. Co. (1886) 41 N. J. Eq. 35, 2 Atl. 618.

**North Dakota.**—Donovan v. Allert (1902) 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441. See also Coagriff v. Tri-State Teleph. & Teleg. Co. (1906) 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525.

**Ohio.**—Western U. Teleg. Co. v. Champion Electric Light Co. (1885) 9 Ohio Dec. Reprint, 540; Burns v. Columbus Citizens' Teleph. Co. (1907) 30 Ohio C. C. 74; Prentiss v. Cleveland Teleph. Co. (1894) 1 Ohio S. & C. P. Dec. 97. Compare Auerbach v. Cuyahoga Teleph. Co. (1900) 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 633.

**Texas.**—Southwestern Teleg. & Teleph. Co. v. Smithdeal (1910) 103 Tex. 128, 124 S. W. 627 (certifying answers to court of civil appeals, see (1910) — Tex. Civ. App. —, 126 S. W. 942). Compare Roaring Springs Town-site Co. v. Paducah Teleph. Co. (1914) — Tex. Civ. App. —, 164 S. W. 50.

**Wisconsin.**—Krueger v. Wisconsin Teleph. Co. (1900) 106 Wis. 96, 50 L.R.A. 298, 81 N. W. 1041.

The rule that a telephone system constructed and maintained in a city street is an additional servitude on the fee is not altered by the fact that the city uses the same poles for its fire alarm and police system. *De Kalb County Teleph. Co. v. Dutton* (1907)

228 Ill. 178, 10 L.R.A. (N.S.) 1057, 81 N. E. 838, 10 Ann. Cas. 464.

In *Union Electric Teleph. & Teleg. Co. v. Applequist* (1902) 104 Ill. App. 517, an owner of property abutting on an alley sued to enjoin the defendant company from tearing up the pavement and excavating in the alley for the purpose of erecting telephone poles. The complainant, it appeared, owned that portion of the alley in fee. It was contended by the defendant that the grant by the city to the telephone company was within the authorized power of the city, and did not subject the alley to an added servitude. With respect to this contention the court said: "Any use of a public street calculated to facilitate travel, under the authorities of our state, is held to be within the contemplation of the dedicatory and cannot be considered an added servitude. But a telephone system is not such a use. Its object has no relation to public travel, or any contemplated use of the streets. It is an added servitude." In *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (1895) 156 Ill. 255, 29 L.R.A. 485, 40 N. E. 1008, the court said by way of dictum: "Telegraph poles erected upon a highway serve no useful purpose in regard to the highway, and telegraph and telephone poles erected upon a street are not directly ancillary to the use of the street as such; for this reason they are held to be an additional servitude in the street."

In *East Tennessee Teleph. Co. v. Russellville* (1899) 106 Ky. 667, 51 S. W. 308, it was said that "it is the imposition of a new and additional servitude on streets and alleys of a city or town, to erect telephone poles and string wires thereon." See, however, *Cumberland Teleph. Co. v. Avritt* (1905) 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955, holding a telephone line on a rural highway not to be an additional servitude, the language of that decision being apparently broad enough to apply to streets.

Likewise, in *Chesapeake & P. Teleph. Co. v. Mackenzie* (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690, the court said: "The planting of a telegraph or telephone pole in a highway

or street is not a public nuisance, because the legislature has declared that it shall not be; but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude, without making appropriate provision for just compensation to the owner."

In *Stowers v. Postal Teleg.-Cable Co.* (1891) 68 Miss. 559, 12 L.R.A. 864, 24 Am. St. Rep. 290, 9 So. 356, wherein an abutting property owner sought to enjoin the defendant from erecting telegraph poles in front of his premises adjoining a city street, it was held that telegraph lines formed no part of the equipment of a public street, but were foreign to its use, and were an additional burden on the fee, entitling an abutting property owner to additional compensation irrespective of whether the fee to the street was in the abutting owner or in the city. In this connection the court said: "It was not competent for the city of Vicksburg, by the action of its municipal authorities, to authorize the erection of the telegraph wires by the telegraph company to the injury of appellant, without having first made compensation to him for the injury inflicted upon him. The authority granted by the municipality would protect the company in its interference with the rights of the public, which is represented by the local authorities. But it cannot operate to withdraw from the appellant his right of property and confer it upon the company. That right is secured by constitutional provisions, and can only be obtained by the exercise of the right of eminent domain, and upon due compensation being first made."

Similarly, in *Bronson v. Albion Teleph. Co.* (1903) 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201, 2 Ann. Cas. 639, the court, in holding that telephone poles and wires in a street were an added burden on the fee, said: "When we recall the forest of poles with their clumsy appurtenances, and the network of wires and even cables with which some of our city streets are encumbered, it seems hard to say that an owner whose light is cut off,

who has the safety of his buildings and their occupants in case of fire endangered, and access to his property impeded by these permanent obstructions, is less entitled to complain than one whose easement, by adjacency, is impaired by a steam railway. Of course, in the greater number of cases, the poles and wires work no substantial injury, and the owner has no ground of objection. But because the damage in most cases is trivial or nominal, we should not be blind to the substantial and considerable damage that often exists."

In *Nicoll v. New York & N. J. Teleph. Co.* (1898) 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583, it was held that, where the fee to a street was in the abutting owners, the use of the street for the construction and maintenance of a telephone line constituted an added burden on the fee, for which an abutting owner was entitled to compensation. The court said: "The public easement, as interpreted in this state, is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers while using the way. Secondly, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes, and gas pipes for the convenience of persons occupying neighboring lands." So, in *Halsey v. Rapid Transit Street R. Co.* (1890) 47 N. J. Eq. 380, 20 Atl. 859, wherein the court held that placing poles in a street for the purpose of using electricity for street car propulsion did not impose

an additional servitude on the fee, it was said obiter: "The question whether a new method of using a street for public travel results in the imposition of an additional burden on the land, or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test, and not the motive power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose by means of the telegraph and telephone differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement." But in *Roake v. American Teleph. & Teleg. Co.* (1886) 41 N. J. Eq. 35, 2 Atl. 618, the court refused to enjoin a telephone and telegraph company from stringing wires in front of the complainant's premises, which abutted on a city street, it appearing that the poles were erected on adjacent property, and that the damage threatened was not of an irreparable nature. The court did not decide the question whether an additional servitude was imposed, but said: "A complainant is not in a position to ask for such an injunction when the right on which he founds his claim is, as a matter of law, unsettled. . . . I do not intend to express any opinion at this time upon the merits of the controversy. . . . If the company has not the right which it claims, its action in the premises will be taken at its peril. It will gain no right by the refusal of this court to prohibit it at this stage of the suit, and this court

will be able to protect the complainant in his rights."

In *Donovan v. Allert* (1902) 11 N. D. 239, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441, the court, in holding that the construction and operation of a telephone line on a city street, the fee to which was in the abutting owner, was not a proper street use, and imposed a new servitude on the fee of the abutting owner, said: "The streets of the said city were given to the public for public use. What is understood by 'public use?' The primary intention and idea of the use of the street was for travel,—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions." In *Cosgriff v. Tri-State Teleph. Co.* (1906) 15 N. D. 210, 5 L.R.A.(N.S.) 1142, 107 N. W. 525, the court, after reviewing many authorities, held that the construction of a telegraph and telephone line on a rural highway constituted an additional servitude on the fee of an abutting owner, for which he was entitled to compensation, but Young, J., delivering the opinion of the court, remarked: "The proposed use must be within the purpose of the original dedication. If it is not, it constitutes an additional servitude, whether it be a street or rural highway."

In *Southwestern Teleg. & Teleph. Co. v. Smithdeal* (1910) 103 Tex. 128, 124 S. W. 627, it was said: "The telephone company was not exempted from the payment of damages caused to abutting property by the construction of its lines. The structure of the telephone company is an additional burden upon the street." See also the decision of the court of civil appeals in the same case (1910) — Tex. Civ. App. —, 126 S. W. 942, wherein the court said: "The question in this case is not what character of title plaintiff possessed in the street, but is: Did the appellant have the right to burden the street with its structures, though having a franchise from the

state and city so to do, without responding to plaintiff in such damages as the erection of its lines along said streets accrued to plaintiff by reason of such structures. Our Constitution provides that 'no person's property shall be taken, damaged, or destroyed for, or applied to, a public use without adequate compensation being made, unless by consent of such person.' Art. 1, § 17. We think it settled in this state by a number of decisions that, where private property is damaged by the construction of a public work, the owner of such property may recover compensation for such damage." But in *Roaring Springs Town-site Co. v. Paducah Teleph. Co.* (1914) — *Tex. Civ. App.* —, 164 S. W. 50, it appeared that a statute authorized telephone and telegraph companies to set their poles, wires, and other fixtures "along, upon, and across any of the public roads, streets, and waters of this state in such manner as not to incommode the public in the use of such roads, streets, and waters." The question arose whether, under that statute, it was necessary for telephone companies to condemn the land in streets for that purpose. The court quoted with approval from the case of *Pierce v. Drew* (1883) 136 *Mass.* 75, 49 *Am. Rep.* 7, wherein a similar statute was under consideration, holding that an additional servitude was not imposed by the appropriation of a public highway for the use of a line of telegraph; and held the statute in question to be constitutional, although it made no provision for compensation to the owner of the fee in the highway.

In *Krueger v. Wisconsin Teleph. Co.* (1900) 106 *Wis.* 96, 50 *L.R.A.* 298, 81 *N. W.* 1041, an abutting owner who held the fee to the center of the street sued to compel a telephone company to remove a pole which it had caused to be placed in front of his premises, and to recover damages for its erection. The court directed the trial court to enter judgment for the plaintiff for the removal of the pole, and for the damages found by the jury. In holding that an additional servitude was imposed, it was said: "The suggestion that the adoption of this

rule will cripple or destroy the commerce of the state is weighty, but the rights of the public, or of corporations engaged in conducting business of a public character, cannot be allowed to prevail over the rights of individuals, except in the way pointed out in the Constitution. The fact that some of the cases mentioned were decided with reference to the location of poles on country roads does not lessen their weight. If it be a fact, as we believe it is, that in the dedication or condemnation of streets the taking and occupancy of a specific portion for permanent structures was not within the contemplation of the parties, then the argument of the greater rights of the public in city streets fails. The freedom of use and enjoyment of adjoining property has been interfered with, and a definite portion of both street and highway has been taken, contrary to the original purpose, and without compensation."

In Ohio, the cases are in conflict, and no decision seems to have been rendered by the court of last resort. In *Western U. Teleg. Co. v. Champion Electric Light Co.* (1885) 9 *Ohio Dec. Reprint*, 540, the court said: "The city council of a city of the class of Springfield is vested by law in Ohio with the control and management of the streets and alleys thereof. As incident thereto, it grants or refuses authority and permission to street and other railways, telegraph and electric light companies, to use the same so far as necessary for laying of tracks, and erecting poles, and maintaining the same thereon. Such grant does not affect the private rights of any individual property owner in the street, which remain unimpaired thereby, and over which the council of the city has no such power or authority." So, in *Burns v. Columbus Citizens' Teleph. Co.* (1907) 30 *Ohio C. C.* 74, it was held that the construction and maintenance of a telephone line on a city street constituted an additional servitude, for which an abutting owner was entitled to compensation, but the court refused to enjoin the telephone company from placing in an underground conduit in the street wires which were

strung on poles, the complainant not having objected to the use of the street for the poles. In *Prentiss v. Cleveland Teleph. Co.* (1894) 1 Ohio S. & C. P. Dec. 97, it was held that the erection of telephone poles on a residence street in a city should be enjoined, but that the telephone wires could be put into underground conduits in the street. However, in *Auerbach v. Cuyahoga Teleph. Co.* (1900) 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 633, set forth at length in subdivision II. a, 2, *infra*, telephone poles and wires were held not to constitute an additional burden upon a city street.

*B. View that telephone or telegraph is not added burden.*

Other courts have taken the view that telephone and telegraph lines are simply new and improved methods of communication; that the primary and original purpose of the dedication of a street includes the transmission of intelligence as well as public travel; and hence that the erection and maintenance of telephone and telegraph lines are within the scope of the original easement for which the landowner has been compensated.

**Alabama.**—See *Southern Bell Teleph. Co. v. Francis* (1895) 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1.

**District of Columbia.**—*Hewett v. Western U. Teleg. Co.* (1886) 4 Mackey, 424.

**Indiana.**—*Magee v. Overshiner* (1897) 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; *Caburn v. New Teleph. Co.* (1900) 156 Ind. 90, 52 L.R.A. 671, 59 N. E. 324.

**Kentucky.**—*East Tennessee Teleph. Co. v. Russellville* (1899) 106 Ky. 667, 51 S. W. 308.

**Louisiana.**—*Irwin v. Great Southern Teleph. Co.* (1885) 37 La. Ann. 63.

**Massachusetts.**—*Pierce v. Drew* (1883) 136 Mass. 75, 49 Am. Rep. 7.

**Michigan.**—*People v. Eaton* (1894) 100 Mich. 208, 24 L.R.A. 721, 59 N. W. 145.

**Minnesota.**—*Cater v. Northwestern Teleph. Exch. Co.* (1895) 60 Minn. 539, 23 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; *Willis v. Erie Teleg. &*

*Teleph. Co.* (1887) 37 Minn. 347, 34 N. W. 337.

**Missouri.**—*Julia Bldg. Asso. v. Bell Teleph. Co.* (1885) 88 Mo. 258, 57 Am. Rep. 398; *Cartwright v. Liberty Teleph. Co.* (1907) 205 Mo. 126, 12 L.R.A. (N.S.) 1125, 103 S. W. 982, 12 Ann. Cas. 249; *Gay v. Mutual U. Teleg. Co.* (1882) 12 Mo. App. 491.

**Montana.**—*Hershfield v. Rocky Mountain Bell Teleph. Co.* (1892) 12 Mont. 102, 29 Pac. 883.

**Ohio.**—*Auerbach v. Cuyahoga Teleph. Co.* (1900) 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 633; but compare other Ohio cases cited in the preceding subdivision.

**Pennsylvania.**—*York Teleph. Co. v. Keesey* (1896) 5 Pa. Dist. R. 366; *Shinzel v. Bell Teleph. Co.* (1906) 81 Pa. Super. Ct. 221. See also *Lockhart v. Craig Street R. Co.* 139 Pa. 419, 21 Atl. 26.

**South Dakota.**—*Kirby v. Citizens' Teleph. Co.* (1908) 17 S. D. 362, 97 N. W. 3, 2 Ann. Cas. 152.

**Tennessee.**—*Frazier v. East Tennessee Teleph. Co.* (1905) 115 Tenn. 416, 8 L.R.A. (N.S.) 823, 112 Am. St. Rep. 856, 90 S. W. 620, 5 Ann. Cas. 838; *Patton v. Chattanooga* (1901) 108 Tenn. 197, 65 S. W. 414.

**West Virginia.**—*Maxwell v. Central Dist. & Printing Teleg. Co.* (1902) 51 W. Va. 121, 41 S. E. 125.

In *Magee v. Overshiner* (1897) 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951, an action was brought by the fee owner to compel the removal of a telephone pole which was placed by the defendant in the curb line of the sidewalk in front of the plaintiff's property. The court, in holding that the reasonable use of city streets for the equipment of a telephone system was not a new and additional servitude for which the abutting property owner was entitled to compensation, drew a distinction between telephone and telegraph lines, saying in this connection: "The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of the



communication of messages between persons within the city than the telegraph." In *Coburn v. New Teleph. Co.* (1900) 156 Ind. 90, 52 L.R.A. 671, 59 N. E. 324, the question arose whether the construction of a subsurface trench in a sidewalk, 3 feet wide, 5 feet deep, and 3 feet from the abutter's lot line, for use as a conduit for telephone cables and wires to be used by the city public in intercommunication by electricity, was such a use of the street as was consistent with the contemplated purpose of the dedication. The court answered this question in the affirmative, saying: "The general doctrine of these cases is that in locating, marking, and dedicating streets in plats of land, for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of public travel, traffic, and communication. Anything which reasonably facilitates these ends is, therefore, consistent with the dedication. In sparsely settled towns and cities public necessity requires but little of the servient owner beyond the right of unobstructed passage over the street, but as cities become populous, and the streets crowded with traveling footmen and vehicles, public necessity increases with the multitude, and, whenever the necessity exists, any use of the street by reasonable structures and devices, above or below the surface, which will enable the citizens to communicate without actual travel upon the street, and which does not materially obstruct the ingress and egress and light and air to abutting property, is within the contemplated purpose of the dedication, and not a new burden upon the fee."

It appeared in *Pierce v. Drew* (1883) 136 Mass. 75, 49 Am. Rep. 7, that a telegraph company was about to build a line in the streets of a city, under a statute allowing it to do so. Adjacent owners thereupon sought to enjoin the authorities from granting the privilege to the company, claiming that the statute was unconstitutional because it did not provide for compensation to the owners of the fee in the street. The court held that the transmission

of information by electricity was a use similar to, if not identical with, the purpose for which highways were established, and that therefore no additional servitude was imposed or other compensation required. In *Auerbach v. Cuyahoga Teleph. Co.* (1900) 9 Ohio S. & C. P. Dec. 389, 7 Ohio N. P. 638, the court held that telephone poles and wires in city streets did not constitute an additional burden, and that an abutting owner was not entitled to compensation therefor, saying: "The question before me is not confined to whether the streets of Cleveland may be used for the purposes of erecting therein telephone poles and wires without the consent of the abutting property owner, or compensation lawfully ascertained and paid to him, but is, broadly, whether or not the use of the streets for telephonic purposes, either by poles or wires, or by underground conduits, is such a use as requires such consent of, or payment to, the abutting owner. If it is within the proper public use of a street in a city to lay telephone wires in underground conduits, it follows that it is equally within such proper public use to erect poles to carry wires. The right to decide whether poles should be erected or conduits constructed in the streets, for the purpose of making possible intercommunication between citizens by means of telephones, lies with the city in the discharge of the trust which attaches to the fee in the streets, which rests in such city. The doctrine which I adopt in deciding this case is that the reasonable use of the streets of a city for the poles, wires, and necessary equipment of a telephone system is not a new and additional burden, for which the abutting property owner is entitled to compensation. This doctrine appears to me to be abundantly supported by authority. In this connection it is proper to say that, because the subject of expansion and development of the public uses of the streets is intimately connected with the progress and development of invention, which make possible such enlarged use and enjoyment, the later decisions, rendered with a better ap-

preciation of modern public demands and responding inventions, should have more weight than those rendered at an earlier time."

The question at issue in *Shinzel v. Bell Teleph. Co.* (1906) 31 Pa. Super. Ct. 221, was whether a telephone pole erected in a city street imposed an additional burden on the adjacent property owner. In holding that it did not, the court said: "The principal question raised in this case has not been decided by our supreme court in a case involving the same state of facts. But the general principles which have received recognition in the cases above cited, as to the servitude in favor of the public in city and borough streets, lead to the conclusion that the erection of telephone poles and wires in such streets, under charter right, with municipal consent, and in conformity to municipal regulations, is not in itself an additional burden for which the owner of the fee is entitled to compensation. It logically follows that unsightliness of the poles, and noises which are the ordinary incident of the lawful and non-negligent maintenance of the poles and wires and the conduct of the business, do not constitute a special injury for which damages are recoverable." So, in *York Teleph. Co. v. Keesey* (1896) 5 Pa. Dist. R. 366, a bill in equity was filed by a telephone company to obtain an injunction restraining the defendant and his employees from interfering with either the erection or maintenance by the complainant of a telephone pole located in a city street on which the defendant's property abutted. A preliminary injunction was issued by the lower court on the ground that the placing and maintaining of this pole imposed an additional burden upon the fee. On appeal, however, the court dissolved the injunction, saying: "Do the erection of poles and the stringing of wires in front of the defendant's property impose an additional servitude upon it? Is it such a burden as was contemplated when the street was either condemned or dedicated? Manifestly not, since the street was either dedicated or condemned more than a hundred years

ago, long before the wildest dreamer imagined such a thing as the transmission of articulate speech over an electrified wire, and before Franklin first drew the electrical spark from the cloud. But the same might be said of lamp-posts, gas and water pipes, street railways, both horse and electric, and it has been ruled as to all of these that they do not impose an additional servitude."

In *Kirby v. Citizens' Teleph. Co.* (1908) 17 S. D. 362, 97 N. W. 3, 2 Ann. Cas. 152, in deciding that a telephone system on the streets of a city was not an additional servitude, the court remarked: "The streets of a city or incorporated town are, in contemplation of law, dedicated, appropriated, or condemned for all proper street uses; and, when a street is used for any proper street purpose by permission of the city authorities, such use does not constitute an additional servitude, though such use may not have been known when the streets were dedicated, appropriated, or condemned for street purposes, and the abutting fee owner is not entitled to compensation for any damages he may sustain by reason of such use. The streets of a city are now used for many purposes unknown in former times. . . . The telephone is but a step in advance of former methods of conveying intelligence and information, and is a substitute for the messenger and carrier of former times."

In *Frazier v. East Tennessee Teleph. Co.* (1905) 115 Tenn. 416, 3 L.R.A. (N.S.) 323, 112 Am. St. Rep. 856, 90 S. W. 620, 5 Ann. Cas. 838, the court held that telephone poles and lines constructed and maintained in a city street did not impose an additional servitude, saying: "We approve the authorities which hold that the chief purpose of a street is that of intercommunication between the inhabitants or denizens of a city or town, and that the telephone is but a new and improved method of effecting this purpose, and hence not a new burden upon the fee of the abutting owner. If this instrument of a larger and more generous civilization were destroyed, not only would social intercourse be

very greatly restricted, but the progress of all business would be retarded and its development confined within much narrower limits than now."

Similarly, in *Maxwell v. Central Dist. & Printing Teleg. Co.* (1902) 51 W. Va. 121, 41 S. E. 125, the court said: "Telephone poles are not things of beauty, yet their utility is so great that their ugliness must be endured until human invention has discovered some more tasteful substitute for them. The public can well afford to surrender a reasonable portion of the public easement in its highways to a public utility of such vastly increasing importance. As the owner of the fee in such highways loses nothing thereby, she has no grounds of complaint. It puts no additional burden on the fee, but it is a burden, alone, upon the permanent easement to which it is appurtenant and subservient." In *Lowther v. Bridgeman* (1905) 57 W. Va. 306, 50 S. E. 410, the court, after quoting from *Maxwell v. Central Dist. & Printing Teleg. Co.* (W. Va.) *supra*, said: "This case is binding authority on this court, and necessarily brings us to the conclusion that there is no additional servitude by the reasonable use of a public highway for the purpose of placing telephone poles and wires for public use along it."

*b. Rural highway.*

*1. View that telephone or telegraph is added burden.*

The weight of authority is to the effect that a telephone or telegraph line is an added burden on a rural highway, entitling an abutting property owner to compensation.

**United States.**—*Pacific Postal Teleg. Cable Co. v. Irvine* (1892) 49 Fed. 113; *Kester v. Western U. Teleg. Co.* (1901) 108 Fed. 926. Compare *Southern Bell Teleph. & Teleg. Co. v. Nalley* (1908) 165 Fed. 268.

**Illinois.**—*Board of Trade Teleg. Co. v. Barnett* (1883) 107 Ill. 507, 47 Am. Rep. 453; *Postal Teleg.-Cable Co. v. Eaton* (1897) 170 Ill. 513, 39 L.R.A. 722, 62 Am. St. Rep. 390, 49 N. E. 365; *Burrall v. American Teleph. & Teleg. Co.* (1906) 224 Ill. 266, 8 L.R.A. (N.S.) 1091, 79 N. E. 705. See also *De Kalb*

*County Teleph. Co. v. Dutton* (1907) 228 Ill. 178, 10 L.R.A. (N.S.) 1057, 81 N. E. 888, 10 Ann. Cas. 464; *American Teleph. & Teleg. Co. v. Jones* (1898) 78 Ill. App. 872.

**Maryland.**—See *Chesapeake & P. Teleph. Co. v. Mackenzie* (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

**New Jersey.**—*Broome v. New York & N. J. Teleph. Co.* (1886) 42 N. J. Eq. 141, 7 Atl. 851.

**North Dakota.**—*Cosgriff v. Tri-State Teleph. & Teleg. Co.* (1906) 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525; *Tri-State Teleph. & Teleg. Co. v. Cosgriff* (1909) 19 N. D. 771, 26 L.R.A. (N.S.) 1171, 124 N. W. 75.

**Ohio.**—*Smith v. Central Dist. Printing & Teleg. Co.* (1886) 1 Ohio C. D. 475; *Denver v. United States Teleph. Co.* (1900) 10 Ohio S. & C. P. Dec. 273; *Daily v. State* (1894) 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710.

**Pennsylvania.**—*Shevalier v. Postal Teleg. Co.* (1903) 22 Pa. Super. Ct. 506.

**Virginia.**—*Western U. Teleg. Co. v. Williams* (1890) 86 Va. 696, 8 L.R.A. 429, 19 Am. St. Rep. 908, 11 S. E. 106.

Holding that the construction of a telegraph line along a public highway amounted to an additional servitude, the court said, in *Pacific Postal Teleg. Co. v. Irvine* (1892) 49 Fed. 113: "Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law." See to the same effect, *Kester v. Western U. Teleg. Co.* (1901) 108 Fed. 926. But in *Southern Bell Teleph.*

ANNO.—TELEGRAPH LINE ON RAILROAD RIGHT OF WAY. 1805

*& Teleg. Co. v. Nalley* (1908) 165 Fed. 263, a bill was filed by a telephone company to enjoin the defendant from interfering with the construction and maintenance of its telephone line. The defendant demurred to the bill, contending that the complainant had no right to maintain a telephone line on the public highway without compensating abutting owners, as such line constituted an additional burden, and exceeded the uses to which the easement in the highway could be put. The court, in overruling the demurrer, held that such use of the highway was not an additional burden or servitude.

In *Board of Trade Teleg. Co. v. Barnett* (1883) 107 Ill. 507, 47 Am. Rep. 453, an action of trespass was brought by an owner of land abutting on a highway, to recover damages alleged to have been sustained by the construction of a telegraph line. The court held that the construction and maintenance of a telegraph line on a public highway constituted a new and additional burden on the fee, to which it was not contemplated it would be subjected when the road was laid out, and that the owner of the fee was entitled to recover additional compensation for such use. In *Postal Teleg.-Cable Co. v. Eaton* (1897) 170 Ill. 513, 39 L.R.A. 722, 62 Am. St. Rep. 390, 49 N. E. 365, it was held that ejection could be maintained by an abutting property owner against a company which constructed a telegraph line in a public highway. The court adopted the rule laid down in *Board of Trade Teleg. Co. v. Barnett* (Ill.) *supra*, to the effect that such line is an additional burden on the owner of the fee, saying: "But it is said the telegraph company obtained the right to construct its line from the county board of Madison county, and the authority of the county officers to grant a license of this character cannot be questioned in a proceeding of this kind. The consent of the county board of Madison county that the line might be erected on the public highway would no doubt be binding on the county and the road authorities in the several towns through which the highway runs upon which the line was authorized to be

constructed, but the county board could give no consent which would be binding on any owner of the fee in the highway where the line was constructed. The right of the owner of the fee was beyond the control of the county board. His right is predicated on that provision of the Constitution which declares that 'private property shall not be taken or damaged without just compensation.' The legislature had no authority to confer power on the county board to authorize the appellant company to take appellee's land without compensation, and hence the county board was powerless to give such authority." In *Burrall v. American Teleph. Co.* (1906) 224 Ill. 266, 8 L.R.A. (N.S.) 1091, 79 N. E. 705, wherein the court held that the construction of a telephone line along a rural highway constituted an additional burden on the fee, it was said: "The fact that a large number of long distance telephone messages are sent over this line daily, and therefore it would be convenient for the public to have the defendant occupy complainant's land, is of no importance whatever. If the land is needed for a public use the law provides a way for acquiring it, and the Constitution prohibits its appropriation for such a use without compensation." In *De Kalb County Teleph. Co. v. Dutton* (1907) 228 Ill. 178, 10 L.R.A. (N.S.) 1057, 81 N. E. 838, 10 Ann. Cas. 464, the court said: "There can be no doubt that under the law in this state, as heretofore announced, a long distance telephone line places an additional servitude upon the fee in a rural highway."

In *Chesapeake & P. Teleph. Co. v. Mackenzie* (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690, the court said: "Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by contract or condemnation."

In *Broome v. New York & N. J. Teleph. Co.* (1886) 42 N. J. Eq. 141, 7 Atl. 851, the court, in granting a mandatory injunction requiring a telephone company to remove its poles from the highway in front of the com-

plainant's premises, and forbidding it to erect others there, said: "The defendants, a telephone company, without any leave or license from or consent by him [the complainant], but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation or any steps to that end, set up their poles upon his land. . . . It is enough to say on that head that it does not appear that the road board had any power to authorize anyone to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned."

In *Tri-State Teleph. & Teleg. Co. v. Cosgriff* (1909) 19 N. D. 771, 26 L.R.A. (N.S.) 1171, 124 N. W. 75, involving a telephone line on a rural highway, the court said: "The contention of plaintiff, suggested by the specifications referred to, that the placing of a telephone and telegraph line upon the land already dedicated to highway purposes is not an additional servitude, entitling the owner of abutting property to compensation, is disposed of adversely to its view by former decisions of this court. And the court, as at present constituted, is not disposed to disturb principles announced in well-considered opinions which may now be regarded as settled law." See to the same effect, *Cosgriff v. Tri-State Teleph. Co.* (1906) 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525.

In *Daily v. State* (1894) 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710, the defendants, employees of a telegraph company, were convicted under an indictment charging them with wrongfully cutting shade trees on a country highway. In affirming the conviction, it was said: "The rule of law rests upon the clear ground that the appropriation of the public highways for the purpose of telegraph lines was a new use. The highways were originally dedicated for the purposes of public travel, and not for the purpose of telegraph lines. Hence the new use imposed an additional burden." So, in *Smith v. Central Dist. Printing & Teleg. Co.*

(1886) 1 Ohio C. D. 475, it was held that the erection of a telephone pole in a rural highway in front of the plaintiff's farm would be an additional burden on the fee, and should be enjoined. See to the same effect, *Denver v. United States Teleph. Co.* (1900) 10 Ohio S. & C. P. Dec. 273.

In *Shevalier v. Postal Teleg. Co.* (1903) 22 Pa. Super. Ct. 506, it was held that a telegraph company which constructed and maintained its lines along a rural highway, the fee to which was in abutting owners, was a trespasser and liable in damages to the fee owners.

In *Western U. Teleg. Co. v. Williams* (1890) 86 Va. 696, 8 L.R.A. 429, 19 Am. St. Rep. 908, 11 S. E. 106, the court said: "That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation it would be a violation of the Constitution. The commonwealth cannot constitutionally grant it to another."

*2. View that telephone or telegraph is not added burden.*

The view is taken by some courts that a telephone or telegraph line is within the purposes for which a rural highway is dedicated, and is not an additional servitude.

**Alabama.**—*Hobbs v. Long Distance Teleph. & Teleg. Co.* (1906) 147 Ala. 393, 7 L.R.A. (N.S.) 87, 41 So. 1003, 11 Ann. Cas. 461; *Horton v. Long Distance Teleph. & Teleg. Co.* (1906) 148 Ala. 680, 41 So. 1006; *Richardson v.*

**Long Distance Teleph. & Teleg. Co.** (1906) 148 Ala. 680, 41 So. 1006; **Pryor v. Long Distance Teleph. & Teleg. Co.** (1906) 148 Ala. 681, 41 So. 1006.

**Kansas.**—**McCann v. Johnson County Teleph. Co.** (1904) 69 Kan. 210, 66 L.R.A. 171, 76 Pac. 870, 2 Ann. Cas. 156.

**Kentucky.**—**Cumberland Teleph. & Teleg. Co. v. Avritt** (1905) 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955. See also **Bevis v. Vanceburg Teleph. Co.** (1905) 121 Ky. 177, 89 S. W. 126.

**Michigan.**—**People v. Eaton** (1894) 100 Mich. 208, 24 L.R.A. 721, 59 N. W. 145; **Wyant v. Central Teleph. Co.** (1900) 123 Mich. 51, 47 L.R.A. 497, 81 Am. St. Rep. 155, 81 N. W. 928.

**Minnesota.**—**Cater v. Northwestern Teleph. Exch. Co.** (1895) 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111.

**Vermont.**—**Rugg v. Commercial U. Teleph. Co.** (1894) 66 Vt. 208, 28 Atl. 1030.

**West Virginia.**—**Lowther v. Bridgeman** (1905) 57 W. Va. 306, 50 S. E. 410.

In **Hobbs v. Long Distance Teleph. & Teleg. Co.** (1906) 147 Ala. 393, 7 L.R.A. (N.S.) 87, 41 So. 1003, 11 Ann. Cas. 461, the court, in holding that a telephone line constructed along a rural highway was not an additional burden on the fee, said: "We may add that the uses of the telephone are as important in the country as in the city, and it does not take a prophet's ken to see that in the near future they are to perform an important part in bringing the rural districts within the beneficial enjoyment of city improvements." See to the same effect, **Horton v. Long Distance Teleph. & Teleg. Co.** (1906) 148 Ala. 680, 41 So. 1006; **Richardson v. Long Distance Teleph. & Teleg. Co.** (1906) 148 Ala. 680, 41 So. 1006; **Pryor v. Long Distance Teleph. & Teleg. Co.** (1906) 148 Ala. 681, 41 So. 1006.

Likewise, in **McCann v. Johnson County Teleph. Co.** (1904) 69 Kan. 210, 66 L.R.A. 171, 76 Pac. 870, 2 Ann. Cas. 156, the court, in holding that a telephone line constructed on a rural highway was not an additional burden on the fee, said: "No modern inven-

tion has contributed more to commercial and social intercourse than the telephone. It is an appliance of great public utility, and is coming into general use in the country as well as in the city. Indeed, it seems to serve a more beneficial purpose, and is a greater convenience to rural residents widely distant from business centers and from one another, than it is to residents in cities. The question, however, is not determinable by the difference between urban and suburban conveniences and necessities, or by the fact that the fee may be in the adjoining landowner in one instance and in the public in the other; it must be decided by the scope and purposes of the highway, and whether, in country or city, it is a means of travel and transportation, a medium of transmission, of intercommunication, between the people located in different places."

So, it was said in **Cumberland Teleph. & Teleg. Co. v. Avritt** (1905) 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955: "The only question we deem it necessary to consider on the appeal is whether a telephone line upon a public highway is an additional servitude which gives the original owner of the land, or those claiming under him, a cause of action. . . . We are unable to distinguish a telephone line from a steam railway or an electric railway on the public highway. The telephone line is certainly a much less serious burden than either of these. It in no way interferes with the use of the property as a public highway. The use of the land by the telephone company is no less a public service than the use of it by a railroad company. The telephone takes the place of the private messenger. The transmission of messages by telephone is a business of a public character, which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular methods of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business."

Concerning the rights of an abut-

ting owner whose fee extended to the center of a highway, the court said in *Cater v. Northwestern Teleph. Exch. Co.* (1895) 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. . . . But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement."

And see *Rugg v. Commercial U. Teleg. Co.* (1894) 66 Vt. 208, 28 Atl. 1036, wherein it was held that a telegraph line could be constructed and maintained along any highway in the state, provided there was no interference with the public in traveling on or repairing the highway.

*c. Rule in New York.*

In New York, it seems to be settled that the erection of telegraph or telephone poles in a rural highway or in a village or city street imposes an additional servitude for which an abutter who owns the fee to the center of the highway or street is entitled to compensation. After that rule had been laid down by two intermediate courts with respect to rural highways (*Blashfield v. Empire State Teleph. & Teleg. Co.* (1893) 71 Hun, 532, 24 N. Y. Supp. 1006, affirmed in (1895) 147 N. Y. 520, 42 N. E. 2; *Gray v. New York State Teleph. Co.* (1903) 41 Misc. 108, 83 N. Y. Supp. 920), it was, as to such highways, established by a decision of the court of appeals (*Eels v. American Teleph. & Teleg. Co.* (1894) 143 N. Y. 133, 25 L.R.A. 640, 38 N. E. 202). That case was followed in

*Andrews v. Delhi & S. Teleph. Co.* (1901) 36 Misc. 23, 72 N. Y. Supp. 50, affirmed without opinion in (1901) 66 App. Div. 616, 73 N. Y. Supp. 1129, an action of ejectment, brought for the purpose of removing telephone poles and wires from the portion of a rural highway in which the plaintiff owned the fee, wherein the court said: "Assuming that the defendant had acquired its charter from the legislature of the state to run its line along the public highway, still the legislature had no power to grant to the defendant title in the premises, nor could the legislature impose upon the premises an additional burden, without the consent of the owner in fee." So, in *Gannett v. Independent Teleph. Co.* (1907) 55 Misc. 555, 106 N. Y. Supp. 3, the court said: "The *Eels Case* . . . establishes the rule of property in this state to be that the maintenance of a telephone line in a country road between the center line and the exterior line of the highway, upon property where the owner holds the fee to the center of the road, is an additional burden, not contemplated by the original dedication of the highway, and not within the scope of the public use." See to the same effect, *Powers v. State Line Teleph. Co.* (1907) 116 App. Div. 737, 102 N. Y. Supp. 34.

In the *Eels Case*, supra, the court explicitly refrained from deciding whether the rule there adopted was applicable to a city or village street. In *New York Teleph. Co. v. De Noyelles Brick Co.* (1913) 154 App. Div. 845, 139 N. Y. Supp. 748, affirmed without opinion in (1913) 209 N. Y. 526, 102 N. E. 1107, the *Eels Case* was followed as to poles on a "highway" within the limits of a village, but on the outskirts thereof, the court saying that since that case "there has been no question of the necessity of compensating the owner of the fee of the highway as a condition of making use of the same for the purposes of a telephone or telegraph line." In *Hudson River Teleph. Co. v. Forrestal* (1907) 56 Misc. 133, 106 N. Y. Supp. 404, the same rule was followed as to poles in a village street. The court, however, laid stress on the

fact that the street in question, although in a village of 4,000 people, was located in a rural and sparsely populated section thereof. In *Powers v. State Line Teleph. Co.* supra, the rule that telephone poles in a village street impose an additional servitude was unequivocally declared. The question presented was whether a telephone company holding a franchise from a village, authorizing the placing of poles and wires in its streets for the purpose of conducting its business, could occupy land forming part of a public street, owned by a citizen, and subject only to those easements arising from a dedication of the street for those purposes, without having acquired such right by condemnation proceedings. "We prefer," the court said, "to hold that this cannot be done." In that case, although involving a village street, the court followed the ruling in *Eels v. American Teleph. & Teleg. Co.* supra, and in this connection said: "It is sufficient in the case at bar to say that the record discloses no conditions or necessities requiring the application of a different rule than that established by the court of appeals in the *Eels Case*. While that court has determined that a different rule may exist and govern the rights of owners of the fee of streets in a village, than is held applicable to the owners of the fee of country highways, it has not held that such different rule does exist. We believe that the rule applicable to a village of 10,000 inhabitants ought to be the same as that in purely rural districts, and that the appellant has attempted to use the streets of this village for other than street purposes, and that the judgment was proper."

The entire question was, however, put at rest by the decision in *Osborne v. Auburn Teleph. Co.* (1907) 189 N. Y. 393, 82 N. E. 428, wherein the court of appeals, in reversing the decision of the appellate division (1906) 111 App. Div. 702, 97 N. Y. Supp. 874, held that the maintaining of telephone and telegraph poles in a city street, for the purpose of stringing wires thereon, was not a street use, and was not within the purposes of the grant of the

lands for a street; and that their erection and maintenance amounted to an additional burden on the fee, for which compensation must be made to the owner. The court said: "We only wish to remark that the fee to lands in the city is as sacred to the owner as it is in the country, and that in either place he is protected by the constitutional provision to the effect that property shall not be taken for public purposes without compensation." So, in the early case of *Dusenbury v. Mutual Teleg. Co.* (1882) 11 Abb. N. C. 440, it was held that, under the General Act for the Incorporation of Telegraph Companies, the payment of compensation to abutting owners along the proposed route was a condition precedent to the erection of their lines, whether those lines were constructed along streets or country highways. But in *Castle v. Bell Teleph. Co.* (1900) 49 App. Div. 437, 68 N. Y. Supp. 482, it was held that the placing of a conduit for telephone wires beneath the surface of a city street, the fee to the center of which was in the abutting owners, did not constitute an additional burden on the fee, entitling the abutting owners to compensation. The court said: "Of all the discoveries of modern science the telephone is one of the most wonderful, as it is one of the most useful, and its convenience is more especially appreciated by the residents of large cities, whose homes are generally at a great distance from their places of business. This simple contrivance annihilates space, and by its aid relatives and friends widely separated may communicate with each other, business of vast importance may be transacted, a physician may be summoned in case of illness, and assistance obtained whenever a fire or other calamity overtakes a person. In short, there are a thousand ways in which it can be used to such advantage as to render it well-nigh indispensable to an urban resident. And this being the case, why is its maintenance a purpose for which a city street may not properly be used?" That case was followed in two cases prior to the decision in the *Osborne Case*, and apparently in con-



flict with the holding therein. In *Johnson v. New York & P. Teleph. & Teleg. Co.* (1902) 76 App. Div. 564, 78 N. Y. Supp. 598, involving the question of the right of a telephone company to erect poles and string wires on a street of an incorporated village, without the consent of a property owner holding title to the center of the street, *Hiscock, J.*, citing *Castle v. Bell Teleph. Co.* *supra*, said: "Passing upon the right of a telephone company like defendant to place its wires in a public street in a city, this court has fully held and decided that such right was within the limits of the public easement in a city street." Further in the opinion the court said: "In the classification of, and distinction to be drawn between, city streets and rural highways, the courts have treated village streets as more analogous and akin to the former than to the latter." So, in *Gannett v. Independent Teleph. Co.* (1907) 55 Misc. 555, 106 N. Y. Supp. 3, it was held that the maintenance of a telephone line in a city street, the fee to which was in the abutting property owners, was within the public easement and a proper street use, and that the abutting owners were not entitled to compensation therefor. In that case the court followed *Castle v. Bell Teleph. Co.* and *Johnson v. New York & P. Teleph. & Teleg. Co.* *supra*, both decided in the same department.

In *State Line Teleph. Co. v. Ellison* (1907) 121 App. Div. 499, 106 N. Y. Supp. 130, the rule of the *Eels Case* was held not to be applicable to a street, the fee of which was owned by the city.

*d. Measure of compensation.*

In jurisdictions holding that a telegraph or telephone line in a street or highway is an added burden on the fee, the rule seems to be that the damages recoverable are nominal, unless special and unusual damages are proved. *Board of Trade Teleg. Co. v. Barnett* (1883) 107 Ill. 507, 47 Am. Rep. 453; *Board of Trade Teleg. Co. v. Darst* (1901) 192 Ill. 47, 85 Am. St. Rep. 288, 61 N. E. 398; *Chesapeake & F. Co. v. Mackenzie* (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690;

*Blashfield v. Empire State Teleph. & Teleg. Co.* (1893) 71 Hun, 532, 24 N. Y. Supp. 1006, affirmed in (1895) 147 N. Y. 520, 42 N. E. 2; *Postal Teleg. Cable Co. v. Bruen* (1896) 39 N. Y. Supp. 220; *Eels v. American Teleph. & Teleg. Co.* (1894) 143 N. Y. 183, 25 L.R.A. 640, 38 N. E. 202; *Tri-State Teleph. & Teleg. Co. v. Cosgriff* (1909) 19 N. D. 771, 26 L.R.A. (N.S.) 1171, 124 N. W. 75; *Shevalier v. Postal Teleg. Co.* (1903) 22 Pa. Super. Ct. 506; *Southwestern Teleg. & Teleph. Co. v. Smithdeal* (1910) 103 Tex. 128, 124 S. W. 627; *Southwestern Teleg. & Teleph. Co. v. Smithdeal* (1910) — Tex. Civ. App. —, 126 S. W. 942.

"In many and perhaps in most instances, the damages may be merely nominal, but in others an actual detriment may be occasioned. That, of course, is a question to be determined from the evidence in each particular case." *Board of Trade Teleg. Co. v. Barnett* (1883) 107 Ill. 507, 47 Am. Rep. 453.

In *Eels v. American Teleph. & Teleg. Co.* (1894) 143 N. Y. 183, 25 L.R.A. 640, 38 N. E. 202, the court said: "The amount of the compensation is not now the question, but that, in many cases, it can be anything more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment upon the rights of the adjoining owner, and there would be but little fear that anything more than nominal damages would be allowed."

So, in *Postal Teleg. Cable Co. v. Bruen* (1896) 39 N. Y. Supp. 220, it was held that the plaintiff was entitled to nominal damages only, where there was no evidence that the value of the premises after the erection of the telephone poles was less than its value before their erection.

Similarly, in *Board of Trade Teleg. Co. v. Darst* (1901) 192 Ill. 47, 85 Am. St. Rep. 288, 61 N. E. 398, it was held that the plaintiff, whose property adjoined a rural highway along which a telephone line was constructed, was entitled to prove as a proper element of damage the unsightliness of the

poles or structures, and their nearness to his residence; also that more labor and expense would be required in cutting weeds and grass around these poles, and that they would render the use of his farm inconvenient or dangerous.

Likewise, in *Shevalier v. Postal Telegr. Co.* (1903) 22 Pa. Super. Ct. 506, the court said: "Another question raised by the assignments of error is that in any event the plaintiffs below were only entitled to nominal damages for the reason that the telegraph line was constructed along the highway. If there had been no evidence except a concession of the ownership of the land by the plaintiffs, and that the telegraph line was constructed in the highway, we think this would have been the correct rule."

The amount of damages allowed in *Blashfield v. Empire State Teleph. & Telegr. Co.* (1893) 71 Hun, 532, 24 N. Y. Supp. 1006, affirmed in (1895) 147 N. Y. 520, 42 N. E. 2, was \$1 for each pole placed in the highway.

In *Chesapeake & P. Teleph. Co. v. Mackenzie* (1891) 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690, the court, in ruling on the measure of damages in a case where a telegraph pole was erected in the portion of a public street of which an abutting property owner held the fee, said: "The true measure of damages in such a case as this is not what a particular individual would be willing to charge for having the pole put up or remain; nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the land of the plaintiff is not taken, nor his soil actually invaded, the measure of damages, as adjudged in many cases, is either, first, the extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of; . . . or, secondly, the difference in the value of the property before the construction of the pole, and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the pole."

In *Southwestern Telegr. & Teleph. Co. v. Smithdeal* (1910) — Tex. Civ. App. —, 126 S. W. 942, it was held that the measure of damages for the construction of a telephone and telegraph line along a city street is the difference in the market value of the property before and after the construction of the line.

So, in *Southwestern Telegr. & Teleph. Co. v. Smithdeal* (1910) 103 Tex. 128, 124 S. W. 627, the court said: "The telephone line may have been constructed by authority of law and with due care, yet, if its presence on the street caused or contributed to a depreciation of the 'market value' of abutting property, the company is liable for such damages."

In *Tri-State Teleph. & Telegr. Co. v. Cosgriff* (1909) 19 N. D. 771, 26 L.R.A. (N.S.) 1171, 124 N. W. 75, the court said: "Neither are we disposed to hold that the right of the owner of property to compensation under such conditions is merely nominal. The damage to the owner, in view of the existing servitude and the further use to which the telephone company may wish to subject it, may be small even to insignificance; but it is nevertheless substantial in the sense that he is entitled to recover a sum sufficient to duly compensate him for all the damage actually sustained under the conditions."

### III. *Effect of act of Congress relative to post-roads.*

It is held that the Federal statute which authorizes the construction of telegraph lines along post roads (Rev. Stat. §§ 5263-5268, Comp. Stat. §§ 10,072-10,077, 9 Fed. Stat. Anno. 2d ed. pp. 505, 517, 518) does not affect the right of a landowner to the damages to which he is entitled for the additional burden on the fee caused by the erection of telegraph poles on a public highway which is a post road. *Kester v. Western U. Telegr. Co.* (1901) 108 Fed. 926; *American Teleph. & Telegr. Co. v. Pearce* (1889) 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910; *Cosgriff v. Tri-State Teleph. & Telegr. Co.* (1906) 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525. W. F. F.

J. J. MERCARDO, Jr., Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals—January 28, 1920.*

(— Tex. Crim. Rep. —, 218 S. W. 491.)

**Husband and wife — refusal to support — justification.**

1. Refusal of a wife to perform any duties for her husband as such is a justification for his refusal to support her.

[See note on this question beginning on page 1314.]

**Definition — wilful.**

2. The term "wilful" in a statute providing for the punishment of one deserting his wife and children implies a set purpose and design.

[See 9 R. C. L. 355, 356.]

**— justification.**

3. Justification is a sufficient lawful reason why a person did or did not do the things charged.

**Husband and wife — liability for desertion.**

4. Conviction cannot be had for

wilful desertion by a man of his wife and children where he contributed to their support the larger part of his earnings until he lost his position, at which time she refused to have anything further to do with him, after which he paid rent for them and agreed to contribute more toward their support as soon as he was able, while they were at no time in necessitous circumstances.

[See 8 R. C. L. 307; 13 R. C. L. 1192.]

APPEAL by defendant from a judgment of the Harris County Court at Law No. 2 (Campbell, J.) convicting him of wilful desertion of his wife and children. *Reversed.*

The facts are stated in the opinion of the court.

Mr. B. L. Palmer for appellant.

Messrs. E. T. Branch, Fred R. Switzer, and Alvin M. Owsley, Assistant Attorney General, for the State.

Lattimore, J., delivered the opinion of the court:

Appellant was convicted in the county court at law No. 2, of Harris county, of the wilful desertion, etc., of his wife and children, and his punishment fixed at six months' imprisonment in the county jail.

The offense for which this conviction was had is set forth in chapter 9a of Vernon's Penal Code. To be guilty of said offense, certain things must affirmatively appear from the evidence in any given case, to wit: (1) That the accused deserted, and neglected or refused to provide for his wife, or children under sixteen years of age; (2) that such conduct on his part was wilful and without justification; (3) that such wife or children were in destitute and necessitous circumstances

at the time. If the testimony fail in any one of these requisites, the case is not made.

The term "wilful" has been often defined by our courts, and as applied to this statute

**Definition—  
wilful.**

we think means not only with evil intent and malice, but that it also implies a set purpose and design. Justification is defined as a sufficient

**—Justification.**

lawful reason why a party did or did not do the thing charged.

Let us discuss the facts pertinent to the three issues involved in this offense as above outlined, and the law applicable thereto. Do the facts show that the appellant wilfully and without justification deserted, or neglected, or refused to provide for his wife or children on the date alleged in the indictment, to wit, April 8, 1919, or theretofore? The children in question were boys aged eleven and twelve years re-

spectively, and they did not testify in the case. The wife did. Her evidence, condensed, showed that prior to April, 1919, her husband worked in Mexico, and that while there he sent her \$125 per month; that she had two boys rooming with her who paid her \$40 per month, and another roomer who paid her \$25 per month; and that she was a teacher and earned about \$40 per month for teaching—making a total income of \$230 per month. Her husband lost his position in Mexico about April 1st, and came home. On April 15th, she moved to 2805 Genesee street, in the city of Houston, and appellant paid a month's rent for her in advance, and gave her \$40, since which time he has given her nothing; and she further stated that since she moved to Genesee street her husband has not lived with her.

It further appears that after this indictment was returned against appellant, on June 2d, he agreed to pay to his wife and children \$60 per month, none of which had been paid at the time of the trial, June 24th. This is the substance of the state's case.

For appellant, it was shown that while in Mexico his salary was \$150 per month and expenses; that he sent his wife regularly \$125 per month; that when he lost his said position he came home, bringing some little presents, and when he arrived he found his wife in bed, and that she refused to kiss him, and told him she would not kiss him and did not want to live with him and wanted a divorce. This was about April 1st. The house they lived in cost \$25 per month rent, and about April 15th the wife rented a house on Genesee street at \$30 per month. Appellant paid the first month's rent and gave her \$40. Appellant's further uncontradicted testimony was that when he came home he went to work for the Gulf Coast Realty Company, selling real estate, and that his actual earnings since his return to the time of the trial had not been \$15, all told. He also

said that when he agreed to give his family \$60 per month he fully intended to do so, but had had no money to pay it with; that it was his intention to pay said amount out of his first earnings. It also appears that prior to the trial the wife had brought suit against appellant for divorce, and he had filed a cross action asking for the custody of the two children, and had enjoined her from taking them out of the jurisdiction of the court. On cross-examination, the wife made the following statement: "It is true that from the time he got back that I refused to have anything to do with him as a wife; refused to perform the duties of a wife."

We think this evidence just the opposite to that necessary to support the propositions laid down by the article under which this prosecution was had. Instead of appellant leaving the wife and children wilfully and without justification, it appears beyond question from the wife's own lips that notwithstanding he had sent her five-sixths of his salary while absent, from the very day of his return she refused to have anything to do with him as a wife, or to perform for him any duties as a wife. Such refusal on her part is not shown to have been with any excuse or reason, and such refusal, in our opinion, would be ample justification for any failure on his part to further support her.

Husband and wife—refusal to support—justification.

Marriage is a partnership, with mutual obligations and duties, and when either party refuses to meet the fair demands of the partnership contract, the law will not compel of the other party a further observance of them.

It is a just law written on our statute books which penalizes the husband and father who wilfully shirks his part of the marital burden; but a thousand precepts from the hands of the Great Law Writer of the Universe, reinforced by every unwritten law of nature, impose upon both husband and wife duties and obligations to which they must

respond; and based on our concept of the graver character of the responsibility of both to the behest of these divine laws, we unhesitatingly hold that if the wife trampled upon the sacred duties of a wife to her husband at a time when he was fully meeting and performing his part of such contract, such violation of the laws of God and nature should justify him, in the eyes of the laws of man, in withholding further compliance with his duty to her. The facts in testimony show that while he had means he gave her the larger portion of same, and that even after she turned away from him, and after the date laid in the indictment, he paid her house rent, and gave her more money than he earned,—probably the remnant left him from the days when his wages were larger. There is nothing in the record sug-

—liability for  
desertion.

gesting any attitude of wilfulness in the appellant's failure to pay after he lost his position, nor that he did not desire or intend to support his children. He asked for them in the divorce proceedings, and enjoined the wife from taking them away from the

county. He swore that out of the first money he might make from his new work he intended to pay the amount he had agreed to contribute to the wife, who voluntarily refused to meet her duties to him.

We do not like to overturn verdicts for insufficiency of evidence, but when the testimony shows that the husband did not desert the wife, but in truth and in fact she turned from him, that he did not wilfully neglect or refuse to provide for her or his children, but gave to them all or the major part of his earnings, and that at the time laid in the indictment they were not in distress or necessitous circumstances, but had house rent paid and money beside, and nothing appears which combats his expressed intention to meet the requirements of the law when financially able so to do, we will not hesitate to say that the verdict is against the law and the evidence. See *Irving v. State*, 73 Tex. Crim. Rep. 615, 166 S. W. 1166; *Wallace v. State*, — Tex. Crim. Rep. —, 210 S. W. 206.

The judgment of the trial court is reversed, and the cause remanded.

### ANNOTATION.

#### **Criminal responsibility of husband for abandonment or nonsupport of wife, who refuses to live with him.**

This note is supplementary to the one upon the same subject in 3 A.L.R. 107. The general rules there set out are followed in the later cases.

Thus, it was held in *Lamm v. State* (1919) — Tex. Crim. Rep. —, 210 S. W. 209, that the evidence was insufficient to support a conviction of the charge of wilfully deserting, neglecting, and refusing to provide for his wife, where it appeared that the accused, because of his inability to earn a living at his home town, went to a neighboring place to work, coming home at first every night, but later, on account of the expense, coming home only two or three nights a week, and that, without his knowledge and in his absence, his father-in-law went

to his home and brought the accused's wife to his, the father-in-law's, house, and locked up the accused's house and nailed up all the windows. The court said that there was no evidence of desertion unless it was found in the fact that the accused had not lived with his wife since his father-in-law took her to his home, and that if there was any desertion in this act it was by the wife.

And it was held in *Green v. State* (1918) — Tex. Crim. Rep. —, 206 S. W. 93, that a husband did not violate the statute against wilful wife desertion, where, after trying to persuade his wife to move to another town with him because of his inability to leave whisky alone in the town of their res-

idence, he went away to a place where he could save his money in order to assist in the support of his family, and, after he left, sent his wife all the money he could spare. The court said that he did not desert her, because he did his best to induce her to go with him where he could make a living, but she declined, and further, that if his action constituted a desertion, it was not wilful.

In the reported case (*MERCARDO v. STATE*, ante, 1312) a husband was held to be justified in his abandonment of, and failure to support, his wife; in a prosecution under a statute requiring proof that his conduct was wilful and without justification, where it appeared that, on his return home, after a long sojourn in another place, from which he had sent her, while absent, practically all of his salary, his wife told him that she did not want to live with him, and refused, without excuse or reason, to have anything to do with him as a wife, and rented and moved into another house.

The evidence was held in *State v. Lyons* (1919) — Mo. App. —, 207 S. W. 264, insufficient to show an abandonment with criminal intent within the meaning of the statute, where it appeared that the accused and his wife were living together at the home of the wife's mother, in the absence from home of her father, and that the accused, on receipt of word from his father-in-law that he was about to return home, rented a room for himself and wife, because of the insufficiency of the accommodations at the home of his father-in-law, and asked his wife to come and live with him in the room so rented, which she declined to do.

On a prosecution of a man for abandoning his wife without good cause and refusing to maintain and provide for her, the exclusion of evidence as to whether or not a witness had rented a house to the accused which his wife refused to occupy was held to be reversible error, the court stating that the question clearly went to the merits of the issue, and that if the accused furnished his wife with a suitable residence, he had so far contributed to her support, and that if she refused to oc-

cupy it, it certainly was not his fault. *State v. White* (1870) 45 Mo. 512.

It was held in a prosecution for failure to provide necessaries under a section of the Criminal Code, to establish responsibility under which it is necessary to prove, among other things, that such failure was without lawful excuse, that the refusal of the wife to live again with her husband, except on condition that he put up security in money for her future support, although such condition was imposed in view of the fact that he had deserted her before, and not given her aid for several years, was a lawful excuse within the meaning of the statute, in the absence of evidence of real danger to her life or health in the event of her living with him again. *Rex v. Wolfe* (1908) 13 Can. Crim. Cas. 246.

But a conviction under the same statute for nonsupport was sustained in *Buteau v. Hamel* (1915) 24 Can. Crim. Cas. 53, where the wife declined an offer to go and live with her husband, the court saying: "The general rule is that when the husband offers to receive his wife, she is bound to go back with him, otherwise the action is debarred. In the present case the wife has a judgment by which she is separated as to bed and board. Is she obliged to renounce it? I do not think so. If she does and if afterwards she gets no satisfaction from her husband, she will have to go to the expense of a fresh action to be separated. And, besides, she has the experience of a first reconciliation, which did not last long. I may add that the defendant has no lodging; how is it that he has waited to be prosecuted to make such an offer to his wife? It is only a trick to escape the consequences of the law."

Where a wife has left her husband's house and lives away from him without his consent and without judicial authority or other valid reason, and he is willing and ready to receive her in his home and to maintain her according to his means and condition and has offered to do so, but she has refused to live with him, he cannot be convicted under the Vagrant Act, of

having wilfully refused and neglected to maintain his wife. *Reg. v. Leclair* (1898) 2 Can. Crim. Cas. 297.

A husband is not guilty of an offense under a statute subjecting to punishment one who wilfully refuses or neglects to maintain his wife, whereby she becomes chargeable to a parish or township, where he asks her to come home and live with him and promises to treat her kindly, but she refuses to live with him upon the ground that she is afraid to do so because of his previous ill-usage of her, although such ill-usage would entitle her to a divorce a mensa et thoro, on the ground of cruelty. *Flannagan v. Bishopwearmouth* (1857) 3 Jur. N. S. 1103, 8 El. & Bl. 451, 120 Eng. Reprint, 168, 27 L. J. Mag. Cas. N. S. 46, 6 Week. Rep. 38, 21 Eng. Rul. Cas. 339.

But in *Thomas v. Alsop* (1870) L. R. 5 Q. B. 151, 39 L. J. Mag. Cas. N. S.

43, 21 L. T. N. S. 715, 18 Week. Rep. 454, 21 Eng. Rul. Cas. 343, under a statute providing that the guardians of a parish to which the wife becomes chargeable may apply to justices in petty sessions to summon the husband before them and to make an order, after hearing the evidence, requiring him to pay a specified weekly sum towards her support, it was held, where it appeared that she was justifiably living apart from him, that an order for her support was properly made under the statute, although the husband offered to take her back and support her and she refused because of her previous ill treatment, where the justices found that it would be injurious to her health to return to cohabitation with her husband. The court distinguished this case from the preceding case upon the ground of an essential difference in the statute. G. V. L.

TOM HILLIARD, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals — February 25, 1920.*

(— Tex. Crim. Rep. —, 218 S. W. 1052.)

**Assault — pistol as deadly weapon — bludgeon.**

1. A pistol used as a bludgeon is not a deadly weapon per se.

[See note on this question beginning on page 1319.]

**— aggravated — striking with pistol.**

2. Striking one on the arm with a pistol so that the blow glances and makes a slight wound on his head, when he prepares to throw a rock at assailant, is not an aggravated assault.

[See 2 R. C. L. 543, 544.]

**Evidence — hypothetical question — bludgeon as deadly weapon.**

3. A physician cannot be permitted to answer a hypothetical question in a prosecution for assault as to whether or not a pistol used by a strong man as a bludgeon could be a deadly weapon.

[See 11 R. C. L. 579.]

APPEAL by defendant from a judgment of the De Witt County Court (Boal, J.) convicting him of aggravated assault. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Chambers, Watson, & Wilson, for appellant:

The hypothetical question asked the physician while a witness for the state was inadmissible in evidence.

Wharton, Crim. Ev. p. 837, art. 411; Cooper v. State, 23 Tex. 331; Hunt v.

State, 9 Tex. App. 166; Thomas v. State, 40 Tex. 42.

The burden of proof is upon the state to make out the case beyond a reasonable doubt.

McLendon v. State, — Tex. Crim. Rep. —, 66 S. W. 553, 13 Am. Crim.

Rep. 152; *Stephenson v. State*, 33 Tex. Crim. Rep. 162, 25 S. W. 784; *Pierce v. State*, 21 Tex. App. 547, 1 S. W. 463; *Jenkins v. State*, 30 Tex. App. 379, 17 S. W. 938.

Mr. Alvin M. Owsley, Assistant Attorney General, for the State.

Davidson, P.J., delivered the opinion of the court:

Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$200 and imprisonment in the county jail for ninety days.

The evidence discloses that Adams, the alleged assaulted party, a white man, and appellant, a negro, had known each other practically all their lives, lived neighbors, and were always on friendly terms. Appellant's daughter and another negro girl at his home had gone something like 100 yards from the residence after wood. This was in the evening. A son of Adams and a relative drove by in an auto and accosted the girls and made indecent proposals. The girls returned to the house and informed their brother, a boy about sixteen years of age, of what had occurred. Shortly after this occurrence the two boys in the auto returned, passing the house, and the brother of the girl accosted them and demanded to know the reason of their conduct. They denied it. Appellant's daughter, standing by, informed them of the fact that they did make such indecent proposals, and further stated that if they denied it they lied. They got out of the car, and when they did the girl struck one of them with a stick. The boys informed their father of what occurred, and when appellant returned that night about 8 o'clock, from the town of Cuero, the girl informed him. The next morning, on account of the situation of things, appellant being a negro and the others white people, appellant wanted to have things adjusted without further trouble, and was going to see Mr. John Adams, who seems to have been his adviser in most things. Appellant went to his brother, Bob Hilliard, and in-

quired for his older son, who was working with Bob Hilliard, and was informed he was in the back of the field. Appellant went to see him, and in returning got his pistol from a neighbor to whom he had loaned it shortly before for the purpose of killing dogs which had been worrying and annoying him. In passing him this party returned the pistol to appellant. The occasion of his returning seems to have been due to the fact that three of the Adamses and a man named Barnes had gone to Bob Hilliard's seeking appellant with reference to this same matter. Bob Hilliard told them where appellant was, and they stated they were going to see him. Bob Hilliard told them to wait and he would send for him, and he did, and appellant came to where they were at Bob Hilliard's house. Appellant, at the request of the assaulted party and another relative, went off about thirty or forty steps to talk over the matter. The prosecuting witness, Adams, wanted to know why the girl had treated his son the way she did, and appellant told them about the conduct of the boys as the girl had informed him. This brought up a contradiction, and appellant is said to have stated that, if the boys told it as the prosecuting witness stated, he would contradict their word and prosecuting witness's word also. This is the state's view of it. Appellant's evidence is to the contrary, and puts vigorous language in the mouth of Adams. When this occurred, however, Adams picked up a rock and prepared to throw it. There seems to have been a great many rocks at that point. The witnesses differ as to the size of the rock picked up by Adams. They were squatted down, and when this occurred both got up. Appellant reached for his pistol, and in the melée he struck prosecuting witness one lick with the pistol. This struck his arm and glanced, and cut a scalp wound on the head about  $\frac{1}{2}$  inch in length and just through the skin. It was not a serious wound, and no physician was



called, nor did Adams suffer any inconvenience from it or go to bed. The testimony shows it was not a serious wound, and the blow as struck was rather a light one from the evidence. The state's contention was that he struck at the head of Adams with the pistol. However that may be, the physical facts show that he was struck on the arm, and the blow evidently glanced and struck his head. It is also in evidence that when this occurred appellant held his pistol on Adams, and at this juncture John Adams came and requested that they leave, and they all separated. This is a sufficient statement of the case to dispose of the issues presented.

We are of opinion this evidence does not show an aggravated assault under the long line of decisions rendered by this court. A pistol used as a bludgeon is not a deadly weapon per se. See Branch's

Assault—  
aggravated—  
striking with  
pistol.

Crim. Law, § 82, p. 42, where a great number of opinions are collated; Skidmore v. State, 43 Tex. 93; Jenkins v. State, 30 Tex. App. 379, 17 S. W. 938; Key v. State, 12 Tex. App. 506; Pierce v. State, 21 Tex. App. 547, 1 S. W. 468; McLendon v. State, — Tex. Crim. Rep. —, 66 S. W. 554, 13 Am. Crim. Rep. 152; Stephenson v. State, 33 Tex. Crim. Rep. 162, 25 S. W. 784; Peacock v. State, 52 Tex. Crim. Rep. 435, 107 S. W. 346. It was held in McLendon v. State, supra, that if defendant struck slightly with the pistol, and could have struck more licks, it shows he was not using it as a deadly weapon. The evidence is uncontroverted that appellant could have further used it and could have fired it, but did not; and it is also in evidence that the lick was induced by reason of the fact that Adams picked up one or two rocks for the purpose of throwing them at appellant, and appellant struck to ward off this anticipated attack. The question is fully settled in Texas that the instrument or weapon used

—pistol as  
deadly weapon  
—bludgeon.

to strike with is not per se a deadly weapon, nor is it the law that, if death results, therefore the conclusion is that the weapon used was a deadly weapon. See Crow v. State, 55 Tex. Crim. Rep. 202, 21 L. R. A. (N.S.) 497, 116 S. W. 52; Washington v. State, 53 Tex. Crim. Rep. 481, 126 Am. St. Rep. 800, 110 S. W. 751, and cases already cited; and also, for a large number of collated cases, see Branch's Crim. Law, § 82, p. 42. There is no question, as we understand this record, that Adams made the first demonstration in picking up the rock with the intention of throwing it. The evidence is in conflict as to whether he placed his arm in position to throw the rock at the time the blow was struck with the pistol, or not, but he intended to throw it, as he himself testified, and was deterred, it seems from the evidence, by the fact that appellant presented his pistol. There was no further attempt on the part of appellant to use the pistol otherwise than hold it where he might use it if further attack was made.

There was an exception taken to the ruling of the court admitting what is termed in the bill the expert testimony of a physician. In view of the disposition of the case on the facts, that matter is not discussed further than to state that the evidence as narrated in the bill was not admissible. That a doctor or any other witness may testify that a certain weapon used by a strong man could be a deadly weapon—that is, that it could inflict death or serious bodily injury—is not sufficient as a hypothetical question in a case, of this character. A hypothetical case, if one is to be used, must be in consonance with facts. It is not what the party could have done with the pistol, but it must be confined to the case as made in accordance with the facts as to what he did. The doctor knew nothing of the facts one way or the other, but he was testifying simply to

Evidence—hypo-  
thetical question  
—bludgeon as  
deadly weapon.

what a strong man might do with a pistol if used in a certain way. A physician may testify as to the nature of a wound and its probable cause and effect. This was decided in *Waite v. State*, 13 *Tex. App.* 169, and *Hardin v. State*, 51 *Tex. Crim. Rep.* 562, 103 S. W. 401. He was not testifying as a physician in reference to wounds; he never saw them and knew nothing of them. His testimony was confined simply to a hypothetical case that a strong man with a pistol used as a bludgeon could inflict serious bodily injury or even death. We are of opinion that the doctor's testimony under this record, and as given, carried the doctrine too far. If it be

treated as a hypothetical question, then it must be based on facts. If the opinion of the witness is not on a hypothetical case, as above stated, the doctor may, if he has examined the wounds and knows about them, state whether or not the injury was serious or not. Almost any character of weapon may be used with deadly effect. A small pocketknife may be so used, but it would depend upon the concurring facts and circumstances. We think, therefore, that the testimony of the doctor, as given, should not have been permitted to go to the jury.

The judgment is reversed and the cause remanded.

### ANNOTATION.

#### Firearm used as a bludgeon as a deadly weapon.

It will be seen that it is held in the reported case (*HILLIARD v. STATE*, ante, 1316) that a blow on the arm with a pistol, glancing to the head and inflicting a slight wound, where the defendant could have struck again and did not, and could have fired the pistol and did not, did not show an assault with a deadly weapon, and that a pistol used as a bludgeon is not a deadly weapon per se.

A double-barreled shotgun, used as a bludgeon, is not necessarily a deadly weapon. *Shadle v. State* (1870) 34 *Tex.* 572, where the court said: "When a gun or pistol is used simply as an instrument to strike with, it is not necessarily a deadly weapon, but would be such, or not, according to its size and the manner of using it; and these facts should be determined by a jury."

So, a pistol used as a bludgeon is not a deadly weapon per se. *Smallwood v. Com.* (1896) 17 *Ky. L. Rep.* 1134, 33 S. W. 822; *People v. Davila* (1915) 23 *P. R. R.* 313; *Shadle v. State* (1870) 34 *Tex.* 572 (obiter); *Skidmore v. State* (1875) 43 *Tex.* 93; *Key v. State* (1882) 12 *Tex. App.* 506; *Pierce v. State* (1886) 21 *Tex. App.* 540, 1 S. W. 463 (obiter); *Ballard v. State* (1890) — *Tex. App.* —, 13 S. W. 674;

*Jenkins v. State* (1891) 30 *Tex. App.* 379, 17 S. W. 938; *Stephenson v. State* (1894) 33 *Tex. Crim. Rep.* 162, 21 S. W. 784; *Branch v. State* (1895) 35 *Tex. Crim. Rep.* 304, 33 S. W. 356 (conviction sustained on another ground); *McLendon v. State* (1902) — *Tex. Crim. Rep.* —, 66 S. W. 553, 13 *Am. Crim. Rep.* 152; *Hardin v. State* (1905) 47 *Tex. App.* 493, 84 S. W. 591; *Peacock v. State* (1908) 52 *Tex. Crim. Rep.* 432, 107 S. W. 366; *HILLIARD v. STATE* (reported herewith) ante, 1316.

Where a prisoner was pronounced guilty of assault and battery with aggravated circumstances, under a complaint that merely charged an assault and battery with the butt end of a revolver, and the only provision of law which could enlarge the crime from a simple assault and battery was that describing a battery as committed with a deadly weapon, under circumstances not amounting to an intent to kill or maim, the court said: "The fiscal concedes that no assault and battery with aggravated circumstances was shown, inasmuch as a battery with the butt end of a revolver is not in itself an assault with a dangerous weapon, and the reported jurisprudence supports him. . . . A pistol used like a piece

of iron is not necessarily a deadly weapon, unless from its size it becomes so, and in this case there is nothing to show that the weapon was a deadly one from its size, or that it was used in the manner of a deadly weapon, in other words, with deadly violence." *People v. Davila* (1915) 23 P. R. R. 313.

An information charging that the accused did make an aggravated assault on another with a pistol does not charge an aggravated assault, as a pistol is not necessarily a deadly weapon. *Key v. State* (1882) 12 Tex. App. 506.

But an allegation in an indictment that a pistol used as a bludgeon was a deadly weapon is a sufficient allegation that the weapon was a deadly weapon. *Allen v. People* (1876) 82 Ill. 610.

In *State v. Franklin* (1871) 86 Tex. 155, where it was held that an indictment for aggravated assault was sufficient which charged that the accused with certain pistols,—"said pistols being then and there deadly weapons,"—did beat, bruise, and wound the assaulted party, inflicting upon him divers serious bodily injuries, the court does not refer to the fact that the allegation of serious bodily injuries was sufficient, without the allegation as to the character of the weapon.

It may be noted that where the statute provided that "an assault with intent to murder, by using any weapon likely to produce death, shall be punished," etc., and the allegation in the indictment was that the defendant with a certain pistol, "said pistol being a weapon likely to produce death," did, etc., the person assaulted, etc., beat, wound, and illtreat, with the intent, etc., the court, in affirming a judgment of conviction, said: "The evidence had upon the trial does not appear in the record. In our judgment, the indictment was sufficient in law to authorize the court to render judgment thereon. The legal presumption, after verdict, is that the jury were satisfied from the evidence that the pistol was of sufficient size to have produced death by beating and

wounding another with it, as is alleged in the indictment." *Prior v. State* (1870) 41 Ga. 155.

In *State v. Napper* (1870) 6 Nev. 113, the court said, obiter: "A pistol may be a deadly weapon under some circumstances, without being loaded with gunpowder and ball."

Evidence is required to show that a pistol used as a bludgeon is a deadly weapon. *People v. Davila* (1915) 23 P. R. R. 313; *Jenkins v. State* (1891) 30 Tex. App. 379, 17 S. W. 938; *Stephenson v. State* (1894) 33 Tex. Crim. Rep. 162, 25 S. W. 784; *Branch v. State* (1895) 35 Tex. Crim. Rep. 304, 33 S. W. 356; *Peacock v. State* (1908) 52 Tex. Crim. Rep. 432, 107 S. W. 346.

Thus, an aggravated assault as made with a deadly weapon is not shown where the weapon was a pistol used as a bludgeon, and its size and weight were not shown. *Branch v. State* (1895) 35 Tex. Crim. Rep. 304, 33 S. W. 356, where the conviction was sustained on another ground.

An information charging an aggravated assault committed with "a pistol, the same being then and there a deadly weapon," by striking the assaulted with said pistol, requires proof that the pistol was a deadly weapon. *Jenkins v. State* (1891) 30 Tex. App. 379, 17 S. W. 938, where the court said: "The evidence does not sustain the allegation. It shows that the pistol was a large one—a five-shooter—which staggered and dazed the assaulted party when struck with it, causing the blood to flow, but it is not shown that it was capable of producing death or serious bodily injury."

It has been held in Texas that where there is an assault with a pistol used as a bludgeon, and the pistol is discharged at the time, that there is no assault with a deadly weapon unless the pistol used as a bludgeon is a deadly weapon. *Pierce v. State* (1886) 21 Tex. App. 547, 1 S. W. 463 (obiter); *Stephenson v. State* (1894) 33 Tex. Crim. Rep. 162, 25 S. W. 784; *Peacock v. State* (1908) 52 Tex. Crim. Rep. 432, 107 S. W. 346.

Thus, in *Pierce v. State* (Tex.) *supra*, the court said obiter, in reviewing a conviction for assault with intent to

murder: "There is evidence tending to show that defendant was striking, or attempting to strike, the injured party with a pistol, when the pistol was accidentally discharged, whereby the injury complained of was inflicted. If the pistol was used by the defendant to strike with only, the assault would not be aggravated, unless the evidence showed that when used in that manner it was a deadly weapon; or that, by means of such, serious bodily injury had been inflicted; or that the assault was committed with premeditated design, and by the use of means calculated to inflict great bodily injury. Penal Code, art. 496. There is no proof establishing either of these conditions. There is no proof that the pistol was a deadly weapon when used to strike with, and in the absence of such proof it would be presumed that it was not that character of weapon when so used. When a gun or pistol is used to strike with, it is not necessarily a deadly weapon, but would be such, or not, according to its size, or the manner of using it, and its character is usually to be determined by the jury. *Hunt v. State* (1879) 6 Tex. App. 663; *Wilson v. State* (1888) 15 Tex. App. 150. If, therefore, the pistol, when used to strike with, was not a deadly weapon, and while being so used was accidentally discharged, whereby serious bodily injury was inflicted, and if the assault was not committed with premeditated design and by the use of means calculated to inflict serious bodily injury, and if no serious bodily injury was inflicted by striking with the pistol, then such assault would be of no higher grade than a simple assault."

So, in *Stephenson v. State* (1894) 33 Tex. Crim. Rep. 162, 25 S. W. 784, the court said, in reversing a conviction for aggravated assault: "The record shows that appellant struck Phillips on the side of the head with the pistol; that the pistol fired accidentally at the time of the blow, cutting out a piece of Phillips's ear, and slightly powder burning his face. The record fails to show the size or weight of the pistol, or that any injury was inflicted on Phillips from its use as a

bludgeon, except the accidental result above stated."

Where the accused struck the assaulted on the head with a pistol, which was discharged as a result of the blow, the court said: "There being no evidence in the record describing the pistol by weight or otherwise, and nothing to indicate whether, when used as a bludgeon, it would be a deadly weapon or one calculated to inflict great bodily injury, it became the imperative duty of the court to submit the issue of simple assault. If the pistol, when used as a weapon with which to strike, was not a deadly weapon, or not one calculated when so used to inflict great bodily injury, certainly, in the absence of proof that serious bodily injury was in fact inflicted, the appellant would be guilty of no greater offense than that of simple assault." *Peacock v. State* (Tex.) *supra*.

The question as to whether a pistol used as a bludgeon was or was not a deadly weapon is in general for the jury. *Riggs v. Com.* (1895) 17 Ky. L. Rep. 1015, 33 S. W. 413; *Smallwood v. Com.* (1896) 17 Ky. L. Rep. 1134, 33 S. W. 822; *Shadle v. State* (1870) 34 Tex. 572 (obiter); *Skidmore v. State* (1875) 43 Tex. 93; *Hardin v. State* (1905) 47 Tex. Crim. Rep. 493, 84 S. W. 591.

Compare *McLendon v. State* (1902) — Tex. Crim. Rep. —, 66 S. W. 553, 13 Am. Crim. Rep. 152, *infra*; also the reported case (*HILLIARD v. STATE*, ante, 1316).

Where the injury was a gash in the head an inch long, made by one blow by a pistol, the jury asked the court: "Is a pistol necessarily a deadly weapon, the size not known, and not known whether empty or loaded?" It was held to be error for the court to reply: "A pistol is a deadly weapon," as the question was one for the jury. *Skidmore v. State* (1875) 43 Tex. 93.

In *Riggs v. Com.* (1895) 17 Ky. L. Rep. 1015, 33 S. W. 413, it was held, in affirming a judgment of conviction for wilfully and maliciously cutting, striking, beating, bruising, and wounding the assaulted with a pistol, a deadly weapon, with intention to kill, where

the assaulted was beaten into insensibility, that the jury had the right to say that the weapon was a deadly weapon in the manner in which it was used.

There may well be doubt as to the theory of *McLendon v. State* (1902) — Tex. Crim. Rep. —, 66 S. W. 553, 13 Am. Crim. Rep. 152, now followed in the reported case, that a pistol used as a bludgeon is not a deadly weapon, when the assaulter does not strike as hard and as often as he can; but from the quotation from the opinion in *People v. Davila* (1915) 23 P. R. R. 313, supra, it may be seen that the court there seems to think that a deadly weapon is one used "with deadly violence."

In reversing a conviction for aggra-

vated assault, the court said: "The proof here showed that appellant only used the pistol, which was a 45-caliber six-shooter, weighing 2½ or 2¾ pounds, to strike with, after he was pressed back on the counter. The pistol used to strike with was not necessarily a deadly weapon, but will be such, or not, according to the size and manner of using it. . . . Here appellant, according to the testimony, after he was pressed back by prosecutor onto the counter, struck three licks with the pistol, and as soon as prosecutor turned him loose he desisted. He had full opportunity to continue the assault, or to have shot the prosecutor. Evidently, he did not use the pistol as a deadly weapon." *McLendon v. State* (Tex.) supra. B. B. B.

WILLIAM T. KEYWORTH, Appt.,

v.

ATLANTIC MILLS.

*Rhode Island Supreme Court — November 14, 1919.*

(— R. I. —, 108 Atl. 81.)

**Workmen's compensation — loss of eye — 90 per cent destruction of sight.**

Destruction of 90 per cent of the sight of an eye does not effect a total loss within the meaning of that term in a workmen's compensation act awarding compensation for total loss of an eye in addition to the award for disability.

[See note on this question beginning on page 1324.]

APPEAL by petitioner from a decree of the Superior Court for Providence and Bristol Counties (Doran, J.) denying him additional compensation under the Workmen's Compensation Act for the loss of an eye. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Waterman & Greenlaw, for appellant:

Petitioner is entitled to specific compensation for the entire and irrecoverable loss of sight of an eye under the provisions of ¶ (b), § 12, of article 2 of the Workmen's Compensation Act.

Weber v. American Silk Spinning Co. 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153; Re J. & P. Coats (R. I.) 41 R. I. 289, 103 Atl. 833; Industrial Commission v. Johnson, — Colo. —, 172 Pac. 422, 16 N. C. C. A. 350; Beau-

regard v. E. N. Tichener & Co. Illinois Industrial Bd. July 1, 1915, No. 69, p. 8; Joliet Motor Co. v. Industrial Bd. 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75; Kriegbaum v. Buffalo Wire Works Co. 182 App. Div. 448, 169 N. Y. Supp. 307; Blaes v. E. W. Bliss Co. 177 App. Div. 370, 163 N. Y. Supp. 722; Smith v. F. & B. Constr. Co. 185 App. Div. 51, 172 N. Y. Supp. 581; International Travelers' Asso. v. Rogers. — Tex. Civ. App. —, 163 S. W. 421; Murray v. Aetna L. Ins. Co. 243 Fed. 285; Routt v. Brotherhood of R. Trainmen,

101 Neb. 763, 165 N. W. 141; Shaanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799; Moore v. Aetna L. Ins. Co. 75 Or. 47, L.R.A.1915D, 264, 146 Pac. 151, Ann. Cas. 1917B, 1005.

Mr. Charles E. Tilley also for appellant.

Messrs. Gardner, Pirce, & Thornley, Benjamin M. McLyman, and Charles R. Haslam, for appellee:

As a matter of law the loss of vision sustained by the petitioner in his right eye as a result of the accident cannot be considered as "the entire and irrecoverable loss of the sight of either eye" within the meaning of § 12, ¶ (b), of article 2 of the Workmen's Compensation Act.

Weber v. American Silk Spinning Co. 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153; Re J. & P. Coats (R. I.) 41 R. I. 289, 103 Atl. 833; Boscarino v. Carfagno & Dragonette, 220 N. Y. 323, 115 N. E. 710, Ann. Cas. 1918A, 530; Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379; Frings v. Pierce Arrow Motor Car Co. 182 App. Div. 445, 169 N. Y. Supp. 309; Vinginerra v. Commercial Casualty Ins. Co. 156 N. Y. Supp. 573.

Vincent, J., delivered the opinion of the court:

On October 5, 1918, the petitioner filed his petition in the superior court, setting forth that on July 23, 1917, being at the time in the employ of the respondent as a painter, he fell out of a second-story window, whereby he sustained two broken ribs, the loss of sight of his right eye, and various bruises, and became totally incapacitated for an undetermined period; that compensation is being made for total incapacity, but that no compensation has been made for the loss of his eye; and that he is entitled to the additional or special compensation provided in § 12, ¶ (b), of article 2 of the Workmen's Compensation Act (Pub. Laws 1911-12, chap. 831).

After a hearing, the superior court ordered and decreed that "the petitioner is entitled to compensation for total incapacity at the rate of \$10 per week, beginning on the 23d day of July, A. D. 1917, and continuing during the period of

total incapacity, but not exceeding a period of five hundred weeks from the date of said injury," and that "petitioner is entitled to no additional compensation for the entire and irrecoverable loss of sight of an eye under the provisions of ¶ (b) of § 12 of article 2 of the Workmen's Compensation Act." From this decree of the superior court the petitioner has taken an appeal, which is now before us.

The only question raised by the appeal is whether or not the petitioner has brought himself within the provisions of ¶ (b) before referred to. It appears from the transcript of the testimony produced at the hearing before the superior court that the petitioner has not sustained a total loss of the sight of his right eye, but that, on the contrary, he still retains about 10 per cent of the normal vision, which is useful to a limited extent for certain purposes, and that he also retains a stereoscopic vision of some value, although it would not afford him any assistance in a vocational pursuit.

Upon this state of the testimony the petitioner argues that, having lost so much of the vision of the right eye that it would no longer serve him in any occupation in which he might engage in earning his livelihood, this court should give to the words of the statute, "the entire and irrecoverable loss of sight of either eye," an interpretation broad enough to cover his case; in other words, that a man with the sight of his eye reduced to 10 per cent of the normal vision should be deemed to have suffered the "entire and irrecoverable loss of sight" therein.

With this contention of the petitioner we cannot agree. We think the words of the statute must be taken in their ordinary sense, and that their meaning is clear. To say that this statute was designed to go any further than to provide for additional com-

Workmen's compensation—  
—loss of eye—  
90 per cent  
destruction of  
sight.

compensation for injuries which resulted in total and complete loss of sight would amount to a distortion of its language. The view which we now take is in accord with the opinion of this court in *Weber v. American Silk Spinning Co.* 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153. In that case the petitioner's thumb was injured in a manner which made it necessary to remove therefrom a small piece of bone and to sever pieces of tendons and flesh, rendering the thumb permanently stiff. The superior court found that the injury to the petitioner's thumb did not bring him within the terms of the Workmen's Compensation Act providing for additional compensation "for the loss by severance" of a thumb, and such finding was held to be without error by this court.

In *Re J. & P. Coats* (R. I.) 41 R. I. 289, 103 Atl. 833, this court held that, where the employee at the time of the accident was blind in one eye and sustained a loss of sight in the other, and thereby became totally blind, he was entitled to compensation based upon total disability,

but not to the additional compensation provided for by § 12 of the Workmen's Compensation Act for the entire and irrecoverable loss of the sight of both eyes, and in its opinion said: "The purpose of § 12 is plainly to provide compensation for specified injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified injury in this case is 'the entire and irrecoverable loss of' the sight of one eye, and not of both, and accordingly the employee is entitled to compensation therefor for fifty weeks, and not for one hundred weeks."

In the petitioner's brief several cases are cited construing the Workmen's Compensation Acts in other states, but as such decisions are based upon language differing from that of our act, they are not particularly helpful, and do not seem to us to demand any special discussion.

The petitioner's appeal is denied and dismissed, the decree of the Superior Court is affirmed, and the cause is remanded to said court for further proceedings.

## ANNOTATION.

### Workmen's compensation: compensation for loss or impairment of eyesight within Workmen's Compensation Acts.

- I. Generally, 1324.
- II. Where vision remains only to discern objects, or eye is removed, 1324.
- III. Where injured eye was previously defective, 1324.
- IV. Where sight of one eye had previously been lost, 1326.

#### I. Generally.

This annotation deals primarily with the question of what amounts to a loss of eyesight within the meaning of the Workmen's Compensation Acts. It assumes that the injury was accidental, and that it arose out of and in the course of the employment, and excludes cases dealing merely with the computation of the amount of compensation.

The determination of the question

- V. Where power to focus or use eyes together is lost, 1329.
- VI. Where condition may be improved by artificial means, 1330.
- VII. Where operation might improve sight, 1330.
- VIII. Effect of ability or inability to follow trade or obtain work, 1331.

here considered is largely one of fact, and it is difficult to lay down any general rules. The provisions of the several Workmen's Compensation Acts with respect to the award of compensation for loss of sight are not entirely uniform. In applying these as well as other provisions of the Compensation Acts, a liberal construction is, in view of the purpose of the acts, generally given, but where the terms are clear and unambiguous, the courts

will not, of course, change their plain meaning.

Thus, it will be observed that in the reported case (*KEYWORTH v. ATLANTIC MILLS*, ante, 1322) it was held that a destruction of 90 per cent of the sight of an eye did not amount to "the entire and irrecoverable loss of sight of either eye" within the meaning of the Rhode Island Compensation Act providing for additional compensation, the court stating that the words must be taken in their ordinary sense, and that their meaning was clear.

In *Hirschhorn v. Fiege Desk Co.* (1915) 184 Mich. 239, 150 N. W. 851, where, as a result of an injury to the employee's eye, its vision was permanently reduced more than one third, the Industrial Accident Board was held to have no power, under § 10, to award about one third of the compensation which the act provided for the full loss of the eye, where the section referred to merely provided that while the incapacity to work resulting from an injury was partial, the employee should be paid one half his weekly wage, and contained a schedule of specific injuries, including the loss of an eye, but not the partial loss.

In *James v. Mordey, C. & Co.* (1913) 109 L. T. N. S. (Eng.) 377, 6 B. W. C. C. 680, it was held that the county court judge was justified in finding that a workman who had suffered an injury to his eye was totally incapacitated, where the medical referee found that the injured eye had only about 1/30 of normal vision, and the right eye was not very good, although the medical referee was inclined to believe that he had better vision than he was willing to own.

**II. Where vision remains only to discern objects or eye is removed.**

Where the employee, by reason of an injury, was left with only sufficient vision to see objects, without being able to identify them, findings that he was blind, and that there was a total loss of sight, have been held proper.

Thus, in *Industrial Commission v. Johnson* (1918) — Colo. —, 172 Pac. 422, 16 N. C. C. A. 350, it was held that an employee was "blind" within the meaning of the Workmen's Com-

pensation Act where, after an accident, he had only such vision as enabled him to recognize a form before him, without being able to distinguish its outlines. The court stated that the act was to be liberally construed, and that to hold otherwise under the circumstances would be to give it a strict construction.

And in *E. H. Titchener & Co. v. Industrial Bd.* (1916) 202 Ill. App. 296, the evidence was held sufficient to bring the case within the provision of the Workmen's Compensation Act giving compensation for the total loss of sight of an eye, where there was testimony that the workman was injured in one of his eyes, and was left permanently so as to be able to distinguish only light, and objects moving before the eye.

In *Nelson v. Kentucky River Stone & Sand Co.* (1918) 182 Ky. 317, 206 S. W. 473, rehearing denied in (1919) 183 Ky. 583, 209 S. W. 506, where an injury necessitated the removal of the eye, it was held that compensation should not be awarded under the schedule of the act making compensation solely for the loss of the "sight" of an eye, but that it should be allowed under the provision awarding compensation "in all other cases of permanent partial disability."

See also *Purchase v. Grand Rapids Refrigerator Co.* (Mich.) infra, III.

**III. Where injured eye was previously defective.**

It has been held that an employee is entitled to compensation for the loss of an eye by an injury which resulted in the removal of the eye, although by reason of a prior accident he could only distinguish light, and see approaching objects. *Purchase v. Grand Rapids Refrigerator Co.* (1916) 184 Mich. 103, 160 N. W. 391. The court said: "The legislature has not attempted a definition, or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs in some degree the functions of a normal eye. A mere sightless organ might, perhaps, be considered no eye



at all. Claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects."

And although an employee was nearsighted, having less than 50 per cent vision, she was held entitled to an award for the permanent loss of an eye where, by reason of an accident, she lost the use of the eye. *Hobertis v. Columbia Shirt Co.* (1919) 186 App. Div. 397, 173 N. Y. Supp. 606. The court said: "The statute does not provide that the loss of the use of an eye shall be compensated by an award based upon the amount of vision which existed previous to the accident, whether it be 50 per cent or 80 per cent of vision lost. It awards specific compensation for the loss of an eye. It is a matter of common knowledge that very few persons have complete and perfect vision. The claimant was working with defective vision. So far as appears, her work was entirely satisfactory to her employer, at least so far as the wages she received."

And in *Pawling & H. Co. v. Mildemberger* (1919) — Wis. —, 174 N. W. 455, an award of compensation for a permanent partial disability equivalent to total blindness of an eye was held sustained by the evidence, where the workman testified that before the injury his eye was all right and that he could read with it, although there was testimony by two doctors that in their opinion the sight of the eye prior to the accident was about 27 per cent normal.

But in *Spring Valley Coal Co. v. Industrial Commission* (1919) 289 Ill. 315, 124 N. E. 545, the evidence was held not to support the finding that the total loss of sight of the eye was due to the accident where, although the workman testified that he had never had any trouble with his eye before the injury, there was uncontradicted testimony of oculists that he had a disease of the eye from which he was certain to go blind, and that there was only a partial loss of vision due to the accident.

*IV. Where sight of one eye had previously been lost.*

There is some apparent disagreement as to whether an employee who had suffered an injury to one of his eyes should be allowed compensation for total incapacity, where he subsequently sustained an injury to his other eye. This apparent disagreement may at least be partially accounted for by the difference in the phraseology of the different acts.

It has been held that a one-eyed man who met with an accident whereby he lost the sight of the remaining eye was entitled to compensation for the latter injury as for total incapacity, notwithstanding that part of his total incapacity was made up of the result of a previous accident. *Branconnier's Case* (1916) 223 Mass. 273, 111 N. E. 792. The court said: "The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But, nevertheless, it was the employee's capacity. It enabled him to earn the wages which he received. He became an 'employee' under the act and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time 'while the incapacity for work resulting from the injury is total.' Stat. 1911, chap. 751, pt. 2, § 9. It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury."

And following *Branconnier's Case* (Mass.) supra, it was held in *Re J. & P. Coats* (R. I.) (1918) 41 R. I. 289, 103 Atl. 833, that although the employee had previously lost the sight of one eye, he was entitled to compensation for total incapacity to work where he sustained an injury by reason of which he lost the sight of the other eye. It was held that from such circumstances a conclusive presumption of total disability arose under the section of the Workmen's Compensation Act providing that it should be conclusively presumed that the injury resulted in permanent total disability in case of the total and irrevocable loss of sight in both eyes.

But it was held that the employee was not entitled to the additional compensation provided for under the act for "the entire and irrevocable loss of the sight of both eyes."

Citing *Branconnier's Case* (Mass.) supra, in *Jennings v. Mason City Sewer Pipe Co.* (1919) — Iowa, —, 174 N. W. 785, where an employee lost his only eye through an injury, it was held that he had suffered a "disability total in character and permanent in quality" within the meaning of the Workmen's Compensation Act, and not a "disability partial in character and permanent in quality."

And in *Kriegbaum v. Buffalo Wire Works Co.* (1918) 182 App. Div. 448, 169 N. Y. Supp. 307, affirmed in (1918) 224 N. Y. 621, 121 N. E. 875, an employee who had previously lost the sight of one eye was held entitled to an award for permanent total disability, where he sustained an injury to his other eye, and lost the sight of it, prior to the amendment of § 15, subd. 6, by chap. 615, Laws of 1915. It does not appear exactly what this amendment was.

And where a laborer who had but one eye, by reason of an accident, was left so that he could not rotate his eye to the left, and was cross-eyed, and could only see 20 feet where a normal person could see 100, and this condition was permanent and totally incapacitated him from doing the work he was engaged in, and made it doubtful

whether he could do any remunerative work, it was held that he had sustained a permanent total disability within the meaning of the Workmen's Compensation Act. *Brooks v. Peerless Oil Co.* (1920) — La. —, 83 So. 663. The court said: "The rationale of these Employers' Liability Acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one, and by the impairment of the sight as much as by the loss of it, if the impairment be to such a degree as to disable entirely from work."

But the Michigan court has held that the loss of his remaining eye by one who had lost the other eye several years before in another employment, although it totally incapacitated him, entitled him to compensation for a partial incapacity only, where the act provided that compensation was payable for incapacity "resulting from the injury," that total incapacity was compensable at a different rate than partial, that the loss of one eye was compensable at a certain rate, and that the loss of both eyes constituted the total and permanent incapacity. *Weaver v. Maxwell Motor Co.* (1915) 186 Mich. 588, L.R.A.1916B, 1276, 152 N. W. 993, Ann. Cas. 1917E, 238. The court said: "In the instant case the loss of the first eye was a partial disability for which, if our Workmen's Compensation Law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the results of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last

accident. It follows that the compensation should be based upon partial incapacity; and it is so ordered."

And in *State ex rel. Melrose Granite Co. v. District Ct.* (1919) — Minn. —, 173 N. W. 857, where one eye had, by reason of an injury, lost one half of its vision, and the employee subsequently sustained an injury to both eyes, and lost all practical vision, and could not follow any occupation, it was held that he was entitled to compensation for permanent partial disability, the Minnesota Compensation Act providing that, "if an employee receive an injury which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

The court further held that a clause of the act providing that the total and permanent loss of the sight of both eyes should constitute permanent total disability did not apply, since the employee had not suffered a total loss of the sight of both eyes as a result of the injury sustained.

And in *State ex rel. Garwin v. District Ct.* (1915) 129 Minn. 156, 151 N. W. 910, 8 N. C. C. A. 1052, it was held that an employee who suffered an injury resulting in the loss of the sight of an eye was entitled to compensation as for partial incapacity only, although he had previously lost the other eye, with the result that the second injury left him totally incapacitated. The court said: "No doubt, in the enactment of the statute, and in providing for relief in cases of this kind, the legislature had in mind the fact that persons suffering from permanent partial disability would seek such employment as their remaining ability would fit them to discharge, and express provision was made in the statute to protect the employer from liability for injuries received by an employee before entering his service, and to this end § 15 of the act was incorporated therein. That section provides: If an employee receives an injury which, of itself, would only cause

permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury.

"The language of the statute is clear and unambiguous, and clearly was intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service, and to relieve him from the consequences of injuries previously sustained, even though both resulted in permanent total disability. From the viewpoint of the legislature, and the fact that the liability created is founded upon no wrong of the employer, it would seem fairly clear that this limitation upon the liability was deliberately made, and founded in justice and fairness. The employer accepts in his service a disabled employee, knowing of the disability and with the knowledge that under the Compensation Statute he is liable for accidental injuries to such employee while engaged in his service, but to couple the prior disability with one suffered while in his service and make the employer liable for both would seem a hardship the legislature intended to avoid. At least we think the language of the statute clearly manifests that intention. The statute is too plain to admit of any other view, and there is no room for judicial construction. While it is true that the combined injuries result in total disability, the statute declares that as to the last employer it shall be treated as a partial disability. That the legislature had the right to so provide cannot well be questioned. And though the statute is remedial in the broadest sense of the term, to be liberally construed, the court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated therein."

In *Lee v. Baird & Co.* [1908] S. C. 905, 45 Scot. L. R. 717, it was held that a miner whose left eye was affected by disease so as to be useless for underground work might be held

to be suffering from incapacity resulting from an accident, where his right eye was injured to such an extent that it was of little use for underground work, although the condition of the left eye was neither caused nor aggravated by the accident.

*V. Where power to focus or use eyes together is lost.*

It has been held that there was a "loss of the sight of an eye" where an injury made it impossible to bring the vision of the injured eye to harmonize with the other, the vision of which was normal, although with the use of correcting glasses he could see clearly with the injured eye at a fixed distance, and although his earning power had not been reduced. *Juergens Bros. Co. v. Industrial Commission* (1919) 290 Ill. 420, 125 N. E. 337. The court said: "The question before this court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon finespun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye, he has lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can through artificial means gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect." It rejected the reasoning in *Frings v. Pierce Arrow Motor Car Co.* (N. Y.) *infra*, and with respect to the rule applicable said: "We believe the true rule should be that where, as here, the employee has lost all practical use of an eye, which practical use cannot be restored so long as he has his other eye, such amounts, in effect, to the loss of the eye, and that compensation for such loss should be paid to such employee under ¶ 'e' of § 8 of the Compensation Act."

And in *Stefan v. Red Star Mill & Elevator Co.* (1920) 106 Kan. 369, 187 8 A.L.R.—84.

*Pac. 861*, it was held that a workman suffered a permanent loss of the use of an eye, within the meaning of the Workmen's Compensation Act, where the injury was such as to distort and constrain the angle of vision, and the use of both eyes caused double vision, and required that the injured eye be kept covered, and there was no remedy for the condition.

And in *Smith v. F. & B. Constr. Co.* (1918) 185 App. Div. 51, 172 N. Y. Supp. 581, it was held that a workman was entitled to compensation for the permanent loss of the use of the right eye, considered as the equivalent of the loss of such eye where, after the injury, with the use of powerful glasses, he had a vision of about one third with the right eye, but, in order to obtain it, he had to close the other eye.

The court here distinguished *Frings v. Pierce Arrow Motor Car Co.* (N. Y.) *infra*, on the ground that there, with the use of glasses, the workman had full vision of the eye.

In *Frings v. Pierce Arrow Motor Car Co.* (1918) 182 App. Div. 445, 169 N. Y. Supp. 309, before referred to, it was held that there was not a permanent loss of use of an eye within the Workmen's Compensation Act where the injured eye, through the use of an artificial lens, could fulfil the natural function of the eye when the uninjured eye was closed, and the employee was able to continue his work, but, owing to a lack of co-ordination of images, the eye could not be used in conjunction with the other. It was stated that the theory of the New York law is not indemnity for loss of a member, or physical impairment, but compensation for disability to work, made on the basis of average weekly wages.

In *O'Brien's Case* (1917) 228 Mass. 211, 17 N. E. 1, a decision that the employee had sustained a "reduction to one tenth of normal vision in either eye with glasses," within the Workmen's Compensation Act, was held proper, where the evidence showed that the employee's left eye was normal; that the vision of the injured eye was about one sixtieth; that by cover-

ing the good eye the vision of the injured one, with a glass, was nearly normal; but that this could not be utilized when he used the normal eye and the corrected one together, as there was a lack of co-ordination; and that no glass could be made that would fuse the vision of the eyes.

In *Oliver v. Christopher* (1916) 98 Kan. 660, 159 Pac. 397, a finding of a partial disability was held warranted where a workman testified that, since the injury to his eye, he could not do the work that he did before, that he "could not get the focus."

See also *Purcell v. International Motor Co.* (N. J.) *infra*, VIII.

*VI. Where condition may be improved by artificial means.*

In *Valentine v. Sherwood Metal Working Co.* (1919) 189 App. Div. 410, 178 N. Y. Supp. 494, it was held that a finding that the injury "resulted in the loss of the left eye" was not justified where the entire testimony was to the effect that the eye, with the aid of a proper glass, was nearly normal for many purposes. The court stated that the case was not distinguishable from *Frings v. Pierce Arrow Motor Car Co.* (1918) 182 App. Div. 445, 169 N. Y. Supp. 309.

And under the Michigan act it has been held that an employee could not be compensated as for a total loss of an eye in the course of his employment, if the sight was diminished only 50 per cent if glasses were used, although without glasses the diminution was 90 per cent.

*Cline v. Studebaker Corp.* (1915) 189 Mich. 514, L.R.A.1916C, 1139, 155 N. W. 519.

And in *Boscarino v. Carfagno & Dragonette* (1917) 220 N. Y. 323, 115 N. E. 710, Ann. Cas. 1918A, 530, reversing (1916) 175 App. Div. 286, 161 N. Y. Supp. 562, it was held that a workman had not lost the use of his right eye within the meaning of the Workmen's Compensation Act, where it appeared that by reason of an injury he had lost 80 per cent of the vision of the eye, but that, aside from this capacity, the eye was in good condition, and if an artificial pupil were made, the vision would be much im-

proved, and that he could pursue callings similar to that in which he was engaged when injured.

And in *Cortina v. Lathrop & S. Co.* (1920) — App. Div. —, 180 N. Y. Supp. 855, it was held that an award for total loss should be set aside on account of the unsatisfactory state of the record, where no evidence was produced, and there was no report, or finding, as to whether the vision of the eye could be corrected advantageously by the use of glasses, and one report of specialists gave the loss of vision at 50 per cent, and another at 90 per cent.

In connection with this subdivision, see also *Frings v. Pierce Arrow Motor Car Co.* (N. Y.); *Smith v. F. & B. Constr. Co.* (N. Y.); *Juergens Bros. Co. v. Industrial Commission* (Ill.) *supra*, V., and *State ex rel. Casualty Co. of America v. District Ct.* (Minn.) *infra*, VIII.

*VII. Where operation might improve sight.*

In *Feldman v. Braunstein* (1915) 87 N. J. L. 20, 93 Atl. 679, where the judge found that an injury to an employee's eye was permanent, and resulted in the loss of 90 per cent of vision if an operation was not performed, it was held that he should have dealt with the case as one of permanent disability, and that it was erroneous to determine that the injury was temporary, and make an award on the theory that the injury would be cured by an operation.

But in *Joliet Motor Co. v. Industrial Bd.* (1917) 230 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75, an award of compensation for complete loss of sight of an eye was held erroneous where there was evidence that the workman was a machinist who sustained an injury to his eye by a particle of steel; that a cataract slowly developed so that fifteen months later the entire sight of the eye was lost; that an operation for the removal of the cataract was neither serious nor dangerous, and in a large majority of cases resulted in the recovery of normal vision; and the board found that the workman unreasonably refused to have an operation performed.

*VIII. Effect of ability or inability to follow trade or obtain work.*

In *State ex rel. Casualty Co. of America v. District Ct.* (1916) 133 Minn. 439, 158 N. W. 700, where the injuries to an employee resulted in the total loss of the sight of the right eye, an impairment of vision to the extent of 95 per cent in the left eye, although by the aid of glasses it could be increased to about one third, and other injuries which affected his head, so that he could not stoop or bend over without pain, and there was evidence tending to show that he would not be able to do any work, or engage in any occupation to earn a livelihood, the finding of the trial court that the employee was permanently totally disabled was held supported by the evidence.

In *Purcell v. International Motor Co.* (1917) 91 N. J. L. 707, 103 Atl. 860, affirmed in (1917) 91 N. J. L. 710, 104 Atl. 894, a finding that an injury to an employee's eyes amounted to nearly one half of a total disability of both eyes was held warranted where there was evidence that, since the injury, the employee's sight was so bad that he could not follow his trade as a machinist, and he testified that he could not distinguish clearly objects with his right eye, and that the vision of his other eye was double, unless he turned his head to one side, and covered his other eye, and an eye specialist testified that the disability to the right eye was two thirds, and to the left one half.

In *Stoughton Wagon Co. v. Myre* (1916) 163 Wis. 132, 157 N. W. 522, where a workman sustained an injury

resulting in the permanent loss of four fifths of the sight of an eye, although his earning capacity was not affected by the injury, he was held entitled to four fifths of the allowance prescribed by the subdivision of the Workman's Compensation Act for "total blindness of one eye," which provided that "in all other cases in this class" the compensation "shall bear such relation to the amount" stated in the schedule "as the disabilities bear to those produced by the injuries named in the schedule."

In *International Harvester Co. v. Industrial Commission* (1914) 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, 5 N. C. C. A. 822, it was held that an injury to a drill-press operator, resulting in the partial loss of the sight of an eye, might justify an allowance of compensation for permanent partial disability, although after a period he was able to earn as much as formerly in the employment in which he was before engaged, if it appeared that because of the partial loss of the sight of his eye employers would be less likely to hire him.

The evidence in this case, however, was held not to sustain a finding that such an injury was suffered as would deter employers from hiring a person.

See also *Juergens Bros. Co. v. Industrial Commission* (Ill.) and *Oliver v. Christopher* (Kan.) *supra*; *State ex rel. Melrose Granite Co. v. District Ct.* (Minn.); *Brooks v. Peerless Oil Co.* (La.); *State ex rel. Garwin v. District Ct.* (Minn.); *Lee v. Baird & Co.* (Scot.) *supra*, IV., and *Boscarino v. Carfagno & Dragonette* (N. Y.) *supra*, VI. J. T. W.

STATE OF NEW MEXICO

v.

STEVE EDINS et al., Appts.

*New Mexico Supreme Court—February 2, 1920.*

(— N. M. —, 187 Pac. 545.)

**Evidence — admission of counsel.**

The production in evidence before a jury of an admission outside of

Headnote by PARKER, Ch. J.

court, by counsel for defendants, that in his opinion, unless a certain fact could be shown, his clients would be convicted, was inadmissible and highly prejudicial, and requires a reversal.

[See note on this question beginning on page 1334.]

APPEAL by defendants from a judgment of the District Court for Chaves County (Bratton, J.) convicting them of voluntary manslaughter. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. E. P. Bujac, J. C. Gilbert, and John Howard, for appellants:

The court erred in overruling the objection of the defendants to the question asked by the district attorney of the witness J. N. Hewitt while testifying as a witness for the defendants.

2 Wharton, Ev. § 622-d, pp. 282, 283; 1 R. C. L. p. 482, ¶ 18; 3 Wigmore, Ev. § 1362; 10 R. C. L. pp. 958, 960; 6 Enc. Ev. 665, 667; 1 Enc. Ev. 469; State v. Moeller, 20 N. D. 114, 126 N. W. 568; Alford v. State, 52 Tex. Crim. Rep. 621, 108 S. W. 364; State v. Sharp, 233 Mo. 269, 135 S. W. 488; State v. Hakon, 21 N. D. 133, 129 N. W. 234; People v. Decker, 143 App. Div. 590, 127 N. Y. Supp. 1059; People v. Kathan, 136 App. Div. 303, 120 N. Y. Supp. 1096; State v. Butler, 151 N. C. 672, 25 L.R.A. (N.S.) 169, 65 S. E. 993, 19 Ann. Cas. 402; State v. Keefe, 54 Kan. 197, 38 Pac. 302; State v. Marx, 78 Conn. 18, 60 Atl. 690; Nels v. State, 2 Tex. 280; Clayton v. State, 4 Tex. App. 515; State v. Beatty, 45 Kan. 492, 25 Pac. 899; Campbell v. State, 30 Tex. App. 645, 18 S. W. 409; State v. Gonzales, 19 N. M. 467, 144 Pac. 1144; State v. Klasner, 19 N. M. 479, 145 Pac. 680.

It was highly improper in the district attorney to undertake to make out his case by a series of objections which, in themselves, amounted to the same thing as if he had been propounding improper questions, and getting before the jury by way of objection his idea of what the law was, and to impress upon their minds certain facts by way of improper objection.

3 Wigmore, Ev. § 1808; 2 R. C. L. pp. 405, 434, 440, §§ 3, 33, 38; 38 Cyc. 1327, ¶ b; Rogers v. State, 8 Okla. Crim. Rep. 226, 127 Pac. 365; 14 Cyc. 1327, ¶ b.

It is the duty of the court and district attorney to see that the defendants get a fair and impartial trial, and that only proper evidence and state-

ments of law are made by counsel in the presence of the jury during the trial of the cause.

8 R. C. L. p. 67, ¶ 20; 22 R. C. L. pp. 102-105, ¶¶ 11, 12; 2 R. C. L. p. 420, ¶ 18; Jamison v. United States, 7 Ind. Terr. 661, 104 S. W. 872; People v. Becker, 210 N. Y. 274, 104 N. E. 396; Price v. State, 10 Okla. Crim. Rep. 427, 137 Pac. 736; Watson v. State, 7 Okla. Crim. Rep. 590, 124 Pac. 1101; Pickrell v. State, 5 Okla. Crim. Rep. 391, 116 Pac. 957.

The court has no power or authority in any event to inquire into collateral matters during the trial of a case, nor does it have the right, nor is it proper upon the part of the court, to examine a witness and to show plainly what the opinion of the court was.

38 Cyc. 1316, ¶¶ L. M. p. 1322, ¶ 8; Taylor v. State, 2 Ga. App. 723, 59 S. E. 12; Murphy v. State, 13 Ga. App. 431, 79 S. E. 228; State v. Ownby, 146 N. C. 677, 61 S. E. 630; New v. State, 99 Ark. 142, 137 S. W. 564; Adler v. United States, 104 C. C. A. 608, 182 Fed. 464; Joyner v. State, 12 Ga. App. 217, 77 S. E. 9; People v. Koerner, 117 App. Div. 40, 102 N. Y. Supp. 93.

The district attorney may not, in his argument to the jury, refer to matters that are not in evidence in the case that can in any way prejudice the jury against defendants, and it is the duty of the district attorney to see to it that defendants have a fair and impartial trial.

2 R. C. L. pp. 404-442; 38 Cyc. 1477-1479; 3 Wigmore, Ev. § 1808; Jamison v. United States, 7 Ind. Terr. 661, 104 S. W. 872; Toledo, St. L. & W. R. Co. v. Burr, 82 Ohio St. 129, 137 Am. St. Rep. 771, 92 N. E. 27; State v. Montgomery, 56 Wash. 443, 134 Am. St. Rep. 1119, 105 Pac. 1035, 21 Ann. Cas. 331; Watson v. State, 7 Okla. Crim. Rep. 590, 124 Pac. 1101; State v. Barton, 70 Or. 470, 142 Pac. 348; State v. Scott, 37 Nev. 412, 142 Pac. 1053.

Messrs. O. O. Askren, Attorney General, and Nicholas D. Meyer, Assistant Attorney General, for the State:

Objections interposed by the district attorney were not improper.

1 Wigmore, Ev. § 18; 16 C. J. §§ 2198, 2199.

Defendant was not prejudiced by the remarks of counsel.

State v. Blancett, 24 N. M. 433, 174 Pac. 207; 1 Thomp. Trials, § 957.

Parker, Ch. J., delivered the opinion of the court:

The defendants were indicted for murder and convicted of voluntary manslaughter. It appears that defendants went to the home of the deceased, and the defendant Edins announced to the deceased that he should consider himself under arrest; this defendant claiming that the deceased had robbed his house of certain articles of merchandise, some of which were found upon the premises of the deceased. The deceased submitted to the arrest, and the defendant Edins told his codefendant, Aubrey Calley, to take charge of the prisoner while he (Edins) searched the premises. Thereupon the deceased refused to allow the search and started toward the door of his tent, when the defendant Calley approached him and forbade his entering into his tent. Thereupon the shooting commenced, and in the controversy the deceased was killed by the defendant Calley. It appears from the testimony that the defendants had no authority to either arrest the deceased or to search his premises; they never having been deputized or authorized by the sheriff to exercise the functions of a peace officer. During the examination of one J. N. Hewitt, sheriff of Eddy county, the following occurred:

Q. Isn't it a fact, in the Gilder Hotel, night before last, Major Bujac came to you with tears in his eyes and told you unless you would swear that you gave this defendant, Steve Edins, a commission, that they were a bunch of blowed-up suckers? (This question was not answered.)

Q. You didn't give him a deputy sheriff's commission at any time?

A. No, sir.

Q. And he was trying to get you to swear something that was not true?

A. Yes, sir.

Upon redirect examination the following occurred:

Q. Did I ask you if the facts were that you had deputized Steve, and you said that you had not? My question was "Mr. Hewitt, did you deputize Steve Edins?" and you said you did not, and I said, "Then you can't swear that?" (An objection to this question was sustained.)

Q. Did I tell you all I wanted was whatever the truth would be in the case, and if he was not deputized, why he was not deputized?

A. Yes, sir.

Q. Then I did not ask you to swear a lie, did I?

A. You asked me if I could swear that I had deputized Steve Edins.

Q. And you said you could not, and I bid you good night?

A. Yes, sir.

Q. And that was all there was to it?

A. Yes; that is a fact; yes, sir.

Upon recross-examination by the district attorney the following occurred:

Q. He said if you didn't do it they were a bunch of blowed-up suckers?

Proper exceptions to this question were preserved, but the court overruled the objection. Then the examination proceeded:

Q. Did he, Mr. Hewitt?

A. Yes, sir.

Counsel for appellant strenuously urge that this testimony was inadmissible and highly prejudicial to the defendants. In this contention they are evidently correct. The statement attributed to Major Bujac, of counsel for defendants, if true, was made by him without the presence of the defendants, and, so



far as the record discloses, without their knowledge or consent. Statements by counsel, without the knowledge or authority of his client, in expressing an opinion as to the prospects of acquittal or a conviction of his client, are no more admissible in a court of justice before a jury than would the same statements be if made by a stranger.

That the evidence was highly prejudicial to the defendants is apparent. The production before the jury of such an admission by coun-

sel absolutely closed the door between him and the jury, so that he must have been unable to argue to them the innocence of the defendants from any standpoint whatever.

Other errors are assigned, but they are of such a character that they will probably not occur at a retrial of the case.

For the reasons stated, the judgment of the trial court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

Roberts and Raynolds, JJ., concur.

### ANNOTATION.

#### Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client.

The reported case (*STATE v. EDINS*, ante, 1332) appears to be the only decision upon this point, and the principle there declared, that statements out of court by counsel, without the presence and without the knowledge or authority of his client, expressing an opinion as to the probability of the conviction of, or a verdict against, his client, are inadmissible, seems to be in accord with reason and the rules relating to admissions.

There is another case having some bearing upon this point, viz., *Hicks v. Naomi Falls Mfg. Co.* (1905) 138 N. C. 319, 50 S. E. 703, an action for personal injuries, in which it was held that it could not be shown that one who was the attorney for plaintiff on a former trial, but who was not his attorney on the present trial, had said in open court on the former trial that if the evidence was as stated by defendant's witnesses, the plaintiff had no case, and had suggested that each side select a man to go to the defendant's factory and examine the machine which caused the injuries, and that if it was found to be as claimed by defendant, he would take a nonsuit, and that on the return of the men selected

his then attorney took the nonsuit. The court, in this connection, said: "These declarations were not made at a place nor under circumstances where the plaintiff could be expected or permitted to protest or reply, and derive no force, therefore, from the fact that the plaintiff may have been present when the statement was made. If held competent, it must be on the ground that the plaintiff is bound in this instance by the admissions of his attorney. Admissions of fact by an attorney only bind a client when they are distinct and formal and made for the express purpose of dispensing with proof of a fact on the trial, and less formal admissions of counsel at a former trial are not evidence against a client at a subsequent trial. Admissions which occur in mere conversation, though they relate to matters at issue in the case, cannot be received in evidence against a client. . . .

The admissions sought to be introduced in this case, however, can hardly be considered admissions of fact at all, but amount only to the attorney's opinion adverse to his client on facts as reported to him, and are clearly incompetent."

G. V. L.

JOHN KLEINE and Wife, Appts.,  
v.  
MARY L. KLEINE, Resp't.

Missouri Supreme Court (Div. No. 1) — March 2, 1920.

(— Mo. —, 219 S. W. 610.)

**Landlord and tenant — signature in lead pencil — sufficiency.**

1. A signature to a lease in lead pencil is sufficient.

[See note on this question beginning on page 1339.]

— sufficiency of description in lease.

2. A description of leased property is sufficient which states that it runs a specified number of feet along a road from its intersection with another, and a specified number of feet along the latter from its intersection with the former.

**Evidence — to explain calls in deed.**

3. Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter and thus giving effect to the deed.

[See 8 R. C. L. 1074.]

**APPEAL** by plaintiffs from a decree of the Circuit Court of the city of St. Louis (Hennings, J.) in their favor in part only, in an action brought to quiet title to certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John W. Mueller, for appellants:

If the description of real estate contained in an instrument, which instrument seeks to convey an interest in said real estate, is so inaccurate, indefinite, and incomplete as to render the identity of the particular tract of land sought to be conveyed wholly uncertain, the instrument is void as a means of conveying interest in real estate or color of title.

Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; McCormick v. Parson, 195 Mo. 91, 92 S. W. 1162; Schroeder v. Turpin, 253 Mo. 258, 161 S. W. 716; Campbell v. Johnson, 44 Mo. 247; Bell v. Dawson, 32 Mo. 79; Shoemaker v. McMonigle, 86 Ind. 421; Hoodless v. Jernigan, 46 Fla. 223, 35 So. 656; Youmans v. Moore, 144 Ga. 375, 87 S. E. 273; Harvey v. Byrnes, 107 Mass. 518; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; Radford v. Edwards, 88 N. C. 347; Hanna v. Palmer, 194 Ill. 41, 56 L.R.A. 93, 61 N. E. 1051.

If the description of property sought to be conveyed by a written instrument does not fix the boundaries or shape of the land sought to be conveyed, so that, by relying on the description contained therein, the form and identity of the premises could not

be ascertained, the instrument is void and inoperative as a means of conveyance of title.

Shoemaker v. McMonigle, 86 Ind. 421; Harvey v. Byrnes, 107 Mass. 518.

A patent ambiguity in an instrument is an uncertainty that arises at once upon the reading of the instrument and arises from the defective, obscure, senseless, or indefinite language used.

Jones, Ev. § 474; Harney v. Wirtz, 30 N. D. 304, 152 N. W. 803; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; Strong v. Waters, 27 App. Div. 299, 50 N. Y. Supp. 257.

Where a mere perusal of the instrument in question reveals an uncertainty as to the identity of the premises sought to be conveyed, and reveals that the description of the premises conveyed as contained in the instrument is given in a defective, obscure, and senseless manner, or by defective, obscure, or senseless language, a patent ambiguity exists in said instrument, which cannot be corrected, explained, or added to by extrinsic testimony.

Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; Carter v. Holman, 60 Mo. 498; Campbell v. Johnson, 44 Mo.

247; *Craven v. Butterfield*, 80 Ind. 503; *Fuller v. Fellows*, 30 Ark. 657; *Bowers v. Andrews*, 52 Miss. 596; *Hall v. Cotton*, 167 Ky. 464, L.R.A.1916C, 1124, 180 S. W. 779; *Mills Power Co. v. Mohawk Hydro Electric Co.* 155 App. Div. 869, 140 N. Y. Supp. 655; *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 669; *Palmer v. Albee*, 50 Iowa, 429; *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647; *Goodsell v. Rutland-Canadian R. Co.* 75 Vt. 375, 56 Atl. 7; *Harney v. Wirtz*, 30 N. D. 304, 152 N. W. 803; *Taffender v. Merrill*, 18 Tex. Civ. App. 661, 45 S. W. 477; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484; *Noyes v. Stauff*, 5 Or. 455; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. 665; 17 Cyc. 682.

An instrument required under the Statute of Frauds to be in writing cannot rest partly on parol and partly on the writing, but must contain in the writing all the elements necessary to the validity of the instrument.

*Norris v. Hunt*, 51 Tex. 609; *Ringer v. Holtzclaw*, 112 Mo. 523, 20 S. W. 800.

Messrs. Igoe & Carroll and F. H. Eschmann, for respondent:

The object of a description in a deed is to define what the parties intended.

*Long v. Wagoner*, 47 Mo. 180.

Intention of parties, whether expressed or shown by surrounding circumstances, is all controlling.

*McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404; *Johnson v. Boulware*, 149 Mo. 451, 51 S. W. 109; *Devlin, Deeds*, §§ 835, 836, 1012; 8 R. C. L. 1037; *Evans v. Greene*, 21 Mo. 195; *Baldwin v. Trimble*, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176; 5 Cyc. 867; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Truett v. Adams*, 66 Cal. 218, 5 Pac. 96; *Thompson v. Motor Road Co.* 82 Cal. 477, 23 Pac. 130.

A deed will not be declared void for uncertainty if it is possible by any reasonable rules of construction to ascertain from description, aided by extrinsic evidence, what property is intended to be conveyed.

*Hubbard v. Whitehead*, 221 Mo. 672, 121 S. W. 69; *Holley v. Currie*, 58 W. Va. 70, 112 Am. St. Rep. 944, 51 S. E. 135; *Tetherow v. Anderson*, 63 Mo. 96; *Cravens v. Pettit*, 16 Mo. 210; *Dunn v. English*, 23 N. J. L. 126; *Bolinger County v. McDowell*, 99 Mo. 632, 13 S. W. 100; *Reamer v. Nesmith*, 34 Cal. 624, 5 Mor. Min. Rep. 610; *Devlin, Deeds*, § 1012; 17 Cyc. 662;

*Hooten v. Comerford*, 152 Mass. 591, 23 Am. St. Rep. 861, 26 N. E. 407; *Reed v. Locks & Canals*, 8 How. 274, 12 L. ed. 1077.

The Statute of Frauds does not apply where the contract has been fully performed.

*Hoyle v. Bush*, 14 Mo. App. 408.

The description in a deed is sufficient if the object covered is ascertainable with the aid of extrinsic evidence.

*Amonett v. Montague*, 63 Mo. 206; *Livingston County v. Morris*, 71 Mo. 603; *Orr v. How*, 55 Mo. 328; *Brown v. Walker*, 11 Mo. App. 235; *Cox v. Hart*, 145 U. S. 389, 36 L. ed. 746, 12 Sup. Ct. Rep. 962; *Mitchell v. D'Olier*, 68 N. J. L. 375, 59 L.R.A. 949, 53 Atl. 467; *Blake v. Doherty*, 5 Wheat. 359, 5 L. ed. 109; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

The office or purpose of a description in a deed is to furnish the means of identification.

*Pipkin v. Allen*, 29 Mo. 229; *Holley v. Curry*, 58 W. Va. 70, 112 Am. St. Rep. 944, 51 S. E. 135; *Mitchell v. D'Olier*, 68 N. J. L. 375, 59 L.R.A. 949, 53 Atl. 467; *Blake v. Doherty*, 5 Wheat. 359, 5 L. ed. 109; *Craven v. Butterfield*, 80 Ind. 503.

A description in a deed is sufficient if it will enable a person of ordinary prudence, acting in good faith and making inquiries which the description would suggest to him, to identify the land.

*Hayes v. Martin*, 144 Ala. 532, 40 So. 204; *Burton v. Mullenary*, 147 Cal. 259, 81 Pac. 544; *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108; *Bogard v. Barhan*, 52 Or. 121, 132 Am. St. Rep. 676, 96 Pac. 678; *Harris v. Iglehart*, 52 Tex. Civ. App. 6, 113 S. W. 170; *Walker v. Lee*, 51 Fla. 360, 40 So. 881; *Devlin, Deeds*, §§ 1012 et seq.; *Dorr v. School Dist.* 40 Ark. 237.

A parallelogram will be presumed to have been intended when a definite and fixed corner is located.

*Smith v. Nelson*, 110 Mo. 552, 19 S. W. 734; *Deal v. Cooper*, 94 Mo. 62, 6 S. W. 707; *Devlin, Deeds*, pp. 1922-1931; 5 Cyc. § 877.

When a conveyance on its face or aided by judicial knowledge equally describes two or more persons or things, this is a patent ambiguity.

*Mudd v. Dillon*, 166 Mo. 110, 65 S. W. 973; *Chambers v. Ringstaff*, 69 Ala. 140.

Parol evidence that is not repugnant to the terms of the writing to

which it relates, but is consistent with and explanatory of it, is admissible.

*Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; 10 R. C. L. p. 1019, § 212; *Gould v. Boston Excelsior Co.* 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554; *Hayes v. Wabash R. R. Co.* 163 Mich. 174, 13 L.R.A. (N.S.) 229, 128 N. W. 217.

Courts will take judicial notice of the streets within a city and the direction in which they run and their relation to each other.

*Stealey v. Kansas City*, 179 Mo. 400, 78 S. W. 599.

In the interpretation of deeds inter partes, courts are not inclined to insist upon that accuracy of description required in sheriffs' deeds or other transfers of property.

*Carter v. Holman*, 60 Mo. 498.

*Graves, J.*, delivered the opinion of the court:

The petition is in conventional form under the statute. By answer the defendant says that she has a lease for a period of twenty years on a portion of the tract of land described in the petition of plaintiffs; that plaintiff John Kleine marked off the lot 100 by 70 feet, and that she built a five-room cottage thereon and fenced it, and took possession of it; that the said John Kleine assisted her in the building of the house and fences; that thereafter she paid rent for two years. Reply was a general denial. Trial before the court resulted in a judgment for plaintiffs as to the title being in them, but the further judgment that defendant had a valid lease for twenty years upon the tract 100 by 70 feet. From such judgment plaintiffs have appealed.

John Kleine and the defendant are brother and sister. In 1913 John Kleine told his sister that she could have a lease upon a small tract (100 by 70) of his land on Coal Bank road in the city of St. Louis. He pointed out to her the boundaries. At her own cost and expense she built a five-room cottage thereon and fenced the land and took possession of it. In 1915, after much urging, she got John Kleine and wife to execute the following lease:

### Lease.

This lease made and entered into by and between John and Rose Kleine, hereafter referred to as lessor, and Mary L. Kleine hereafter referred to as lessee.

Said lessor, for and in consideration of a rent of \$5 to be paid yearly by said lessee, does hereby lease unto said lessee the following described premises situated in the city of St. Louis, state of Missouri.

One hundred feet running westward on Coal Bank road, beginning at private road fronting house, and 70 feet running northward on private road beginning at Coal Bank road.

This lease begins June 15, 1913, expires June 15, 1933. Lessee has the right to remove at any time improvements made by lessee.

During the time of lease said lessee has the privilege of a moderate use of water.

Said lessee promises to sell improvements made on premises for a reasonable price at any time when lessor sells the land.

Mary L. Kleine.  
Jno. J. Kleine.  
Rosa Kleine.

For two years he accepted the money for the rent, but thereafter he declined rent. Conceiving the lease invalid, he and his wife brought this action. Kleine's testimony in the case tends to leave a bad taste in the judicial mouth. Among other things, he requested that the lease be signed with a lead pencil, and says that he "figured" that it was no good when he signed it, "because there was no starting point." All this was after the sister had put her money into the improvements. Further details will be left to the opinion.

I. It is clear that the idea of John Kleine, as to there being no starting point mentioned in the lease, is without foundation. The lease says: "One hundred feet running westward on Coal Bank road, beginning at private road fronting house, and 70 feet running northward on

private road beginning at Coal Bank road."

From this it is clear that the starting point is the intersection of Coal Bank road and the private road. From this intersection, or starting point, the tract was to be 100 feet on Coal Bank road, and 70 feet on the private road,

Landlord and tenant—  
sufficiency of  
description in  
lease.

from the intersection of the two. In other words the description in the lease gives a starting point, and two sides of the lot. Having a fixed corner and the two sides given, a parallelogram will be presumed. In other words, we have the width and depth of the tract given, and only have to extend the lines to get a parallelogram.

In *Smith v. Nelson*, 110 Mo. 552, 19 S. W. 734, we have a description calling for 1 acre in the corner of a government-surveyed tract. There we had only the starting point. We held that an acre in a square form would be presumed from such a description. So in this case, having the starting point and two sides given, we will presume the parties had in mind a parallelogram. See also 2 Devlin, Deeds, p. 1922.

We have no doubt about the fact that this lease calls for a parallelogram 100 by 70 feet, with the long side of the parallelogram on Coal Bank road.

The idea of there being no common starting point for the respective sides of the parallelogram is not borne out by the lease itself. Whether the description fails for other reasons we will discuss later.

II. The real issue in the case is not the views expressed by John Kleine, to the effect that he signed the lease (in lead pencil, at his own suggestion) because he thought it invalid, owing to the absence of a starting point. He seems not only to have had that idea, but the other

—signature in  
lead pencil—  
sufficiency.

erroneous view, entertained by many laymen, that a deed cannot be signed with a lead pencil, but must be signed with pen and

ink. After his sister had expended her money on a five-room cottage and fences upon ground which he pointed out to her, it required two years to get him to sign a lease. When he did sign it, he thought that he had it in shape to beat the sister. And all this after he had accepted the rent for the first two years. What Wagner, J., said in *Tetherow v. Anderson*, 63 Mo. loc. cit. 98, is peculiarly applicable to John Kleine. That learned jurist thus spoke: "The only ground urged for a reversal is that the description was so uncertain and indefinite that nothing passed by the plaintiff's deed. This claim surely comes with a bad grace from the plaintiff, who acknowledges that he sold and conveyed the land by that description."

The appellant Kleine not only went upon the ground and marked out the lot upon which the sister was going to build her little home, but he assisted her agents in the building of the cottage and fences, accepted the agreed rent for two years, and finally executed the lease in writing, after telling his sister to make it as short as possible. There is no question that the house is there facing the private road mentioned. There is no question that there is and was a private road. There is no question that Coal Bank road is and was a public highway in the city of St. Louis and state of Missouri. There is no question that the plaintiffs owned a tract of land (some 8 acres more or less) on this public road, and that the lease was intended to cover a part of this tract. A surveyor testified that he could and did take the deed, and from its terms located the lot leased, after finding out the property on Coal Bank road owned by the plaintiffs. In other words, once given their property on Coal Bank road, the tract claimed by defendant could be located by the description given in the lease.

The real issue is whether the description taken as a whole, aided by such extrinsic evidence as may be used in construing the ambiguous terms of the contract, is sufficient to

locate the land described in this lease. Thus, in *Hubbard v. Whitehead*, 221 Mo. loc. cit. 683, 121 S. W. 71, Gantt, P. J., said: "Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter and thus give effect to the deed. While it is true that a deed must so describe land sought to be conveyed thereby that it can be identified, that is certain which can be rendered certain, and in construing a doubtful description in a grant the court will put itself in the position of the contracting parties as near as possible and consider the circumstances of the transaction between them, and

Evidence—to explain calls in deed.

then read and interpret the words used in the light of these circumstances."

The proof aliunde in this case located the lands of plaintiffs on Coal Bank road; it located the private road; it located the lot pointed out by John Kleine to his sister; it located the cottage in actual existence when the lease was written; it located the defendant in possession with the knowledge and consent of plaintiffs. With this information the surveyor said he could and did locate the leased ground.

Under the rule in the *Hubbard Case*, supra, the judgment nisi is right, and should be affirmed. It is so ordered.

All concur; Blair, P. J., in result.

## ANNOTATION.

### Signature with lead pencil.

An examination of the cases which have considered the question under annotation discloses that, at least so far as transactions of private business are concerned, the fact that the signature to an instrument was made with a lead pencil will not affect its validity.

Thus, that a signature with lead pencil is sufficient has been held in *Drefahl v. Security Sav. Bank* (1906) 132 Iowa, 563, 107 N. W. 179 (check); *Merritt v. Clason* (1815) 12 Johns. (N. Y.) 102, 7 Am. Dec. 286 (memorandum of contract of sale); *Clason v. Bailey* (1817) 14 Johns. (N. Y.) 484 (memorandum of contract of sale); *Brown v. Butchers' & D. Bank* (1844) 6 Hill (N. Y.) 443, 41 Am. Dec. 755 (indorsement on bill of exchange); *Porter v. Valentine* (1896) 18 Misc. 213, 75 N. Y. S. R. 902, 41 N. Y. Supp. 507 (signature of underwriter of policy of insurance); *Re Schoner*, 8 Pa. Co. Ct. 453 (signature to application for liquor license); *Myers v. Vanderbilt* (1877) 84 Pa. 510, 24 Am. Rep. 227 (signature to will); *Closson v. Stearns* (1831) 4 Vt. 11, 23 Am. Dec. 245 (indorsement of promissory note); *Geary v. Physic* (1826) 5 Barn. & C.

234, 108 Eng. Reprint, 87, 7 Dowl. & R. 653, 4 L. J. K. B. 147, 29 Revised Rep. 225 (indorsement of promissory note); *KLEINE v. KLEINE* (reported herewith) ante, 1335 (lease).

But in *Van Platz Brewing Co. v. Interstate Ice & Cold Storage Co.* (1912) 161 Mo. App. 531, 143 S. W. 542, while admitting the general rule that a signature to an instrument is sufficient if written with a pencil, it was held that where a voucher draft required that the signature of the receptor should be in ink, a signature in lead pencil is insufficient, the court saying that it was a requirement which could be rightfully made and insisted upon.

The law extends great indulgence to looseness and inaccuracy in writings necessary to the transaction of the common business of life, propter simplicitatem laicorum. Otherwise the fair intention of the parties would frequently be defeated by their want of acquaintance with the forms of business, and by the haste in which such writings are often necessarily drawn and executed, at times and in places when and where the means of making them in the best manner and

with the best materials are not at hand. *Stone v. Sprague* (1851) 24 N. H. 309.

"To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink was for a long time unknown to them. In the days of Job, they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, etc., with a style or iron instrument. The next improvement was writing upon waxed tables; until at last paper and parchment were adopted, when the use of the calamus or reed was introduced. The common law has gone so far to regulate writing as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument or the material by which the letters were to be impressed on paper or parchment has never yet been defined; this has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject the courts have, with great latitude and liberality, left the parties to their own discretion.

... A lead pencil is generally the most accessible and convenient instrument of writing on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience and afford more opportunities and temptation to parties to break faith with each other than by allowing the writing with a pencil to stand. It is no doubt very much in use." *Clason v. Bailey* (1817) 14 Johns. (N. Y.) 484.

And in *Geary v. Physic* (1826) 5 Barn. & C. 234, 108 Eng. Reprint, 87, it was said that "there is no authority for saying that where the law requires

a contract to be in writing that writing must be in ink. . . . That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff."

However, no prudent scrivener will write a will in pencil unless under extreme circumstances. Whenever so written, any appearance of alteration should be carefully scrutinized. Yet, inasmuch as the statute is silent on the question, we cannot say that the mere fact that it is written or signed in pencil thereby makes it invalid. It is nevertheless a writing known and acknowledged as such by the authorities and fulfils the requirements of the statute. *Myers v. Vanderbilt* (1877) 84 Pa. 510, 24 Am. Rep. 227.

And in *Re Schoner* (1890) 8 Pa. Co. Ct. 453, the court said that, owing to the liability to erasures, the practice of making important signatures in pencil ought to be discouraged.

In the case, however, of a signature required by law to be made by a public officer, signatures with lead pencil have generally been held to be insufficient.

Thus, in *Stone v. Sprague* (1851) 24 N. H. 309, an officer's indorsement on a summons in lead pencil was held to be insufficient.

And in *United States v. Thompson*

(1812) 2 Cranch, C. C. 409, Fed. Cas. No. 16,484, a signature in pencil of justice of peace issuing warrant of arrest was held insufficient because liable to be so easily obliterated.

Also in *Re Thirty-third Division* (1906) 15 Pa. Dist. R. 350, 32 Pa. Co. Ct. 571, a signature to petition for division of election divisions, in lead pencil, was held sufficient ground to defeat the granting of the petition.

In *Stone v. Sprague* (N. H.) *supra*, the court said that "the indorsement which the statute requires to be made on a summons is the act of a public officer, who cannot be heard to excuse himself on the ground of ignorance; who is bound to be furnished at all times with the means of discharging his duty in a safe and proper manner; and who has no right to be in such haste as to prevent him from doing all that the law requires of him, with due care and deliberation. The apparent object of the law requiring a summons to be indorsed with the name of the officer who serves it is to give the defendant information who the officer was that took his property, and in case he should conceive himself to be wronged by the taking or detention of the property, to furnish him with prompt and certain proof against a responsible party. This object will not be adequately secured if the indorsement is such that it may be easily erased and obliterated by accident or design. If indorsed in pencil and left at the defendant's house, before it comes to his hands there may be nothing on it to show by whom it was served. If indorsed at an attorney's office when the sheriff took it, and carried it about with other papers a week or a month, as is not unfrequently the case, before it was served, there could be no certainty that it would have any legible indorsement on it at the end of that time. . . . So far as we are informed, this is the first trial of the

kind that has taken place in the state; but if such indorsements were held to be legal, it would not be likely by any means to be the last. We should expect indorsements to be made generally in that way. There can be no hardship in holding the officer to make these indorsements in a way to avoid all this uncertainty. He can, without any disproportionate trouble, provide himself at all times with the means of indorsing his process in ink. We have seen no case in which it has been held that the record, signature, or other writing, required by law to be made by a public officer, may be in pencil marks; but if an officer's indorsement on a summons, made in pencil, should be decided to be sufficient, it is not easy to see how any line of distinction could be established which should prevent the rule from being extended to all cases where an officer is required to make a writing or a record. No statute requires that judgments shall be enrolled or deeds recorded in ink. Bail is taken by a mere indorsement of his name on the writ. He would probably be held chargeable if it were done in pencil. But it would be a dangerous looseness if the officer were allowed to take bail and discharge the defendant from arrest, where the only security returned was a pencil mark on the writ, which, as original writs are kept and used in our practice, would in a contested case seldom remain legible till the plaintiff obtained judgment. . . . We think the legislature never intended that these indorsements should be made except in a permanent manner, that would effectually secure the object of the law, and that an indorsement in pencil . . . is not sufficient."

And in *Re Thirty-third Division* (Pa.) *supra*, it was said that the practice is not a proper one and is not to be encouraged.

J. H. B.



**AMERICAN FUEL COMPANY OF UTAH, Plff. in Certiorari,  
v.  
INDUSTRIAL COMMISSION OF UTAH et al.**

*Utah Supreme Court — January 28, 1920.*

(— Utah, —, 187 Pac. 633.)

**Workmen's compensation — effect of insolvency of insurer.**

Securing insurance for the payment of awards under the Workmen's Compensation Act does not relieve the employer from liability in case the insurer becomes insolvent, under a statute providing that employers shall secure compensation to their employees by insuring and keeping insured the payment of such compensation with any stock company authorized to do business in the state, and that the employer or the insurer shall pay compensation for injuries received; especially where other provisions of the act indicate an intention to make both the employer and insurance carrier liable for the payment of the compensation.

[See note on this question beginning on page 1346.]

**CERTIORARI** to the Industrial Commission to review its award to claimant, defendant Lappas, in a proceeding by him to recover compensation for injuries received while in the employ of plaintiff. *Petition dismissed.*

The facts are stated in the opinion of the court.

Messrs. Dey, Hopbaugh, and Mark, for plaintiff:

The Industrial Commission is given no power or authority under the act to make an award against an employer, but is restricted solely to awarding compensation in proper cases out of the fund provided by the act, and the award, as against plaintiff, is void, and should be annulled.

*Industrial Commission v. Daly Min. Co.* — Utah, —, 172 Pac. 301; *Industrial Commission v. Evans*, — Utah, —, 174 Pac. 825; *Reinholz v. Industrial Commission*, 96 Ohio St. 457, 119 N. E. 129; *Scranton Leasing Co. v. Industrial Commission*, — Utah, —, 170 Pac. 976; *Winfield v. New York C. & H. R. R. Co.* 168 App. Div. 351, 153 N. Y. Supp. 499; *Fidelity & C. Co. v. House*, — Tex. Civ. App. —, 191 S. W. 155; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888; *Bradbury, Workmen's Compensation*, 3d ed. p. 1181.

Messrs. Dan B. Shields, Attorney General, Oliver C. Dalby, James H. Wolfe, and Herbert Van Dam, Jr., Assistant Attorneys General, for defendants:

The fact that the Industrial Commission Act requires the employer to secure compensation does not absolve

him from all liability for compensation, and substitute his insurance carrier as the only party liable.

*Industrial Commission v. Evans*, — Utah, —, 174 Pac. 825; *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 357; *Crockett v. International R. Co.* 170 App. Div. 122, 155 N. Y. Supp. 692.

Weber, J., delivered the opinion of the court:

Plaintiff, a corporation under the laws of Utah, procured the issuance by this court of a writ of certiorari directed to defendants. In its petition plaintiff, inter alia, alleges that on April 21, 1919, Theras Lappas filed an application with the Industrial Commission praying for compensation for personal injuries suffered by accident arising out of and in the course of the employment of said applicant by the American Fuel Company, the plaintiff; that on the 26th of September, 1919, a formal hearing was had before the Industrial Commission, when the plaintiff appeared and presented evidence showing that it had complied with the requirements of § 3114, Comp. Laws Utah 1917, and

had secured compensation to its employees by insuring and keeping insured the payment of said compensation in the Guardian & Guaranty Company, a stock corporation authorized to transact the business of workmen's compensation insurance in this state, and that on said date petitioner held a binding policy of insurance in said Guardian Casualty & Guaranty Company, executed and delivered to it in conformity with the provisions of the Workmen's Compensation Act; that the policy covered the payment of compensation to all of its employees at its mines at Neslen, Utah, including the applicant, Theras Lappas; that said policy was in full force and effect at the time of said accident, to wit, July 25, 1917; that the Guardian Casualty & Guaranty Company recognized its liability to the applicant and for a considerable period of time made payments to him, as compensation and hospital expense, to an amount in excess of \$550; that the Guardian Casualty & Guaranty Company does not deny its liability, but that said company is in the hands of a receiver; that on October 29, 1919, the Industrial Commission made and entered its award and order requiring petitioner to pay to the applicant the sum of \$968.95 as compensation for said injuries; that on November 22, 1919, the petitioner made application for rehearing before the Industrial Commission on the ground that the Industrial Commission was without jurisdiction to order petitioner to pay the award, and that said Commission acted in excess of its powers in making and entering said award.

Defendants have filed a demurrer to the petition on the ground that the facts therein stated are not sufficient to constitute a cause of action. It is the claim of petitioner that, by procuring insurance, it was relieved from all liability to pay compensation to its injured employee, and that the sole liability to pay the compensation ordered by the Commission devolved upon the Guardian

Casualty & Guaranty Company, the insolvent insurance carrier.

Comp. Laws Utah 1917, §§ 3113 and 3114, are as follows:

"Sec. 3113. If a workman receives personal injury by accident arising out of and in the course of his employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified.

"Sec. 3114. Employers, but not including municipal bodies, shall secure compensation to their employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation with the state insurance fund; or

"2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or

"3. By furnishing to the Commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this title.

"In the latter case the Commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred. All stock corporations or mutual associations transacting the business of workmen's compensation insurance in this state under the terms of subdivision 2 of this section shall be subject to the rules and regulations of the Commission with respect to rates to be charged, and methods of compensation to be used."

What is meant by the words "employers shall secure compensation to their employees"? Does it mean they shall obtain an insurance policy and thereby be relieved of all responsibility to the employees, who have no voice in making the selection of the insurance carrier? Or does it not plainly appear, both

from the letter and the spirit of the law, that the employer "shall secure"—make sure, make more certain—the payment of compensation, leaving the obligation still that of the employer? The primary obligation on the part of the employer is to pay compensation when awarded. Insurance is incidental, though important. It is necessary, because employers sometimes fail in business, and because payments to injured employees or their dependents are frequently distributed over long periods of time. To make more certain the prompt payment of these awards the insurance feature was provided by the law. In harmony with § 3114 is § 3116, which reads: "Every policy of insurance covering the liability of the employer for compensation, whether issued by the Commission or by a stock company, or by a mutual association authorized to transact workmen's compensation insurance in this state, shall cover the entire liability of the employer to his employees covered by the policy or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names, either by, at any time, filing a separate claim, or by, at any time, making the insurance carrier a party to the original claim, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation, by either the employer or the insurance carrier, shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

Why provide that the employee file a separate claim against the insurance carrier if the employer is not liable, and why make the insurance carrier a party to the original claim? Why provide that payment, in whole or in part, by either the employer or the insurance carrier, shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid, unless both are liable?

Section 3117 provides: "Every such policy and contract shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this title, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions, and awards rendered against the employer for the payment of compensation under the provisions of this title."

If the employer is relieved from liability when he procures his insurance, why should an award be rendered against him? The employer is the one against whom jurisdiction must be obtained, and the insurance company is bound by the orders and awards against the employer, whose primary liability seems to be recognized by the section just quoted.

Section 3118 reads: "Every such policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer, and his discharge therein, shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy or contract."

Discussing the above section, the attorney general aptly says in his brief: "In considering this section the thought immediately occurs, why, if the employer is not liable, provide that insolvency or bankruptcy shall not relieve the insurance carrier? If he was never liable, under the plaintiff's theory, why should his insolvency or solvency, bankruptcy or prosperity, make any difference in its effect upon the insurance carrier? This section was inserted to save the situation from the principle that an insolvency or bankruptcy, or a discharge therefrom, of

the employer, should relieve the insurance carrier. But why should it be necessary to save the situation from such a legal principle if the carrier were, from the beginning, the only and original one liable? Why speak of him not being released on the contingency of the employer being unable to pay because of insolvency or bankruptcy, if the employer was never liable, regardless of him being solvent or insolvent, bankrupt or flourishing?"

Section 3119 is as follows: "Each county, city, town, or school district which is liable to its employees for compensation may insure in the state insurance fund or pay compensation direct."

If a county, city, town, or school district procures insurance, it certainly is not absolved from its primary liability to pay compensation, and yet there is no difference as between private and public employers; both are liable for compensation; but the public employer is exempt from the obligation to secure such payment. Otherwise their obligations are the same.

Section 3126 is as follows: "If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state as provided for in this title, even though such injury was received outside of this state. If a workman who has been hired outside of this state is injured while engaged in his employer's business, and is entitled to compensation for such injury under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state if his rights are such that they can reasonably be determined and dealt with by the Commission and the court in this state."

The provision that the employee shall be entitled to enforce his rights against his employer is another recognition of the principle that the employer is primarily liable for compensation. This thought

is emphasized in § 3132, which reads, in part: "The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee shall be the exclusive remedy against the employer. . . ."

Section 3134 reads: "Every employee, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer, waives his right to exercise his option to institute proceedings in any court. Every employee, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this title, waives his right to any award or direct payment of compensation from his employer."

It will be noticed that this section uses the words "compensation from an employer" and "direct payment of compensation from his employer,"—not from the insurance carrier.

Section 3127 provides that employers who comply with the provisions of § 3114 shall not be liable to respond in damages for injuries sustained by their employees not resulting in death. If complying with § 3114 and obtaining insurance relieves the employer from all liability, as contended by plaintiff, why say he "is not liable to respond in damages," leaving the unavoidable inference that he is still liable for compensation?

Reading the statute as a whole, and considering all of its provisions, the plain and unmistakable import of the language of the act compels the conclusion that the right to compensation arises out of the relation existing between employer and employee; that compensation is a tax upon industry or upon the employer's business, a tax that is added to the price of the product and is ultimately paid by the consumer; that the employer is primarily liable for compensation to the employee; that both employer and insurance carrier are liable for

the payment of compensation to the injured employee; and that the default of either will not excuse payment by the other.

**Workmen's compensation—effect of insolvency of insurer.**

The demurrer to the petition is therefore sustained; plaintiff's peti-

tion is dismissed, and the Commission's award is affirmed. Plaintiff to pay costs.

Corfman, Ch. J., and Gideon and Thurman, JJ., concur.

Frick, J., being disqualified, did not participate herein.

### ANNOTATION.

#### **Workmen's compensation, insolvency of insurer or employer, as affecting liability for compensation.**

The determination of the several rights of the parties in case of the insolvency or bankruptcy of the employer or insurer depends upon the provisions of the compensation act in force in the jurisdiction where the question arises.

It will be observed that in the reported case (*AMERICAN FUEL CO. v. INDUSTRIAL COMMISSION*, ante, 1342), the taking of insurance for the payment of compensation awards under the Workmen's Compensation Act was held not to relieve the employer from liability where the insurer was insolvent, and the act provided that employers "shall secure compensation" to their employees by insuring, and keeping insured, the payment of such compensation with any stock company authorized to do business in the state, and that the employer or the insurer should pay compensation for injuries received, and that the policy should contain a provision to the effect that the insolvency or bankruptcy of the employer should not relieve the insurer from payment of compensation, the court holding that these provisions, read with reference to other clauses of the act, showed an intention to make the employer primarily liable, and that both the employer and insurer were liable for the payment of compensation to an injured employee, and that the default of either did not excuse payment by the other.

In *Illinois Indemnity Exch. v. Industrial Commission* (1919) 289 Ill. 283, 124 N. E. 665, a section of the Workmen's Compensation Act provided that any person who should become entitled to compensation under the act should,

"in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company, association, or insurer which may have insured such employer against loss growing out of the compensation required by the provisions of this act to be paid by such employer, and, in such event only, the said insurance company, association, or insurer shall become primarily liable to pay to the employee or his personal representative the compensation required by the provisions of this act to be paid by such employer." It was held that by this provision, in case of the employer's insolvency, the legislature intended to charge the liability directly to the insurer, and make it primarily liable to the employee; and under § 15 of the act, giving the Industrial Commission jurisdiction over the operation and administration of the act, the Commission was held to have jurisdiction to enforce the employee's claim directly against the insurer without first having procured a judgment, notwithstanding a provision of the insurer's policy making the procurement of a judgment a condition of liability, where there was also a rider attached to the policy, providing that it intended covering such legal liability of the insured as was imposed by the Workmen's Compensation Act.

It is provided by subsec. 1 of § 5 of the English act that, where an employer had entered into a contract with any insurers respecting any liability under the act to any workman, then, in the event of the employer becoming

bankrupt, or making a composition or arrangement with his creditors, or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and rest in the workman, and upon any such transfer the insurers shall have the same rights and remedies, and be subject to the same liabilities, as if they were the employer; so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer. And it is provided by subsec. 2 of § 5 that "if the liability of the insurer to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or litigation."

In *Re Pethick* [1915] 1 Ch. (Eng.) 26, [1914] W. N. 403, 84 L. J. Ch. N. S. 285, 112 L. T. N. S. 212, 59 Sol. Jo. 74, [1915] H. B. R. 59, [1915] W. C. & Ins. Rep. 5, 8 B. W. C. C. 337, the employer, and the company in which insurance had been taken by the employer, went into bankruptcy, and it was held that § 5, above set out, was fatal to any claim by the employee to a right of priority, or to a right to prove his claim for compensation against his employer, but that the employee could prove his claim only against the insurer.

And in *Renishaw Iron Co.* [1917] 1 Ch. (Eng.) 199, 115 L. T. N. S. 755, 61 Sol. Jo. 147, where an insurer, which had issued a policy to an employer, was ordered to be wound up compulsorily, and subsequently the employer was also wound up, it was held, under subsec. 1 of § 5, set out supra, that the right of the employer to prove in the proceedings of the insurer was transferred to employees who had sustained injuries, and that, under subsec. 2 of § 5, supra, the employees were entitled to prove in the employer's proceedings only for the amount of their claims not covered by the insurance.

And in *Craig v. Royal Ins. Co.*

[1914] W. N. (Eng.) 442, 84 L. J. K. B. N. S. 333, 112 L. T. N. S. 291, [1915] H. B. R. 57, [1915] W. C. & Ins. Rep. 139, 8 B. W. C. C. 339, it was held that upon an employer's becoming bankrupt, the rights which he, or his trustees in bankruptcy, had against the insurer, were vested in the employee, and that the employer's right of indemnity against the insurer was lost, and that the trustees of a bankrupt employer had no right to repayment from an insurer of amounts paid to an injured employee as compensation.

Under the provisions of the English act the employee is entitled only to the employer's rights against the insurer; and where a policy of insurance, issued to an employer which has become bankrupt, contained a clause requiring disputes between the insurers and the employers to be submitted to arbitration, and there was a genuine dispute, it was held that an injured employee could not take proceedings in the county court to have compensation awarded until the dispute had been submitted to arbitration and an award had been made. *King v. Phoenix Assur. Co.* [1910] 2 K. B. (Eng.) 666, 80 L. J. K. B. N. S. 44, 103 L. T. N. S. 53, 8 B. W. C. C. 442.

In *Daff v. Midland Colliery Owners' Mut. Indemnity Co.* [1913] W. N. (Eng.) 256, 82 L. J. K. B. N. S. 1340, 109 L. T. N. S. 418, 29 Times L. R. 730, 57 Sol. Jo. 773, 6 B. W. C. C. 799, where the employer, a member of a mutual insurance company, was bankrupt, the insurance company was held liable, under § 5 of the Workmen's Compensation Act, to pay compensation to a workman employed by such member, who was injured prior to a default by the employer in the payment of a call by the association, notwithstanding an article of the association providing that "whenever a member's protection has been determined . . . he shall not be entitled to any indemnity in respect of any accident," such provision being held not to refer to accidents which had occurred prior to the determination of membership in the association.

In *Brzinski v. Acme Body Co.* (1914)

37 N. J. L. J. 183, a claim, under the Employers' Liability Act, by an injured employee, was held to be for injuries, and not a claim for wages, entitled to priority as against his bankrupt employer's estate under the Bankruptcy Act, providing that wages due to workmen and clerks, earned within three months before the commencement of proceedings, should have priority, but the claim of the employee was held to have priority un-

der another section of the Bankruptcy Act, giving priority to debts owing to any person who, by the laws of the states or the United States, is entitled to priority, where the Employers' Liability Act provided that the right of compensation granted by the act should have the same preference against the assets of the employer as is now, or may hereafter be, allowed by law for a claim for unpaid wages for labor.  
J. T. W.

### EX PARTE CHARLES E. BALL.

*Kansas Supreme Court — March 23, 1920.*

(106 Kan. 536, 188 Pac. 424.)

#### Bail — right of one charged with murder.

Murder in the first degree not being punishable capitally, persons charged with that offense are bailable, under the self-executing provision of the Bill of Rights that all persons shall be bailable by sufficient sureties, except for capital offenses where proof is evident or the presumption great, notwithstanding the Statute of 1911, which provides that persons charged with the crime of murder in the first degree shall not be admitted to bail when the proof is evident or the presumption great.

[See note on this question beginning on page 1352.]

Headnote by BURCH, J.

APPLICATION by petitioner for a writ of habeas corpus to obtain admission to bail. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. Dale, Amidon, Buckland, & Hart and Sam P. Ridings for petitioner.

Mr. A. M. Jackson for respondent.

Burch, J., delivered the opinion of the court:

The petitioner was arrested on a warrant charging murder in the first degree, and at the conclusion of a preliminary examination was bound over to the district court, without bail. The writ of habeas corpus was prayed for to obtain admission to bail, which this court granted.

The territorial Crimes Act of 1859 contained the following provisions:

"Section 1. Every murder which shall be committed by means of poison or by lying in wait, or by any other kind of wilful, deliberate and

premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree.

"Sec. 2. Every murder which shall be committed purposely and maliciously, but without deliberation and premeditation, shall be deemed murder in the second degree.

"Sec. 3. Persons convicted of murder in the first degree shall suffer death. Those convicted of murder in the second degree shall be punished by confinement and hard labor for not less than ten years." Comp. Laws 1862, chap. 33, §§ 1-3.

The territorial Code of Criminal

Procedure contained the following provision: "Persons charged with an offense punishable with death, shall not be admitted to bail, when the proof is evident or the presumption great; but, for all other offenses, bail may be taken in such sum as, in the opinion of the magistrate, will secure the appearance of the person charged with the offense, at the court where such person is to be tried." Comp. Laws 1862, chap. 32, § 45.

These statutes were continued in force in the Revision of 1868 (Gen. Stat. 1868, chap. 31, §§ 6, 7, 8; chapter 82, § 53), and until modified as hereinafter stated.

The Constitution adopted in 1859, under which the state was admitted to the Union in 1861, contains the following provision: "All persons shall be bailable by sufficient sureties except for capital offenses where proof is evident or the presumption great." Bill of Rights, § 9 (Gen. Stat. 1915, § 113).

The legislature of 1907 amended the Crimes Act by the enactment of the following statute: "Persons convicted of murder in the first degree shall be punished by confinement and hard labor in the penitentiary of the state of Kansas for life. Those convicted of murder in the second degree shall be punished by confinement and hard labor for not less than ten years." Gen. Stat. 1915, § 3369.

Following the enactment of this statute, persons charged with murder in the first degree were generally admitted to bail. In a few instances bail was refused, and on application to this court bail was allowed as a matter of right, under the provision of the Constitution. In 1911, the legislature amended the Criminal Code by enactment of the following statute: "Persons charged with the crime of murder in the first degree shall not be admitted to bail when the proof is evident or the presumption great; but for all other offenses bail may be taken in such sum as in the opinion of the magistrate will secure the appearance of the

person charged with the offense at the court where such person is to be tried." Gen. Stat. 1915, § 7962.

Following enactment of this statute, courts and committing magistrates generally admitted to bail in accordance with the Bill of Rights, precisely as if the statute had not been passed. In a few instances in which bail was denied this court granted bail. In order to render inexcusable denial of bail in any murder case, so long as murder is not a capital offense and the Constitution remains unchanged, this opinion is published.

The press of more important business prevents the court from assuring itself with certainty of the date of the initial appearance of the provision of the Bill of Rights in Anglo-American legal history. It is sufficient for present purposes to know that it formed § 11 of the "Laws Agreed Upon in England," etc., which accompanied Penn's frame of government for the province of Pennsylvania, to which the illustrious Quaker set his "hand and broad seal, this five and twentieth day of the second month, vulgarly called April, in the year of our Lord one thousand six hundred and eighty-two." 5 Thorpe, Am. Charters & Const. p. 3059. While the Habeas Corpus Act of three years before, and the Bill of Rights Act of seven years later, dealt with bail, neither one employed the same or equivalent phraseology.

The provision in question appeared in the Constitution under which Kentucky was admitted to the Union in 1792, and appeared in form or substance in a majority of the Constitutions framed before Kansas became a state. The Kansas Bill of Rights followed the Ohio model, and the provision was contained in the Ohio Constitutions of 1802 and 1851. In all these Constitutions the word "capital" had a definite, settled meaning, which was the meaning accorded the word in general usage whenever employed as an adjective qualifying the terms "crime," "offense," or "felony"—



punishable by deprivation of life. Dr. Johnson's definition is a sentence from Bacon: "That which affects life." The Oxford English Dictionary gives many illustrations, extending from 1483 to modern times. Illustrating the present meaning of the word, Webster's New International Dictionary and the Century Dictionary give quotations from Spencer, Milton, Swift, and Macaulay. Histories of English and American legal institutions and legal textbooks know no other meaning than that indicated, and the same is true of the courts.

"The language of the Constitution is: 'All persons shall, before conviction, be bailable by sufficient securities, except for capital offenses where the proof is evident or the presumption great.' . . . Under the Constitution, and the law as it stood before the adoption of the Penal Code, although the offense might be reduced, on the trial, below the grade of the one charged, still when the charge was made, and the proof evident or the presumption great, the magistrates were not permitted to take bail. The question, in contemplation of law, to be tried by the magistrates on an application for bail, was not whether the accused must necessarily be punished with death,—because this they could not know until after the trial,—but whether he might be so punished, and probably would be under the proof. . . . The Penal Code is then adopted, giving to the juries the power of saying, in cases of murder in the first degree, whether the accused shall suffer death or go to the penitentiary for life. This is but a simple extension of the power of the jury one degree beyond what it was before. Capital punishment still remains, and, in cases where the jury so decide, with precisely the same certainty that it existed before the adoption of the Penal Code." *Ex parte McCrary*, 22 Ala. 65, 71.

"If the statute imposes death as a punishment, and provides for no other punishment, of course the offense is a capital felony. The ques-

tion now is, when the statute provides that the punishment shall be death or imprisonment, as the jury shall recommend, and the jury recommends imprisonment, whether the verdict of guilty of the offense is a conviction of a capital offense. In our view the expression 'capital felony,' when used in our law, is merely descriptive of those felonies to which the death penalty is affixed as a punishment under given circumstances to distinguish such felonies from that class in which, under no circumstances, would death ever be inflicted as a penalty for the violation of the same." *Cæsar v. State*, 127 Ga. 710, 712, 57 S. E. 67.

"Section 3910 of the General Statutes provides: 'Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.' A capital case is a case in which a person is tried for a capital crime. A capital crime is one for which the punishment of death is inflicted. The crime of murder in the second degree is punished by imprisonment in the state prison for life, and is not a capital crime." *Adams v. State*, 56 Fla. 1, 13, 48 So. 224.

"A capital crime is one punishable by the death of the offender." *Com. v. Ibrahim*, 184 Mass. 255, 258, 68 N. E. 232.

"By the Constitution it is provided 'that all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.' Section 24, Bill of Rights. . . .

"A 'capital offense' is one which is punishable—that is to say, liable to punishment—with death. This is the substance of the definitions by the lexicographers both professional and lay." *Ex parte Dusenberry*, 97 Mo. 504, 507, 11 S. W. 217.

"Of course, a capital offense is one which may be punished by death. There can be no capital offense unless the punishment is by death." *Ex parte Russell*, 71 Tex. Crim. Rep. 377, 378, 160 S. W. 76.

"It will be observed that the leg-

islature, in the enactment of the sections quoted, construed the words 'capital offenses' in the constitutional provision as meaning offenses punishable by death. This is the general and legal meaning of the words." *Re Schneck*, 78 Kan. 207, 209, 96 Pac. 44.

The legal effect of the constitutional provision as a whole is equally definite and well settled. All offenses are bailable of right, except those to which the death penalty is affixed, and those to which the death penalty is affixed are bailable unless the proof be evident or the presumption great.

"The Constitution of the state declares that 'all persons shall be bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great.' Article 1, § 7. The Criminal Practice Act, however, provides that 'a person charged with an offense may be admitted to bail before conviction, as follows: (1) As a matter of discretion in all cases where the punishment is death; (2) as a matter of right in all other cases; and that 'no person shall be admitted to bail when he is charged with an offense punishable with death, when the proof is evident or the presumption great.' Sections 509 and 510. The Constitution, as will be thus seen, secures to the citizen accused the right to bail in all cases, except when charged with a capital offense, and even then, unless the proof of guilt is evident, or the presumption of it is great. The statute, on the other hand, renders the admission to bail a matter of discretion, where the punishment is death, unless such evident proof or great presumption exist. In this respect the statute conflicts with the fundamental law. The admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases. In all other cases, the admission to bail is a right which the accused can claim, and which no judge or court can

properly refuse." *People v. Tinder*, 19 Cal. 539, 542, 81 Am. Dec. 77.

"Under our Code of Procedure special venires are only provided for in 'capital' cases. . . .

"Article 35 of our Penal Code expressly declares that 'a person for an offense committed before he arrived at the age of seventeen years shall in no case be punished with death.'"

"When the district attorney admitted that the defendant was under seventeen years of age, that was an admission that the case was not 'capital,' and that death could in no event be inflicted, notwithstanding he was indicted for and might be convicted of murder in the first degree. The case was not a 'capital' case, and consequently the court did not err in overruling the defendant's motion for a special venire. He was not entitled to one." *Walker v. State*, 28 Tex. App. 503, 504, 13 S. W. 860.

"The Constitution, art. 1, § 11, reads as follows: 'All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident,' etc. The general proposition enunciated in the Bill of Rights, therefore, is that all prisoners shall be bailable with the exception stated,—that unless for capital offenses when the proof is evident. In order to make the case nonbailable under this clause of our Constitution, the proof must be evident that there has been committed a capital offense." 71 Tex. Crim. Rep. 377, 378, *supra*.

"The Constitution of this state, § 8, art. 1, provides that, 'all persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.' By chapter 103, Laws of 1853, capital punishment is abolished in this state. . . .

"By the Court, Downer, J.: 'The court are of opinion that since the abolition of capital punishment in this state persons charged with murder are in all cases bailable.' *Re Perry*, 19 Wis. 676, 677.

"The first objection is merely stated without argument or sustaining authority. We assume, however, that it is based upon the statute, Rem. & Bal. Code, § 2138 (P. C. 135, § 1167), which, so far as pertinent, reads: 'In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors.' It is clear that the twelve challenges are only allowed in prosecutions for capital offenses. A capital offense is one which may be punishable with death. . . . The statute above quoted obviously uses the term 'capital offenses' as so defined. The second clause, by allowing only six peremptory challenges in prosecutions for offenses punishable by imprisonment in the penitentiary, in effect, defines such offenses as not capital. Capital punishment was abolished in this state by the act approved March 22, 1913, Laws 1913, p. 581, 3 Rem. & Bal. Code, § 2392, which went into effect on June 9, 1913, ten days before this case was called for trial. The first clause of the statute relating to peremptory challenges above quoted was clearly suspended by the abolition of capital punishment. Since there is now no capital punishment in this state, there are no capital offenses; hence, no offense in prosecution for which the provision for twelve peremptory challenges can be invoked. No amount of argument could add to the clear sequence of this conclusion." *State v. Johnston*, 83 Wash. 1, 2, 144 Pac. 945.

The Constitution, which in this

respect is self-executing, left the legislature free to prescribe whatever punishment it saw fit for murder, and all other offenses. The Constitution, however, dealt specifically with the subject of bail, and made all offenses which the legislature did not see fit to punish capitally bailable. The meaning of the Bill of Rights at the time it was adopted cannot be changed without changing the Constitution itself. This the legislature is not competent to do. At present, treason is the only capital offense under the laws of this state, and all others are bailable as a matter of right, notwithstanding the Statute of 1911.

Bail—right of one charged with murder.

The territorial Code of Criminal Procedure contained two provisions relating to bail; one in the division relating to arrest and examination of offenders, quoted above, page 1349, and one in the division relating to indictments. Offenses could be prosecuted by indictment only, and after indictment found, the following section governed: "All offenses are bailable by sufficient sureties, except murder, when the proof is evident or the presumption great." Comp. Laws 1862, chap. 32, § 114.

This section has been retained in subsequent compilations of the statutes, and appears as § 8048 of the General Statutes of 1915. Manifestly, the section fell under the restriction of the Bill of Rights as soon as the Constitution became effective, and has continued under such restriction ever since.

All the Justices concur.

## ANNOTATION.

### Abolition of death penalty as affecting right to bail of one charged with murder in first degree.

Aside from the reported case (*EX PARTE BALL*, ante, 1348), the only reported case which has considered the subject under annotation is *Re*

*Perry* (1865) 19 Wis. 676, which held, without any discussion whatever, that "since the abolition of capital punishment in this state per-

sons charged with murder are in all cases bailable," which decision is in accord with the decision in *EX PARTE BALL*.

There is, however, an obiter statement in *Re Welisch* (1917) 18 Ariz. 517, 163 Pac. 264, which was an application for admission to bail pending appeal from conviction of the crime of violating the Prohibition Law, to the effect that "the people of Arizona at the last election, through the adoption of an initiated measure submitted to the voters, abolished capital punishment for murder, so that now all persons charged with the crime of murder, however diabolical or atrocious it may be, and howsoever evident may be the proof of guilt thereof, as well as all other crimes not punishable with death, may, before conviction, demand admission to bail as a strict legal right

which no judge or court can properly refuse."

In *Re Schneck* (1908) 78 Kan. 207, 96 Pac. 43, and *Re Stewart* (1908) 78 Kan. 885, 96 Pac. 45, it was held that one charged with murder in the first degree is not entitled to admission to bail because of the abolition of the death penalty, where the crime charged was committed before such abolition, although the prosecution was had after such abolition. This, however, was upon the ground that, there being no special saving clause in the statute, the penalty of death for murder committed before the statute went into effect was not affected. The imposition of a life sentence as affecting the capital character of the offense for the purpose of bail is considered in *Walker v. State*, 8 A.L.R. 968, and note.

J. H. B.

JESSE D. JONES, Appt.,

v.

G. J. BRANTLEY.

*Mississippi Supreme Court (In Banc)—March 8, 1920.*

(— Miss. —, 83 So. 802.)

**Sunday — services of attorney — works of necessity or charity.**

1. Services rendered by an attorney in straightening out the affairs of a partnership are not works of necessity or charity within the meaning of the Sunday laws.

[See note on this question beginning on page 1356.]

**Attorney and client — right of attorney to compensation.**

2. An attorney who is retained to transact business for a client, and remains at his office at the client's request for several days to care for such business, is entitled to a reasonable retainer fee and reasonable compensation for his time in waiting.

[See 2 R. C. L. 1033.]

**— indivisible contract — work on Sunday.**

3. A contract by an attorney to straighten out the affairs of a partnership, which is not for a gross amount, is not an indivisible one, so as to prevent recovery for the retainer and work done on secular days by the performance of some work on Sunday.

(Sykes, J., dissents.)

**APPEAL** by plaintiff from a judgment of the Circuit Court for Humphries County (Elmore, J.) in favor of defendant in an action brought to recover an amount alleged to be due for personal services rendered to him by plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Robert B. Mayes, Clayton D. Potter, and H. F. Jones for appellant. Messrs. Cashin & Murphy, for appellee:

The contract in question is not only voidable, but absolutely void, and, being void, is a legal nullity.

Kountz v. Price, 40 Miss. 341; Collins v. McCargo, 6 Smedes & M. 128; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Wooten v. Miller, 7 Smedes & M. 386; Coulter v. Robertson, 14 Smedes & M. 29; Adams v. Rowan, 8 Smedes & M. 638; Torrey v. Grant, 10 Smedes & M. 97.

The court will not lend its aid to enforce a contract, where it grows immediately out of an illegal or immoral act, where it is connected with an illegal act, and where only a part of the consideration is illegal.

Wooten v. Miller, 7 Smedes & M. 380; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903; Gray v. Hook, 4 N. Y. 449; Nellis v. Clark, 4 Hill, 424; Handy v. St. Paul Globe Pub. Co. 41 Minn. 188, 4 L.R.A. 466, 16 Am. St. Rep. 695, 42 N. W. 872; Perkins v. Cummings, 2 Gray, 258; Block v. McMurry, 56 Miss. 219, 31 Am. Rep. 357.

The contract was entire, inseparable, and indivisible, and tainted throughout with its original illegality.

Handy v. St. Paul Globe Pub. Co. 4 L.R.A. 466, 16 Am. St. Rep. 695, and note, 41 Minn. 188, 42 N. W. 872; Williams v. Hastings, 59 N. H. 373.

Ethridge, J., delivered the opinion of the court:

Appellant sued the appellee for professional services as an attorney for the sum of \$500, alleging that the appellee was engaged in a mercantile business in a partnership, and that he desired the professional services of plaintiff in rearranging or adjusting the partnership business, and that value of the stock, etc., involved in the mercantile business, amounted to \$30,000, and that the services so rendered were reasonably worth \$500.

The defendant filed the general issue and a special plea, alleging in the special plea that the contract and legal services were entered into and performed on Sunday, and that the said services were in violation of the laws of the state of Missis-

sippi and would not support an action. He also gave notice under the general issue to the same effect, and alleged that the employment was gross, entire, and not divisible, and in such notice alleged that thereafter further services in connection with said matter were rendered by the said plaintiff on Sunday, the 23d day of June, 1918, and on secular days thereafter, to which said plea and notice under the general issue the plaintiff in his replication said that the said contract was not entered into on Sunday as alleged. At the conclusion of the evidence the court gave a peremptory instruction for the defendant, and judgment was entered thereon for the defendant, from which judgment this appeal is prosecuted.

There is a conflict in the evidence between the plaintiff and the defendant as to whether the contract was entered into on Sunday, but the plaintiff admits that he did some of the work and had certain consultations in reference thereto on Sunday. The testimony of plaintiff with reference to employment in part is as follows: "Some time along about the middle of June, 1918, last year, one day along about Thursday or Friday of the week, Mr. T. L. Gilmer and myself were standing on the corner talking by Parker & Parker's store. Mr. Brantley walked up and spoke to us and stood there and talked a few minutes about different things, and said to me, 'I want to see you and talk to you a little.' I said, 'All right.' He said, 'Clint Abrams and two or three other traveling men know you pretty well and said you were a good lawyer, and I have some business I want you to attend to.' I said, 'All right.'"

He further testified that Brantley asked him, would he be in his office on Sunday; that he usually attended to such things on Sunday, and that he replied that he would be if Brantley wanted to see him; that he did confer with Brantley on Sunday and discussed the business and did

some writing in reference to the said business; that it was necessary for them to see the other partner in reference to the new contract; and that Brantley requested the plaintiff not to leave town, as he wanted him to see his partner and do the talking when his partner came to town. Plaintiff testified further that he waited some ten days for Brantley's partner to come because of Brantley's request, and that he neglected to make certain trips and to attend to certain other business because of a request of Mr. Brantley that he would not leave town.

It further appears that the plaintiff drew the contract of partnership between Brantley and his partner, or rather closed their business by a contract, that there was no agreement about the amount of the fee, but that after the business was concluded he sent his statement of his fee to the defendant, to which the defendant failed to reply, and he subsequently sent other statements and finally wrote Mr. Brantley that if the fee was not all right he would like to know about it. "I am due the courtesy of some attention in the matter, or at least an explanation of why the delay of payment."

To this the defendant replied: "I am in receipt of your bill for \$250, also note what you say and fully intended to see you and talk with you about this bill, but owing to illness and being very much overworked have not been able to get to this. However, I want to say to you I think your charges are entirely too much. I would be glad to pay you what is right as soon as we can get this matter straightened out."

The plaintiff's testimony and that of other lawyers show that the services rendered were reasonably worth \$500, but a peremptory instruction was given for the defendant on the theory that the services were rendered on Sunday in violation of § 1366, Code of 1906 (§ 1102, Hemingway's Code), which reads as follows: "1366. Sabbath; Viola-

tions of generally.—If any person, on the first day of the week, commonly called Sunday, shall himself labor at his own or any other trade, calling, or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall, on conviction, be fined not more than \$20 for every offense, deeming every apprentice or servant so employed as constituting a distinct offense; but nothing in this section shall apply to labor on railroads or steamboats, telegraph or telephone lines, street railways or in the business of a livery stable, meat market or ice house."

The plaintiff's testimony as we view it shows the retainer contract between the plaintiff and his client was made on a secular day, and his testimony shows further that he stayed in town for ten days at the request of defendant, neglecting to attend to other matters, waiting to close up the business for the defendant. It shows that some of the services were rendered on Sunday, but the contract is not shown to have been made on Sunday so far as the plaintiff's testimony is concerned. The plaintiff was entitled to recover a reasonable fee as a retainer, and a reasonable amount for his time in waiting in Belzoni at the request of the defendant, if his testimony as to these facts is believed by the jury.

It is our opinion that the services rendered on Sunday as shown in this record were not a work of necessity or charity in the meaning of the statute. There are some services that an attorney may lawfully perform on Sunday, as the law expressly authorizes certain suits and other legal matters to be done on Sunday. We do not think the contract an indivisible one. There was no contract for the

Attorney and client—right of attorney to compensation.

Sunday—services of attorney—works of necessity or charity.

gross amount, but the plaintiff was depending upon the value of the retainer and particu-

Attorney and client—indivisible contract—work on Sunday.

lar services performed under the retainer, and for such time as he was

detained in Belzoni on secular days. This view of the law, we think, is supported by *Duggan v. Champlin*, 75 Miss. 441, 23 So. 179; *Western*

*U. Teleg. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36; and *Campbell v. Davis*, 94 Miss. 164, 47 So. 546, 19 Ann. Cas. 239.

The judgment of the court below is reversed, and the cause remanded for a new trial in accordance with this opinion.

Sykes, J., dissents.

Suggestion of error overruled.

## ANNOTATION.

### Application of Sunday laws to attorneys.

Legal services generally are not a work of necessity or charity, the usual exception from the statutory prohibition of work on Sunday. In the reported case (*JONES v. BRANTLEY*, ante, 1353) the services held to be prohibited, consisted in a conference at the attorney's office with a member of a firm as to the rearranging or adjusting of the partnership business, a discussion of the business, and the doing of some writing with reference thereto, but the court said that there were some services that an attorney might lawfully perform on Sunday, as the law expressly authorized certain suits and other legal matters to be done on that day.

It was stated in *Peate v. Dicken* (1834) 3 Dowl. P. C. 171, 1 Crompt. M. & R. 422, 149 Eng. Reprint, 1145, 5 Tyrw. 116, 4 L. J. Exch. N. S. 28, that it was doubtful whether an attorney was within the Statute of 29 Car. II. chap. 7, by which it was enacted that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted, as an attorney was not one of the persons specifically mentioned, and could not be included under the words "other person," since those words meant other persons ejusdem generis, but it was held that, even supposing that attorneys came within the statute, an

attorney, in entering into an agreement on a Sunday for the settlement of his client's affairs, whereby he rendered himself personally liable to pay his client's debts, was not exercising his ordinary calling within the meaning of the statute.

In *Markle v. Scott* (1885) 2 Tex. App. Civ. Cas. (Willson) 593, upholding a contract made on Sunday (by an attorney apparently) in relation to the commencement of an attachment suit, the court said that the Sunday laws of the state prohibited certain labor on that day, and also provide that no suit shall be brought on that day, except an attachment suit, and that a contract made in violation of the statute would be illegal and incapable of enforcement, but that there was no law which made a contract illegal and void, or even voidable, merely because made on Sunday when such contract was in regard to a matter not made unlawful by statute, and that at common law, as to contracts, no distinction was made between Sunday and any other day.

Where an attorney contracts on a secular day to perform legal services in rearranging or adjusting a partnership business, and, in order to complete the performance of such services, stays in town over Sunday at his client's request, he can recover a reasonable fee as retainer, no agreement having been made as to the amount of his fee, and a reasonable amount for such time as he was detained in town on secular days, al-

though some of the services were performed on Sunday in violation of the statute, since such contract was not an indivisible one. *JONES v. BRANTLEY* (reported herewith) ante, 1353.

In *Alfree v. Gates* (1891) 82 Iowa, 19, 47 N. W. 993, an action by an employee, whose character did not appear from the report, to recover for services of a character usually performed by attorneys, under a contract requiring him personally to go out of the state and look after the sale of his employer's land, using his best judgment and discretion as to sales, to look up taxes and pay the same, examine and report records, and make and record contracts and deeds, and to do generally everything arising in the selling and looking after the land and the sales and contracts already made, for which services he was to receive a certain sum per day for every day consumed, dating from the day of his departure from the state until his return thereto, Sundays and all, together with all expenses legitimately incurred in such business—the court apparently assumed that the performance of such services on Sunday would be illegal, and stated that two questions were presented for decision: First, was the contract illegal in providing for labor on Sunday? Second, was the employee en-

titled to recover compensation for Sundays included in the time he spent away from home? The contract was held legal upon the grounds that, as it did not in terms require the performance of labor on Sunday, the presumption was that it did not, and that while it might be said that all days the employee spent away from home to perform the duties required of him by the contract were consumed in discharging such duties, a day so consumed would not necessarily be spent in labor. Upon the second question the court held that the employee was entitled to recover for Sundays included in the time he was away, upon the ground that the specification of a certain compensation per day was simply a means adopted to ascertain the employee's compensation for his services.

It has been held that an attorney's clerk employed at a weekly salary cannot recover from his employer extra compensation for services rendered on Sunday in the ordinary calling of the parties in violation of the prohibition of the statute against working on Sunday, there being no ground for saying that the case is within the exception of works of necessity or charity, and there being no pretense that the parties kept the last day of the week. *Watts v. Van Ness* (1841) 1 Hill (N. Y.) 76.

G. V. I.

JOHNSON HARDY, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals—January 21, 1920.*

(— Tex. Crim. Rep. —, 217 S. W. 939.)

#### **Evidence — of threat against jury.**

1. Evidence is not admissible in a criminal case that accused has stated that if the jury convicted him he would "get" some of them if they did not watch out.

[See note on this question beginning on page 1361.]

— failure to object to predicate question — effect.

2. Failure to object to the predicate question propounded to an accused for

the purpose of showing a threat against a jury does not estop him from objecting to the admission of testimony of such threat.



**Witness — impeachment — immaterial matter — effect of answer.**

3. The state is bound by the answer of accused to a predicate question propounded for his impeachment, which is not material to the case.

**Name — idem sonans.**

4. The names McPherson and McPhersion are idem sonans.

[See 19 R. C. L. 1334 et seq.]

**Appeal — rejection of evidence — nonreversible error.**

5. It is not reversible error to re-

fuse to admit evidence in a homicide case that accused had told witness that decedent had threatened his life and he was afraid of him, if there was nothing to show the relation of the statement in time to the killing.

[See 13 R. C. L. 923.]

**— description of wounds.**

6. It is not error to permit witness in a prosecution for homicide to describe the wounds in the body of the victim and state that some of them were in the back of the body.

[See 13 R. C. L. 912.]

**APPEAL** by defendant from a judgment of the District Court for Montgomery County (Singleton, J.) convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. N. Foster, W. R. Cousins, and E. H. Carter, for appellant:

The judgment should be arrested and set aside because of the variance between the name of the alleged injured party as shown in the indictment upon which the defendant was tried, and the name of the injured party as shown by the uncontroverted proof, and all the proof on the trial, in that the indictment alleges the name of the alleged injured party as Monroe McPhersion while the proof and all the proof shows that his name was Monroe McPherson.

Stewart v. State, 31 Tex. Crim. Rep. 154, 19 S. W. 908; Perry v. State, 4 Tex. App. 566; Martin v. State, 16 Tex. 240; Collins v. State, 43 Tex. 577; Henderson v. State, — Tex. Crim. Rep. —, 38 S. W. 618; Carnes v. State, 53 Tex. Crim. Rep. 490, 110 S. W. 750; Mindex v. State, — Tex. Crim. Rep. —, 38 S. W. 995; Robert v. State, 2 Tex. App. 6; Nance v. State, 17 Tex. App. 389; Westbrook v. State, 23 Tex. App. 401, 5 S. W. 248; Waters v. State, — Tex. Crim. Rep. —, 31 S. W. 642; McDevro v. State, 23 Tex. App. 429, 5 S. W. 133; Chaney v. State, 59 Tex. Crim. Rep. 284, 128 S. W. 614; Burgamby v. State, 4 Tex. App. 573; Parchman v. State, 2 Tex. App. 241, 28 Am. Rep. 435; Neiderluck v. State, 21 Tex. App. 827, 17 S. W. 467; Brown v. State, 28 Tex. App. 65, 11 S. W. 1022; Harrison v. State, 48 Tex. Crim. Rep. 44, 85 S. W. 1058.

It is highly prejudicial to the defendant, improper and a gross error for the district attorney, in argument to the jury, to go outside of the record and state facts on his own information, not testified to by the witnesses.

Marshall v. State, 76 Tex. Crim. Rep. 386, 175 S. W. 154; Liner v. State, 70 Tex. Crim. Rep. 75, 156 S. W. 211; Grimes v. State, 64 Tex. Crim. Rep. 64, 141 S. W. 261; Johnson v. State, 63 Tex. Crim. Rep. 50, 137 S. W. 1021; Sorell v. State, 74 Tex. Crim. Rep. 100, 167 S. W. 356.

Threats against third persons when they are the jury trying the case are not admissible.

Luttrell v. State, 40 Tex. Crim. Rep. 651, 11 Am. St. Rep. 226, 51 S. W. 930; Lucas v. State, 50 Tex. Crim. Rep. 219, 95 S. W. 1055; Harrison v. State, 47 Tex. Crim. Rep. 393, 83 S. W. 699; Strange v. State, 38 Tex. Crim. Rep. 280, 42 S. W. 551; Brown v. State, 56 Tex. Crim. Rep. 389, 120 S. W. 444.

Mr. Alvin M. Owsley, Assistant Attorney General, for the State:

Lattimore, J., delivered the opinion of the court:

This is an appeal from the judgment of the district court of Montgomery county, by which appellant was adjudged guilty of the murder of one Monroe McPhersion, and given a life sentence in the penitentiary.

The undisputed testimony shows that appellant killed deceased and one Gentry in 1904, and was arrested and placed in jail, from which he escaped, and was a fugitive from justice for many years, being apprehended, tried, and convicted in 1919.

On his trial, appellant took the stand as a witness in his own behalf, and testified in chief, as well as upon his cross-examination, that

he killed both of said men, and gave his reasons for so doing. There was no sort of question raised as to the fact that he shot both said parties with a gun, and killed them.

While on the witness stand, after he had told his story of said killing, on cross-examination the state asked him if it was not a fact that, some three months prior to the date of said trial, he had stated to one Alton Utz as follows: "I killed two men, and twelve men will try me; and if they convict me and don't watch me, I will get some of them."

Appellant denied making the statement. Thereafter, the state placed the said Utz on the stand, and he stated that, at the time mentioned, appellant did make the statement contained in the above quotation.

Appellant reserved a bill of exceptions to the admission of said testimony, which shows that the objection as first made to the testimony of said Utz was that no sufficient predicate had been laid therefor, which objection was overruled, and the witness was permitted to answer. Appellant at once moved to exclude said testimony, upon the ground that the same was not material to any issue in the case, and because the same could only prejudice the jury against appellant, as said statement could only be construed as a threat against the jury. In this connection, counsel for the appellant stated to the court that they had not understood the language used by the state's attorney in laying his predicate, while appellant was on the stand, and hence did not realize that the language imputed to appellant in said predicate question was a threat against the jury, and that, if they had so understood, they would have made the further objection to the testimony of said Utz when it was offered, which was now made the ground of their motion to exclude said testimony, and then moved the court to exclude the testimony, as above stated. This motion was overruled, and appellant took his bill of exception, setting forth the matters just referred to.

The trial court approved said bill, with the explanation that appellant made no objection to the predicate question when same was asked of appellant while on the witness stand. We are of opinion that the action of the trial court, in refusing this motion and in permitting this evidence to remain with the jury, was error. The fact

that no objection was made to the predicate question or answer does not

*Evidence—failure to object to predicate question—effect.*

estop appellant. It is well established that one may not be impeached by proof of statements as to matters not material; and if a party attempting to lay a predicate does so by asking about matters not material, he does so at his peril; and, if the witness answer without objection from the opposite party, such answer ends the inquiry, and the party seeking to lay the predicate is not allowed to prove the falsity of such answer. So it follows, in the instant case, that there

*Witness—impeachment—immaterial matter—effect of answer.*

was no need of objection to the predicate question. Was the matter contained therein material to any issue in the case? We think, in view of appellant's testimony, and admission of the fact that he had killed both said men, that the question and answer sought could shed no light on the case; but if the question had only been, if he had not stated to Utz that he had killed two men, and stopped there, we would have held the matter harmless. If the question be asked as to the materiality of the predicate in its entirety, truth and fairness compel us to say that it was not material to any issue. Not only was the state's proof clear and abundant that appellant killed both of said men, but this was uncontradicted by any evidence of the appellant, and, as stated, he himself had taken the stand and sworn positively that he did kill them. We are unable to see how proof of a statement by him ex

cathedra would have any probative force to establish the fact that he did kill them, and are compelled to believe that such evidence was sought and introduced solely because of the other matters contained therein, besides the statement that appellant had killed the two men. It appears to us that the remainder of said statement contains matters which were most injurious to appellant. Whether the alleged threat against the jury was offered as impeaching evidence, or as an original

**Evidence—of  
threat against  
jury.**

statement made by the accused, it should not have been admitted, or if it was given in the testimony by reason of the failure to make proper objection, under a misapprehension, then it should have been stricken out on a motion. It is very difficult for us to see how a jury could be that fair and impartial tribunal which is guaranteed by our Constitution, when it was revealed to them by testimony that the man whose life and liberty were dependent on their calm judgment had said of them that, if they decided that case against him, they would better watch out, as some of them would be his next victims.

"Mankind is unco weak, and little to be trusted;

Should self the wavering balance shake,  
'tis rarely right adjusted."

—were the truthful words of a great poet-philosopher; and when the jury, who were just ordinary humans, were told that their own safety, and lives even, were threatened by the man on trial, it might have been thus made much easier for them to send the threatener to the penitentiary for life, and thus put him in a place where he could not do them any harm. We think injury probable from the admission of this testimony, and, in view of this verdict, sufficient to demand the reversal of this case.

In our opinion, the trial court correctly overruled the motion of appellant for a peremptory instruction of not guilty, upon the ground of variance in the name of deceased,

as alleged in the indictment and as shown by the testimony. We are of opinion that "Mc-Pherson" and "Mc-Phersion" are idem sonans. See § 23, Branch's Anno. Penal Code; article 456, Vernon's Code Crim. Proc., and authorities cited.

The contentions arising from the argument of counsel for the state will likely not occur on another trial.

By two bills of exception, a review is sought of the action of the trial court in refusing to allow the witness Johns to testify to certain statements made to him by the appellant prior to the homicide. The statements were substantially that appellant told witness that he believed the presence of the witness with appellant kept deceased and Gentry from killing him on one occasion; and also that appellant told him that said parties had threatened his life, and he was afraid to have lights in his house at night, or sit by an open window, etc. This evidence was offered as showing the condition of appellant's mind, and was objected to as being self-serving. As presented here, no error appears. The relation in point of time of said evidence to the homicide is not shown, and, for aught we can tell, the alleged statement was made months prior thereto. On another

**Appeal—rejection of evidence—nonreversible error.**

trial, if it should appear that said conversation and statement occurred reasonably near the date of the homicide, we think same should be admitted. *Cole v. State*, 48 Tex. Crim. Rep. 443, 88 S. W. 341. Practically the same evidence was admitted when said witness detailed what occurred at the time he and appellant met and talked with one Palmer.

We do not think there was any error in allowing the witnesses Sterrett and Anderson to describe wounds on the bodies of deceased and Gentry, and to state that said wounds, or some of

**—description of wounds.**

them, were on the backs of said bodies.

The charge of the trial court was exceptionally full and fair. The special charges 1 and 2 asked by appellant were properly refused. As we read this record, and the evidence of appellant, there is nothing therein to support the proposition that appellant, just prior to the homicide, accosted the deceased or Gentry, and demanded that they leave his land and desist from cutting and removing his timber, or that he armed himself for the purpose of seeking an interview with them, to protect his property. He said in his testimony that he was hunting for his horse, and kept hearing a bell, and on going up the bottom he heard loud talking and cursing and went to it, and saw Gentry and deceased, and he went

right up to them, and said: "Now, Gentry, you are taking my posts, are you?" And that Gentry denied it with an oath, and further called him an opprobrious name, and grabbed a stick and started toward him; and he threw his gun on Gentry, who turned away, and that he shot Gentry. That deceased then started toward the wagon on which there were an ax and a few posts, and he shot deceased before he got to the wagon.

The witness Jones, who saw appellant first after the shooting, said that appellant told him that he had shot Gentry and deceased and said that they cursed him, and that he could not take that. This evidence did not call for the issues contained in said special charge.

For the errors mentioned, the judgment is reversed, and the cause remanded.

### ANNOTATION.

#### Admissibility of threats by accused against jury or prosecuting attorney in criminal case.

Research has disclosed little authority on the question under annotation other than the reported case (*HARDY v. STATE*, ante, 1357), which holds that threats against the jury, made by the defendant shortly before the trial, are not admissible, in case they tend to prejudice the jury against him. Such threats, it might be contended, should be admitted, as tending to show the character of the accused, or his consciousness of guilt or innocence. But while, on these grounds, it seems, under the authorities cited in the annotation, there may be circumstances where threats by the accused against those engaged in the prosecution or trial would be admissible, this would not seem to be the general rule, and such evidence, because of its clear tendency to prejudice the accused, should be received with great caution.

Threats against the prosecuting attorney, made by the accused after the crime, at a time when no prose-

cution was pending against him, and he had no reason to anticipate that he was to be prosecuted, were held inadmissible in *Gawn v. State* (1896) 13 Ohio C. C. 116, 7 Ohio C. D. 19, where they were made during, or soon after, proceedings before the grand jury in which the prosecuting attorney was attempting to secure an indictment against a detective employed by the defendant to trace rumors imputing the crime to him, and had relation to such proceedings. The court said that the only ground on which the admission of such threats could stand was that the declarations were of such a character and made under such circumstances as to indicate a consciousness of guilt in the mind of the accused as to the charge under investigation; that if one suspected of crime undertakes to obstruct a full investigation of his guilt by the destruction of evidence, or attempts by intimidation to deter the public prosecutor from doing his full duty in the matter, the inference

naturally arises that his conduct is to be attributed to a consciousness of guilt; but that under the circumstances of that case it seemed reasonably certain that the hostility expressed by the accused toward the prosecuting attorney arose solely out of the attempt by such attorney to indict the detective, and the means used to accomplish this purpose, and that the accused did not contemplate by the alleged threats any obstruction of a prosecution against himself; that the evidence did not, therefore, tend to show consciousness of guilt, and was incompetent, and its admission prejudicial error.

That threats made by the defendant in a criminal case, after the beginning of the prosecution, against those engaged therein, may be admissible under some circumstances to show the character of the accused, is held in *State v. Rorabacher* (1865) 19 Iowa, 154. In sustaining a conviction for burglary, the court said: "This instruction was asked: 'Any threats made by the defendant, since the commencement of this prosecution, against the parties engaged therein, such as threatening to have satisfaction or revenge on such parties, is not evidence that can be considered by the jury in determining the guilt or innocence of defendant.' This was given, the court adding, 'except as links in a chain of testimony to show persistency in the crime charged.' It is difficult to perceive the necessity of this modification or addition, and yet we cannot say that it was error. The instruction itself was not correct for all cases. We can readily see that threats thus made might seem to indicate a mind equal to the commission of the crime charged or any other. While an innocent man might use such threats, yet they are more consistent with a wicked disposition than a life of honesty or integrity. And when the testimony shows, as in this case, that the probable criminals were discovered by a series of long-continued and well-conceived plans, persistently carried out by police officers and detectives, admitted into the confi-

dence of the prisoners, expressions and threats may have been made and used from which the jury could see a determination to persist in the crime, and the development of a feeling extremely inconsistent with innocence. If the modification was susceptible of the construction that the court meant thereby that defendant admitted, by such threats, the truth of the charge against him, it would, of course, be erroneous. This, however, is not its fair construction. All that is meant is that such threats are only proper as showing the mind, spirit, and purpose of the defendant, in his defense and in relation to the crime charged."

In *People v. Bezy* (1885) 67 Cal. 223, 7 Pac. 643, 6 Am. Crim. Rep. 508, the court, in holding that threats made by the defendant against the brother of the deceased were not admissible on a trial for murder, said that while threats against a deceased are admissible to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased; and that the evidence was inadmissible to show the general character of the defendant as to peace and quietness, for evidence of particular facts was not admissible on this issue.

And in *Clinton v. State* (1908) 16 Fla. 57, 47 So. 389, it was held that on a trial for arson, a threat made by the accused to "get even" with the attorney for the owner of the dwelling burned was not admissible, when it was clearly shown that the threat was directed against the attorney personally, and not the client.

It was held in *State v. McHamilton* (1911) 128 La. 498, 54 So. 971, that in a trial for shooting with intent to murder, threats made by the deceased against third persons, or against a class to which the prosecuting witness did not belong, are inadmissible, and that the admission of threats made by the accused about an hour and a half before the shooting against a class to which it was not shown the prosecuting witness

belonged, which doubtless had the effect of impressing the jurors with the view that the accused was a malicious person generally, who disregarded human life, and was bent upon murdering anybody or everybody, was reversible error.

There are, of course, a number of other cases, such as *Henson v. State* (1899) 120 Ala. 316, 25 So. 23, and *Carr v. State* (1888) 23 Neb. 749, 37 N. W. 630, supporting the general proposition, apparently well established, that a mere general threat made by the accused, or one directed against some other person than the victim or the class to which he belongs, is not admissible against him.

The annotation does not purport to cover cases of threats against witnesses, but attention is called to several decisions of this nature, among possibly others, because of their relationship to the class of cases under consideration.

In *People v. Chin Hane* (1895) 108

Cal. 597, 41 Pac. 697, it was held that in a trial for murder evidence was admissible of threats made by the defendants, while in jail for the killing, against a witness who came to the jail and identified them. The court said that threats made by a defendant against a witness whom he expects to testify against him, with the evident purpose of intimidating the witness, are proper evidence; and that the fact that the defendants were in custody at the time was wholly immaterial.

And threats by the accused in a criminal case to whip certain witnesses for the state were held admissible in *Deisher v. State* (1916) 80 Tex. Crim. Rep. 428, 190 S. W. 729, the court stating that the effect of the threat would at least tend to show that the defendant was trying to prevent the witnesses from testifying against him, and that this would be a circumstance against him.

R. E. H.

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GEORGE J. SIEDLER et al.

v.

JACOB S. WALN et al., Appts.

*Pennsylvania Supreme Court — February 23, 1920.*

(— Pa. —, 109 Atl. 643.)

**Easements — reservation — who entitled to benefit.**

1. A reservation by the owner of a parcel of land containing only his residence, when selling a portion of the tract, of a right of way to himself, his heirs and assigns, being the owners, tenants, and occupiers for the time being of the ungranted parcel, inures to the benefit of all occupiers after subdivision of such parcel into building lots, their families and others who, through permission of such owners, may desire to visit their homes for any lawful purpose.

[See note on this question beginning on page 1368.]

— increase of use.

2. Under a reservation of a right of way to the grantor, his heirs and assigns, the grantor's property may be

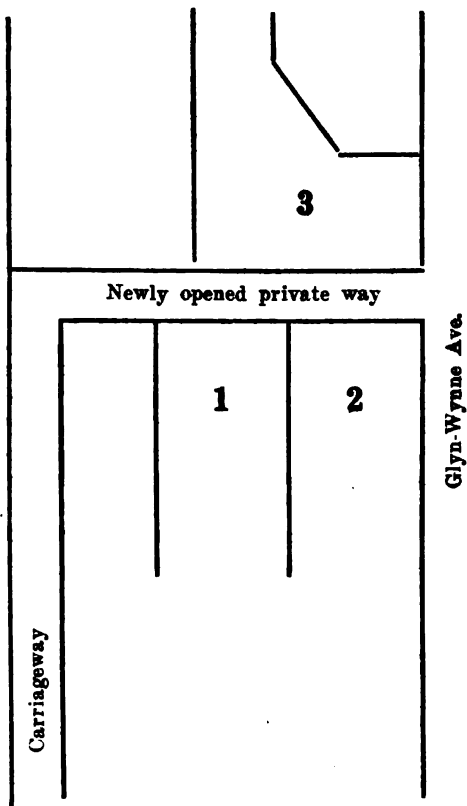
improved so as to increase the use of the easement.

[See 9 R. C. L. 787.]

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APPEAL by defendants from a decree of the Court of Common Pleas No. 2, for Philadelphia County (Rogers, J.), in favor of plaintiffs in a suit to restrain defendants from obstructing an alleged right of way over a paved carriageway. *Affirmed.*

The situation out of which this controversy arises appears from the following plat:



The parcels numbered 1, 2, and 3, the owners of which are now claiming a right to use the carriageway, do not border upon it, and the claim of right rests entirely upon the fact that such parcels were originally part of the larger tract having a right to the use of the way.

The further facts sufficiently appear in the opinion of the court.

Messrs. George Douglass Hay, John Lewis Evans, and William A. Schnader, for appellants:

Mahan's act in opening for public use apple orchard land and connecting it with defendants' carriageway without preventing the public from using the two ways as a through highway from Glyn-Wynne avenue to Gray's lane so increased the burden over defendants' carriageway, and changed the character of the user, as to amount to an extinguishment of Mahan's easement over defendants' car-

riageway. Thereafter Mahan had no right of easement which he could convey to the plaintiffs.

Washb. Easements & Servitudes, p. 627; McKinney v. Pennsylvania R. Co. 222 Pa. 48, 21 L.R.A. (N.S.) 1002, 70 Atl. 946; American Academy of Music v. Weldon, 32 W. N. C. 307; Riefler & Sons v. Wayne Storage Water Power Co. 232 Pa. 282, 81 Atl. 300; Schmoele v. Betz, 212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525; Kirkham v. Sharp, 1 Whart. 323, 29 Am. Dec. 57; Darlington v. Painter, 7 Pa. 473; Jamison v. M'Credy, 5 Watts & S. 129; Coleman's Appeal, 62 Pa. 252, 14 Mor. Min. Rep. 221; Allen v. Scheib, 257 Pa. 6, L.R.A. 1917F, 446, 101 Atl. 102; Gowen v. Philadelphia Exch. Co. 5 Watts & S. 141, 40 Am. Dec. 489.

Even if the easement over defendants' carriageway was not extinguished, plaintiffs are not in a position to invoke equitable relief.

McCullough v. Broad Exch. Co. 101 App. Div. 566, 92 N. Y. Supp. 533; American Academy of Music v. Weldon, 32 W. N. C. 307; Crosland v. Pottsville, 126 Pa. 511, 12 Am. St. Rep. 891, 18 Atl. 15.

If the easement was extinguished, the defendants were and are entitled to help themselves.

Crosland v. Pottsville, *supra*; Allen v. Scheib, 257 Pa. 6, L.R.A. 1917F, 446, 101 Atl. 102.

If the easement is not extinguished, and if the plaintiffs are entitled to equitable relief (although defendants contend they are not), plaintiffs cannot prevent the defendants from taking effective steps consistent with such rights as the plaintiffs may have, to exclude the public from defendants' carriageway.

Kohler v. Smith, 3 Pa. Super. 176; Bosch v. Hoffman, 42 Pa. Super. 313; Hartman v. Fick, 167 Pa. 18, 46 Am. St. Rep. 658, 31 Atl. 342; Mercantile Library Co. v. Philadelphia Trust Co. 235 Pa. 5, 83 Atl. 592.

If defendants' rights are being invaded, it is immaterial whether they have sustained or are sustaining material damage.

Schmoele v. Betz, 212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525.

Mr. Thomas Raeburn White, for appellees:

Not only plaintiffs, but their families, servants, guests, tradesmen, and anyone lawfully visiting them, are entitled to use the way.

*Gunson v. Healy*, 100 Pa. 42; *Benner v. Junker*, 190 Pa. 423, 43 Atl. 72; *Com. v. Burford*, 225 Pa. 93, 73 Atl. 1064; *Harper v. Greenmount Cemetery Co.* 15 W. N. C. 172; *Citizen's Electric Co. v. Davis*, 44 Pa. Super. Ct. 138.

The opening of Orchard lane did not extinguish the easement.

*McCullough v. Broad Exch. Co.* 101 App. Div. 566, 92 N. Y. Supp. 533, affirmed in 184 N. Y. 592, 77 N. E. 1191; *Mendell v. Delano*, 7 Met. 176; *Walker v. Gerhard*, 9 Phila. 116.

Moschzisker, J., delivered the opinion of the court:

Plaintiffs filed a bill in equity praying defendants be restrained from obstructing, closing, or interfering with the former's use of a certain private road, or "paved carriageway." After final hearing on bill, answer, and proofs the injunction was granted. Defendants have appealed.

Prior to March 1, 1887, Frederick Sylvester owned a tract of land at Haverford, Pennsylvania, consisting of about 7 acres, bounded on the south by Gray's lane, on the east by Glyn-Wynne avenue, on the north by Booth's lane, and on the west by lands of one Dotson. The "paved carriageway" here involved connected the Sylvester's residence with the two above-mentioned lanes, the southern half of this private road, the part now in controversy, extending along the extreme western boundary of the tract.

On the date last mentioned Sylvester conveyed the Gray's lane front of his land, some 246 feet in depth, to Roland Evans. The latter forthwith deeded the western portion thereof, a little over one third of his purchase, to the defendant Lydia L. Waln.

In the deeds to Evans and Waln, there is reserved to "Frederick Sylvester, his heirs and assigns, being the owners, tenants, and occupiers for the time being of the adjoining piece of land to the northward," the "free use, right, liberty, and privilege" of the carriageway in question, 16 feet wide, running along the westernmost end of the land granted in the two deeds, "from

said Gray's lane to said adjoining piece of land to the northward, . . . for all purposes of ingress, egress, and regress as fully and effectually as though said paved carriageway was a public highway."

The above-quoted reservation states that the carriageway is to be enjoyed by "Frederick Sylvester, his heirs and assigns, being the owners, tenants, and occupiers for the time being" of the lands to the north, "in common with the said Roland Evans, his heirs and assigns, being the owners, tenants, and occupiers for the time being" of the balance of the tract.

From the date of his conveyance in 1887 until March, 1913, Sylvester remained the owner of the land north of the plot conveyed to Evans, and during this period the paved carriageway was used only for family purposes by the occupants of the Sylvester and Evans or Waln properties; the road being marked at both the northern and southern entrances thereto by gateways.

March 27, 1913, Sylvester conveyed to one Mahan a portion of the original tract immediately north of the premises theretofore deeded to Evans, giving and granting to Mahan the same use of the paved carriageway which previously had been reserved in the deed to Evans; but Sylvester, by special covenant, then and there extinguished the right of passage possessed by himself, his heirs and assigns, and all future owners and occupiers of the remainder of the original tract (being that portion lying north of the part conveyed to Mahan), over the roadway leading southward therefrom to Gray's lane, being the paved carriageway in question.

The piece of land conveyed to Mahan runs clear across the Sylvester tract from east to west more than 400 feet in width. Mahan opened through the center of this property a private road 33 feet wide, extending from Glyn-Wynne avenue on the east to the western boundary line of the tract, at which point it con-



nected with the paved carriageway. Prior to plaintiffs' bill there was erected on the Glyn-Wynne avenue entrance to this new road a sign, 41 inches long by 36½ inches high, reading as follows: "Private Road. Persons not having business with residents of this property are forbidden to use this road. Any violation of this notice will be prosecuted as a trespass."

Mahan laid out building lots on either side of the 33-foot road, some of which were conveyed by him to plaintiffs. In each instance the deed granted the privilege of the paved carriageway and reserved, for the benefit of the balance of the land, a like right.

From the time the Mahan land was thus divided into building lots, and occupied by several homes, the use of the carriageway increased, and this despite the fact that such way was legally and physically shut off from the easement of the remainder of the Sylvester tract to the north, and its use had been (as stated by the chancellor in his findings) also "lessened by the fact that some of the traffic to and from plaintiffs' properties [which had a right to use the paved carriageway] enters and leaves by way of Glyn-Wynne avenue."

The defendants, however, claiming that the opening of the 33-foot road practically makes a public thoroughfare from Glyn-Wynne avenue to the paved carriageway, and that this has so enlarged the use of the latter as to constitute an abuse of the privilege therein possessed by plaintiffs, threatened to erect a permanent barrier at the northern entrance to the way, and thus to exclude any and all future use thereof by others than the occupants of the Waln lot. The present bill was filed to prevent the erection of this barrier.

The chancellor finds as a fact that the paved carriageway has been employed since 1913 "by plaintiffs and their families, in walking and riding over it to and from the railroad station and stores in Haverford,"

that "their friends use it by vehicles, and tradespeople, who have business with the plaintiffs, also use it with their wagons and automobiles," adding: "Undoubtedly it is used to some extent by people other than those to whom the privilege is given by the reservation contained in the deeds," but that this latter use is merely incidental (not specially encouraged by plaintiffs), and not of a character materially to injure defendants.

The court below concluded as a matter of law that the right of way over the road in question might be "used and enjoyed by those who owned or occupied any part of the dominant tenement, for any purpose for which it may from time to time be legitimately applied," and that "only those who may be properly regarded as trespassers . . . can be excluded," adding that its present or attempted use by those "who have no right or authority so to do gives defendants no warrant or license to close the way or interfere with the lawful and legitimate use thereof by plaintiffs."

On these findings and conclusions, defendants are enjoined from closing the carriageway or in any manner "interfering with plaintiffs in their use" thereof "in accordance with their rights as set forth in their respective deeds." The decree further states: "Plaintiffs and defendants are to take such steps as will give notice to the public that the paved carriageway is a private road."

We see no error in the decree as entered.

The court below, in answer to one of plaintiffs' requests, states a conclusion of law to the effect that plaintiffs, their families, servants, visitors, "or others to whom they may grant permission," are entitled to the use of the way in controversy. This conclusion is justly complained of as too broadly stating plaintiffs' rights.

While we cannot agree with the suggestion of defendants that the words of the original reservation re-

strict the use of the carriageway to "the owners, tenants, and occupiers for the time being" of the Sylvester tract, no more can it tenably be maintained that Sylvester retained, for himself and his assignees, an easement in gross over the road, which could be granted by his or their "permission" to whomsoever he or they pleased. The words of the reservation, "owners, tenants, and occupiers," were evidently intended for the very purpose of showing that the easement was not in gross, but appurtenant to the land (*Jamison v. M'Credy*, 5 Watts & S. 129, 140); and, being so appurtenant, of course, the privilege includes not only the right to use the road by the respective owners for the time being of the several pieces of the original tract, but also

Easements—  
reservation—  
who entitled to  
Benefit.

by their families, and others who, through permission of such owners, may desire to visit their homes for any lawful purpose. This marks the extent of the easement. *Com. v. Burford*, 225 Pa. 93, 99, 73 Atl. 1064; *Gunson v. Healy*, 100 Pa. 42, 46.

The court below did not err in stating, as a matter of law, that, when the easement was created, the parties must have anticipated the Sylvester property would not always remain in its then present condition, but might be

—increase of  
use.

improved in the future so as to increase the use of the carriageway. *Benner v. Junker*, 190 Pa. 423, 429, 43 Atl. 72; 9 R. C. L. 787.

"As a rule, it seems that no unlawful additional burden is imposed on the lands of a servient estate by an increased number of persons using an unlimited right of way to which the land is subject; and so, if such a right is granted to a person who afterwards erects tenement houses on his lands, the way may be

used by his tenants." 9 R. C. L. 791, § 47.

We cannot agree that the facts of this case show plaintiffs, or their predecessors in title, to have participated in any endeavor, the purpose and effect of which was to increase the burden on defendants' servient estate, of a character and extent to justify a finding that the former had renounced, abandoned, or extinguished their rights of easement. While "it is difficult, if not impossible, to lay down a clear and definite rule to determine what may be considered a proper and reasonable use [of an easement], as distinguished from an unreasonable and improper one, and such questions must, of necessity, be usually left to the determination of a jury or the trial court, as questions of fact" (9 R. C. L. p. 787), here the chancellor has found the facts against defendants; and we are not convinced of reversible error in that regard.

The case of *McKinney v. Pennsylvania R. Co.* 222 Pa. 48, 21 L.R.A.(N.S.) 1002, 70 Atl. 946, in no sense governs the present one, for the facts materially differ therefrom. In the *McKinney* Case the complainant's right in the alleged private way, as a private way, had been extinguished by his active participation in legal proceedings whereby the way was turned into a public road. After this statement of fact we need add nothing else in order to distinguish the two cases.

The many authorities cited by counsel on both sides have been examined and considered, but we do not feel that any useful purpose would be served by specially mentioning others than these already referred to; nor is it necessary to pass specifically upon each of the twenty-two assignments of error.

The decree is affirmed; costs to be divided.

## ANNOTATION.

**Right of owners of parcels into which dominant tenement has been divided, to use a right of way.**

It is a general rule, where there is an easement of way appurtenant to a tenement, that the subsequent owner of a part of such tenement has the right to use the way as appurtenant to his particular part of the land.

California.—*Currier v. Howes* (1894) 103 Cal. 437, 37 Pac. 521 (stating the rule).

Colorado.—*Durkee v. Jones* (1900) 27 Colo. 159, 60 Pac. 618.

Connecticut.—*C. B. Alling Realty Co. v. Olderman* (1916) 90 Conn. 241, 96 Atl. 944.

Illinois.—*Garrison v. Rudd* (1858) 19 Ill. 558 (as stating the rule); *Morrison v. King* (1871) 62 Ill. 30.

Iowa.—*Brossart v. Corlett* (1869) 27 Iowa, 288 (obiter).

Massachusetts.—*Underwood v. Carney* (1848) 1 Cush. 285; *Whitney v. Lee* (1861) 1 Allen, 198; *Fox v. Union Sugar Refinery* (1872) 109 Mass. 292; *Miller v. Washburn* (1875) 117 Mass. 371; *Boland v. St. John's Schools* (1895) 163 Mass. 229, 39 N. E. 1035; *Bailey v. Agawam Nat. Bank* (1906) 190 Mass. 20, 3 L.R.A.(N.S.) 98, 112 Am. St. Rep. 296, 76 N. E. 449 (as probably approving the rule); *Ball v. Allen* (1914) 216 Mass. 469, 103 N. E. 928, Ann. Cas. 1917A, 1248 (as stating the rule).

Minnesota.—*Dawson v. St. Paul F. & M. Ins. Co.* (1870) 15 Minn. 136, Gil. 102, 2 Am. Rep. 109 (as stating the rule).

New Jersey.—*Trenton v. Toman* (1908) 74 N. J. Eq. 702, 70 Atl. 606.

New York.—*Lansing v. Wiswell* (1848) 5 Denio, 213, affirmed in (1848) 5 How. Pr. 77.

Ohio.—*Sachs v. Cordes* (1896) 11 Ohio C. C. 145, 5 Ohio C. D. 67.

Pennsylvania.—*Watson v. Bioren* (1814) 1 Serg. & R. 227, 7 Am. Dec. 617; *Myers v. Birkey* (1863) 5 Phila. 167; *Walker v. Gerhard* (1873) 9 Phila. 116 (a tenant of part); *Zell v. First Universalist Soc.* (1888) 119 Pa. 390, 4 Am. St. Rep. 654, 13 Atl. 447 (a tenant of part); *Ehret v. Gunn* (1895)

166 Pa. 384, 31 Atl. 200; *SIEDLER v. WALN* (reported herewith) ante, 1363; *Citizens' Electric Co. v. Davis* (1910) 44 Pa. Super. Ct. 138.

Utah.—*Rollo v. Nelson* (1908) 34 Utah, 116, 26 L.R.A.(N.S.) 315, 96 Pac. 263 (as recognizing the rule).

Vermont.—*Dee v. King* (1905) 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839.

Virginia.—*Linkenhoker v. Graybill* (1885) 80 Va. 835.

West Virginia.—*Henrie v. Johnson* (1886) 28 W. Va. 190.

It will be seen that it is held in the reported case (*SIEDLER v. WALN*, ante, 1363) that a right of way appurtenant to a tenement may be used and enjoyed by those who use or occupy any part of such tenement for any purpose to which it may be legitimately applied.

In *Methodist Protestant Church v. Laws* (1893) 7 Ohio C. C. 211, 4 Ohio C. D. 562, it was said that "the law undoubtedly in America is, that one having an easement by grant may assign that easement with the dominant estate, and the easement goes to every portion of the dominant estate assigned, however many the tenants may be."

Where there is a right of way appurtenant to a farm, and the farm is devised in two separate parcels, each devisee thereby acquires a right of way as appurtenant to his land. *Lansing v. Wiswell* (N. Y.) supra.

Where an owner of five city lots had built a building thereon, the entrance to the second story of which was by a single entrance and stairway, and on his death the widow was allotted some of the lots and the building thereon, it was held that the owners of the rest of the building could not tear down the stairway. *Morrison v. King* (1871) 62 Ill. 30.

That the subdivision in question does not abut upon the way does not alter the rule. *C. B. Alling Realty Co. v. Olderman* (1916) 90 Conn. 241, 96 Atl. 944; *Fox v. Union Sugar Ref.*

Co. (1872) 109 Mass. 292; Boland v. St. John's Schools (1895) 163 Mass. 229, 39 N. E. 1095; Ehret v. Gunn (1895) 166 Pa. 384, 31 Atl. 200; SIEDLER v. WALN (reported herewith) ante, 1863; Henrie v. Johnson (W. Va.) supra.

But in Dawson v. St. Paul F. & M. Ins. Co. (1870) 15 Minn. 137, Gil. 102, 2 Am. Rep. 109, it was held that the plaintiff, owning a part of what he claimed to be the dominant tenement, could not enjoin building on the alleged right of way, where it did not appear that his land abutted on such way, unless he could show a right either by grant or necessity to reach the way over the intervening lands. It will be observed that this raises the interesting question as to whether the court is concerned with the right of a party to reach the right of way.

In a partition between the two tenants in common of lot 1, which had a right of way over lot 2, the commissioners, in setting off to the defendant a part of lot 1 which did not touch lot 2, refused to give him a right of way over the rest of lot 1 to reach lot 2. The court, in affirming the decision, said: "But it may be said that, unless Johnson is allowed a right of way over lot A, which separates lot B from lot No. 2, he cannot get to lot No. 2, so as to enjoy his easement over it; and that therefore the decree complained of does in fact deprive him of his right of way over lot No. 2. This may be true; but it is also true that the decree does not attempt to take from him his right of way over No. 2. It merely denies him a right of way over lot A, and determines nothing as to his right of way across No. 2. If he can reach this lot in any legal manner, he has the undoubted right to use his right of way across it. As between him and the owner of lot No. 2, his right of way over this lot is entirely unaffected by the decree." Henrie v. Johnson (1886) 28 W. Va. 190.

In Fox v. Union Sugar Refinery (1872) 109 Mass. 292, an owner of land divided it into lots by a plan which included two passways, the first joining the second as the top of a T,

the first passway connecting two streets and the second passway running from the first passway to a third street. Later he sold to the plaintiff lots which abutted only on the second passway, one of them abutting also on the second street. It was held that the plaintiff was entitled to use not only the second passway on which his lots abutted, but also the first passway, although to get to the first passway he would apparently have to use a part of the second passway beyond the boundary of his lots. The court said: "The grantee of an interior lot upon such a plan, referred to in his deed, cannot be restricted in his rights to the single passageway upon which he is bounded. The law will imply in his favor the right to use the passageway upon which he is bounded, not only for the purpose of going back and forth upon it, but also for the purpose of reaching the public ways, by means of such other avenues as his grantor has, by his plan, represented to exist. If there are two or more of such avenues, it is not for the grantor to say that his grantee shall be restricted to one only. The deed is to be taken most strongly against him, and in furtherance of the beneficial operation of his grant."

And where the owner of the dominant tenement was entitled to use several connecting passways, after sale of a part of such tenement the owner of the part so sold was not confined to the use of the passways touching his premises, although the other passways were not necessary to him. Boland v. St. John's Schools (1895) 163 Mass. 229, 39 N. E. 1035.

In a case where the defendant was cut off from direct access to the right of way, but was able to reach it through an adjoining lot owned by him, the court said that the deed "to the defendant of the front part of the lot did not, either by virtue of the division or of its detachment from the portion adjoining the passway, destroy the easement as appurtenant to it, or deprive it of the benefit of the easement in so far as there might exist means for its enjoyment. In the present case such means existed through

access to the way over the Beardsley lot." *C. B. Alling Realty Co. v. Olderman* (1916) 90 Conn. 241, 96 Atl. 944.

The question whether the use of the way by the tenants of parts of the dominant tenement will enhance the burden upon the servient tenement seems to be very little developed by actual decisions. In one or two of the authorities the matter is referred to. Thus, in *Henrie v. Johnson* (W. Va.) supra, the court said: "The law seems to be well settled that where land is granted with a right of way over other lands, the right is appurtenant to every part of land so granted, and the grantee of any part, no matter how small, is entitled to it, provided no additional burden is thereby created upon the servient estate." So, in *Outerbridge v. Phelps* (1883) 13 Abb. N. C. (N. Y.) 117, where the point was not material to the case as decided, it was said at special term: "The general rule undoubtedly is, that where an easement is secured to a dominant estate, and is designed to benefit the same, in whosoever hands it may be, it will inure to the benefit of the owners of the several parts into which it may be divided, provided the burden upon the servient estate is not thereby enhanced."

There is, however, at least one case where the court considered that the use of a waterway by the owner of a part of the dominant estate would be

unreasonable as against the grantor of the easement.

Thus, in *Bower v. Hill* (1835) 2 Bing. N. C. 339, 132 Eng. Reprint, 133, where the owner of an inn near a watercourse sold land between the inn and the watercourse to the plaintiff, who claimed that there was an obstruction of a way along the watercourse which had formerly been used by the proprietor of the inn, the court affirmed a nonsuit on the ground that "upon the evidence the right was found to belong to the King's Head Inn and yard, as one entire subject, and not to the frontage occupied by the plaintiff." The proprietor of the inn had ceased to use the watercourse, but the court considered that he might resume the use, "and the consequence would be, if the plaintiff were held to be entitled to the right of passage, that two different persons would be entitled to use it for themselves and their servants, with boats and barges, or, indeed, as many different persons as possessed any share of the frontage. This would be an unreasonable construction against the grantor, who may have been contented to grant the right to the occupier of the King's Head Inn and yard, from his knowledge of the degree of user which would follow from the grant when so limited."

The subject of rights of way across railroads is excluded. B. B. B.

LAURA A. COLLINS et al., Appts.,

v.

ADA L. LONG et al., Respts.

*Oregon Supreme Court — January 27, 1920.*

(— Or. —, 186 Pac. 1038.)

**Will — guardianship — testamentary capacity.**

1. That one is under guardianship does not destroy his right to make a will if he has sufficient mental capacity to do so.

[See note on this question beginning on page 1375.]

— effect of forgetfulness.

2. That a ninety-four-year old testator is forgetful, does not recognize persons and places, and at times has

illusions does not invalidate his will if he knew what his property consisted of and how he wanted to dispose of it.

**APPEAL** by plaintiffs from a decree of the Circuit Court for Linn County (Bingham, J.) reversing a decree of the County Court in their favor in a suit to set aside the will of Samuel G. Collins, deceased. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Mr. N. M. Newport, for appellants:

The testator was incompetent to make a will because of his mental condition.

Sanford v. Hanan, 80 Or. 269, 156 Pac. 1040; Graves v. Graves, 132 Iowa, 199, 10 L.R.A.(N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1106; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Allen v. International Text Book Co. 201 Pa. 579, 88 Am. St. Rep. 835, 51 Atl. 323; Coffey v. United States, 116 U. S. 445, 29 L. ed. 687, 6 Sup. Ct. Rep. 437; Darby v. Hindman, 79 Or. 223, 153 Pac. 56; Mendenhall's Will, 43 Or. 545, 72 Pac. 318, 73 Pac. 1033; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Hubbard v. Hubbard, 7 Or. 42; King v. Tonsing, 87 Or. 237, 170 Pac. 319; Stewart v. Rowell, 80 Or. 617, 157 Pac. 1064; Re Diggins, 76 Or. 341, 149 Pac. 73; Re Hart, 65 Or. 265, 132 Pac. 526; Tyler v. Gardiner, 35 N. Y. 585; Re Van Ness, 78 Misc. 592, 139 N. Y. Supp. 499; Re Van Houten, 147 Iowa, 725, 140 Am. St. Rep. 344, 124 N. W. 886; 1 Redf. Wills, p. 136; Hoffman v. Hoffman, 192 Mass. 418, 78 N. E. 492; Thomp. Wills, 1916 ed. p. 78, § 84; 2 Alexander, Wills, 1912 ed. p. 381, § 583; Greenwood v. Cline, 7 Or. 22.

Evidence was sufficient to establish undue influence on the part of testator's daughter and her husband.

Holman's Will, 42 Or. 359, 70 Pac. 908; Re Diggins, 76 Or. 341, 149 Pac. 73; Greenwood v. Cline, 7 Or. 17; Re Turner, 51 Or. 8, 93 Pac. 461; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Tyler v. Gardiner, 35 N. Y. 592; Soper v. Cisco, 85 N. J. Eq. 165, 95 Atl. 1016, Ann. Cas. 1918B, 454; Burton v. Burton, 17 Ann. Cas. 991, note; Richmond's Appeal, 21 Am. St. Rep. 96, and note, 59 Conn. 226, 22 Atl. 82; Baur v. Cron, 71 N. J. Eq. 743, 66 Atl. 535; Hensan v. Cooksey, 237 Ill. 620, 127 Am. St. Rep. 345, 86 N. E. 1107; Post v. Hagan, 71 N. J. Eq. 234, 124 Am. St. Rep. 997, 65 Atl. 1026; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Garvin v. Williams, 44 Mo. 465, 100 Am. Dec. 314; Weston v. Teufel, 213 Ill. 292, 72 N. E. 908; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; 1 Woerner, Administration, 2d ed. § 32; Purdy v. Hall, 134 Ill. 298, 25 N. E.

645; Bush v. Delano, 113 Mich. 321, 71 N. W. 628; Boyd v. Boyd, 66 Pa. 283; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; Henry v. Hall, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187; Scattergood v. Kirk, 192 Pa. 263, 43 Atl. 1080; Marx v. McGlynn, 88 N. Y. 357; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 719, 5 S. W. 7; Haydock v. Haydock, 34 N. J. Eq. 574, 38 Am. Rep. 385; 2 Alexander, Wills, 1912 ed. p. 871, § 576; Hoffman v. Hoffman, 192 Mass. 418, 78 N. E. 592.

Mr. H. H. Hewitt, for respondents:

The mental capacity of the testator is to be tested as of the date of the execution of the will, and, other things being equal, the evidence of the attesting witnesses, and, next to them, of those present at the execution, is most to be relied upon.

Clark v. Ellis, 9 Or. 147; Pickett's Will, 49 Or. 150, 89 Pac. 377; Chrisman v. Chrisman, 16 Or. 138, 18 Pac. 6; Lee v. Lee, 15 S. C. L. (4 M'Cord) 183, 17 Am. Dec. 722.

A testator may not have sufficient memory or vigor of intellect to make and digest all parts of a contract, and yet be competent to direct the distribution of his property by will.

Chrisman v. Chrisman, 16 Or. 137, 18 Pac. 6; Stevens v. Myers, 62 Or. 381, 121 Pac. 434, 126 Pac. 29.

If a testator, at the time he executes his will, understands the business in which he is engaged and has knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity to make a will, notwithstanding his old age, sickness, debility of body, or extreme distress.

Luper v. Werts, 19 Or. 122, 23 Pac. 850; Franke v. Shipley, 22 Or. 104, 29 Pac. 268; Swank v. Swank, 37 Or. 439, 61 Pac. 846; Wade v. Northup, 70 Or. 578, 140 Pac. 451; Re Diggins, 76 Or. 345, 149 Pac. 73; Ames v. Ames, 40 Or. 504, 67 Pac. 737; Stevens v. Myers, 62 Or. 381, 121 Pac. 434, 126 Pac. 29; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Potter v. Jones, 20 Or. 239, 12 L.R.A. 161, 25 Pac. 769; Clark v. Ellis, 9 Or. 123; Re Cline, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542; Hubbard v. Hubbard, 7 Or. 42.

Influence from gratitude, affection,

or esteem cannot become undue unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempts to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts.

Re Darst, 34 Or. 65, 54 Pac. 947; Re Turner, 51 Or. 8, 93 Pac. 461; Re Diggins, 76 Or. 346, 149 Pac. 73; Holman's Will, 42 Or. 357, 70 Pac. 908; Pickett's Will, 49 Or. 153, 89 Pac. 377; Hubbard v. Hubbard, 7 Or. 42.

It is not sufficient to show that a party benefited by a will had the motive and opportunity for such undue influence. There must be evidence that he did exert it, and so controlled the action of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not the will of the testator.

Hubbard v. Hubbard, 7 Or. 46; Cudney v. Cudney, 68 N. Y. 152; Woodward v. James, 34 S. C. L. (3 Strobb.) 552, 51 Am. Dec. 649; Re Hess, 31 Am. St. Rep. 665; and note, 48 Minn. 504, 51 N. W. 614.

Presumption of mental infirmity may be overcome by evidence proving that a person under guardianship at the time he executed a will was in fact of sound and disposing mind and memory.

Ames's Will, 40 Or. 503, 67 Pac. 737; Stone v. Damon, 12 Mass. 488; Breed v. Pratt, 18 Pick. 115; Slinger's Will, 72 Wis. 22, 37 N. W. 236; Re Sturtevant, 92 Or. 269, 178 Pac. 192, 180 Pac. 595.

Benson, J., delivered the opinion of the court:

There are two questions now presented for our consideration. The first is: Was Samuel G. Collins, on June 9, 1916, mentally competent to make a will? The second is: Was such will the result of undue influence, exerted upon the testator by the defendants Ada L. Long and her husband, John H. Long?

The history involved in the investigation of the case, as gleaned from the pleadings and the testimony, is about as follows:

Samuel G. Collins, who was

ninety-four years of age at the time of the execution of the document tendered for probate as his last will and testament, had been married twice; his first wife having died after bearing two children, who still survive, being the defendants Ada L. Long and John R. Collins. Subsequently he married the plaintiff Laura A. Collins, who survives as his widow, by whom he had six children, who survive and are plaintiffs here, together with five grandchildren, who are the offspring of a deceased daughter. Both marriages occurred in Iowa. The family moved to Oregon in 1875, where the deceased purchased the farm which constitutes practically all of the estate involved in this litigation. It appears that on April 25, 1877, the defendant Ada L. Long, who was then, according to her own testimony, fifteen years of age, and according to her stepmother, seventeen, was for some reason which the record does not undertake to explain, driven from home, penniless, and forbidden to return, and thereafter the mention of her name in the household was taboo. Thereafter, according to evidence offered by the plaintiffs, strangers within the next two or three years wrote to the girl's father, urging him either to take her back into the home or to provide for her support, but he refused to do either. In some fashion she managed to survive and support herself, and finally was married to the defendant John H. Long, with whom she is still living at their home in Bellingham, Washington. On a visit to California with her husband, she visited her father at his farm, arriving there on his ninetieth birthday, and was cordially received during a visit of a few days. In 1913, proceedings were begun in the county court of Linn county for the appointment of a guardian for Samuel G. Collins, upon the ground that he was suffering from senile dementia and was in danger of wasting his property; and John R. Collins was appointed such guardian. Thereafter Mrs. Long made an-

other visit to her father, finding him at the home of the guardian, at Independence, in Polk county. During this visit, the old man filed a petition in the county court of Linn county to be relieved from the control of a guardian, insisting that he was fully competent to look after himself and his property. After a hearing, his petition was denied. Immediately thereafter he undertook to convey to his daughter, Mrs. Long, the north half of his farm, and the deed so executed was duly recorded by her, and, with the consent of the guardian and the county court, she took her father with her to her home in Bellingham. The guardian commenced a suit in the circuit court of Linn county to set aside the conveyance to Mrs. Long, and a decree was made and entered in accordance with the prayer of the complaint. Mrs. Long and her father returned from Bellingham, to contest this suit, and after its conclusion again went to the home in Bellingham, where the old man remained until his death, which occurred on December 9, 1916. On June 9, 1916, the old man employed John R. Crites, an attorney practicing law in Bellingham, to write his last will and testament, which was done, and this instrument, properly executed and witnessed, is the one now contested. By its terms, the north half of the farm in Linn county is devised to the daughter, Ada L. Long, and in the south half is granted a life estate to the testator's widow, with remainder over to the other sons and daughters and the children of the deceased daughter, in equal shares.

The evidence by which the plaintiffs seek to establish the testator's incompetency consists, in the first place, of the decree of the county court, adjudging the testator to be an incompetent person and appointing a guardian of his person and estate. Counsel for plaintiffs urges that such decree, not having been appealed from, is *res judicata* and conclusive. This contention is fully answered by the opinion in *Re Stur-*

tevant, 92 Or. 269, 178 Pac. 192, in which it is held that "a person under guardianship does not on that account lose his right to make testamentary disposition of his estate, if he retains sufficient mental capacity to execute a will."

Will—guardianship—testamentary capacity.

his estate, if he retains sufficient mental capacity to execute a will."

In the case of *Ames's Will*, 40 Or. 495, 67 Pac. 737, this court, speaking by Mr. Justice Moore, said: "The rule is settled in this state that if a testator, at the time he executes his will, understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body, or extreme distress."

There is evidence tending to show that before the old man was taken to Bellingham he was very forgetful, would put money away and be unable to recall where he had placed it, would fail to recognize old acquaintances or familiar places, and that he on one occasion was heard tapping the wall of his sleeping apartment with his cane, and, when asked why he did so, explained that he was driving out the ghosts. Our attention is also called to the fact that on another occasion, when his daughter entered the kitchen with an apron full of chips, he referred to the chips as a lapful of "nigger babies," and laughed; and on another occasion, when the heavy rains had raised the water in a slough which passed through other farms before it reached his, he complained that neighbors were turning in water to drown out his farm. All of these fragments of evidence occurred more than two years before the old man executed the will in question. Upon the other hand, Mr. Crites, the lawyer who prepared the will, says that he received all of the data and information from the old man himself, who had no written memorandum with him when he described the property and named the members of his family, and that



the testator appeared to him to be exceptionally bright and clear mentally at the time. The same witness testifies further as follows: "Well, he told me that he had two sets of children, and said that this farm in Oregon, which amounted to about 200 acres, was purchased or procured with money that came from land that was owned by the mother of Mrs. Long and John Collins—his son John—I think it was back in Iowa, and that when he married his present wife they practically kicked Mrs. Long out to hustle for herself, and she had been making her own living for years, ever since, and he felt as though he had never done anything for her, and had done her a great wrong, and he felt as though he would like to make that wrong right in making this will. That came up when I suggested to him why he did not make John and Mrs. Long equal in his bounty, and he said that he believed that he could right it, and while he wanted his wife to have a living during her lifetime, he felt that the other children had been practically raised out of the proceeds of this farm, and Mrs. Long never had any benefit from it. So, he thought, by giving her the north one half of the land and allowing his wife to have the other one half during her lifetime, and giving the other one half that his wife had during her lifetime, to all of the children—and especially, as John had always enjoyed the use of this farm, he ought to be classed with the other children—he could make things right."

W. A. McCutcheon, one of the subscribing witnesses to the will, says: "At the time he talked very intelligently, and seemed to have quite a business head on him, and was very firm in any remarks he made, and wanted everything done exactly the way he wanted it. I do not believe you could change the old man's mind at all. He seemed to be perfectly competent to make a will, and seemed not to forget it, and seemed to know what he was talking about."

Mr. Fred P. Offerman, the other subscribing witness, says: "I think he was competent, as far as I know. He acted that way. He was rather an old man, but I supposed he was competent."

Dr. Goodheart, a physician at Bellingham, who had attended the old man professionally on several occasions, the last being the day on which the will was executed, testified that he regarded him as an exceptionally capable man for his age, and quite competent. We think that, under the law as declared by this <sup>—effect of forgetfulness.</sup> court in the cases cited, the testator was fully competent.

The remaining topic for consideration is that of the exercise of undue influence. In support of this, plaintiffs call our attention to the deeds executed in favor of Mrs. Long while the decedent was under the control of a guardian, her taking him to her home in Bellingham and keeping him out of touch with his family, her active defense of the suit to set aside the last deed made to her by the old man, and the alleged statement made by her, that she intended to get the property mentioned in the will or spend a considerable sum of money in the effort. It is further urged that, although she and her husband both testify that they never at any time discussed with the old man the contents of his will, they are not to be believed, because she is a vicious and dishonest woman. It is true that the petition contains this allegation: "That the said Ada L. Long is a scheming unprincipled woman, without sense of honor, and for years was what is commonly called and termed 'an adventuress,' and it was a part of her scheme and purpose in getting him to go with her to the state of Washington, and getting permission to take him to the said state and out of the state of Oregon, to get his property."

No evidence was offered in support of these allegations, and they simply add to the weight of wrong

heaped upon this defendant by the occupants of the house to which she had a right to look for guidance and protection. The statement of the testator to his attorney, that he was making this bequest in an effort to atone for the hideous cruelty of driving an unformed country girl, not more than seventeen years old, out into a hostile world to fend for herself, is much more impressive.

Practically every legal question presented in this case has been fully discussed and settled in *Re Sturtevant*, supra, and it is, therefore, needless to enlarge upon them here.

We conclude that the petitioners have not established the charge of undue influence, and the decree of the Circuit Court is affirmed.

Bean, Burnett, and Harris, JJ.,  
Concur.

## ANNOTATION.

### Effect of guardianship of adult on testamentary capacity.

This note is confined to the substantive question whether one under guardianship has the right to make a will, and does not include cases involving the admissibility, or probative force, of the adjudication establishing the guardianship, as evidence of want of testamentary capacity. That question is the subject of annotation in 7 A.L.R. 562.

It is a practically universal rule that the mere fact that one is under guardianship does not deprive him of the power to make a will.

**California.**—*Re Johnson* (1881) 57 Cal. 529.

**Indiana.**—*Harrison v. Bishop* (1891) 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069.

**Iowa.**—*Re Fenton* (1896) 97 Iowa, 192, 66 N. W. 99; *Reeves v. Hunter* (1919) — Iowa, —, 171 N. W. 567.

**Maine.**—*Re Chandler* (1906) 102 Me. 72, 66 Atl. 215.

**Massachusetts.**—*Stone v. Damon* (1815) 12 Mass. 487; *Leonard v. Leonard* (1883) 14 Pick. 280; *Breed v. Pratt* (1836) 18 Pick. 115.

**New York.**—*Re Barlow* (1917) 180 App. Div. 860, 168 N. Y. Supp. 131; *Lewis v. Jones* (1868) 50 Barb. 645; *Re Pendleton* (1889) 1 Connolly, 480, 5 N. Y. Supp. 849.

**Oklahoma.**—*Hill v. Davis* (1917) — Okla. —, L.R.A.1918B, 687, 167 Pac. 465.

**Oregon.**—*Re Sturtevant* (1919) 92 Or. 269, 178 Pac. 192, 180 Pac. 595; *COLLINS v. LONG* (reported herewith) ante, 1370.

**Pennsylvania.**—*Draper's Estate* (1906) 215 Pa. 314, 64 Atl. 520.

**Rhode Island.**—*Jenckes v. Probate Ct.* (1852) 2 R. I. 255; *Hamilton v. Hamilton* (1873) 10 R. I. 538.

**Vermont.**—*Williams v. Robinson* (1867) 39 Vt. 267; *Re Cowdry* (1905) 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

**Wisconsin.**—*Slinger's Will* (1888) 72 Wis. 22, 37 N. W. 236.

**England.**—*Cooke v. Cholmondeley* (1849) 2 Macn. & G. 22, 42 Eng. Reprint, 9, 2 Hall & Tw. 162, 47 Eng. Reprint, 639, 19 L. J. Ch. N. S. 81, 14 Jur. 117; *Re Walker* [1905] 1 Ch. 106, 4 B. R. C. 432, 74 L. J. Ch. N. S. 86, 53 Week. Rep. 177, 91 L. T. N. S. 713.

One under guardianship may also revoke a will made by him before he was placed under guardianship. *Linkmeyer v. Brandt* (1898) 107 Iowa, 750, 77 N. W. 493.

Two of the earlier New York cases, however, are opposed to the general rule. Thus, it was held in *Re Patterson* (1849) 4 How. Pr. (N. Y.) 34, that an habitual drunkard cannot make a valid will during the existence of the commission, without permission of the court. And there is a dictum in *Re Burr* (1847) 2 Barb. Ch. (N. Y.) 208, to the effect that one who has been found by inquisition to be incapable of governing himself and managing his affairs is legally incompetent to make a valid will while his person and property are under the control of the committee appointed by the court. But these

cases were distinguished and criticized in *Lewis v. Jones* (1868) 50 Barb. (N. Y.) 645, which upholds, with an elaborate discussion, the general rule.

The reason commonly given for the general rule is well stated in *Re Chandler* (1906) 102 Me. 72, 66 Atl. 215, where the court said that the law recognized that a person might require a guardian by reason of incapacity in one particular, while in other respects he might be entirely competent, and that there might be partial insanity of a testator, some unsoundness of mind that did not in any way relate to his property or disposition of the same by will.

In some cases the holding in accordance with the rule is based upon statute. Thus, it is held in *Re Johnson* (1881) 57 Cal. 529, that the fact that one is under guardianship as an incompetent person does not deprive him of the power to make a will, since it is provided by statute that, after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined; but if actually restored to capacity he can make a will, though his restoration is not thus determined.

And the holding in *Hill v. Davis* (1917) — Okla. —, L.R.A.1918B, 687, 167 Pac. 465, that one under guardianship, if actually restored to capacity at the time, may make a valid will, though his restoration has not been judicially determined, is based upon a similar statute.

And in *Re Chandler* (Me.) supra, the court, in giving the reason for holding that the mere fact that one under guardianship does not render him incapable of making a will, said that it was well settled that a man might be of unsound mind in one respect, and not in all respects, and that this principle was recognized in a statute of the state which provided that, when a person over twenty-one years of age was under guardianship, he was incapable of disposing of his

property otherwise than by his last will.

And in *Jenckes v. Probate Ct.* (1852) 2 R. I. 255, holding that one under guardianship was not necessarily incapable of making a will, the court overruled the contention of counsel that a will was a conveyance within the meaning of a statute providing that all contracts, bargains, and conveyances made by any person under guardianship shall be utterly void.

It appears that the rule generally applies, irrespective of the cause or reason for the appointment of the guardian, since, although the usual reason is insanity, habitual drunkenness was the cause of the guardianship in *Re Johnson* (Cal.) supra; *Re Barlow* (1917) 180 App. Div. 860, 168 N. Y. Supp. 131, supra, and *Lewis v. Jones* (N. Y.) supra.

And in *Slinger's Will* (1888) 72 Wis. 22, 37 N. W. 236, supra, the guardian was appointed upon the ground that the testator was a spendthrift, and incompetent to have charge of his estate.

And in *Jenckes v. Probate Ct.* (R. I.) supra, the testator was placed under guardianship under a statute permitting a guardianship of one who, for want of discretion in managing his estate, shall be likely to bring himself and family to want, and thereby render them chargeable to the town.

It has been held, however, that a person under guardianship as non compos mentis is prima facie incapable of making a will, in *Hamilton v. Hamilton* (1873) 10 R. I. 538, and in *Re Cowdry* (1905) 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70. And in *Re Fenton* (1896) 97 Iowa, 192, 66 N. W. 99, there is a dictum to the effect that persons under guardianship are prima facie disqualified to make a will. But it is held in *Re Cowdry* (Vt.) supra, that while a person who is adjudged a non compos, and placed under guardianship as such, is thereby rendered prima facie incapable of making a will while the adjudication remains in force, an adjudication of mental incapacity to take care of one

self and one's property, and the appointment of a guardian thereunder, does not render one *prima facie* mentally incapable of making a will. It appears in this case that the statute, as first constituted, provided for the appointment of guardians for insane persons, which were defined as including idiots, persons non compos, lunatics, and distracted persons, but that the statute was subsequently amended so as to include among those for whom a guardian could be appointed persons who merely lacked mental capacity to take care of themselves or their property, and who might, therefore, be possessed of a sound and disposing mind and memory.

The general rule hereinbefore laid down presupposes, of course, that the one under guardianship was in fact mentally competent to make a testamentary disposition of his property. This is sometimes expressly stated as a condition of the rule. Thus, if one under guardianship is restored to his reason, he may make a will, although the guardianship

has not been judicially terminated. *Stone v. Damon* (1815) 12 Mass. 487; *Hill v. Davis* (1917) — Okla. —, L.R.A.1918B, 687, 167 Pac. 465.

It appears in *Hill v. Davis* (Okla.) supra, that, by a statute in force at the time, it was provided: "After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined." And it also appears from the case of *Re Johnson* (1881) 57 Cal. 529, that it has been so provided by statute in California.

And the mere fact that one is an inmate of an insane asylum at the time of making a will is not a sufficient ground for granting an issue of *devisavit vel non*, where the uncontradicted testimony shows that he had testamentary capacity at such time. *Draper's Estate* (1906) 215 Pa. 314, 64 Atl. 520. G. V. I.

GEORGE M. ESTES and Wife, Respts.,

v.

C. P. CROSBY et al., Appts.

*Wisconsin Supreme Court—January 18, 1920.*

(— Wis. —, 175 N. W. 933.)

**Broker — liability for securing excessive price from customer.**

1. A real estate broker may be liable for injury to a purchaser who relies upon representations of the broker's agent as to the lowest price to be taken for the property, which price is fixed by the broker without knowledge of the owner, although the agent acts in good faith, and therefore is not personally liable.

[See note on this question beginning on page 1383.]

—agent of owner — absence of legal interest.

2. A real estate broker who has no legal interest in property placed in his hands for sale is, in fixing prices, merely the agent of the property owner.

[See 4 R. C. L. 262.]

—employee of broker — subagent.

3. One employed by a real estate  
8 A.L.R.—87.

broker to aid in the sale of property placed in his hands for that purpose is a subagent of the owner if the broker has authority to employ a subagent.

[See 4 R. C. L. 260, 261.]

**Principal and agent — liability for misrepresentations of agent.**

4. A real estate broker who benefits by misrepresentations of his subagent

as to the lowest sale price of property in his hands for sale is answerable for the damages thereby caused to the purchaser.

— scope of authority — naming price of land.

5. An agent of a real estate broker is acting within the scope of his authority in naming to a customer the price fixed by the broker as the lowest

price for which the property can be had.

**Broker — liability of subagent.**

6. An agent of a real estate broker is not liable to a customer for charging him an excessive price for the property, which is named to him by the broker, if he acted in good faith and after using reasonable diligence to ascertain the true facts in the case.

**APPEAL** by defendants from a judgment of the Circuit Court for Oneida County (Reid, J.) in favor of plaintiffs in an action brought to recover damages for alleged deceit of defendants in a sale of real estate to plaintiffs. *Reversed as to defendant Crosby. Affirmed as to defendant Hume.*

Statement by Eschweiler, J.:

Both defendants in 1914 and for some time before were engaged in the business of dealing in real estate in Oneida county, defendant Hume having his office in the city of Milwaukee, and defendant Crosby at Rhinelander, in Oneida county.

The plaintiffs, husband and wife, were residents of the state of Missouri. Mrs. Estes in August, 1914, came to Rhinelander for the purpose of investigating a proposed purchase by them of a farm in Wisconsin. She called upon the defendant Crosby, knowing him to be in the real estate business, and was shown by him certain pieces of property for the sale of which he had or claimed to have the agency, among which was a farm that had been placed for sale through him by defendant Hume at the fixed price of \$4,000, with an agreement for \$200 as a commission in case of a sale. The farm in question at that time was actually owned by one E. S. Shepard. The transactions between Hume and Shepard were oral and in writing.

In July, 1913, Shepard wrote the defendant Hume, referring to the farm in question and saying: "The 197.95 acres on Lake Julia I told you you could have for \$2,000 cash, no com. [understood to mean commission]. This land is actually worth \$25 to \$35 per acre, but owing to my need of raising money to pay this I have put the price down to almost nothing for the sake of raising immediate cash to pay with."

Three days later he again wrote to defendant Hume, referring to a talk with some man who had called on him with reference to the same farm: "I would not tell him the price I gave you. Don't tell anyone anything for fear—see?"

Hume testifies that subsequent to these letters Shepard orally raised the price to \$3,500, then down to \$3,250, and finally accepted \$3,000 cash.

August 17th, plaintiffs wrote to Crosby: "What is the best terms possible to get on the place; as I told you, we can now pay \$1,000 down and more as soon as we sell, which we hope to do soon, but, of course, we cannot tell. If we could pay the \$1,000 down and let the balance run indefinitely at 6 per cent or until we can sell (which we hope to do soon), we will then turn the money in on the place or hope to make some next year if enough can be broke to farm. . . . I want to decide on some place, so please answer this the same day you receive my letter. . . . Please write just what you think we could do on same. . . ."

Crosby to plaintiffs, August 19th: "The piece in question belongs to a gentleman in Milwaukee who wanted me to sell it, and he told me to sell it for \$4,000 on any reasonable terms. I think he would be satisfied with \$1,000 cash down. . . ."

Letter of August 26th, Crosby to plaintiffs: "Dear Sir:—Mr. Hume of Milwaukee was in the office this morning and talked with me about

that Shepard farm. I supposed all the time that he owned that, because he bought a tract of land from Shepard and he gave me a list of this farm for me to sell, but it seems that he does not own it and that Shepard still owns it, and has about decided not to sell, but he told Mr. Hume that he would sell it for \$4,000 provided it is all cash and the sale must be made this week or early next. Mr. Hume says that he is going back to Milwaukee Friday, and if he can find anybody who will take a mortgage for \$3,000 on the place, he will wire me and we will close the deal up at once, but I don't want to take your \$1,000 and pay on the land until I know that he can get somebody to handle the \$3,000.

In September plaintiffs purchased the farm by paying \$1,000 cash and giving a note for \$3,000 secured by mortgage. They moved there in October and have lived there since.

The deed from Shepard was made directly to the plaintiffs, and was sent to them by Crosby, after he had received the \$1,000 and the mortgage, in a letter of September 18th, saying: "Dear Madam:—I just returned from the state fair, and the deed being all recorded, am inclosing it herewith. The deed was made from Shepard direct to you to save transfer through Mr. Hume, and Mr. Hume had a trade with him on some other property, so made the deed run '\$ Consideration, \$3,250 and other valuable considerations.' So you will understand why that sum is mentioned in the way that it is."

August 6, 1914, Hume had written Crosby, saying: "This was given to me as a 200-acre tract, and my price on it, as I telephoned you, was \$4,000, and we would have to get this price even if the acreage should fall short."

September 1st, after Hume had been notified of the progress of the deal between Crosby and plaintiffs, he writes Crosby as follows: ". . . I was not able to see my party regarding the Lake Julia land until

noon to-day, but am in shape to carry through the proposition providing I can get the property from Shepard as I talked to you. Shepard wants all cash and will consider nothing less. I am prepared to pay it to him providing the deal that you have on hand goes through. . . . If you will have your party deposit \$1,000 in your bank at Rhinelander, payable to," etc., "also have her execute a mortgage of \$3,000 payable to," etc., "on advice from you that the money has been deposited, I would immediately go up and close the deal with Shepard. In handling this matter on your part, I would not mention to anybody that you have anything to do with Shepard for the reason that I stated to you."

On September 12th he again writes Crosby: "I called up Shepard on the phone and I find that the matter is still open, so I secured money and will be up there on Monday morning to conclude deal, provided Shepard does not change his mind."

The following testimony was given by Mr. Hume on the trial:

Q. Did you have anything in writing or anything that was binding, between Mr. Shepard until that date when you went to his place of business or to his home with money in your pocket to buy?

A. Nothing. The question came up, and I said, "Now, Gene, you better give me a writing," and he said, "No; we have dealt enough, and my word will be all right; you get around here, and we will clean it up."

Shepard testified that he was paid only \$2,750 for the property; that Hume claimed to have a partner in the deal with whom he must share a \$500 commission.

After plaintiffs learned that considerably less than \$4,000 had been paid to the owner, Shepard, on the farm, they brought this action against the two defendants to recover the difference between the amount so paid and the \$4,000.

A special verdict was submitted.

to the jury, which, with the answers thereto, were as follows:

"Question No. 1: Did the statements orally and by letter, which were made by defendant Crosby to the plaintiffs, naturally and reasonably convey to the plaintiffs the understanding that \$4,000 was Shepard's lowest price for the land in question? Answer: Yes.

"Question No. 2: If you answer the first question 'Yes,' then, did the plaintiffs pay \$4,000 for the land in question by reason of such understanding? Answer: Yes.

"Question No. 3: If you answer the second question 'Yes,' then were the plaintiffs justified in relying upon the representations of the defendant Crosby in respect to Shepard's price? Answer: Yes.

"Question No. 4: Did the defendant Hume give the defendant Crosby reasonable grounds to understand, before the sale was made to the plaintiffs, that Shepard's price for the land was \$4,000, out of which a commission was to be paid? Answer: Yes.

"Question No. 5: If you answer the first three questions 'Yes,' then what damages did the plaintiffs suffer by reason of the misrepresentations therein referred to? Answer: \$875."

Upon the fourth question the court charged the jury as follows: "You will note that it relates to Shepard's price and to a time before the sale was made to the plaintiffs. Did the defendant Hume by his conversation and correspondence with Crosby give Crosby reasonable ground to understand that Shepard's price was \$4,000, out of which he would pay a commission? If the evidence satisfies the jury to a reasonable certainty that this question should be answered affirmatively, then you will so answer it. Otherwise you should answer it 'No.'"

After the verdict the two defendants made separate motions for judgment in their favor or in default thereof for other relief, which were severally denied, and plain-

tiffs' motion for judgment upon the verdict granted, and thereupon judgment entered for the amount of damages as found by the jury, together with interest and costs, and from the judgment so entered the two defendants have severally appealed.

Mr. E. D. Minahan, for appellant Hume:

The fact that Hume paid no consideration for the option from Shepard to purchase the land from him did not make it any the less an option, as an option is merely "an unaccepted offer to sell."

*Yerkes v. Richards*, 153 Pa. 646, 34 Am. St. Rep. 721, 26 Atl. 221.

An action for damages for deceit does not lie against Hume for the representation made by Crosby to the plaintiffs with reference to the price at which Shepard was holding the land, assuming that such an action lies against Crosby on account of such representation.

*Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581; *White v. New York, S. & W. R. Co.* 68 N. J. L. 123, 52 Atl. 216; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Ellison v. Stockton*, — Iowa, —, 170 N. W. 435; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Bateman v. Johnson*, 10 Wis. 1; *Akerly v. Vilas*, 15 Wis. 402; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678.

Crosby's representation with reference to Shepard's price was outside the scope of his authority.

*Tondro v. Cushman*, 5 Wis. 279; *Hoyer v. Ludington*, 100 Wis. 441, 76 N. W. 348; *Bryant v. Bank of Commerce*, 95 Wis. 476, 70 N. W. 480; *Ellison v. Stockton*, — Iowa, —, 170 N. W. 435; *Leggett v. Moore*, 36 S. D. 288, 154 N. W. 804.

Crosby is not liable to an action for deceit on account of the representation made by him to the plaintiffs with reference to Shepard's price for the land; and if he is not liable, his principal, Hume, is not liable.

*Ripy v. Cronan*, 131 Ky. 631, 21 L.R.A.(N.S.) 305, 115 S. W. 791; *McLennan v. Investment Exch. Co.* 170 Mo. App. 389, 156 S. W. 730.

Mr. Charles F. Smith, Jr., for appellant Crosby.

Messrs. John Van Hecke and Max Van Hecke, for respondents:

Defendants were liable to plaintiffs for the fraud perpetrated.

Grant v. Hardy, 33 Wis. 668; Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Bergeron v. Miles, 88 Wis. 397, 43 Am. St. Rep. 911, 60 N. W. 788; Hokanson v. Oatman, 165 Mich. 512, 35 L.R.A. (N.S.) 423, 131 N. W. 111; Hoyer v. Ludington, 100 Wis. 441, 76 N. W. 348; Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109; Hull v. Doheny, 161 Wis. 27, 152 N. W. 417; Miranovitz v. Gee, 163 Wis. 246, 157 N. W. 790; Helberg v. Hosmer, 143 Wis. 620, 128 N. W. 439; Woteshek v. Neuman, 151 Wis. 365, 138 N. W. 1000.

Eschweiler, J., delivered the opinion of the court:

The appellant Hume assigns as error: (1) That there is no evidence to warrant the instruction to the jury given by the court to the effect that he (Hume) was the agent of the owner, Shepard; (2) or that Crosby was such agent; (3) that there is no cause of action shown as against him (Hume); (4) that the representation made by Crosby that the bottom price of this property was \$4,000 was not within the scope of Crosby's employment; (5) that there is no ground for liability against the agent Crosby, and therefore there can be none predicated against Hume; and lastly (6) that there is no evidence to support the finding of the jury to the fourth question of the special verdict.

However much Mr. Hume may have felt justified from his manner of dealing with Mr. Shepard, and possibly from more or less of a custom among people engaged in that line of business, in proceeding to deal with this farm as though he were the owner, and therefore fixing such price upon it as he pleased and lawfully might, it nevertheless appears from the correspondence and testimony given above, there being no writing sufficient to meet the requirement of the statute, that there was at no time any binding agreement in law between them sufficient

to give Hume an interest in the real estate. When the time came for the conclusion of the transaction with the plaintiffs, Hume evidently did not consider that any prior negotiations between himself and Shepard were complete or binding before he offered to Shepard the cash to meet the latter's then terms. This was after the plaintiffs had paid their \$1,000 to Crosby and he in turn sent that sum to Hume.

In offering this property for sale as he did Hume could only act on his own behalf in case he had such a legal interest as would warrant such a course; if he did not possess such interest he was in law an agent of Shepard, the real owner. Not having placed himself in the first position, the legal consequence of his acts necessarily placed him in the second. The trial court was therefore correct in his charge to the jury in summarizing the situation by saying that Hume was the agent of Shepard.

Broker-agent of owner—absence of legal interest.

As between Shepard and Crosby the latter was therefore a subagent of the former, conceding Hume's right to employ such a subagent.

—employee of broker—sub-agent.

The contention on the third point to the effect that there is no cause of action against Hume also cannot be sustained.

Although Crosby was subagent for Shepard, he was also at the same time agent for the defendant Hume in this transaction with the plaintiffs. As such agent for Hume he represented to the plaintiffs that the lowest price for this property was \$4,000. Hume fixed that price himself, and, knowing that it is being made by Crosby to the plaintiffs, receives the benefit of such representation. Having profited thereby, he, as

Principal and agent—liability for misrepresentations of agent.

principal for his agent, Crosby, must be held chargeable with the damage done to the plaintiffs by their relying upon and acting on such representa-



tion. First Nat. Bank v. Hackett, 159 Wis. 113, 119, 149 N. W. 703.

There is support for the finding of the jury that the plaintiffs relied upon this representation that \$4,000 was the lowest purchase price, from the evidence of the plaintiffs as well as by the assumption, in which a jury may properly indulge, that in the usual course of human affairs purchasers do not pay the higher in preference to a possible lesser price.

On the fourth point the evidence warrants the conclusion that in making the representation to the plaintiffs as to the price being the lowest Crosby was acting within the scope of his employment. Hume fixed this price, gave it to Crosby to be given to possible purchasers, and it was therefore strictly within the scope of the employment to so represent it.

The question argued in the fifth proposition as to whether or not there was a liability against Crosby is immaterial so far as defendant Hume is concerned. His liability is predicated upon that which was done on his behalf by Crosby, who acted only as agent for him, and from whose acts as subagent Hume reaped the benefit. Hume alone was the moving cause for this error of fact which resulted in damage to plaintiffs; therefore he alone must assume the consequent liability.

The finding of the jury embodied in their answer to the fourth question of the special verdict that Crosby had reasonable grounds to believe that the bottom price for this property was \$4,000 is supported by the correspondence between the two defendants and the testimony. Crosby dealt with Hume alone, and not with Shepard. It was Hume who fixed the price, and he confirmed what Crosby had done in regard to the same by accepting the result.

On the appeal of defendant Cros-

by we deem it necessary to discuss but one of the several points urged by him. Being satisfied, as we have above indicated, that the jury were warranted in arriving at the conclusion that Crosby had reasonable grounds, based upon his transactions with the defendant Hume, to understand that the price of this property was \$4,000 to Mr. Shepard less a commission, this in effect determined that Crosby acted in good faith in this transaction, and necessarily also that he used reasonable diligence in ascertaining as to the fact before representing the same. Being acquitted, therefore, by this finding of any lack of either good faith or reasonable care, there is no basis upon which he can be held personally liable. He concealed no material fact within his knowledge. He discloses in the letter of August 26th, supra, that he is merely conveying from Hume to plaintiffs the statement as to Shepard's selling price being \$4,000, and he did not fail in the exercise of the ordinary care required of an agent in such a situation. He therefore breached no duty that he owed, if any, to the plaintiffs, and incurred no liability. While a principal may be liable for the mistake of the agent, it does not follow that an agent, having acted in good faith and with reasonable care, is liable for the mistake of his principal.

It follows that the trial court was right in awarding judgment against the defendant Hume, but erred in denying the motion of the defendant Crosby for judgment in his favor.

The judgment is so modified as to discharge the defendant Crosby from any liability thereunder, and it is allowed to stand as against the defendant Hume. Appellant Crosby to have his costs on this appeal as against the plaintiffs, the plaintiffs to have theirs as against the defendant Hume.

Petition for rehearing denied March 9, 1920.

A motion to amend the mandate

—scope of authority—naming price of land.

—liability of subagent.

Broker—liability for securing excessive price from customer.

having been filed, the following *Per Curiam* response was handed down May 5, 1920 (— Wis. —, 177 N. W. 512):

The decision and mandate of this court on the appeal in this case determined that the defendant Crosby was entitled to a judgment in the court below of dismissal of the

action as against him. Upon such a judgment in the circuit court he would be entitled to costs in his favor as against the plaintiffs as a matter of course. For this reason we do not deem it necessary to change the mandate, and the motion to amend it is therefore denied, without costs.

### ANNOTATION.

#### **Liability of broker to purchaser for overstating lowest price at which owner is willing to sell.**

Whether a purchaser of property can recover damages from the broker through whom he bought, for overstating the lowest price at which the property could be purchased, depends entirely on the facts involved in each case, and it is therefore impossible to lay down a rule that will apply in all cases.

In *Kice v. Porter* (1899) 21 Ky. L. Rep. 871, 53 S. W. 285, the evidence disclosed that the plaintiff, desiring to buy a house, went to the defendant, a real estate broker, asking to be shown property. After inspecting certain property she intimated that she would pay \$7,000 for it, but suggested that she would first see the owner and inquire if he would accept less. The broker informed her that this would be of no use, as the owner would not accept a less amount for the property. Shortly after this conversation the owner called at the office of the broker and agreed to accept \$6,500 for the property, and this proposition was put in writing and accepted by the broker. The same day the broker sold the property to the plaintiff for \$7,000, and a deed was made to her a few days later. The additional \$500 was retained by the broker. The question whether the transaction amounted to a sale to the broker and a resale by him to the plaintiff was considered the crucial one and the case was remanded for a retrial thereof. The court said that although the broker was not the agent of the purchaser, yet if he, as agent for the vendor, practised a fraud on her, and by this fraud obtained \$500 of her money, she was entitled to re-

cover this amount less the amount of the broker's commission. It was further said that if the broker had bought the property from the vendor before the sale to the plaintiff, the plaintiff could not recover, without regard to whether she knew that the broker had bought the property for himself. See to the same effect (1901) 22 Ky. L. Rep. 1704, 61 S. W. 266.

In *Hokanson v. Oatman* (1911) 165 Mich. 512, 35 L.R.A.(N.S.) 423, 131 N. W. 111, the action was in *assumpsit* by a purchaser against a broker for fraud. The plaintiff proved that the defendant falsely and fraudulently pretended that the owner was demanding \$1,200 for the property, and that this was the lowest price obtainable. As a result of these representations he purchased the property for that price when, as a matter of fact, the owner's price was \$900. The court quoted with approval from *Kice v. Porter* (1900) 22 Ky. L. Rep. 1704, 61 S. W. 266, *supra*, and in affirming a judgment for the plaintiff held that the rule of caveat emptor did not apply. In this connection it was said: "The verdict of the jury establishes gross fraud practised by defendant, both upon the plaintiff and the owner of the property. The plaintiff was a color mixer, residing in Chicago, wholly ignorant of the value of farm lands, and unable to form any rational estimate of such value by inspection. Knowing these facts and relying upon them to enable him to carry out his fraudulent scheme, defendant stated, in reply to plaintiff's question if the farm could

not be bought cheaper, the representations hereinbefore quoted, contending that he had induced the owner to reduce the price to a point where it was a bargain, and the very lowest price the owner would accept. He also induced the plaintiff to believe that the \$300 secured by the mortgage was for the benefit of the owner. The representations by defendant were not mere statements of opinion as to the value of the property, but were statements of facts within his own knowledge and unknown to plaintiff, which were intended to, and did, influence him in making the purchase, and upon which he had a right to rely. We agree with the conclusion of the Kentucky court of appeals that plaintiff made out a case of fraud and deceit, for which he was entitled to maintain an action of assumpsit under our statute."

The same principle was announced in *Hack v. Crain* (1915) — Mo. —, 177 S. W. 587. It therein appeared that the owner of real estate had listed it for sale with a real estate broker at the price of \$1,600. The broker showed the property to a prospective purchaser who was not familiar with the value of the land, stating that the land was worth \$2,500, that it was a bargain at that price, and that the owner would not accept less for it. On these representations the plaintiff purchased for \$2,500, paying \$1,500 cash, and giving the broker a note for \$1,000 secured by a deed of trust. Affirming a judgment for the plaintiff in an action to cancel the deed of trust the court said: "In our opinion, counsel for the defendant has clearly misconceived the character of the cause of action charged in the bill. They seem to proceed upon the theory that the petition seeks to recover from the defendant upon the ground that he was the agent of the plaintiff. That is clearly not the case. The petition proceeds upon the theory that plaintiff was ignorant of the character of the soil and the value of the land purchased, and that defendant knew those facts, and that, after plaintiff informed defendant thereof and told him that he was going to rely upon his judgment

as to the character and value of the land, then, under the facts and circumstances stated in the petition, which were fully proven by the evidence, the conduct of the defendant clearly constituted such a deception and fraud upon the plaintiff as to entitle him to the relief prayed, regardless of the question as to whether or not he had also perpetrated a fraud upon the vendor of the land."

It is held in the reported case (*ESTES v. CROSBY*, ante, 1877) that a subagent was not liable to a purchaser for overstating the owner's lowest price for the property, where it appeared that the subagent had reasonable grounds, based on his transactions with the agent, for believing that the price he gave the purchaser was in fact the lowest price, and he concealed no material fact within his knowledge. However it is held that since the agent gave this price to the subagent and knew that the subagent was representing it as the lowest price, which was, as he knew, untrue, and since he obtained the benefits from the transaction, he was chargeable with the damage done to the plaintiffs by their relying and acting on the representations of the subagent.

But a recovery was denied to the purchaser in the case of *McLennan v. Investment Exch. Co.* (1913) 170 Mo. App. 389, 156 S. W. 730, wherein it appeared that the real estate brokers, learning that a purchaser would pay \$12,000 for certain property, obtained a contract from the vendor for the land at a price of \$11,500. After securing this contract they returned to the purchaser, and, still claiming to be the agents of the vendor, represented that the lowest price their principal would put on the farm was \$13,005. The sale was eventually closed for \$12,928.50. It was held that the fraud, if any, was against the principal, since the brokers were acting for the vendor, and not for the purchaser. It was said further that since the plaintiff's testimony showed that he purchased the farm at his own price, for less than it was worth, no damage resulted to him by the broker's actions. The court said: "Under the

rule of caveat emptor, which recognizes the parties to a sale as business antagonists dealing at arm's length, the purchaser has a right to buy at as low price as his skill will secure, and the vendor has the corresponding right to sell at the best price he can obtain. Neither has the legal right to the other's best price, and therefore the representation of either that he has made his best offer cannot be said to be a representation of a material fact. To say otherwise would be to impose a restriction on the right of persons to make their own bargains. We agree with plaintiff that defendants in law and in fact were the agents of Elebracht in the transaction. The trick by which they pretended to purchase the property themselves was nugatory as to their principal. The law would not permit them to do such violence to the trust and confidence their principal had reposed in them. Therefore the representations they made to plaintiff were the representations of their principal, and as they did not relate to a material fact and did not damage plaintiff, he has no cause of action."

So, in *Merryman v. David* (1863) 31 Ill. 404, wherein it appeared that the plaintiff bought real estate from the defendant, who represented himself to be the agent of the owner, paying a price in excess of the amount the defendant procured it for, although the facts showed that the defendant was not the agent of the vendor, the court, in denying a recovery, said: "The only thing in which appellee was misled, was as to appellant being Gregg's agent. Has he any interest in the relation that appellant occupied to Gregg? Appellant, having assumed to be Gregg's agent, if recognized as such, had no right to speculate upon his principal. He was bound to the utmost good faith to his principal, and had no right to realize a profit off the fund with which he was acting. Having received more than he accounted for to his principal, if he was an agent, he would be liable to his principal to refund the amount retained, beyond his compensation. But the rights, duties, and liabilities of an agent do

not attach to other persons than the principal. And in this case it is not claimed that appellant was the agent of appellee. Nor can appellant be liable to him as an agent. If appellant has acted in bad faith with his principal, it does not concern appellee."

And it was held in *Ripy v. Cronan* (1909) 131 Ky. 631, 21 L.R.A.(N.S.) 805, 115 S. W. 791, that a purchaser of property could not recover damages from a broker who falsely stated that a certain price was the lowest sum at which the property could be purchased. The court said: "The general rule applicable to cases of this kind is that, if no confidential relations exist between the parties, and if the facts misrepresented or concealed are not peculiarly within the knowledge of the party charged, and the other party has available means of knowing the truth by the exercise of ordinary prudence and intelligence, and nothing is said or done to prevent inquiry by him, he must make use of his means of knowledge, or he cannot complain that he was misled." The main point of distinction between the foregoing case and *Kice v. Porter* (1899) 21 Ky. L. Rep. 871, 53 S. W. 285, *supra*, is the fact that in *Ripy v. Cronan* no effort or artifice was used by the broker to prevent inquiry or investigation by the purchaser, whereas in *Kice v. Porter* the purchaser expressed a desire to see the vendor and get a lower price, but was dissuaded from so doing by the statement of the broker that the seller would not accept a lower amount.

In *Aronowitz v. Woollard* (1915) 166 App. Div. 365, 152 N. Y. Supp. 11, it appeared that the plaintiff, as agent for one Champagne, sold to the defendant certain real estate for \$12,500, receiving therefor the checks of the defendant drawn to Champagne, one of which for \$500 was thereupon indorsed and turned over to the plaintiff. The defendant stopped payment on the latter check and action was brought to recover thereon. The evidence disclosed that the plaintiff asked the defendant to buy a certain piece of property; that the defendant inquired as to the lowest price and received the

reply that the owner would not accept less than \$12,500. The defendant thereupon inspected the property and then asked the plaintiff to see the owner and ascertain the lowest price he would take. Later the plaintiff returned, saying that he had seen the owner and that the owner would not accept less than \$12,500. The plaintiff had an agreement with the owner by which he was to receive for his services in selling the property any sum he might be able to get in excess of \$12,000. The owner received the \$12,000 and the plaintiff received the check in question. In the lower court the defendant successfully defended against the check on the ground that the statement that the owner would not take less than \$12,500 was false. On appeal the judgment was reversed and judgment directed for the plaintiff, the court saying: "The plaintiff was not the defendant's agent and was under no obligation to sell the property to him except upon his own terms, and under the agreement between him and the owner had a right to obtain the best price he could. A misstatement of fact, so long as it actually did not affect the value of the property, is not actionable. For all that appears the property may be worth much more than the price agreed to be paid."

Likewise, in *Bradley v. Oviatt* (1912) 86 Conn. 63, 42 L.R.A. (N.S.) 828, 84 Atl. 321, the plaintiff was de-

nied a recovery against a real estate broker. Some time previous to the institution of the action the owner of the property in question listed it with the defendant to sell at "the best price obtainable." The plaintiff, who was well acquainted with the value of property, made a careful examination of this property and purchased it at a price which the defendant told him was the lowest price. At that time no price had been fixed by the owner. The defendant then wired the owner that he had sold the property, but falsely stated a lower price than the plaintiff agreed to purchase it for, and the owner ratified the sale, the defendant retaining for himself the difference in price. It was held that the defendant was not liable, the court giving three reasons for its decision: (1) That he did not know, at the time the representations were made, the ultimatum of the owner as to the "lowest price" it would take; (2) that if he obtained the best price obtainable, and then deceived the owner of the property, this was a matter which concerned the owner, and not the plaintiff; (3) that the plaintiff did not rely on the statements of the defendant in purchasing the property, but relied on his own judgment as to the value of the land and believed it was worth what he paid, basing his judgment on such investigations as he cared to make.

W. F. F.

## WILLIAM J. HOGARTY

v.

## PHILADELPHIA & READING RAILWAY COMPANY, Appt.

*Pennsylvania Supreme Court — October 9, 1916.*

(255 Pa. 236, 99 Atl. 741.)

### Limitation of actions — amendment of pending action — new cause.

1. A common-law action by a railroad employee to recover against his employer for personal injuries cannot be amended so as to count upon the Federal Employers' Liability Act after the limitation period provided by that act has elapsed.

[See note on this question beginning on page 1405.]

(355 Pa. 236, 99 Atl. 741.)

**Master and servant — injury in interstate commerce — source of liability.**

2. The right to recover for injuries to employees engaged in interstate commerce is governed entirely by the provisions of the Federal Employers' Liability Act.

[See 18 R. C. L. 837.]

**— injury in intrastate commerce — common-law liability.**

3. The common-law liability of a railroad company for injury to its employees in intrastate commerce is not

affected by the Federal Employers' Liability Act.

[See 18 R. C. L. 841.]

**Pleading — action under Federal Employers' Liability Act.**

4. The pleading in an action to recover under the Federal Employers' Liability Act for injury to a servant in interstate commerce must allege facts and show that the case is within such statute, although it is not necessary to refer to the statute.

[See 18 R. C. L. 860, 861.]

(Moschzisker, J., dissents.)

**APPEAL** by defendant from a judgment of the Court of Common Pleas, No. 5, for Philadelphia County (Martin, J.), overruling its motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. William Clarke Mason, for appellant:

There was no proof that the defendant was negligent.

Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 185, 36 Am. Rep. 662; Clough v. Hoffman, 132 Pa. 626, 19 Am. St. Rep. 620, 19 Atl. 299; Durst v. Carnegie Steel Co. 173 Pa. 162, 33 Atl. 1102; Price v. Lehigh Valley R. Co. 202 Pa. 176, 51 Atl. 756; Patton v. Texas & P. R. Co. 179 U. S. 663, 45 L. ed. 364, 21 Sup. Ct. Rep. 275.

The original statement of claim was not sufficient to sustain a judgment in favor of the plaintiff, because it failed to aver that at the time of the injury he was engaged in interstate commerce, and this fact was necessary as an averment in the declaration and to be proved at the trial in order to sustain a recovery under the Federal Liability Act.

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Mis-

souri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Garrett v. Louisville & N. R. Co. 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; Thomas v. Chicago & N. W. R. Co. 202 Fed. 766; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Chicago, R. I. & C. R. Co. v. Wright, 239 U. S. 548, 60 L. ed. 431, 36 Sup. Ct. Rep. 185; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Moliter v. Wabash R. Co. 180 Mo. App. 84, 168 S. W. 250.

It was error to allow the amendment to the statement of claim filed by the plaintiff, for the reason that the amendment changed the cause of action declared upon from a cause of action at common law to a cause of action under the Federal Employers' Liability Act, and at the time the amendment was allowed more than two years had elapsed since the cause of action arose, and under the terms of the act of Congress such a cause of action was barred.

*Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144.

Messrs. Simpson, Brown, & Williams, for appellee:

The amendment was properly allowed.

*Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131; *People's Water Co. v. Pittston*, 241 Pa. 208, 38 Atl. 503; *Nice v. Walker*, 153 Pa. 123, 34 Am. St. Rep. 688, 25 Atl. 1065; *Bolton v. Hey*, 168 Pa. 418, 31 Atl. 1097; *Devine's Estate*, 199 Pa. 256, 48 Atl. 1072; *Pantall v. Rochester & P. Coal & L. Co.* 204 Pa. 158, 53 Atl. 751; *Fellows v. Loomis*, 204 Pa. 225, 53 Atl. 998; *Re Pulaski Ave.* 235 Pa. 151, 83 Atl. 687; *Bell v. Allegheny County*, 184 Pa. 296, 63 Am. St. Rep. 795, 39 Atl. 227; *Allen v. International Text Book Co.* 201 Pa. 579, 88 Am. St. Rep. 834, 51 Atl. 323; *Lafferty's Estate*, 230 Pa. 496, 79 Atl. 711; *Cassell v. Cooke*, 8 Serg. & R. 287, 11 Am. Dec. 610; *Rodridge v. Curcier*, 15 Serg. & R. 81; *Coxe v. Tilghman*, 1 Whart. 282; *Knapp v. Hartung*, 73 Pa. 290; *Erie City Iron Works v. Barber*, 118 Pa. 7, 12 Atl. 411; *Noonan v. Pardee*, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517; *Smith v. Bellows*, 77 Pa. 441, 12 Mor. Min. Rep. 157; *Holmes v. Pennsylvania R. Co.* 220 Pa. 192, 123 Am. St. Rep. 685, 69 Atl. 597; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Bixler v. Pennsylvania R. Co.* 201 Fed. 553; *Allen v. Tuscarora Valley R. Co.* 229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34; *Renn v. Seaboard Air Line R. Co.* 170 N. C. 128, 86 S. E. 964; *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857.

*Brown, Ch. J.*, delivered the opinion of the court:

On February 1, 1910, William J. Hogarty, while performing his duties as an extra freight conductor of a shifting crew of the Philadelphia & Reading Railway Company, was thrown under a car and sustained serious injuries, which resulted in the loss of his right arm. He was thrown under the car by coming

in contact with a telegraph pole, which he alleges, in the statement of his cause of action, had been negligently placed and left by the railway company too close to the track on which the cars in his charge were being shifted. In the performance of his duties at the time he was injured it was necessary for him to lean out beyond the side of a car to uncouple it while it was in motion, and in so leaning out his body struck the pole. The case has been twice tried. On the first trial the jury were instructed to find for the defendant, and judgment was subsequently entered in its favor. Plaintiff's statement of claim averred a mere common-law liability on the part of the defendant, and, it having proved that he had accepted benefits as a member of its relief association, the court below sustained its contention that he could not recover under *Reese v. Pennsylvania R. Co.* 229 Pa. 340, 78 Atl. 851, and other cases. He called attention to the Act of Congress of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208), which forbids the defense set up; the defendant having admitted that at the time he was injured it was engaged, and he was employed by it, in interstate commerce. To this the defendant replied that, as the suit had been brought at common law, the Federal statute was without application. The rejoinder of the plaintiff was that if he should have formally pleaded the Federal statute he was entitled to amend. On his appeal from the judgment in favor of the defendant his right to amend was sustained by this court, and the judgment was reversed with a *venire facias de novo*. *Hogarty v. Philadelphia & R. R. Co.* 245 Pa. 443, 91 Atl. 854. The second trial resulted in a verdict and judgment for the plaintiff, and on defendant's appeal from it we are asked, in effect, to reconsider our action in sustaining the plaintiff's appeal from the judgment entered on the first trial; and we must do so if what we then

held is, as counsel for defendant contends, in conflict with certain rulings of the Supreme Court of the United States, one of which was made since this appeal was taken. The questions which counsel were directed to argue are: (1) Were the original pleadings sufficient to sustain judgment for the plaintiff? (2) Did the court below err in allowing the statement of claim to be amended?

The Federal Employers' Liability Act of 1908 supersedes the laws of the states upon all matters within

Master and  
servant—injury  
in interstate  
commerce—  
source of  
liability.

its scope, and in cases involving accidents to the employees of railroad companies when engaged in interstate commerce the state laws must be regarded as non-existent (Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Hogarty v. Philadelphia & R. R. Co. supra); but, while this is so,

—injury in  
intrastate  
commerce—  
common-law  
liability.

the common-law liability of a railroad company engaged in intrastate commerce continues, and a right to recover from it for negligence, when so engaged, is still subject to common-law rules (Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Hench v. Pennsylvania R. Co. 246 Pa. 1, L.R.A. 1915D, 557, 91 Atl. 1056, Ann. Cas. 1916D, 230).

The action which the appellee brought against the appellant was strictly one at common law to enforce a common-law liability. This conclusively appears from the statement of his cause of action, which

is as follows: "On February 1, 1910, plaintiff was employed by defendant as freight conductor on a train of freight cars in its Philadelphia yards near American street and Lehigh avenue, and was directed by William L. Weyman, then acting for defendant, to place two of said cars (there being several in the train) on a certain track. In the performance of this duty plaintiff was required to lean over between two of the cars to uncouple them while the train was moving, and whilst so doing, through no fault of his own, his body struck a telegraph pole, he was thrown beneath the wheels, had three ribs and a collar bone broken, and his right arm was crushed (afterwards amputated). The defendant was negligent in having the pole too close to the track or the track too close to the pole, there not being sufficient room between the two to permit safe performance of the service as directed, and in directing plaintiff to put the cars on the said track, the danger being unknown to plaintiff and no warning given."

Not a word is to be found in plaintiff's statement indicating anything but a common-law liability on the part of the defendant, and to the charge therein alleged against it, it came into court with a complete common-law defense. It was held, however, on plaintiff's appeal, that, notwithstanding the common-law cause of action which he had set forth in his pleadings, the act of Congress was controlling, in view of the admission of the defendant that, at the time the plaintiff was injured, it and he were engaged in interstate commerce. After argument and reargument of this appeal, ordered of our own motion, we are of opinion that our view expressed on the first appeal is not in harmony with the rulings of the Supreme Court of the United States, and, as they are controlling, what we there held must yield to them.

As the act of Congress, and not the common law, gave the plaintiff a right to recover, his pleadings



ought to have shown that his case was within the Federal statute, and proof of this was a material part of it. In *Garrett v.*

Pleading—  
action under  
Federal  
Employers'  
Liability Act.

*Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, which was an action for damages under the Federal Employers' Liability Act, the plaintiff sought to recover for the pecuniary loss to the parents of the deceased employee of the defendant company; but, as his declaration failed to set forth such loss, recoverable under the act of Congress, it was held that for this reason there could be no recovery. In so holding it was said: "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. . . . The request is now made that in view of all the circumstances, especially the former undetermined meaning of the statute, this court remand the cause for a new trial upon the declaration being so amended as to include the essential allegation. But we do not think such action would be proper. The courts below committed no error of which just complaint can be made here; and the rights of the defendant must be given effect, notwithstanding the unusual difficulties and uncertainties with which counsel for the plaintiff found himself confronted."

This rule was observed in *Allen v. Tuscarora Valley R. Co.* 229 Pa. 97, 30 L.R.A. (N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34, where we held that the court below had improperly allowed an amendment of plaintiff's statement after two years from the time of the accident. The amendment averred that the defendant corporation, at the time of the

committing of the grievances complained of, was engaged in interstate commerce. In holding that the amendment introduced a new and different cause of action, which was barred by the Statute of Limitations, we said, through Mr. Justice Mestrezat: "The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. *Wabash R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879. It is apparent that without this amendment the act of Congress could have had no place in the case."

In *Brinkmeier v. Missouri P. R. Co.* 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, in referring to the attempt to secure the advantage of the Safety Appliance Acts of Congress under insufficient pleadings, Mr. Justice Van Devanter said: "The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad, that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The supreme court of the state held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad; and, second, upon the use of the car in moving interstate traffic. It did not

embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce."

While it must affirmatively appear by distinct averments, in the statement of a cause of action brought under the Federal Employers' Liability Act, that the defendant corporation was engaged in interstate commerce at the time of the grievances of which the plaintiff complains, special reference to the act of Congress in the declaration is not essential. The act is controlling if the averments in the statement show that at the time of the alleged negligent act by the railroad company it was engaged in interstate commerce. In *Seaboard Air Line R. Co. v. Duval*, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790, the complaint of the plaintiff below made no distinct reference to the Employers' Liability Act, but, as it did allege that the railroad company was operating a line of railroad between Portsmouth, Virginia, and Monroe, North Carolina, and that the plaintiff, while in its employment as baggage master and flagman upon a passenger train running between the said points, was negligently injured, it was held that a ground of action under the act of Congress was sufficiently pleaded; and in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, the averment was that the plaintiff had been employed in the performance of his duties on a train bound from Parsons, in the state of Kansas, to Osage, in the state of Oklahoma, and it was held that the act of Congress applied, because "it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce." For the same reason a statement was held sufficient in *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

While a plaintiff pleading only a

common-law right of action against a railroad company may not invoke the Federal Employers' Liability Act, the company in its defense may, of course, rely upon the act of Congress, if it can show, or the testimony offered by the plaintiff shows, that it was engaged in interstate commerce at the time the plaintiff was injured. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

In the case at bar, as already observed, plaintiff's original statement showed nothing but a mere common-law right of action against the defendant. By it the railroad company was notified to come into court and defend against a common-law charge of negligence. Nothing within its four corners even hinted that plaintiff had undertaken to hold it liable under the act of Congress which had given him a cause of action. In view of his receipt of benefits, he had no common-law right of action, and so the record stood until more than four years had elapsed from the time he had acquired a cause of action against it under the Federal statute; but that statute provides that no action shall be maintained under it "unless commenced within two years from the day the cause of action accrued;" and we now come to the consideration of the second question, of which little need be said, as we regard it as settled by a ruling of the Supreme Court of the United States, announced since we heard this appeal.

In *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, the plaintiff sought to recover under the Federal Employers' Liability Act, but it was contended by the defendant that his statement did not sufficiently aver a right to recover under that act. It averred that the

defendant was operating a line of railroad "in Virginia, North Carolina, and elsewhere." Over the objection of the defendant the trial court allowed the plaintiff to amend by averring that the line of the defendant's railroad extended between the city of Raleigh, in the state of North Carolina, and the city of Richmond, in the state of Virginia. On a writ of error taken by the defendant company, the Supreme Court of the United States, in an opinion filed May 22, 1916, held that

Limitation of  
actions—  
amendment of  
pending action—  
new cause.

the amendment had not been improperly allowed, as no new cause of action had been introduced.

Mr. Justice Van Devanter, speaking for the court, said: "This was an action by an employee of a railroad company to recover from the latter for personal injuries suffered through its negligence. The plaintiff had a verdict and judgment under the Employers' Liability Act of Congress (chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; chap. 143, 36 Stat. at L. 291, Comp. Stat. § 8662; 8 Fed. Stat. Anno. 2d ed. p. 1369), the judgment was affirmed (170 N. C. 128, 86 S. E. 964), and the defendant brings the case here. The original complaint was exceedingly brief, and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause

of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6, that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a Federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion, or been a matter of local procedure. *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 603, 604, 36 L. ed. 829, 832, 833, 12 Sup. Ct. Rep. 905; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 41 L. ed. 485, 17 Sup. Ct. Rep. 120; *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Crotty v. Chicago Great Western R. Co.* 95 C. C. A. 91, 169 Fed. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. *Sicard v. Davis*, 6 Pet. 124, 140, 8 L. ed. 342, 348; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *United States v. Dalcour*, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58. The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere; that the plaintiff was in its employ; that when he was injured he was in the line of duty and was proceeding to get aboard one of

the defendant's trains; and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired."

It clearly appears from this last utterance of the Supreme Court of the United States that, if Renn's original complaint had averred merely a common-law right of action against the railway company, with nothing in it indicating that the employer was operating a line of railroad from one state into another, the amendment would have been improperly allowed, for the reason that it introduced a new cause of action under the Federal Employers' Liability Act, which had been barred, by the express terms of that act, after two years from the time of the accident. What was held in the Renn Case logically followed what the court had said in *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

On October 20, 1914, nearly five years after this appellee was injured, the court below, under what we held on the first appeal, allowed his statement to be amended as follows: "On February 1, 1910, the defendant was engaged as a common carrier by railroad in commerce between the several states, and, subject to all the provisions of the Act of Congress of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208), the plaintiff was employed by defendant as freight conductor in such interstate commerce, on a train of freight cars in the Philadelphia yards of the defendant near American street and Lehigh avenue, and was directed by William L. Weyman, then acting for defendant, to place two of said cars (there being several in the train) on a certain track."

The allowance of this amendment was excepted to by the defendant, on the ground that it introduced a new cause of action under the Act of Congress of April 22, 1908, which was barred. Under *Seaboard Air Line R. Co. v. Renn*, it was improperly allowed, and proof in support of it, if admitted by the court below, would not have helped the plaintiff. The same is true of the admission by the defendant that when he was injured, it was engaged, and he was employed by it, in interstate commerce. At the time the admission was made, and for nearly three years before, all liability of the defendant under the Act of Congress had ceased; for none could have been enforced against it except by an action brought within two years from the time the injuries were sustained. The admission was not that the plaintiff had a cause of action under the act of Congress, but merely that at the time of the accident, and for two years thereafter, the defendant might have been liable under the act, which, however, was no longer availing to the plaintiff.

The assignments of error are sustained, the judgment below is re-



ciple, nearly, if not quite, rules the present one. In *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep. 135, 17 N. C. C. A. 1087, an action was brought in a state court to recover for personal injuries. The plaintiff was not employed by the defendant company, and therefore could not sue under the Federal statute. The defendant proved that the plaintiff was an employee of the Burlington Company, another railroad, and that he had received benefits as a member of the latter's relief association; further, that this Burlington Company was a joint tort-feasor with it, the defendant. On these facts the defendant claimed that, "since there can be but one satisfaction for an injury," the plaintiff was not entitled to recover against it, because its joint tort-feasor, the Burlington Company, had been released from liability through and by reason of the acceptance of its relief benefits by the plaintiff. The state supreme court held that, notwithstanding the fact the action was not brought under the act of Congress, since it appeared the accident happened in the course of interstate commerce, the validity of the alleged release must be tested by the Federal, and not the state, law. This view was sustained on appeal, the Supreme Court of the United States saying (239 U. S. 457, 458): "It is urged that § 5 [the part of the Federal Employers' Liability Act which prohibits the defense in question] was wholly inapplicable in an action brought against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton Company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, § 5 cannot be considered for any purpose; that is, that under § 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington Company from liability in a suit against it under the act. This involves, we think, a funda-

mental misconception. It is, of course, impossible to determine whether a joint tort-feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that, if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. . . . When, therefore, the Alton Company sought to escape from liability otherwise existing under the state law by reason of a release to the Burlington Company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute, and could not operate as a discharge."

It is clear that the above quotation means that, had the Burlington Company been sued as the Alton Company was in the then present action, the Federal act would have applied so as to exclude the defense depended upon, and it is particularly to be observed that the court there states the alleged release "could not operate as a discharge." In fact, as I read it, the whole context of the opinion indicates that the Federal Supreme Court meant to rule that such a release can never operate as a discharge in any case where suit is brought against a railroad by an employee injured in the course of interstate commerce, where the latter fact is properly made to appear, and that this rule applies, whether the action to recover for the injuries is formally instituted under the act of Congress or otherwise. . In this connection, when the case just reviewed was in the supreme court of Illinois on appeal (*Wagner v. Chicago & A. R. Co.* 265 Ill. 245, 251, 252, 106 N. E. 809, Ann. Cas. 1916A, 778), that tribunal took the position that, although under the local law the defense of an implied release through the acceptance of relief association benefits might ordinarily be a valid

one, yet "the state law in this regard has been modified . . . by the Federal Employers' Liability Act as to cases where injuries are received by certain employees of an employer engaged in interstate commerce," and in such cases the defense in question cannot apply. After first saying that a stipulation filed at the trial of the case left it as though no allegation that the plaintiff had been injured in interstate commerce had been made in the declaration, the court adds: "When plaintiff in error [the defendant below] attempted to prove a satisfaction by the payment of benefits by its joint tort-feasor, the Burlington Company, to the defendant in error, it was proper for defendant in error [the plaintiff below], in rebuttal, to show that no valid release had been given the Burlington Company by him. As between defendant in error and the Burlington Company, the Federal Employers' Liability Act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all state laws on the subject, then the release given by defendant in error to the Burlington Company was not valid, and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington Company was concerned, it was clearly invalid as to plaintiff in error, and constituted no defense to this action."

Although the view just quoted was dissented from by two justices of the supreme court of Illinois, yet, as we have seen, on appeal it was approved by the Supreme Court of the United States, the latter saying, with reference thereto, it simply meant that "the release could not aid the Alton Company, for the very plain reason that the alleged joint tort-feasor had not been discharged," and adding these significant words: "The state law did not recognize the discharge of the defendant by virtue of a release of a joint tort-feasor, which, under the

law applicable thereto, was found to be without validity."

We use the term "significant," for the Federal Employers' Liability Act is referred to as "the law applicable" to the alleged release, though the case quoted from was not an action under that statute. It seems to me that *Chicago & A. R. Co. v. Wagner*, just reviewed, is sufficient to sustain the judgment entered in this case; but it is not necessary to rest thereon; for, as I shall now show, many other United States Supreme Court decisions can be mentioned which justify the position that the present case was subject to the provisions of § 5 of the Federal Employers' Liability Act.

To begin with, under the relevant Federal authorities, it is not always required that a statement of claim shall expressly aver the act of Congress here in question, or that it is relied upon. In *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790, while the complaint alleged that the defendant's railroad ran from a point in Virginia to one in North Carolina, and that the plaintiff was injured on a train operated between these two places, yet neither it nor the defendant's answer made any direct reference to the act of Congress; nevertheless the Supreme Court of the United States said of the declaration: "This states a ground of action under that act." In *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168, as appears from the opinion of the Supreme Court, the complainant alleged and the evidence showed that the accident happened "in the course of the operation of interstate commerce," but "no express claim was made under the Employers' Liability Act." The court there states: "It is urged it was error in the reviewing court to test the correctness of the rulings of the trial court by the provisions of the Employers' Liability Act, instead of confining the subject exclusively to the Safety Appliance Law [which

was pleaded] and the rules of the common law."

And in overruling this contention the court said: "This simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness, considered as an original proposition, the contention is not open, as it was expressly foreclosed in *Seaboard Air Line R. Co. v. Duvall*."

See also *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 184, the plaintiff, who was "sole beneficiary of the deceased under the state statute," sued in her individual capacity to recover for the death of a son, killed in the employ of the defendant company. The case was in the United States courts by reason of diverse citizenship. The original complaint charged that at the time of the accident the deceased was a fireman on a train bound from a point in the state of Kansas to one in the state of Oklahoma; but it further expressly averred that the suit was instituted "by virtue of the laws of the state of Kansas, where the said Fred S. Wulf was killed," and which by statute provides "a right of action for injuries resulting in death." The defendant answered that the cause of action was "not governed by the laws of Kansas," but by the Federal Employers' Liability Act, whereupon the plaintiff asked leave to amend and apply the Federal statute. To this the defendant objected that the Statute of Limitations had run; but the court allowed the amendment. On appeal from a judgment in favor of the plaintiff, the Supreme Court of the United States said: "It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her

individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition . . . alleged an entirely new and distinct cause of action; and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years. . . . It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce, . . . it had the effect of superseding state laws upon the subject. . . . Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any . . . repealed statute would have done."

It is true that in the course of the foregoing opinion the Federal Supreme Court said that the original petition "sufficiently averred that the deceased came to his death through injuries suffered while he was employed . . . in interstate commerce;" but an examination of the original pleadings in the court below, as sent up on appeal, shows that the excerpt just quoted from the opinion of the Supreme Court must mean, and could only mean, that a certain allegation in the original complaint to the effect that the deceased at the time of the accident was employed in the "performance of his duties . . . upon a train bound from Parsons, in the state of Kansas, to Osage, in the state of Oklahoma," was a sufficient aver-



ment to bring the case within the statute; for that is the only possible matter in the entire declaration that in any manner indicated the plaintiff's case had a Federal aspect. Of course, an amendment of the party plaintiff was necessary in this Wulf Case, for the action was instituted by one who in the capacity in which she was named had no right to sue under the Federal statute, which likewise was the situation in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, where the plaintiffs elected to stand on their action as brought, and a verdict in their favor was reversed. In all the cases reviewed in this paragraph it will be observed that the respective declarations failed to aver the fact of the act of Congress, or that it was depended upon; yet each of them contained some allegation of fact which indicated that the cause at issue had a possible Federal aspect; but we shall show, by the authorities discussed in the next paragraph, that it is not always required of a declaration to go even this far in order to justify the application of the Federal Employers' Liability Act, when the actual facts of a given case bring it within the statute.

While in a case of negligence for personal injuries, before the act of Congress here in question will be applied, it must appear in some definite way that the accident happened in the course of interstate commerce, yet, under the relevant authorities, the manner in which this is made to appear, whether in the pleadings or otherwise, does not seem to be of controlling importance. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, likewise reported in 98 Ark. 240, 135 S. W. 874 (whence we get our information concerning the contents of the complaint), was an action to recover for the death of the plaintiff's intestate. We use the terms "plaintiff" or "defendant" to designate the parties as they stood in the trial court. The

declaration simply averred that the defendant was operating a line of railroad "in the state of Oklahoma," and that "deceased was a brakeman on defendant's said line in Oklahoma." The defendant's answer did not refer to the Federal act nor to the interstate character of the plaintiff's employment. The testimony showed, however, that at the time of the accident the deceased was working on a train engaged in interstate commerce; whereupon the defendant requested a peremptory instruction to the effect that a certain item of damage not permitted by the Federal statute could not be recovered. The trial court, while treating the defendant's motion as sufficient to raise a Federal question under the act of Congress, held that the statute did not apply, and the supreme court of the state subsequently decided that it was "only supplementary, and the judgment [for the plaintiff] could be upheld under the state laws." The United States Supreme Court accepted the finding of the court below to the effect that a Federal question was involved, and reversed the case, holding that the act of Congress applied. In *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act, but, over the plaintiff's objection, evidence was admitted to show that the accident happened in interstate commerce; thereupon the defendant insisted that the case was governed by the act of Congress, which contention the trial court overruled. On appeal the Supreme Court of the United States held that it was error not to apply and enforce the provisions of the Federal statute, and reversed. In *Central Vermont R. Co. v. White*, 238 U. S. 507, 513, 59 L. ed. 1433, 1437, 35 Sup. Ct. Rep. 868, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265 (we quote from the opinion of the Supreme Court): "The declaration contained no allegation that White was engaged in interstate commerce

at the time of the collision. The company made this the ground of a plea in bar. The administratrix thereupon filed a replication admitting that the deceased was engaged in such commerce at the time of his death. The company demurred to the replication on the ground that it was a departure from the cause of action under the state law, and the assertion of a new cause of action under the Federal Employers' Liability Law. This demurrer was overruled."

In affirming judgment for the plaintiff, the Supreme Court said it was sufficient that the state court of appeals held the defect in the declaration "cured by the charge in the plea and the admission in the replication that White was employed in interstate commerce." In *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 549, 551, 60 L. ed. 431, 433, 434, 36 Sup. Ct. Rep. 186 (we quote from the opinion of the United States Supreme Court): "The petition described the road engine as moving from one point to another in Nebraska, and said nothing about interstate commerce, but the answer alleged that this engine was being taken to a point in another state, and that the defendant was engaged and the intestate was employed in interstate commerce. . . . As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act; . . . and as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling."

In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, the act of Congress was not pleaded, and the plaintiff's declaration did not indicate in any way that deceased was engaged in interstate service. The defendant set up "as a special defense" that "at the time the plain-

tiff's intestate was killed he was engaged in interstate commerce," and "that the liability of the defendant was fixed and regulated by the Federal Employers' Liability Act." The state court "assumed that the record sufficiently presented a question of Federal right," but decided the point against the party asserting the right, holding that "the action was brought under the statute of North Carolina, that the Federal act had no application, and that the cause was triable under the statutes of the state."

In reversing, the United States Supreme Court ruled that "the Federal act governed to the exclusion of the statutes of the state."

In *Koennecke v. Seaboard Air Line R. Co.* 101 S. C. 86, 85 S. E. 375, the supreme court of South Carolina held: "Where, in an action for the death of a railroad employee, evidence that he was engaged in interstate commerce was elicited without objection, on the cross-examination of one of the plaintiff's witnesses, either party might, so long as the evidence remained in the record, claim the benefit of the Federal statute, though the pleadings of neither asserted any right or immunity under it," saying that, where the facts are not changed, the cause of action is essentially the same, whether tried under the state or Federal law, and that "it could rarely happen that a shifting from one to the other would work prejudice and surprise."

The court observed, however, that "if the parties have not been previously warned by the pleadings that such shifting might take place, and if it should be made to appear that it would be a surprise and operate to cut off a claim or defense which could otherwise have been made, the [trial] court would either not allow it or allow it upon such terms as would prevent prejudice."

On appeal the Supreme Court of the United States (*Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 352, 354, 60 L. ed. 324, 326, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165) affirmed, saying, *inter alia*: "The

cause of action arose under a different law by the amendment, but the facts constituting the tort were the same."

See also *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 480, 481, 60 L. ed. 1110, 1115, 1116, 36 Sup. Ct. Rep. 626.

Thus, from the authorities reviewed, it may be seen that in causes like the one before us, whenever, by any formal method, it is properly made to appear, or whenever it is directly or impliedly conceded, whether by the pleadings or otherwise, that the accident under investigation happened to an employee of a defendant railroad during the course of interstate commerce, the court will regard this as a governing fact and apply the Federal law; and, as suggested in one of the above-cited cases, when we consider that in the vast majority of instances the plaintiff has no way of knowing whether or not he was injured in interstate commerce, while the defendant almost invariably has such knowledge, it is plain that the rule as stated is a just one. Moreover, it is a rule from which no material wrong can flow; for, as suggested in another of the cases, a party taken by surprise is always entitled to a continuance if the trial court be convinced that he may suffer harm.

Before passing to a consideration of the other cases chiefly relied upon by the appellant, it may be well at this point to examine *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, which, when applied to the facts at bar, to my mind, is a controlling authority against the majority view, although it is cited in support thereof. The opinion in that case was handed down on May 22, 1916, by Mr. Justice Van Devanter. The action was instituted in a state court by an employee of the defendant railroad to recover for personal injuries. Nothing was averred in the declaration which directly indicated the suit was other than a common-law action; but the

plaintiff secured a verdict under the Employers' Liability Act. A judgment entered on this verdict was affirmed by the state supreme court (170 N. C. 128, 86 S. E. 964), and the defendant appealed to the Supreme Court of the United States. In affirming, that tribunal said: "The original complaint was exceedingly brief, and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs. . . . The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6, that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a Federal question, and subject to re-examination here; . . . *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 603, 604, 36 L. ed. 829, 832, 833, 12 Sup. Ct. Rep. 905; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 41 L. ed.

485, 17 Sup. Ct. Rep. 120; *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1181, 23 Sup. Ct. Rep. 778; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Crotty v. Chicago G. W. R. Co.* 95 C. C. A. 91, 169 Fed. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. *Sicard v. Davis*, 6 Pet. 124, 140, 8 L. ed. 342, 348; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *United States v. Dalcour*, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58."

After this the court pointed out that certain allegations in the original declaration, in no way connected with the happening of the accident, but merely descriptive of the character of the defendant railroad, might be taken as consistent with a recovery under the act of Congress, and that the absence from such declaration of any mention of the laws of Virginia, the state in which the action was instituted, was "at least consistent with their inapplicability." Then the court concluded: "In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And, this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit, which was before the limitation had expired."

Surely this decision should be accepted as controlling the present case; for here, as there, the original declaration, while not averring the act of Congress, or facts bringing the plaintiff's cause of action directly thereunder, contains nothing inconsistent therewith; hence, in view of the defendant's admission it was engaged in interstate commerce,

and that the plaintiff was so employed when injured, the declaration should be held sufficient, and the amendment as merely "expanding or amplifying" the cause of action originally stated.

The remaining cases chiefly relied upon by the appellant are easily distinguished from the one at bar. In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, the action was by the widow and parents of an employee of the defendant railroad to recover for his death. The plaintiff's petition contained nothing to indicate that the accident happened in the course of interstate commerce. The defendant excepted to the pleading on the ground that it did not show whether the action was brought under the state or Federal law. If the Federal law applied,—and the evidence showed it did,—then the suit was by the wrong party, as the United States statute requires the action to be in the name of the personal representative of the deceased. The plaintiffs elected to stand by their petition as originally stated. On appeal the Supreme Court reversed, "without prejudice to such rights as the personal representative of the deceased may have," saying: "The plaintiffs . . . stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. . . . When the evidence was adduced it developed that the real case was not controlled by the state statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved."

The above decision simply amounts to this: There could be no recovery in the suit as instituted; for the evidence showed that the case fell within the act of Congress, and the parties named as plaintiffs were without authority to sue under

defendant was operating a line of railroad "in Virginia, North Carolina, and elsewhere." Over the objection of the defendant the trial court allowed the plaintiff to amend by averring that the line of the defendant's railroad extended between the city of Raleigh, in the state of North Carolina, and the city of Richmond, in the state of Virginia. On a writ of error taken by the defendant company, the Supreme Court of the United States, in an opinion filed May 22, 1916, held that the amendment had not been improperly allowed, as no new cause of action had been introduced.

Limitation of actions—  
amendment of pending action—  
new cause.

Mr. Justice Van Devanter, speaking for the court, said: "This was an action by an employee of a railroad company to recover from the latter for personal injuries suffered through its negligence. The plaintiff had a verdict and judgment under the Employers' Liability Act of Congress (chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; chap. 143, 36 Stat. at L. 291, Comp. Stat. § 8662; 8 Fed. Stat. Anno. 2d ed. p. 1369), the judgment was affirmed (170 N. C. 128, 86 S. E. 964), and the defendant brings the case here. The original complaint was exceedingly brief, and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause

of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6, that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a Federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion, or been a matter of local procedure. *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 603, 604, 36 L. ed. 829, 832, 833, 12 Sup. Ct. Rep. 905; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 41 L. ed. 485, 17 Sup. Ct. Rep. 120; *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 185, Ann. Cas. 1914B, 134; *Grotty v. Chicago Great Western R. Co.* 95 C. C. A. 91, 169 Fed. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. *Sicard v. Davis*, 6 Pet. 124, 140, 8 L. ed. 342, 348; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *United States v. Dalcour*, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58. The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere; that the plaintiff was in its employ; that when he was injured he was in the line of duty and was proceeding to get aboard one of

the defendant's trains; and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired."

It clearly appears from this last utterance of the Supreme Court of the United States that, if Renn's original complaint had averred merely a common-law right of action against the railway company, with nothing in it indicating that the employer was operating a line of railroad from one state into another, the amendment would have been improperly allowed, for the reason that it introduced a new cause of action under the Federal Employers' Liability Act, which had been barred, by the express terms of that act, after two years from the time of the accident. What was held in the Renn Case logically followed what the court had said in *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

On October 20, 1914, nearly five years after this appellee was injured, the court below, under what we held on the first appeal, allowed his statement to be amended as follows: "On February 1, 1910, the defendant was engaged as a common carrier by railroad in commerce between the several states, and, subject to all the provisions of the Act of Congress of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208), the plaintiff was employed by defendant as freight conductor in such interstate commerce, on a train of freight cars in the Philadelphia yards of the defendant near American street and Lehigh avenue, and was directed by William L. Weyman, then acting for defendant, to place two of said cars (there being several in the train) on a certain track."

The allowance of this amendment was excepted to by the defendant, on the ground that it introduced a new cause of action under the Act of Congress of April 22, 1908, which was barred. Under *Seaboard Air Line R. Co. v. Renn*, it was improperly allowed, and proof in support of it, if admitted by the court below, would not have helped the plaintiff. The same is true of the admission by the defendant that when he was injured, it was engaged, and he was employed by it, in interstate commerce. At the time the admission was made, and for nearly three years before, all liability of the defendant under the Act of Congress had ceased; for none could have been enforced against it except by an action brought within two years from the time the injuries were sustained. The admission was not that the plaintiff had a cause of action under the act of Congress, but merely that at the time of the accident, and for two years thereafter, the defendant might have been liable under the act, which, however, was no longer availing to the plaintiff.

The assignments of error are sustained, the judgment below is re-

versed, and is here entered for the defendant.

**Moschzisker, J., dissenting:**

The plaintiff lost an arm through the negligence of the defendant. So far as concerns the facts of the accident, all the members of this court are convinced the case was for the jury, and of the justice of the verdict rendered. The sole point upon which we differ concerns the law controlling the defense. Since the point of difference involves a substantive Federal question, which may be reviewed by the Supreme Court of the United States (*Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1), I shall state my dissent at greater length than otherwise would be justified.

The present appeal raises more than a mere question of pleading, for the only material fact necessary to invest the case with a Federal aspect, i. e., that at the time of his injury the plaintiff was engaged in interstate commerce, was formally and unconditionally admitted at the trial by the defendant, during the presentation of the plaintiff's case. Hence, we have before us a substantive question of law, arising out of an agreed state of facts; and that question is, When it affirmatively appears, by an unrestricted and unqualified agreement of record, that a plaintiff employed by an interstate railroad was injured while engaged in interstate commerce, can the defendant, after making such an admission, under any circumstances, subsequently be heard to say that § 5 of the Federal Employers' Liability Act of April 22, 1908 (Comp. Stat. § 8661), does not apply to the case? To my mind, both on principle and authority, the answer to this question must be in the negative, as I shall endeavor to demonstrate.

The trial under review proceeded in this manner:

While the plaintiff was presenting his evidence, the following admission was entered on the record: "It

is agreed between counsel for the plaintiff and defendant that at the time of the accident to William Hogarty on February 1, 1910, the cars upon which the plaintiff was working contained shipments of freight in interstate commerce."

So it may be seen that this is not an instance where the plaintiff was permitted to prove a material fact, the averment of which had been omitted from his declaration; on the contrary, it is one where the fact in question was expressly and unconditionally agreed to by counsel for the defendant, and thus established as part of the plaintiff's case. Hence it thereby became apparent that the Federal law controlled; for it has been definitely decided that the Act of 1908, *supra*, announces a broad public policy which supersedes the laws of the states upon all matters within its scope, and that, so long as it remains upon the statute books, in cases involving accidents to railroad employees when engaged in interstate commerce, such laws must be viewed as though nonexistent, or, to state the ruling in another way, that every branch of that public policy is to be considered "as much the policy" of each particular state in the Union "as if the act had emanated from its own legislature." *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 57, 56 L. ed. 327, 349, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. ed. 140, 36 Sup. Ct. Rep. 27.

That the Act of 1908, *supra*, applies and controls even in a suit not instituted thereunder, when it affirmatively appears that the injury sued for happened to one engaged in interstate commerce, has been decided by the Supreme Court of the United States in many cases, one of the most recent of which, on prin-

ciple, nearly, if not quite, rules the present one. In *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep. 135, 17 N. C. C. A. 1087, an action was brought in a state court to recover for personal injuries. The plaintiff was not employed by the defendant company, and therefore could not sue under the Federal statute. The defendant proved that the plaintiff was an employee of the Burlington Company, another railroad, and that he had received benefits as a member of the latter's relief association; further, that this Burlington Company was a joint tort-feasor with it, the defendant. On these facts the defendant claimed that, "since there can be but one satisfaction for an injury," the plaintiff was not entitled to recover against it, because its joint tort-feasor, the Burlington Company, had been released from liability through and by reason of the acceptance of its relief benefits by the plaintiff. The state supreme court held that, notwithstanding the fact the action was not brought under the act of Congress, since it appeared the accident happened in the course of interstate commerce, the validity of the alleged release must be tested by the Federal, and not the state, law. This view was sustained on appeal, the Supreme Court of the United States saying (239 U. S. 457, 458): "It is urged that § 5 [the part of the Federal Employers' Liability Act which prohibits the defense in question] was wholly inapplicable in an action brought against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton Company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, § 5 cannot be considered for any purpose; that is, that under § 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington Company from liability in a suit against it under the act. This involves, we think, a funda-

mental misconception. It is, of course, impossible to determine whether a joint tort-feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that, if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. . . . When, therefore, the Alton Company sought to escape from liability otherwise existing under the state law by reason of a release to the Burlington Company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute, and could not operate as a discharge."

It is clear that the above quotation means that, had the Burlington Company been sued as the Alton Company was in the then present action, the Federal act would have applied so as to exclude the defense depended upon, and it is particularly to be observed that the court there states the alleged release "could not operate as a discharge." In fact, as I read it, the whole context of the opinion indicates that the Federal Supreme Court meant to rule that such a release can never operate as a discharge in any case where suit is brought against a railroad by an employee injured in the course of interstate commerce, where the latter fact is properly made to appear, and that this rule applies, whether the action to recover for the injuries is formally instituted under the act of Congress or otherwise. . In this connection, when the case just reviewed was in the supreme court of Illinois on appeal (*Wagner v. Chicago & A. R. Co.* 265 Ill. 245, 251, 252, 106 N. E. 809, Ann. Cas. 1916A, 778), that tribunal took the position that, although under the local law the defense of an implied release through the acceptance of relief association benefits might ordinarily be a valid



one, yet "the state law in this regard has been modified . . . by the Federal Employers' Liability Act as to cases where injuries are received by certain employees of an employer engaged in interstate commerce," and in such cases the defense in question cannot apply. After first saying that a stipulation filed at the trial of the case left it as though no allegation that the plaintiff had been injured in interstate commerce had been made in the declaration, the court adds: "When plaintiff in error [the defendant below] attempted to prove a satisfaction by the payment of benefits by its joint tort-feasor, the Burlington Company, to the defendant in error, it was proper for defendant in error [the plaintiff below], in rebuttal, to show that no valid release had been given the Burlington Company by him. As between defendant in error and the Burlington Company, the Federal Employers' Liability Act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all state laws on the subject, then the release given by defendant in error to the Burlington Company was not valid, and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington Company was concerned, it was clearly invalid as to plaintiff in error, and constituted no defense to this action."

Although the view just quoted was dissented from by two justices of the supreme court of Illinois, yet, as we have seen, on appeal it was approved by the Supreme Court of the United States, the latter saying, with reference thereto, it simply meant that "the release could not aid the Alton Company, for the very plain reason that the alleged joint tort-feasor had not been discharged," and adding these significant words: "The state law did not recognize the discharge of the defendant by virtue of a release of a joint tort-feasor, which, under the

law applicable thereto, was found to be without validity."

We use the term "significant," for the Federal Employers' Liability Act is referred to as "the law applicable" to the alleged release, though the case quoted from was not an action under that statute. It seems to me that *Chicago & A. R. Co. v. Wagner*, just reviewed, is sufficient to sustain the judgment entered in this case; but it is not necessary to rest thereon; for, as I shall now show, many other United States Supreme Court decisions can be mentioned which justify the position that the present case was subject to the provisions of § 5 of the Federal Employers' Liability Act.

To begin with, under the relevant Federal authorities, it is not always required that a statement of claim shall expressly aver the act of Congress here in question, or that it is relied upon. In *Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790, while the complaint alleged that the defendant's railroad ran from a point in Virginia to one in North Carolina, and that the plaintiff was injured on a train operated between these two places, yet neither it nor the defendant's answer made any direct reference to the act of Congress; nevertheless the Supreme Court of the United States said of the declaration: "This states a ground of action under that act." In *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168, as appears from the opinion of the Supreme Court, the complainant alleged and the evidence showed that the accident happened "in the course of the operation of interstate commerce," but "no express claim was made under the Employers' Liability Act." The court there states: "It is urged it was error in the reviewing court to test the correctness of the rulings of the trial court by the provisions of the Employers' Liability Act, instead of confining the subject exclusively to the Safety Appliance Law [which

was pleaded] and the rules of the common law."

And in overruling this contention the court said: "This simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness, considered as an original proposition, the contention is not open, as it was expressly foreclosed in *Seaboard Air Line R. Co. v. Du-vall*."

See also *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, the plaintiff, who was "sole beneficiary of the deceased under the state statute," sued in her individual capacity to recover for the death of a son, killed in the employ of the defendant company. The case was in the United States courts by reason of diverse citizenship. The original complaint charged that at the time of the accident the deceased was a fireman on a train bound from a point in the state of Kansas to one in the state of Oklahoma; but it further expressly averred that the suit was instituted "by virtue of the laws of the state of Kansas, where the said Fred S. Wulf was killed," and which by statute provides "a right of action for injuries resulting in death." The defendant answered that the cause of action was "not governed by the laws of Kansas," but by the Federal Employers' Liability Act, whereupon the plaintiff asked leave to amend and apply the Federal statute. To this the defendant objected that the Statute of Limitations had run; but the court allowed the amendment. On appeal from a judgment in favor of the plaintiff, the Supreme Court of the United States said: "It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her

individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition . . . alleged an entirely new and distinct cause of action; and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years. . . . It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce, . . . it had the effect of superseding state laws upon the subject. . . . Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any . . . repealed statute would have done."

It is true that in the course of the foregoing opinion the Federal Supreme Court said that the original petition "sufficiently averred that the deceased came to his death through injuries suffered while he was employed . . . in interstate commerce;" but an examination of the original pleadings in the court below, as sent up on appeal, shows that the excerpt just quoted from the opinion of the Supreme Court must mean, and could only mean, that a certain allegation in the original complaint to the effect that the deceased at the time of the accident was employed in the "performance of his duties . . . upon a train bound from Parsons, in the state of Kansas, to Osage, in the state of Oklahoma," was a sufficient aver-

ment to bring the case within the statute; for that is the only possible matter in the entire declaration that in any manner indicated the plaintiff's case had a Federal aspect. Of course, an amendment of the party plaintiff was necessary in this Wulf Case, for the action was instituted by one who in the capacity in which she was named had no right to sue under the Federal statute, which likewise was the situation in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, where the plaintiffs elected to stand on their action as brought, and a verdict in their favor was reversed. In all the cases reviewed in this paragraph it will be observed that the respective declarations failed to aver the fact of the act of Congress, or that it was depended upon; yet each of them contained some allegation of fact which indicated that the cause at issue had a possible Federal aspect; but we shall show, by the authorities discussed in the next paragraph, that it is not always required of a declaration to go even this far in order to justify the application of the Federal Employers' Liability Act, when the actual facts of a given case bring it within the statute.

While in a case of negligence for personal injuries, before the act of Congress here in question will be applied, it must appear in some definite way that the accident happened in the course of interstate commerce, yet, under the relevant authorities, the manner in which this is made to appear, whether in the pleadings or otherwise, does not seem to be of controlling importance. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, likewise reported in 98 Ark. 240, 135 S. W. 874 (whence we get our information concerning the contents of the complaint), was an action to recover for the death of the plaintiff's intestate. We use the terms "plaintiff" or "defendant" to designate the parties as they stood in the trial court. The

declaration simply averred that the defendant was operating a line of railroad "in the state of Oklahoma," and that "deceased was a brakeman on defendant's said line in Oklahoma." The defendant's answer did not refer to the Federal act nor to the interstate character of the plaintiff's employment. The testimony showed, however, that at the time of the accident the deceased was working on a train engaged in interstate commerce; whereupon the defendant requested a peremptory instruction to the effect that a certain item of damage not permitted by the Federal statute could not be recovered. The trial court, while treating the defendant's motion as sufficient to raise a Federal question under the act of Congress, held that the statute did not apply, and the supreme court of the state subsequently decided that it was "only supplementary, and the judgment [for the plaintiff] could be upheld under the state laws." The United States Supreme Court accepted the finding of the court below to the effect that a Federal question was involved, and reversed the case, holding that the act of Congress applied. In *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act, but, over the plaintiff's objection, evidence was admitted to show that the accident happened in interstate commerce; thereupon the defendant insisted that the case was governed by the act of Congress, which contention the trial court overruled. On appeal the Supreme Court of the United States held that it was error not to apply and enforce the provisions of the Federal statute, and reversed. In *Central Vermont R. Co. v. White*, 238 U. S. 507, 513, 59 L. ed. 1433, 1437, 35 Sup. Ct. Rep. 868, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265 (we quote from the opinion of the Supreme Court): "The declaration contained no allegation that White was engaged in interstate commerce

at the time of the collision. The company made this the ground of a plea in bar. The administratrix thereupon filed a replication admitting that the deceased was engaged in such commerce at the time of his death. The company demurred to the replication on the ground that it was a departure from the cause of action under the state law, and the assertion of a new cause of action under the Federal Employers' Liability Law. This demurrer was overruled."

In affirming judgment for the plaintiff, the Supreme Court said it was sufficient that the state court of appeals held the defect in the declaration "cured by the charge in the plea and the admission in the replication that White was employed in interstate commerce." In *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 549, 551, 60 L. ed. 431, 433, 434, 36 Sup. Ct. Rep. 186 (we quote from the opinion of the United States Supreme Court): "The petition described the road engine as moving from one point to another in Nebraska, and said nothing about interstate commerce, but the answer alleged that this engine was being taken to a point in another state, and that the defendant was engaged and the intestate was employed in interstate commerce. . . . As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act; . . . and as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling."

In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, the act of Congress was not pleaded, and the plaintiff's declaration did not indicate in any way that deceased was engaged in interstate service. The defendant set up "as a special defense" that "at the time the plain-

tiff's intestate was killed he was engaged in interstate commerce," and "that the liability of the defendant was fixed and regulated by the Federal Employers' Liability Act." The state court "assumed that the record sufficiently presented a question of Federal right," but decided the point against the party asserting the right, holding that "the action was brought under the statute of North Carolina, that the Federal act had no application, and that the cause was triable under the statutes of the state."

In reversing, the United States Supreme Court ruled that "the Federal act governed to the exclusion of the statutes of the state."

In *Koennecke v. Seaboard Air Line R. Co.* 101 S. C. 86, 85 S. E. 375, the supreme court of South Carolina held: "Where, in an action for the death of a railroad employee, evidence that he was engaged in interstate commerce was elicited without objection, on the cross-examination of one of the plaintiff's witnesses, either party might, so long as the evidence remained in the record, claim the benefit of the Federal statute, though the pleadings of neither asserted any right or immunity under it," saying that, where the facts are not changed, the cause of action is essentially the same, whether tried under the state or Federal law, and that "it could rarely happen that a shifting from one to the other would work prejudice and surprise."

The court observed, however, that "if the parties have not been previously warned by the pleadings that such shifting might take place, and if it should be made to appear that it would be a surprise and operate to cut off a claim or defense which could otherwise have been made, the [trial] court would either not allow it or allow it upon such terms as would prevent prejudice."

On appeal the Supreme Court of the United States (*Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 352, 354, 60 L. ed. 324, 326, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165) affirmed, saying, *inter alia*: "The

cause of action arose under a different law by the amendment, but the facts constituting the tort were the same."

See also *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 480, 481, 60 L. ed. 1110, 1115, 1116, 36 Sup. Ct. Rep. 626.

Thus, from the authorities reviewed, it may be seen that in causes like the one before us, whenever, by any formal method, it is properly made to appear, or whenever it is directly or impliedly conceded, whether by the pleadings or otherwise, that the accident under investigation happened to an employee of a defendant railroad during the course of interstate commerce, the court will regard this as a governing fact and apply the Federal law; and, as suggested in one of the above-cited cases, when we consider that in the vast majority of instances the plaintiff has no way of knowing whether or not he was injured in interstate commerce, while the defendant almost invariably has such knowledge, it is plain that the rule as stated is a just one. Moreover, it is a rule from which no material wrong can flow; for, as suggested in another of the cases, a party taken by surprise is always entitled to a continuance if the trial court be convinced that he may suffer harm.

Before passing to a consideration of the other cases chiefly relied upon by the appellant, it may be well at this point to examine *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, which, when applied to the facts at bar, to my mind, is a controlling authority against the majority view, although it is cited in support thereof. The opinion in that case was handed down on May 22, 1916, by Mr. Justice Van Devanter. The action was instituted in a state court by an employee of the defendant railroad to recover for personal injuries. Nothing was averred in the declaration which directly indicated the suit was other than a common-law action; but the

plaintiff secured a verdict under the Employers' Liability Act. A judgment entered on this verdict was affirmed by the state supreme court (170 N. C. 128, 86 S. E. 964), and the defendant appealed to the Supreme Court of the United States. In affirming, that tribunal said: "The original complaint was exceedingly brief, and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs. . . . The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6, that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a Federal question, and subject to re-examination here; . . . *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 603, 604, 36 L. ed. 829, 832, 833, 12 Sup. Ct. Rep. 905; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 41 L. ed.

485, 17 Sup. Ct. Rep. 120; *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1181, 23 Sup. Ct. Rep. 778; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Crotty v. Chicago G. W. R. Co.* 95 C. C. A. 91, 169 Fed. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. *Sicard v. Davis*, 6 Pet. 124, 140, 8 L. ed. 342, 348; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *United States v. Dalcour*, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58."

After this the court pointed out that certain allegations in the original declaration, in no way connected with the happening of the accident, but merely descriptive of the character of the defendant railroad, might be taken as consistent with a recovery under the act of Congress, and that the absence from such declaration of any mention of the laws of Virginia, the state in which the action was instituted, was "at least consistent with their inapplicability." Then the court concluded: "In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And, this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit, which was before the limitation had expired."

Surely this decision should be accepted as controlling the present case; for here, as there, the original declaration, while not averring the act of Congress, or facts bringing the plaintiff's cause of action directly thereunder, contains nothing inconsistent therewith; hence, in view of the defendant's admission it was engaged in interstate commerce,

and that the plaintiff was so employed when injured, the declaration should be held sufficient, and the amendment as merely "expanding or amplifying" the cause of action originally stated.

The remaining cases chiefly relied upon by the appellant are easily distinguished from the one at bar. In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, the action was by the widow and parents of an employee of the defendant railroad to recover for his death. The plaintiff's petition contained nothing to indicate that the accident happened in the course of interstate commerce. The defendant excepted to the pleading on the ground that it did not show whether the action was brought under the state or Federal law. If the Federal law applied,—and the evidence showed it did,—then the suit was by the wrong party, as the United States statute requires the action to be in the name of the personal representative of the deceased. The plaintiffs elected to stand by their petition as originally stated. On appeal the Supreme Court reversed, "without prejudice to such rights as the personal representative of the deceased may have," saying: "The plaintiffs . . . stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. . . . When the evidence was adduced it developed that the real case was not controlled by the state statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved."

The above decision simply amounts to this: There could be no recovery in the suit as instituted; for the evidence showed that the case fell within the act of Congress, and the parties named as plaintiffs were without authority to sue under

the Federal law. In short, the parties plaintiff were entitled to sue under the state law, but not under the Federal statute, whereas, under the evidence adduced, the latter was the only law which could be applied; therefore the Supreme Court properly said that the case pleaded was not proved, and the case proved was not pleaded. In connection with this Seale Case consider the discussion of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134. Also see *Winfree v. Northern P. R. Co.* 227 U. S. 296, 302, 57 L. ed. 518, 520, 33 Sup. Ct. Rep. 273, a case involving the same act of Congress which is now before us, where it was expressly held that "damages to his [the decedent's] estate [under the Federal statute] would be a distinct cause of action from damages to his parents [under a state statute]," the principle of which ruling, when kept in mind, makes plain the decision in *St. Louis, S. F. & T. R. Co. v. Seale*, *supra*. The case at bar differs from the one just reviewed in that here there is nothing whatever in the party plaintiff or in the averments of his declaration inconsistent with an action under the Federal law, and, in addition, we have the element of the admission of record previously discussed.

The present case is readily distinguishable from *Allen v. Tuscarora Valley R. Co.* 229 Pa. 97, 30 L.R.A. (N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34; *Brinkmeier v. Missouri P. R. Co.* 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, and other like authorities, which hold that there can be no recovery under the original Federal Safety Appliance Act of March 2, 1893 (chap. 196, § 2, 27 Stat. at L. 531, Comp. Stat. § 8606, 8 Fed. Stat. Anno. 2d ed. p. 1161), unless the statute is either expressly declared upon or the plaintiff avers a breach of its provisions in his statement of claim. The Safety Appliance Act is not of the character of the Employers' Liability Act. The latter ordains broad general rules of public policy,

and, within its field, not only supercedes the common law, but all relevant state enactments, while the former is one which ordains a minute, physical regulation, to wit, that a certain kind of mechanical contrivance, or coupler, must be used upon all cars engaged in interstate commerce. Hence, of course, if one desires to recover because of a breach of this special regulation, he must bring his declaration strictly within the provisions of the statute which ordains it. The case of *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168, shows, however, that even when the Safety Appliance Act is expressly pleaded, all the provisions of the Employers' Liability Act apply, though the latter is not referred to in the pleadings. Whether or not the distinction which we have drawn be sound is not important, however, for, as already pointed out, here the defendant had, in effect, conceded in the court below that the Federal law controlled, before raising the inconsistent contention that the relevant act of Congress could not apply because of the plaintiff's failure to plead it. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, is sufficiently distinguished in the *Wulf Case*, *supra*.

The defendant relies largely upon an excerpt from Mr. Justice McReynold's opinion in *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, which was an action under the Employers' Liability Act, where the declaration was held defective because it contained no averment of pecuniary loss to the plaintiff, the court saying: "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof, . . . so that the parties may come prepared with their evidence, and not be taken by surprise."

The principle just quoted is a correct statement of a general rule;

but, if in the Garrett Case the defendant had, as in the case at bar, expressly admitted on the record, during the course of the presentation of the plaintiffs' evidence, the latter's pecuniary loss, it is not within the bounds of reason to suppose that under such circumstances a judgment for the plaintiff would have been reversed because of the absence of an averment of pecuniary loss in the declaration; not only was no such admission made in the Garrett Case, but there the plaintiff refused to amend his declaration when offered an opportunity so to do. Of course, in the case before us for decision there was no surprise, either actual or legal.

As stated at the beginning of this dissent, I do not feel that the present case turns on a question of pleading, but, if it did, I am of opinion the plaintiff's original declaration was sufficient to sustain the judgment; for, while there is nothing therein to indicate the action occurred in interstate commerce, yet, on the other hand, there is nothing to exclude that idea. *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857. In certain instances, where a legislative enactment creates in detail a right or duty new to the law, for instance, the Federal Safety Appliance Act, or, again, where a plaintiff has a choice between the common law and a statute, it may be necessary to plead the latter in a declaration claiming damages by reason of a breach thereof; but that is not this case. Here the ordinary rule applies that it is not necessary to plead an act of assembly; for, though the law thus established is to govern when applicable, yet it is not part of the cause of action; or, to speak more specifically, while, in the contingency of certain defenses being offered, the nonapplication of the Federal Employers' Liability Act might, in the end, serve to defeat the plaintiff, yet, since the right to sue in no sense depended upon it, the act could not be said to enter into

his cause of action. Ordinarily it is only essential to plead the facts showing the plaintiff's right and the defendant's violation thereof, and in so doing it is never required that a defense shall be anticipated; but even assuming that, generally speaking, it is the duty of a plaintiff, in a case like the present, in some way to indicate in his declaration that the Act of 1908, *supra*, is depended upon, and to prove facts showing his case to be within the statute, then we come back to my original position concerning the admission by the defendant. In this connection see *Noel v. Kessler*, 252 Pa. 244, 97 Atl. 446, where we recently held that defendants, "by their admissions in the pleadings, could waive the proper and necessary averments in the statement, and if they did so they cannot on this appeal, after a trial . . . on the merits, object to the informalities of the statement." This was said in a contract case, but it was an instance where the so-called "informality" concerned a vital matter of substance. Since the abandonment of special pleading, much that was formerly developed in that way prior to trial is now accomplished by formal admissions of record at the time of trial. With us in trespass the general issue is the only plea permitted; hence in a negligence case there could be no such admissions as those referred to in the above quotation, i. e., in the pleadings; for, under our practice in such cases, all admissions by the defendant must be made by written stipulation or orally in court, but, when so made, *ex necessitate*, they should have the same force and be given the like effect as though contained in a formal pleading. Of course, a fact that is at issue, in the sense that it is controverted, must, as a general rule, have had an averment in the pleadings to support it; but a fact admitted of record, no matter how material it may be, stands on a different footing. An unrestricted admission of record is more than merely evidential in effect, for it not only grants the fact



in question, but also its admissibility, and to this extent, at least, such an admission tacitly concedes the pleadings in the case to be good and sufficient. Therefore, in this case, after counsel made the before-quoted admission, without either qualification or restriction, for the purpose of the trial, it was, in effect, conceded the defendant had knowledge of the fact that the accident under investigation had happened in interstate commerce, and that the plaintiff so claimed, just as much as though the latter had either been put formally on notice thereof by an averment in the declaration or had admitted it by an answer in the nature of a plea; and the defendant could not subsequently avoid the force of this admission by complaining that the plaintiff had failed formally to declare the facts comprehended therein. To my mind it is losing sight of the realities of the situation, and playing with the administration of the law, to permit one, after making such an admission, to assume the position that, because the statement of claim failed to inform the defendant of that which it admittedly already knew, the plaintiff could not take advantage of the real facts in the case and the court could not administer the only law applicable thereto.

I think the Supreme Court of the United States never intended to rule as a governing general principle that, if an injured plaintiff incidentally avers the fact that the defendant's railroad traverses more than one state, then the Federal Employers' Liability Act will apply to his cause of action (even though, as in the *Wulf* Case, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, such plaintiff further expressly avers that he depends upon the local law), whereas, if he fails to inform the railroad, by an averment in his declaration, of the terminal points of its line, then the Federal law will not apply (even though, as in the present case, the defendant as all times knew the accident in controversy happened on

its road to an employee, while engaged in the transaction of interstate business). In this connection, it seems to me, the majority of our court, in reading the recent decisions of the Federal Supreme Court, lay undue emphasis upon certain passages from the *Wulf* and *Renn* opinions, *supra*. To my mind, the passages in question represent relevant judicial make-weights, proper under the peculiar facts of those particular cases; but were not intended as statements of restrictive general principles to control all future actions for injuries to railroad employees, particularly where, as here, it is unrestrictedly and unqualifiedly admitted at trial that such injuries happened in the course of interstate commerce.

Moreover, in a case such as the one now before us, where the plaintiff's employer relies upon a defense which is repudiated by the United States law as against public policy, and which, since the happening of the accident that gave rise to the plaintiff's injury, has, for a like reason, been forbidden by statute in our own state (see § 204 of article 2, Act June 2, 1915 [P. L. 736]), it seems to me that this court should not be astute to find reasons for reversing the judgment entered below, particularly when we have already held, in reviewing a prior trial (245 Pa. 443, 91 Atl. 854), that on the pleadings as originally made the issues involved were for the jury.

Before concluding, it may not be amiss to note that at the former trial of this case there also was an unrestricted and unqualified admission that the accident to the plaintiff occurred in the course of interstate commerce. See *Hogarty v. Philadelphia & R. R. Co.* 245 Pa. 443, 91 Atl. 854. Hence the amendment of the declaration subsequently permitted merely made the pleadings accord with the real facts involved, as they had previously been agreed to by counsel for the defendant; but, however this may be, under *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep.

135, 17 N. C. C. A. 1087, and other authorities herein cited, after the defendant's admissions of record, the case under review should not be made to turn on a mere question of pleading.

I cannot agree with the majority view, as written by our honored Chief Justice, that the recent decisions of the Supreme Court of the United States compel a reversal of the present judgment. On the con-

trary, I strongly feel that, under a proper reading of the relevant authorities on the admitted facts at bar, the defense depended upon was not available, and the plaintiff should hold his verdict; therefore, I dissent.

Petition for writ of error dismissed by the Supreme Court of the United States, October 20, 1919 (U. S. Adv. Ops. 1919-20, p. 49) 250 U. S. 650, 63 L. ed. 1189, 40 Sup. Ct. Rep. 12.

### ANNOTATION.

#### Amending complaint, after limitation period has expired, so as to come within Federal Employers' Liability Act as changing the cause of action.

##### I. Introduction, 1405.

##### II. Doctrine that amendment does not state new cause of action:

###### a. In general, 1406.

###### b. View that pleadings should be liberally construed to state cause of action under Federal statute, 1414.

##### III. View that amendment states new cause of action, 1419.

##### IV. Miscellaneous, 1424.

##### I. Introduction.

The general rule appears to be well established that an amendment to a declaration, which does not set up a new cause of action or make a new demand, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point; in other words, when an amendment, or an additional count, is brought into a pending action merely to restate in a different form the same cause of action originally pleaded, it relates back to the beginning of the action, and is not affected by the circumstance that the period set by the Statute of Limitations expired after the suit was brought. On the other hand, when a cause of action set forth in an amended pleading in a pending litigation is new, different, and distinct from that originally set up, there is no relation back, but the new pleading is equivalent to the bringing of a new action, and the Statute of Limitations runs against

the new cause of action down to the time it is introduced. These rules are supported by many authorities.

There seems to be a conflict among the different jurisdictions on the general proposition whether a cause of action at common law and one based upon a statute, or a cause of action based upon a statute of one state and one based upon a statute of another state or a Federal statute, where the basic transaction is the same, are the same cause of action, or are different and distinct from each other. If they are the same, an amendment changing from one to the other after the Statute of Limitations has run is proper, and relates back to the time of the original pleading, so as to avoid the bar of the statute; but if they are held to be different and distinct from each other, the amendment, in some jurisdictions, is not allowed after the limitation period has elapsed; while in others it is permitted, but a plea of the Statute of Limitations is thereafter allowed as a bar to recovery upon the amendment.

As illustrating the divergence of opinion on this general proposition, attention is called to the following, among other cases, involving amendments from the common law to statutes as affected by Statutes of Limitations: Alabama Consol. Coal & I. Co. v. Heald (1908) 154 Ala. 530, 45 So. 636, later appeal in (1910) 168 Ala. 626, 53 So. 162; Henderson v.

Moweaqua Coal Min. & Mfg. Co. (1908) 145 Ill. App. 637; Wasson v. Boland (1909) 136 Mo. App. 622, 118 S. W. 663. As involving amendments from statute to common law: Townes v. Dallas Mfg. Co. (1908) 154 Ala. 612, 45 So. 696; Bradley v. Chicago-Virden Coal Co. (1907) 231 Ill. 622, 83 N. E. 424; Oolitic Stone Co. v. Ridge (1910) 174 Ind. 558, 91 N. E. 944. And as involving change from a statute of one jurisdiction to statute of another: De Valle Da Costa v. Southern P. Co. (1910) 100 C. C. A. 313, 176 Fed. 843, writ of certiorari denied in (1910) 217 U. S. 606, 54 L. ed. 900, 30 Sup. Ct. Rep. 696, and Wingert v. Carpenter (1894) 101 Mich. 395, 59 N. W. 662.

*II. Doctrine that amendment does not state new cause of action.*

*a. In general.*

The authorities on the question indicated in the title to the present annotation are conflicting. While the doctrine of the reported case (HOGARTY v. PHILADELPHIA & R. R. Co. ante, 1386), that an action based on the common law for personal injury of a railroad employee cannot be amended so as to count upon the Federal Employers' Liability Act, after the limitation provided by that act has elapsed, is supported by some authorities cited later in the note, the conclusion reached does not seem to be in accord with the apparent weight of authority. This is true not so much because the courts have declared a different rule of law, but because, by a liberal construction of the pleadings, they have construed the original complaint as stating, though defectively, a cause of action under the Federal statute. But even apart from this consideration, by which many of the courts have reached a different conclusion from that reached in the HOGARTY CASE, there are a number of authorities which seem to support a different rule of law from the doctrine of that case, and to take the view that a complaint which attempts to state a cause of action at common law, or under a state statute, and does not

allege facts sufficient to bring the case under the Federal Employers' Liability Act, may be amended so as to bring the case within that act, although the period of limitations prescribed thereby has elapsed; in other words, that the amendment is not the beginning of a new action, so as to subject it to limitations, but relates back to the filing of the original complaint.

**United States.**—St. Louis, S. F. & T. R. Co. v. Smith (1916) 243 U. S. 630, 61 L. ed. 938, 37 Sup. Ct. Rep. 477, affirming (1914) — Tex. Civ. App. —, 171 S. W. 512 (state statute); Smith v. Atlantic Coast Line R. Co. (1913) 127 C. C. A. 311, 210 Fed. 761.

**Colorado.**—Wilson v. Denver & R. G. R. Co. (1920) — Colo. —, 187 Pac. 1027 (state statute).

**Georgia.**—Gainesville Midland R. Co. v. Vandiver (1914) 141 Ga. 350, 80 S. E. 997 (state statute).

**Iowa.**—Basham v. Chicago G. W. R. Co. (1916) 178 Iowa, 998, 154 N. W. 1019, 157 N. W. 192 (state statute).

**Kentucky.**—Cincinnati, N. O. & T. P. R. Co. v. Goode (1915) 163 Ky. 60, 173 S. W. 329; Baltimore & O. R. Co. v. Smith (1916) 169 Ky. 593, L.R.A. 1918F, 1205, 184 S. W. 1108.

**Louisiana.**—Lanis v. Illinois C. R. Co. (1916) 140 La. 1, 72 So. 788.

**Michigan.**—Jorgenson v. Grand Rapids & I. R. Co. (1915) 189 Mich. 537, 155 N. W. 535 (state statute). See also Fernet v. Pere Marquette R. Co. (1913) 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834.

**Mississippi.**—Broom v. Southern R. Co. (1917) 115 Miss. 493, 76 So. 525.

**New York.**—Kinney v. Hudson River R. Co. (1916) 98 Misc. 11, 162 N. Y. Supp. 42, affirmed without opinion in (1917) 177 App. Div. 948, 164 N. Y. Supp. 1098 (but see later appeal, set out infra).

**Tennessee.**—Nashville, C. & St. L. R. Co. v. Anderson (1916) 134 Tenn. 666, L.R.A.1918C, 1115, 185 S. W. 677, Ann. Cas. 1917D, 902 (state statute).

**Texas.**—Ft. Worth Belt R. Co. v. Jones (1916) — Tex. Civ. App. —, 182 S. W. 1184; Pope v. Kansas City,

**M. & O. R. Co. (1918)** — Tex. —, 207 S. W. 514; **Bird v. Ft. Worth & R. G. R. Co. (1918)** — Tex. —, 207 S. W. 518.

**Wisconsin.**—**Curtice v. Chicago & N. W. R. Co. (1916)** 162 Wis. 421, L.R.A.1916D, 316, 156 N. W. 484, later appeal to same effect in (1918) 166 Wis. 594, 166 N. W. 444, petition for certiorari denied in (1917) 247 U. S. 510, 62 L. ed. 1242, 38 Sup. Ct. Rep. 578 (complaint for personal injuries apparently based on state law). See also **Callahan v. Chicago & N. W. R. Co. (1915)** 161 Wis. 288, 154 N. W. 449.

The effect of the Federal Employers' Liability Act, in cases to which it is applicable, is to abolish the defense embodied in the so-called fellow-servant doctrine; to abolish the defense of contributory negligence in all cases where the injury was contributed to by the violation by the carrier of any statute enacted for the safety of its employees, and, in all other cases, to establish the doctrine of comparative negligence, so that the contributory negligence of the employee will not bar a recovery, but merely diminishes the damages; to abrogate the defense of assumption of risk in all cases where the injury was contributed to by the violation by the carrier of any statute enacted for the safety of employees; and to prevent the common carrier from exempting itself from liability under the act by any contract, rule, regulation, or other device. Although the Federal Act is supreme in its field, and where the facts bring the case within its scope no recovery can be had under any other law, yet it has been held that the state law governs in all matters not expressly provided for in the statute, such as the sufficiency of a general allegation of negligence (**Louisville & N. R. Co. v. Stewart (1913)** 156 Ky. 550, 161 S. W. 557); the rules of evidence governing an action brought under the statute (**Kansas City Southern R. Co. v. Leslie (1914)** 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834); the sufficiency of the evidence (**Louisville & N. R. Co. v. Johnson (1914)**

161 Ky. 824, 171 S. W. 847). As the act does not attempt to define negligence, the question as to what constitutes negligence will be determined by the state law. **Cincinnati, N. O. & T. P. R. Co. v. Swann (1914)** 160 Ky. 458, L.R.A.1915C, 27, 169 S. W. 886. Probably the most important change in the common law made by the Federal statute is the abrogation of the so-called fellow-servant doctrine, so that a common carrier is liable for an injury to an employee, although such injury was caused by the negligence of a fellow servant.

It is said in **Smith v. Atlantic Coast Line R. Co. (1913)** 127 C. C. A. 311, 210 Fed. 761, that the Federal statute does not deal with the cause of action, so far as negligence is concerned, but with the defenses that may be allowed and the measure of the recovery. And some of the cases in which it has been held that the cause of action was not changed by an amendment of a complaint based on a state law, or on the common law, so as to show a statement of facts within the Federal statute, may perhaps be explained on this ground.

And in **Kinney v. Hudson River R. Co. (1916)** 98 Misc. 11, 162 N. Y. Supp. 42, the court stated that the Federal decisions on the Federal Employers' Liability Act were clearly to the effect that the statute did not create a new or different cause of action, but simply abolished the fellow-servant rule, and modified the common law as to contributory negligence and in other respects; but that the right of action was not affected by it.

In **Koennecke v. Seaboard Air Line R. Co. (1915)** 101 S. C. 86, 85 S. E. 374, so far as appears, the Statute of Limitations was not involved, but in taking the view that an amendment in an action for death of a railway employee so as to bring the case specifically within the Federal statute,—the complaint having originally stated a cause of action under a state statute—did not introduce a new cause of action, the court said: "Strictly and very technically speaking it may be that the amendment

substituted one cause of action for another, though it would, perhaps, be more nearly correct to say that the cause of action is the same, whether the action be brought and tried under the state or Federal law; and, since the principal differences between an action under the state and Federal law lie in the authority by which the right of action is given, and in some of the rules of law applicable in the determination of the rights of the parties, they relate to form and procedure rather than to substance. So that it would rarely happen that a shifting from one to the other would work prejudicial surprise." The decision is affirmed in (1915) 239 U. S. 352, 60 L. ed. 324, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165.

We do not understand the contention to be, said the court in *Lanis v. Illinois C. R. Co.* (1916) 140 La. 1, 72 So. 788, that the statute or law, under authority of which an action is brought, is the cause of action.

The declaration in *Broom v. Southern R. Co.* (1917) 115 Miss. 493, 76 So. 525, *supra*, stated a cause of action, the court said, under the state law; it alleged that the deceased, while on duty as an engineer in the defendant's employ, sustained injuries resulting in his death, through the negligence of a fellow servant; that the defendant was an intrastate railroad; and proceeded upon the theory of recovery of damages under the state law. After more than two years had elapsed from the time the cause of action accrued, the railway company gave notice that it would prove that at the time of the injury the deceased was employed in interstate commerce. Thereupon the plaintiff, the action being by the administratrix, was permitted to amend the declaration by alleging the interstate character of the business in which the railway company and the decedent were engaged. In holding that the amendment was properly allowed, the court said: "It will be observed here that the only amendment made to the original declaration was the allegation that the injury occurred while the parties were engaged in in-

terstate commerce, instead of intrastate commerce. This amendment did not present a new or different statement of facts upon which the action was based, but merely amended the declaration, so as to come within the operation of the Federal Employers' Liability Act, instead of the state law. The allegations contained in the original declaration did not support a cause of action under the Federal law, but the amendment is not inconsistent with the purpose and relief originally sought by the declaration. It appears, therefore, that the amendment did not constitute a new cause of action, inconsistent with that set forth in the original declaration. The amendment was properly allowed by the lower court. It was not the beginning of a new action; but the suit should be treated as having been commenced at the time of the filing of the original declaration, which was done within the two years allowed in such cases."

The change of the basis of a cause of action for wrongful death from a state statute to the Federal Employers' Liability Act, and the insertion of allegations that decedent was employed in interstate commerce, are not a beginning of a new action within the operation of the Statute of Limitations; at least, if the interstate character of the transaction was made to appear by the pleadings before the statute had run. *Nashville, C. & St. L. R. v. Anderson* (1916) 134 Tenn. 666, L.R.A.1918C, 1115, 185 S. W. 677, Ann. Cas. 1917D, 902, *supra*. In this case, where the action was brought by the widow under a state statute for the death of a railroad employee, and the railway company, by plea filed seven months after the accident occurred, set up the interstate character of the commerce in which the deceased and the railway company were engaged, but this plea was erroneously overruled, and a judgment for the plaintiff was reversed because of the error, it was held that on the remanding of the case to the trial court, although more than two years had elapsed from the accrual of the cause of action,

amendments substituting the administrator as the party plaintiff, instead of the widow, eliminating reference to the state statute, and averring the interstate character of the commerce in which the deceased and the railway company were engaged, should be allowed, as the amendments were not, in effect, the bringing of a new action which would be subject to limitations. The court apparently rested its decision in part on the ground that the pleadings, before the limitations period had expired, showed the interstate character of the commerce in which the parties were engaged; but it seems that the holding would have been the same without this additional feature of the case.

In the recent case of *Wilson v. Denver & R. G. R. Co.* (1920) — Colo. —, 187 Pac. 1027, *supra*, the supreme court of Colorado held that, in an action for death of a railroad employee, where the complaint stated a cause of action under the state statute, but it developed on the trial that the defendant was, at the time of the accident, engaged in interstate commerce, and the judgment for the plaintiff had been set aside because recovery was not allowed under the state statute by the plaintiff as widow, but the action must be by the personal representative of deceased under the Federal Employers' Liability Act, an amendment of the complaint should be allowed in the trial court, changing the character of the plaintiff from widow to administratrix, and alleging that the defendant was engaged in interstate commerce at the time of the accident, so as to bring the action within the Federal statute, although the Statute of Limitations therein provided had run. The court said: "In the district court, the plaintiff was permitted to and did amend her complaint in the material particulars only that the amended complaint fixed the relationship of the plaintiff to the deceased as administratrix of the estate, instead of as widow, to comply with the Federal statute in that respect, and with the further allegation that the defendant was engaged in interstate

commerce at the time of the accident. In all other material particulars the amended complaint is the same as the original complaint in the statement of facts. . . . On the former hearing we said: 'The death of plaintiff's husband, through the negligence of defendant, its officers, agents, or servants, constitutes the cause of action, if any. If the facts establish a case, the defendant would be liable for damages therefor either to the plaintiff in her individual capacity or to the personal representative of the deceased, depending in that regard whether the employee was at the time engaged in intra or interstate commerce.' . . . This must be held to be the law in this case, and therefore we must hold, as there declared, that the death of plaintiff's husband, through the negligence of defendant, its officers, agents, or servants, constitutes the cause of action, and that, if the facts establish a case, the defendants are liable in damages therefor, either to the plaintiff in her individual capacity, or to the personal representative of deceased, depending in that regard upon whether the employer was at the time engaged in intrastate or interstate commerce. The facts alleged in the amended complaint being identical with the facts in the complaint there considered must, under such ruling, be held to be the same cause of action, and not a new and different cause of action as contended by the defendant in error. The cases cited in the former opinion are conclusive of the question." The court relied largely on the opinion of the Federal Supreme Court in *Missouri, K. & T. R. Co. v. Wulf* (1913) 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, cited under II. b, *infra*.

And in *Gainesville Midland R. Co. v. Vandiver* (1914) 141 Ga. 350, 80 S. E. 997, *supra*, the complaint alleged that the plaintiff, while in the service of the defendant railway company as fireman, was injured through its negligence, setting forth the nature of the injury and the negligence, and that the plaintiff brought the action under the Georgia statute.

The railway company filed a plea in abatement, alleging that it was engaged in interstate commerce at the time of the injury. The plaintiff thereupon sought to amend the petition by striking from it all reference to the Georgia statute, and further alleging the interstate character of the commerce in which the railway company was engaged. It was held that the amendment did not set up a new cause of action and should be allowed, although more than two years had elapsed from the time the cause of action accrued. The court said: "It was contended that, by the allegation that the defendant was engaged in interstate commerce at the time of the plaintiff's injury, the amendment changed the cause of action as originally laid. We do not think so. The cause of action was the injury sustained by the plaintiff in the negligent operation of the specific train described in the petition. The time, the place, and the manner of the injury were not varied. No new person was brought into the case, and the only added fact was the character of the business in which the train was engaged. When a suit is brought against a carrier by an employee on account of an injury sustained in the operation of its locomotive and cars, all that is necessary for the plaintiff to allege is a statement of the facts showing his relation as an employee and the circumstances under which he sustained his injury, showing negligence and a right of recovery; and, on the trial of the case, if the plaintiff shows a right to recover under any law of which the court will take judicial cognizance, that law will be applied. . . . When the proof is submitted, and it develops that the injury was committed by a carrier engaged in interstate commerce, then it becomes a question of comparison of the pleadings with the proof. If it be necessary to amend the pleading by alleging the interstate character of the carrier, it would be simply an elaboration of the old matter, and not the introduction of new matter. . . . There is no occasion to apply any other than

the rule that an amendment relates to the time of filing the petition which is amended."

A similar view seems to be taken in *Basham v. Chicago G. W. R. Co.* (1916) 178 Iowa, 998, 157 N. W. 192, *supra*, where it does not clearly appear whether the petition was intended to be based on the Federal or state law, although the action in this instance was brought by the administrator, who alleged that the railway company operated a line of railroad through Iowa, Illinois, and other states, and that the injury occurred while the deceased was in charge of an engine operating between certain points in Iowa. It was held that, although more than two years had elapsed after the accrual of the cause of action, the plaintiff should be permitted to amend the petition by adding an allegation that the deceased left a dependent wife who suffered pecuniary injury by his death, and that the action was being prosecuted for her benefit. The court said: "We are of the opinion that the Statute of Limitations affords no defense in this case. The suit was originally brought and has ever since been maintained by the administrator, who is the proper person to prosecute it, whether it be maintainable under the law of the state or under the Federal Employers' Liability Act. The cause of action in either case is the death of Spellman, occasioned by the alleged negligence of the defendant. In other words, whether the action be brought in one form or the other, it is by the same party, against the same party, in the same court, for damages for the same alleged wrong; the sole distinction being in the measure of damages to be recovered and the person or beneficiary to whom the plaintiff must account for the damages, if any, which he collects. Now, assuming that plaintiff seeks to recover under the statute of the state, and alleges a good cause of action, but before the case is brought to trial, or even pending the trial, it develops that the deceased was injured while engaged in interstate commerce, and

that, to sustain a verdict in favor of the administrator, the petition should allege that he was survived by a dependent wife or family, an amendment to the petition adding such necessary averment does not, in the judgment of the court, state a new cause of action permitting the defendant to successfully interpose a plea of the Statute of Limitations. Such is the logical and necessary effect of our own holdings."

In *Jorgenson v. Grand Rapids & I. R. Co.* (1915) 189 Mich. 537, 155 N. W. 535, supra, the original declaration, in an action for death of a railway fireman, did not refer to the Federal statute, nor, in express terms, charge that the defendant was engaged in interstate commerce, but, on the contrary, counted solely on the Michigan Employers' Liability Act. During the trial and more than two years after the right of action had accrued, an amendment was allowed bringing the case under the Federal statute. In holding that it was not error to permit the amendment, the court said: "Nor did the amendment introduce any new cause of action. Congress is given power to regulate commerce between the states; and when it has acted, as in passing the Federal Employers' Liability Act, such enactment becomes the general law of the land and supersedes all state laws upon the same subject. Therefore the reference to the state law in the declaration might well have been struck out as surplusage, and as if the reference had been to a law that had been repealed. The charges of negligence and of injury remained the same as before the amendment, and stated in substantially the same words." The Federal statute, the court said, was a general law, as much in force in Michigan as elsewhere, and therein the case differed from a former decision by that court, where it was attempted by an amendment to plead a foreign law, and thereby to introduce into the declaration a cause of action not existing under the laws in force in that state. It is true that, in this case, the original petition alleged that the

defendant operated a railway system extending through Michigan and Indiana, and that the decedent was employed by it in the construction and the care of the roadbed, and the court stated that this amounted to an allegation that the defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce. But it appears that the same result would have been reached in the absence of such allegation, for the court said that, had there been no allegation in the declaration that the defendant was engaged in interstate commerce, and that the decedent was employed by it therein, the addition of such matter to the declaration would have amounted simply to an elaboration of the old matter, and not to the introduction of new,—citing *Gainesville Midland R. Co. v. Vandiver* (Ga.) supra.

"We think it is clear," said the court in *Cincinnati, N. O. & T. P. R. Co. v. Goode* (1915) 163 Ky. 60, 173 S. W. 329, supra, "that, when the cause of action arises under the Federal statute, but suit is brought under the state law, or by some person not authorized to maintain an action under the Federal statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action, filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition." The allegations of the original petition are not shown. The court said, however, that it stated a good cause of action under the Federal statute; but that both parties, after the filing of the petition, seemed to treat the case as falling under the state law; and that the amended petition merely reiterated the averments of the original petition, setting out perhaps more fully than it did the facts showing that the cause of action arose under the Federal statute. The question whether the amendment was barred by limitations arose on a second appeal, the amendment having been offered in the trial court after



a judgment rendered against the railway company had been reversed, because, assuming that the action was brought under the state law, the plaintiff could not recover for the injury, on account of contributory negligence.

In *Baltimore & O. R. Co. v. Smith* (1916) 169 Ky. 593, L.R.A.1918F, 1205, 184 S. W. 1108, *supra*, the petition in an action for damages for injury to a railroad employee alleged that the railway company operated trains over a line of road extending through various states, and that at the time of the injury the plaintiff was employed as a telegraph operator. The court was of the opinion that the petition, as originally filed, sufficiently stated facts showing that the railway company was engaged in interstate commerce, and that the plaintiff was employed by it in such commerce, and so stated a cause of action under the Federal statute. But the court took the position that, if it was mistaken in this view, and the cause of action, as stated by the original petition, was one under the state law, under the authority of *Cincinnati, N. O. & T. P. R. Co. v. Goode* (Ky.) *supra*, and the decisions of the Federal Supreme Court, the petition might be amended so as to show that the cause of action arose under the Federal Employers' Liability Act, and that the amendment would not state a new cause of action so as to subject it to the operation of the limitations prescribed by that act.

And where the complaint in an action for the death of a railroad employee, brought by the widow and children of the deceased, did not allege whether the railway company or the deceased was engaged in interstate or intrastate commerce at the time of the accident, but the evidence showed that they were engaged in interstate commerce, it was held in *Pope v. Kansas City, M. & O. R. Co.* (1918) — Tex. —, 207 S. W. 514, *supra*, that an amended petition substituting as plaintiff the personal representative of the deceased, and alleging the interstate character of the commerce in which he and the

railway company were engaged, did not introduce a new or different cause of action so as to subject it to the limitations prescribed by the Federal statute. The court took the view that, under the Federal Supreme Court decisions, an amendment showing that the cause of action arose under the Federal law did not present a new or different cause of action from a petition stating a cause of action under the state law, where the facts showing the negligence and the damages were the same. To a similar effect is *Bird v. Ft. Worth & R. G. R. Co.* (1918) — Tex. —, 207 S. W. 518.

It was held in *Smith v. Atlantic Coast Line R. Co.* (1913) 127 C. C. A. 311, 210 Fed. 761, *supra*, that in an action for injury to a railroad employee a new cause of action was not stated by an amendment alleging that the train on which the injury occurred was engaged in interstate commerce, and that such an amendment might be made although more than two years had elapsed after the injury. The court said that the original complaint stated a cause of action, to which the defendant was entitled to interpose certain affirmative defenses; and that when by the amendment the fact was developed that the defendant was engaged in interstate commerce, and the injury was sustained while the plaintiff was employed on an interstate train, the defendant, by virtue of the Federal statute, was deprived of these defenses; that the Federal statute did not deal with the cause of action, so far as negligence was concerned, but with the defenses that might be allowed and the measure of the recovery.

Although the effect of the Statute of Limitations is not discussed in the opinion, attention is called to *Fernette v. Pere Marquette R. Co.* (1913) 175 Mich. 653, 144 N. W. 834, where it was held that the appellate court would treat the declaration in an action for injuries to a railway employee, as amended to conform to the proof showing that the defendant was engaged in interstate commerce

at the time of the injury, so as to sustain a judgment for the plaintiff, although more than two years had elapsed from the date of the injury. The court said: "We are, therefore, bound to hold that plaintiff may recover only under the Federal statute. His declaration, while it counts upon neither act specifically, was properly held by the learned trial judge to be based upon the liability fixed by the state act. This follows because of the fact that there is no averment in the declaration that, at the time of the accident, defendant was engaged in interstate commerce. At the time plaintiff commenced his action that fact could not have been known by him, and could have been ascertained only with great difficulty and trouble, if at all. Defendant was in possession of all the facts touching upon the matter, and upon the trial promptly put them in evidence as a matter of defense. Should plaintiff be held to be debarred from recovery because of his failure to aver in his declaration a fact of which he was in ignorance, and which, in the nature of things, he could not ascertain? We think it would be a reproach to the administration of justice to so hold. It should be borne in mind that the declaration sets out facts which would impose a liability upon defendant under the Federal act, if it had charged that, at the time of the collision, defendant was engaged in interstate commerce. We are of opinion that it was not necessary for plaintiff to plead either statute, but that, upon the coming in of the proofs, it was the duty of the trial court to permit an amendment of the pleadings to conform thereto." To a similar effect, see *Callahan v. Chicago & N. W. R. Co.* (1915) 161 Wis. 266, 154 N. W. 449. The doctrine that in an action for injury to a railway employee brought under the state law, where the evidence shows that the carrier was engaged in interstate commerce and that the recovery, if any, must be under the Federal statute, the petition may be amended to conform to the proof, is, of course, supported by some cases, such as

*Cincinnati, N. O. & T. P. R. Co. v. Tucker* (1916) 168 Ky. 144, 181 S. W. 940, which are not within the scope of the present annotation, because no question as to limitations is raised.

In some cases, in which, although limitations had run, an amendment of the complaint was held proper by substituting the administrator as plaintiff, so as to bring the action in the form required by the Federal statute, it does not clearly appear whether the original complaint was based on the Federal or state law.

Thus, it has been held that, where an action by a widow in her own name is brought within the statutory time, she may subsequently, by an amendment to her petition, be substituted as administratrix and recover in a proper case, although the two-year limitation has expired. *Texarkana & Ft. S. R. Co. v. Casey* (1915) — Tex. Civ. App. — 172 S. W. 729. But it is not clear in this case whether the original petition was based on the Federal statute or not. The same conclusion was reached in *Eastern R. Co. v. Ellis* (1918) — Tex. Civ. App. —, 153 S. W. 701, where, however, it appears that the original petition attempted to predicate a cause of action under the Federal statute. Both of these cases follow the decision of the Federal Supreme Court in *Missouri, K. & T. R. Co. v. Wulf* (1913) 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, *supra*.

It was held in *Vaughan v. St. Louis & S. F. R. Co.* (1914) 177 Mo. App. 155, 164 S. W. 144, that where an action, brought by the widow in her own name, proceeds to judgment rendered in her favor, an amendment substituting her as administratrix upon the granting of a new trial may be allowed, and that a recovery as such administratrix will not be denied merely because the amendment was made after the expiration of the two-year limitation fixed by the Federal act. In the original petition the interstate character of the railway in question is alleged, but a state statute is also pleaded, permitting an action by the widow for the death of a railway employee.

Although the case is one in which the amendment attempted to eliminate allegations in the complaint regarding the interstate character of the business in which the defendant was engaged, and to predicate the cause of action on the state statute rather than on the Federal Employers' Liability Act, on which the action was originally based, attention is called to *Nash v. Minneapolis & St. L. R. Co.* (1918) 141 Minn. 148, 169 N. W. 540, in which the court held that the proposed amendment did not attempt to set out a new cause of action, so as to subject it to the bar of the two-year Statute of Limitations of Iowa, it being said that the plaintiff had but one cause of action, viz., the wrongful act of the defendant in causing the injury to the plaintiff's intestate which resulted in his death; that the action was brought by the administratrix, who was the proper party to prosecute it, whether under the Federal act or the state law, and that whether in one form or the other it was by the same party, against the same party, in the same court, to recover damages for the same wrong. See also, to the effect that the court in an action for injury to a railway employee may disregard reference in the declaration to interstate commerce, as surplusage, and permit recovery on the remaining allegations if they sufficiently state a cause of action at common law, where the evidence fails to show that the parties were engaged in interstate commerce, *Hayes v. Wabash R. Co.* (1913) 180 Ill. App. 511, writ of error dismissed in (1914) 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, for want of jurisdiction.

*b. View that pleadings should be liberally construed to state cause of action under Federal statute.*

See *Jorgenson v. Grand Rapids & I. R. Co.* (Mich.) and *Baltimore & O. R. Co. v. Smith* (Ky.) II. a, *supra*; also *Lucchetti v. Philadelphia & R. R. Co.* (Fed.) III. *infra*.

Apparently reluctant to admit as a principle of law that a complaint based on the common law or a state statute may be amended so as to bring

the action within the Federal Employers' Liability Act after the limitation prescribed by that act has run, the courts have apparently, in some instances, effected this result by construing the complaint as pointing, although defectively, to a statement of a cause of action under the Federal statute. This has been true not only where the pleadings were silent on the question whether the railway company and the employee were engaged in interstate or intrastate commerce, but even where the action, as originally brought, seemed plainly intended to be based on state law.

The view of the Federal Supreme Court on the question under annotation is not entirely clear, and its decisions have been differently construed by the state courts. It appears, however, that the court has adopted a very liberal view as to the construction of the pleadings in cases to which the Federal statute is applicable, and there is authority of that court for the proposition that even though the pleadings are silent on the question as to the nature of the commerce in which the railway company and the employee were engaged, and the cause of action is construed by the state courts as based on the state statute, an amendment of the petition may be allowed so as to substitute the administrator as the party plaintiff, in place of the widow and parents of the deceased, and permit recovery under the Federal statute, though the limitation period prescribed by that act had elapsed before the amendment. This appears to be the effect of the decision in *St. Louis, S. F. & T. R. Co. v. Smith* (1916) 243 U. S. 630, 61 L. ed. 938, 37 Sup. Ct. Rep. 477, affirming (1914) — Tex. Civ. App. —, 171 S. W. 512. The decision is announced in a per curiam opinion, which states simply that the judgment is affirmed on the authority of *Missouri, K. & T. R. Co. v. Wulf* (1913) 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, *Ann. Cas.* 1914B, 134; *Seaboard Air Line R. Co. v. Koennecke* (1915) 239 U. S. 352, 60 L. ed. 324, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165; and *Seaboard*

*Air Line R. Co. v. Renn* (1916) 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1. To understand the significance of this decision consideration of the previous rulings in the case is necessary. It appears that an action was brought by the widow and parents of the deceased, who, while on duty as a railroad employee, was killed by a switch engine in railroad yards in Texas. The petition was silent on the question whether the railway company and the deceased, at the time of injury, were engaged in interstate commerce. The railway company, by special exception, sought to require the plaintiffs to allege in the petition such facts as would enable it to determine whether the Federal or the state law was applicable. The state court in its opinion, reported under title *St. Louis & S. F. R. Co. v. Seale* (1912) — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800, held that the action was brought under the state law, that the petition stated a good cause of action, and was not subject to the exceptions presented. It held also that the facts, as shown on the trial, did not bring the case within the Federal statute. On this latter holding, the decision was reversed by the United States Supreme Court. See decision (1913) 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156. In reversing the judgment, the Federal Supreme Court seems to have regarded the petition as subject to amendment, so as to permit substitution of the personal representative as the party plaintiff, although more than two years had elapsed from the accruing of the cause of action, for it remanded the case for further proceedings, "without prejudice to such rights as a personal representative of the deceased may have." When the proceeding came again before the Texas court of appeals (reported in 171 S. W. 512), the court held that an amendment substituting the personal representative of the deceased as the party plaintiff was not the beginning of a new action, but related back to the filing of the original petition, that

the amendment did not set up a new cause of action, and hence that the Statute of Limitations did not apply. It does not appear that the amendment did more than change the capacity of the party plaintiff. Yet the fact remains that the original petition was silent as to the nature of the commerce in which the parties were engaged, and that the state court regarded it as so clearly stating a cause under the state statute that the defendant had no ground to require the plaintiff to state the facts more explicitly, so as to show whether he relied on the state or Federal statutes.

An important case in this connection is *Missouri, K. & T. R. Co. v. Wulf* (1912) 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, which is cited in the dissenting opinion in the reported case (*HOGARTY v. PHILADELPHIA & R. R. Co.* ante, 1386). In this case the Federal Supreme Court took the view that, although the original petition did not mention the act of Congress, but asserted a right of action under the laws of Kansas, it was sufficiently averred that the injury occurred in interstate commerce, it being alleged at the time of the injury that the deceased was in the employ of the defendant as a foreman on a train running from a point in Kansas to a station in Oklahoma, and that an amendment of the petition, where the action was brought by the sole surviving parent in an individual capacity, by which she set up for the first time the right to sue as personal representative, was not equivalent to the beginning of a new action, for the purpose of applying the two-year limitation prescribed by the Federal statute. The court said that, aside from the capacity in which the plaintiff assumed to bring the action, there was no substantial difference between the original and amended petitions; that "it is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enact-

ment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. . . . Therefore, the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done. . . . Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the Employers' Liability Act. The change was in form rather than in substance. . . . It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

Assuming that the doctrine as to liberal construction of the pleadings to state a cause of action under the Federal statute was the basis of the decision in *Curtice v. Chicago & N. W. R. Co.* (1916) 162 Wis. 421, L.R.A.1916D, 316, 156 N. W. 484, the case shows well the extreme to which the courts have gone in construing the pleadings so as to permit recovery under the Federal Liability Act, where the act is applicable, and limitations against the bringing of a new action have run prior to the time of the allowance of the amendment specifically setting up a right of action under the Federal statute. In this case the complaint, in an action to recover damages for personal injuries to a railway employee, alleged that the defendant operated a railway between certain points in Wisconsin, and contained no allegations tending to show that the plaintiff or defendant was engaged in interstate commerce at the time of the injury. On the other hand, as is pointed out in the dissenting opinion, the complaint seemed to indicate, if anything, that the employee was engaged in intrastate commerce. Counsel for the

plaintiff stated that he intended to state a cause of action under the state law. The defendant set up facts showing the interstate character of the commerce in which it and the plaintiff were engaged. And it was held that an amendment showing that at the time of the injury the railroad was an interstate railroad, and that the injury occurred in interstate commerce, so as to come within the operation of the Federal Employers' Liability Act, did not state a new cause of action, so as to be subject to the limitations prescribed by the Federal statute. It was said: "It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that, at the time the injury was sustained, the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict or inconsistent with the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover damages was defectively stated in the original complaint, and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint, and became a part of it; hence the Statute of Limitation was no defense." A later appeal to a similar effect is reported in (1918) 166 Wis. 594, 166 N. W. 444, petition for certiorari denied in (1918) 247 U. S. 510, 62 L. ed. 1242, 38 Sup. Ct. Rep. 578.

In other cases, the courts have more clearly shown that they intended to construe the original complaint as stating, though imperfectly, a cause of action under the Federal statute.

Thus, in *Vickery v. New London Northern R. Co.* (1914) 87 Conn. 634, 89 Atl. 277, the complaint in an action for injury to a railway employee alleged that the defendant railway company owned a railroad in Connecticut, which was operated by a lessee, also made a defendant, and that the injury occurred while the plaintiff was employed by the lessee

as a brakeman in a railroad yard at a certain point in the state. In holding that, although more than two years had elapsed from the date of the injury, the plaintiff should be allowed to amend his complaint by allegations showing that the defendant and the plaintiff were engaged in interstate commerce, the court said: "The complaint contains no clear statement upon the pertinent matter of the employer's character and the nature of the employee's employment. It is not stated whether the operating corporation was engaged in interstate or intrastate commerce. . . . Counsel for the defendants say that the manifest intention of the pleader was to give to the operating corporation an intrastate character, and for that reason to state an action cognizable at common law only. We fail to discover substantial ground for that conclusion. . . . It well may be that the pleader was anticipating a common-law recovery; but that he intended to state a case without the purview of the Federal statute, and by that means bring it under the operation of the common law, is quite another proposition. . . . Judged in the light of the conditions existing when it was drafted, reasonable foundation for a conclusion that the pleader intended to state an intrastate commerce case, which could not be established, cannot be found in the allegations made." And the court accordingly stated that it was unnecessary to consider the proposition whether a change of allegations in the complaint, having the sole purpose of indicating that the remedy applicable was under the Federal statute, and not at common law, would amount to a change of the cause of action; but that the complaint, from the defendants' standpoint, at most merely omitted allegations showing that it was brought under the Federal statute, and, assuming that such allegations formed a part of the statement of a cause of action, the fault with the complaint was that it contained a defective statement of a good cause

of action, and not the statement of a defective cause of action.

In *Missouri, K. & T. R. Co. v. Lenahan* (1913) 39 Okla. 283, 135 Pac. 383, where the action was by the widow of the deceased, the petition was apparently based on the state statute, and did not, the court said, set out a cause of action arising under the Federal Employers' Liability Act; but the answer alleged, and the evidence showed, that the railway company was engaged in interstate commerce. And while it was held that a judgment for the plaintiff must be reversed, as the Federal statute controlled, and the plaintiff could not maintain the action in her own right, the court said that, on the remanding of the case to the district court, she might present an application to be made a party plaintiff in her representative capacity, and that the fact that more than two years had expired after the accrual of the cause of action would not bar her right to be made a party to the suit in her capacity as administratrix. In subsequent proceedings in (1918) — Okla. —, 171 Pac. 455, it was held that the trial court, on the remanding of the case, had properly allowed the petition to be amended by joining the widow as administratrix, as a party plaintiff, without in any way enlarging or modifying the facts upon which the action was based, and that such amendment was not equivalent to the beginning of a new action, for the purpose of applying the two-year limitation provided by the Federal statute. The court said that, aside for the capacity in which the plaintiff sued, there was no difference between the original and amended petitions; that in the former, as in the latter, it was sufficiently averred that the deceased came to his death through injury suffered while he was employed by the railway company in interstate commerce.

And where the original petition alleged the operation by the railway company of a line of road through various states, an amendment specifically alleging the interstate character of the commerce in which the

parties were engaged at the time of the injury has been construed, with more plausibility, as a mere amplification of a statement of a cause of action under the Federal Employers' Liability Act, and not the bringing of a new action under that act so as to subject the amendment to the defense of limitations.

Thus, in *Lammers v. Chicago G. W. R. Co.* (1919) — Iowa, —, 175 N. W. 311, where the complaint in an action for injury to a railroad section hand alleged that the defendant operated a line of railway through Illinois, Iowa, and other states, and that the line extended to Kansas City and St. Paul, and that, at the time of the accident, the plaintiff was unloading rails to repair the track, it was held that an amendment specifically alleging that the plaintiff was employed and the defendant engaged in interstate commerce at the time of the accident was not the assertion of a new cause of action, but served only to amplify or enlarge the allegations of the original petition, and related back to the time of filing the petition, and was, therefore, not subject to the limitations of the Federal statute. In this instance, the case was tried and submitted to the jury under the state law, but on appeal the judgment for the plaintiff was reversed on the ground that the state law was inapplicable. On the remanding of the case to the trial court, the amendment was allowed, and the railway company relied on the bar of the Statute of Limitations. The court, in holding that the amendment was properly allowed, said: "If the amendment served only to amplify or enlarge the allegations of the original petition, it related back, and the Statute of Limitations did not bar the action. . . . If, however, the amendment stated a new cause of action, it did not relate back, and as it was filed more than two years after the cause of action accrued, under the provisions of the Federal act, the bar of the statute was complete. . . . By reference to the allegations of plaintiff's original petition quoted above, it will at once be seen that the character of

defendant, as a common carrier engaged in interstate commerce, was sufficiently set forth. Aside from a brief reference to the defendant's negligence, which in no wise changed the cause of action originally pleaded, the amendment to plaintiff's petition included only the statement of the conclusion that plaintiff was employed, and defendant engaged, in interstate commerce at the time of the accident. . . . Defendant tacitly concedes that plaintiff was injured while employed by defendant in performing services in interstate commerce. He had but one cause of action, and that was under the law of Congress. He could not recover under the state statute for two reasons: One, the facts did not bring the case within the terms of the statute; and the other, that all state statutes, where the parties were engaged in interstate commerce at the time of the accident, were superseded by the Federal act. The amendment in no wise varied or altered the allegations of negligence, or the facts constituting his cause of action. There was no departure from the law under which the cause of action was originally pleaded, which was the only law under which it could be maintained, to a law of Congress; the facts and the substantial allegations of the petition remained the same. . . . We think it clear that the amendment did not state a new cause of action, but only amplified and enlarged the cause of action by specifically and directly asking relief under the Federal Employers' Liability Act, and therefore related back to the original cause of action."

And where the petition alleged that the defendant owned and operated a railroad through Nebraska and other states named, and that the plaintiff was employed by the company as a baggage handler at its Omaha depot, and that, while so engaged, a fellow servant negligently caused a heavy trunk to fall upon him, whereby he sustained personal injuries for which he sought to recover damages, the court stated in *Eskelsen v. Union P. R. Co.* (1918)

102 Neb. 423, 167 N. W. 408, that in this class of cases, where a carrier is engaged in both interstate and intrastate commerce, liberality must be permitted in the amendment of pleadings; and held that the petition stated a cause of action under the Federal act, and that an amended petition, filed more than two years after the accident, which in specific terms alleged the interstate character of the business in which the railway company and the plaintiff were engaged, did not state a new cause of action, but related back to the filing of the original petition, and was not barred by limitations. Rehearing was denied in (1918) 102 Neb. 427, 168 N. W. 366.

There are, of course, other cases, not within the scope of the note, which construe liberally pleadings in an action for injury or death of a railway employee, so as to bring the action within the Federal Employers' Liability Act. See, for example, *Martinson v. Chicago, B. & Q. R. Co.* (1918) 102 Neb. 238, 166 N. W. 624, holding that a petition in an action against a railway company for personal injuries to the plaintiff while in the defendant's employ, stating that the defendant was the owner, and was engaged in the operation of a system of railroads in Illinois, Iowa, Nebraska, and other states, when not attacked by demurrer or motion, sufficiently alleged the interstate character of the defendant, so as to bring the cause of action within the Federal statute.

See also the statement of the rule in *Vandalia R. Co. v. Stringer* (1914) 182 Ind. 676, 106 N. E. 865, 107 N. E. 673, to the effect that while the action must be brought and recovery had under the state law where the injury occurs in intrastate commerce, or under the Federal act where injury occurs in interstate commerce, the plaintiff need not specifically plead or refer to the state statute in the one case, or to the Federal act in the other; but that the proper procedure is to plead the facts; and the recovery may then be had according as

the evidence develops the case under the one law or the other.

*III. View that amendment states new cause of action.*

The decision in the reported case (*HOGARTY v. PHILADELPHIA & R. R. Co.* ante, 1386), that a common-law action by a railroad employee to recover, against his employer, for personal injury, cannot be amended so as to count upon the Federal Employers' Liability Act, after the limitation provided by that act has elapsed, is supported by the following cases: *Walker v. Iowa C. R. Co.* (1917) 241 Fed. 395; *Morrison v. Baltimore & O. R. Co.* (1913) 40 App. D. C. 391, Ann. Cas. 1914C, 1026; *Carpenter v. Central Vermont R. Co.* (1919) — Vt. —, 107 Atl. 569.

A similar rule in actions brought under state statutes for death of a railroad employee is supported by a number of cases to the effect that, if the action as originally brought is based on a state statute, an amendment of the petition, so as to base the action on the Federal Employers' Liability Act, introduces a new or different cause of action, and is subject to the limitations prescribed by the Federal statute. *Hall v. Louisville & N. R. Co.* (1907) 157 Fed. 464; *Hughes v. New York, O. & W. R. Co.* (1913) 158 App. Div. 443, 143 N. Y. Supp. 603; *Kinney v. New York C. & H. R. R. Co.* (1917) 166 N. Y. Supp. 868; affirmed in (1920) — App. Div. —, 179 N. Y. Supp. 929 (amendment may be allowed, but limitations is a defense); *Findley v. Coal & Coke R. Co.* (1915) 76 W. Va. 747, 87 S. E. 199. See also *Seaboard Air Line R. Co. v. Renn* (1915) 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1 (where rule seems to be implied); and *Lucchetti v. Philadelphia & R. R. Co.* (1916) 233 Fed. 137 (supporting rule, although original action was held to be based on Federal statute, and amendment, therefore, proper).

The Pennsylvania supreme court in the *HOGARTY CASE* reversed its former position taken in the decision on an earlier appeal of the case, reported in (1914) 245 Pa. 443, 91 Atl. 854,



this reversal being due largely to the implication in the decision in *Seaboard Air Line R. Co. v. Renn* (1916) 241 U. S. 290, 60 L. ed. 1006, 30 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, which was decided between the two appeals. It must be conceded that the decision of the Federal Supreme Court in the *Renn* Case, by implication, strongly supports the view that an amendment of a complaint based on the common law or a state statute so as to charge a cause of action under the Federal Employers' Liability Act presents a new cause of action, which is subject to the limitation prescribed by the Federal statute. It was held in the latter case that allegations in the complaint in a suit in a North Carolina court by a railway employee, to recover for personal injury suffered through the railway company's negligence, that the company was operating a railway in Virginia, North Carolina, and elsewhere, that plaintiff was in its employ, and that, when injured, he was in the line of duty, and that the injury occurred in Virginia by reason of a defect in the right of way, point, although imperfectly, to a cause of action under the Federal Employers' Liability Act, so that an amendment stating distinctly that, at the time of the injury, defendant was engaged and plaintiff was employed in interstate commerce, did not introduce a new cause of action which would be barred because the two years' limitation prescribed by the Federal statute had elapsed; but that such amendment merely expanded or amplified what was alleged in support of the cause of action, and related back to the commencement of the suit. The court said: "The original complaint was exceedingly brief, and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both

parties conceded that what was alleged in the amendment was true in fact, and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action, consistently with the provision in § 6 that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. . . . But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. . . . The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere; that the plaintiff was in its employ; that when he was injured he was in the line of duty, and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina, when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was, at least, consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce,

and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit, which was before the limitation had expired."

Although the language of the Federal Supreme Court in the Renn Case (U. S.) supra, seems to lend support to the view taken in the reported case (HOGARTY v. PHILADELPHIA & R. R. Co. ante, 1386), that an amendment of the complaint in an action for damages for injury to a railway employee, based on common-law liability, cannot, after the period of limitations prescribed by the Federal Employers' Liability Act has elapsed, be amended so as to predicate a cause of action on the Federal statute, it seems doubtful whether the United States Supreme Court would take this view in a case squarely presenting the question. And it seems clear that that court would be very liberal in its construction of the pleadings, as pointing to a cause of action under the Federal statute, where they do not state the nature of the commerce in which the parties were engaged. There seems much force in the statement made in *Pope v. Kansas City, M. & O. R. Co.* (1918) — Tex. —, 207 S. W. 514, that the decision of the United States Supreme Court in *St. Louis, S. F. & T. R. Co. v. Smith* (1916) 243 U. S. 630, 61 L. ed. 938, 37 Sup. Ct. Rep. 477, cited under II. b, supra, is adverse to the decisions of the courts which have construed the earlier opinions of the Federal court as requiring the holding that an amendment which shows that the cause of action arose under the Federal law presents a new or different cause of action from a petition stating a cause of action under the state law, though the facts showing the

tort and the damages therefrom were the same in each pleading.

A writ of error in the HOGARTY CASE was dismissed by the Federal Supreme Court in (U. S. Adv. Ops. 1919-20, p. 49), 250 U. S. 650, 63 L. ed. 1189, 40 Sup. Ct. Rep. 12, for want of jurisdiction under the Amendment of 1916 to the Judicial Code. It may be noted as a possible ground for distinguishing the HOGARTY CASE from many of the other cases that the plaintiff in order to recover was obliged to take the position that the case was an interstate one and so within the provisions of the Federal Employers' Liability Act, relieving him of a defense which would have been fatal if the case had been an intrastate one and so governed by the state law. It should be observed that the Federal Employers' Liability Act makes the carrier liable for death to the personal representative of the employee, for the benefit of the surviving widow, or husband, and children, of such employee. And if an action is brought under a state statute for death to recover damages for the widow alone, it seems that an amendment which would attempt to set up a cause of action for the children would be subject to the limitations of the Federal statute. This was the situation in *Lanis v. Illinois C. R. Co.* (1916) 140 La. 1, 72 So. 788, where the widow of a railway employee, killed through the negligence of the company in interstate commerce, brought suit in her individual capacity for damages under a state statute, and the defendant excepted to the proceeding on the ground that the right of action under the Federal act precluded a right of action under the state statute. The court held that it was proper to allow the plaintiff to amend the petition by appearing in the capacity of administratrix for the benefit of herself and child, and that, as to the demand for the benefit of the widow, the amendment might be allowed, although more than two years had elapsed from the accrual of the cause of action. But the court was of the opinion, apparently, although it was unnecessary to decide

the point, since the damages recovered for the child were purely nominal and did not affect the costs, that as to a demand for damages for the benefit of a child of the deceased, made for the first time in the amendment, a new cause of action was stated, which would be subject to the limitations of the Federal statute.

In *Hughes v. New York, O. & W. R. Co.* (1913) 158 App. Div. 443, 143 N. Y. Supp. 603, *supra*, the complaint in an action for injury to a railway conductor alleged that the defendant was organized under the laws of New York, and operated a railroad in various parts of that state and Pennsylvania, and that at the date of the accident the plaintiff was in the defendant's employ as a conductor on a train operated in Pennsylvania, and pleaded the statute of the latter state. Before trial the plaintiff died, and, more than two years after the cause of action accrued, a motion was made to substitute as plaintiff the decedent's widow, who had been appointed administratrix, and to permit her to serve an amended complaint, basing the action on the Federal Employers' Liability Act. In holding that the motion was properly denied, the court said: "The action was not brought under that act, but is specifically based on the common law, as modified by the statute of the state. An action under the Federal law must be begun within two years from the time the cause of action accrued, . . . but after nearly three years it is sought to convert the action under the state law into an action under the Federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the Federal act was amended so as to provide 'that any right of action given by this act to a person suffering injury shall survive.' . . . But the right cannot survive the time limited for its exercise, and when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the Federal statute is at least dormant, and ceases after the expiration of the two years. The Federal statute is tend-

ered to him who, entitled, chooses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited and, upon emergency, the action be changed into one under the Federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the Federal statute."

The position taken by the New York court in *Kinney v. New York C. & H. R. R. Co.* (1917) 166 N. Y. Supp. 868, appears to be that where the complaint in an action for injury to a railway employee states no fact bringing the action under the provisions of the Federal Employers' Liability Act, but states a cause of action entirely under the common law or statutes of the state, while an amendment setting up the facts that the plaintiff, at the time of the accident, was engaged in interstate commerce, may properly be allowed although more than two years have elapsed after the accrual of the cause of action, such limitations, if pleaded and proved by the defendant, are a defense. The opinion relies largely on the decision of the Federal Supreme Court in *Seaboard Air Line R. Co. v. Renn* (1916) 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, *supra*. Although the decision in the *Kinney* Case was affirmed without opinion in (1920) — App. Div. —, 179 N. Y. Supp. 929, it does not appear that the appellate division was of the same opinion as the lower court on the point under consideration, for it will be observed that the lower court decision is based also on other independent grounds.

The doctrine of *Kinney v. New York C. & H. R. R. Co.* (N. Y.) *supra*, is opposed to the view taken on an earlier appeal in the same case, reported in (1916) 98 Misc. 11, 162 N. Y. Supp. 42, which is affirmed without opinion in (1917) 177 App. Div. 943, 164 N. Y. Supp. 1098. This earlier appeal makes a distinction between the case in question, which was an action for injuries to an employee, and *Hughes v. New York, O. & W. R. Co.* (N. Y.) *supra*, where the amendment

attempted to set up a right in the administratrix, after the death of the employee, who had begun the action. It was said that the cases involving death claims were clearly distinguishable; that it was a well-known and conceded fact that all actions for damages for death caused by negligence were purely statutory; and that in every case where an action is brought by the injured person himself, or for his injury while living, and he afterward dies, and an amendment substituting and setting forth the new cause of action for his death is asked, it is plain that a new cause of action is sought to be interposed, and, if the Statute of Limitations has run against this new cause of action before the amendment is made, it is barred.

It was held in *Hall v. Louisville & N. R. Co.* (1907) 157 Fed. 464, *supra*, that in an action for the death of a railway employee, brought by the widow under a state statute for her benefit alone, an amendment changing the character of the plaintiff from widow to administratrix introduced a new cause of action based on the Federal statute, which did not relate back to the beginning of the suit, and was subject to the defense of the Statute of Limitations. The court said: "The right of the plaintiff to recover in such actions as this was unknown to the common law. The right here asserted is entirely statutory. It becomes a matter of importance, therefore, to determine under which statute this suit was originally brought. To determine this fact, this court can only look to the plaintiff's own statement of her cause of action. . . . Wherever a right is conferred by a statute which is in derogation of the common law, such statute must be strictly construed. Under the state statute . . . the right to sue and recover in such a case as this is vested in the widow alone, there being a widow living. . . . Her recovery in the action would be for her benefit alone. . . . Under the Federal statute . . . the right of action is conferred upon the personal representative

alone. The Federal statute effects radical changes in the liability, as it exists at common law or under the Florida statute, of common carriers engaged in interstate commerce, for injuries to their employees, in the disposition of the proceeds of the recovery when the injury results in death, and in the effect of the right of recovery for such injuries when the employee is guilty of negligence which directly contributes to his injury. There being, therefore, such marked distinctions between the two statutes, the conclusion is inevitable that the action, if brought under any authority at all, must have been brought under the state statute. Especially must this be the case when we consider the fact that at the time the suit was brought there was no personal representative in existence in whose name this suit could have been maintained under the Federal statute. . . . Here, under a suit in the name of the widow, she alone would be entitled to recover, and the measure of her damages would be such as the jury might determine that she alone had sustained on account of the death of her husband, . . . while under the Federal statute the administratrix would be entitled to recover for all damages sustained by her and her three children—probably just four times as much as she would recover in a suit as widow. Again, her recovery as widow would be no bar to a recovery under the Federal statute, at least in so far as her three children are concerned, who were neither a party to, nor interested in, any suit in the name of the widow as such. It seems, therefore, that the amendment presents an entirely new cause of action, to which the plea of the Statute of Limitations is a good defense."

*Lucchetti v. Philadelphia & R. R. Co.* (1916) 233 Fed. 137, supports the view against the right to amend after limitations has run, the court stating that a party may have two causes of action, which, although growing out of the same facts, are distinct and separate, one of them, for illustration, arising out of the general

principles of the law of negligence, and the other out of the provisions of a statute, state or Federal, and that, if he brings his action for the one cause, and wishes to change to the other, it is clear he is not amending the pleadings of the action brought, but is bringing in a new cause of action. But it was held that an amendment setting up other essential elements to bring the case within the Federal Employers' Liability Act was proper in this case, because it sufficiently appeared, both from the allegations of the statement of claim, and from the fact that the action was brought in a Federal court by one who could not have brought an action there except for a cause arising under the laws of the United States, that the cause of action meant to be set forth was one under the Federal statute.

And although it does not appear that the question of limitations was involved, attention is called to *Molitor v. Wabash R. Co.* (1914) 180 Mo. App. 84, 168 S. W. 250, where the petition in an action for injuries to a railroad employee did not state a case under the Federal Employers' Liability Act, but, the evidence showing that the plaintiff was, at the time of the injury, employed in interstate commerce, he contended that a recovery in his favor should be sustained on the theory that the Federal statute was applicable. The court in rejecting this view said that since the action, as stated in the pleading, was either under the common law or the statute of Missouri, and not under the Federal statute, the plaintiff could not recover under the latter statute without changing his cause of action from law to law, and that, it had been decided, he could not do.

See also among other cases not involving, so far as appears, the question of limitations. *Creteau v. Chicago & N. W. R. Co.* (1911) 113 Minn. 418, 129 N. W. 855, holding that where the action, by the allegations of the complaint, was founded entirely upon the state statute, and the trial proceeded throughout upon the theory of liability or nonliability thereunder,

the action of the trial court in submitting the case to the jury under the Federal act was a clear departure from the issues presented, and the course of the trial, and was unauthorized.

*Union P. R. Co. v. Wyler* (1895) 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, is frequently cited in the cases on the present question which take the position that an amendment in an action for death or injury of a railway employee under a state statute or common law, so as to base the action on the Federal statute, presents a new cause of action against which limitations run until the amendment is offered. That case, however, decided before the enactment of the Federal Employers' Liability Act, seems clearly distinguishable from the class of cases covered by the present annotation. In that case, where the action for injury to a railway employee was brought in a Missouri court, the petition, which alleged that the injury occurred in Kansas, was based on the general law of master and servant, alleging that the injury occurred because of the retention by the railway company of an incompetent servant, with knowledge of such incompetency. It was held that an amendment to the petition, attempting to set up a liability under a Kansas statute, which made the railway company liable for the negligence of a fellow servant without regard to the rule regarding retention of an incompetent servant, was a departure from law to law, and presented a new cause of action against which the Statute of Limitations of the state of the action ran until the amendment was offered.

#### IV. Miscellaneous.

Where the complaint in an action for injuries to a railway employee alleged the circumstances of the injury, but omitted definite statement as to whether the plaintiff was at the time engaged in interstate commerce, and the railway company in its answer, filed within two years from the time of the accident, set up the interstate character of the com-

merce in which the parties were engaged, and issues were joined and the case tried as one arising under the Federal statute, it was held that the omission in the complaint to allege specifically the interstate character of the commerce in which the plaintiff and the railway company were engaged was cured; and that it was not erroneous for the court, at the close of the evidence, although more than two years had elapsed since the date of the injury, to permit the plaintiff to amend the complaint, by alleging that the plaintiff was injured while engaged in interstate commerce. *King v. Norfolk-Southern R. Co.* (1918) 176 N. C. 301, 97 S. E. 29. The court said that the omission by the plaintiff to make definite averment on the question of interstate commerce and applicability of the Federal statute was cured by the allegations of the answer and the treatment of the parties of the case, the amendment being without material significance, and only a formal statement of conditions which the parties had already created, and about which there was no dispute; that the parties were not only concluded by their treatment of the cause as one under the Federal statute, but the case properly called for the application of the doctrine of "aider" by the additional and supplemental averments in the adversary pleadings, by which a defective statement may be explained.

See also, among other cases not within the scope of the annotation because not involving the question of limitations, *White v. Central Vermont R. Co.* (1914) 87 Vt. 330, 89 Atl. 618, affirmed in (1915) 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 8 A.L.R.—90.

265, holding that the defect in the original declaration in an action for death of a railway employee, in failing to allege the interstate character of the commerce in which the deceased and the railway company were engaged at the time of the accident, was cured by averments in the plea and admissions in the replication that the deceased was employed in interstate commerce.

As to whether a judgment in an action brought under the state law for the death of a railroad employee is a bar to a subsequent action brought for his death under the Federal statute, see *Troxell v. Delaware, L. & W. R. Co.* (1913) 227 U. S. 434, 57 L. ed. 586, 38 Sup. Ct. Rep. 274, holding that a judgment in an action brought by a widow in her individual capacity, for herself and children, to recover damages from an interstate carrier for the death of her husband while in its employ, which was prosecuted and tried on the theory that it involved a cause of action under the state law, under which there could be no recovery for the negligence of the fellow servants of the deceased, was not a bar to a subsequent action by the widow as administratrix, brought against the carrier under the Federal Employers' Liability Act, in which recovery was asked because of the negligence of such fellow servant.

Among possibly other cases on the question whether counts at common law and under the Federal Employers' Liability Act may be joined in the same complaint, see *Bouchard v. Central Vermont R. Co.* (1914) 87 Vt. 399, L.R.A.1915C, 33, 89 Atl. 475, which holds in the affirmative on this proposition.

R. E. H.

DORIA RICHARD  
v.  
AMOSKEAG MANUFACTURING COMPANY.

*New Hampshire Supreme Court — June 28, 1919.*

(— N. H. —, 109 Atl. 88.)

**Master and servant — disobedience of orders — effect.**

1. A master may be liable for the act of his superintendent in using excessive force in compelling obedience to working rules, although he was expressly directed not to use such force, if the use of some force was necessary.

[See note on this question beginning on page 1432.]

— act of superintendent — use of unreasonable force.

2. That the foreman of a room in a shop uses unreasonable force to compel compliance with rules does not show that he was not negligent in the means he adopted to perform his service of superintendence.

**Appeal — objection to theory of case.**

3. The objection that the case was tried on the wrong theory cannot be raised for the first time on appeal.

[See 2 R. C. L. 183, 184.]

**Master and servant — liability for wanton act of servant.**

4. A master is answerable for the act of his superintendent in enforcing obedience to the rules of employment, although he acts with a wanton or reckless purpose to accomplish the end in an unlawful manner.

— assault by superintendent — liability.

5. A master is liable for assault by his superintendent upon a servant if the superintendent was doing what he was employed to do at the time of the injury.

[See 18 R. C. L. 810.]

**Evidence — authority of superintendent to use force.**

6. Authority of a superintendent of a mill to use some force to compel employees to remain at their work may be inferred from the fact that employees did not understand the language of the superintendent.

**Master and servant — scope of employment — use of excessive force.**

7. The use of excessive force by a factory superintendent in compelling obedience to working rules in the shop may be found to have been within the scope of his employment.

[See 18 R. C. L. 810.]

— authority to lay hands on employees.

8. The superintendent of a factory has implied authority to take hold of employees to lead them back to work when they leave it contrary to rules, if they cannot understand the language of the superintendent.

**Appeal — erroneous expression in instruction — mode of preserving question for review.**

9. To preserve for review on appeal error in the use of an expression in an instruction, the attention of the court must be expressly called to it.

[See 2 R. C. L. 75.]

**On Petition for Rehearing.**

**Trial — waiver of defense.**

10. The defense of fellow service is waived in an action against a master for assault by one servant upon another, by placing the defense upon the ground that assailant was not acting within the scope of his authority, without making reference to the question of fellow service.

[See 21 R. C. L. 584, 585.]

**Appeal — ambiguous words in instruction — effect.**

11. The use of the expression "apparent authority" in an instruction in an action against a master for assault by one employee upon another, that the jury must determine whether or not in the event of disobedience of orders assailant had apparent authority to enforce their execution, is not error if, when viewed in connection with the rest of the charge, it is evident that the court used the word in the sense of implied authority.

[See 14 R. C. L. 817.]

(Plummer, J., dissents.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Hillsborough County (Kivel, Ch. J.) made during the trial of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff. **Overruled.**

The facts are stated in the opinion of the court.

Messrs. Warren, Howe, & Wilson and Louis A. Thorp for defendant.

Messrs. Taggart, Tuttle, Wyman, & Starr, for plaintiff:

Defendant was liable for the injury to plaintiff.

Grant v. Singer Mfg. Co. 190 Mass. 489, 6 L.R.A.(N.S.) 567, 77 N. E. 480, 20 Am. Neg. Rep. 351; Rogahn v. Moore Mfg. & Foundry Co. 79 Wis. 573, 48 N. W. 669; Jacques v. Great Falls Mfg. Co. 66 N. H. 482, 13 L.R.A. 824, 22 Atl. 552; Compher v. Missouri & K. Teleph. Co. 127 Mo. App. 553, 106 S. W. 536; Rowell v. Boston & M. R. Co. 68 N. H. 358, 44 Atl. 488; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Memphis & N. Packet Co. v. Hill, 58 C. C. A. 610, 122 Fed. 246; Avondale Mills v. Bryant, 10 Ala. App. 507, 63 So. 932; Jebeles-Coliss Confectionery Co. v. Booze, 181 Ala. 456, 62 So. 12; Nettle v. Flour City Ornamental Iron Works, 126 Minn. 530, 148 N. W. 43.

Mr. A. E. Boisvert also for plaintiff.

Walker, J., delivered the opinion of the court:

The question is whether the defendant is responsible for the injuries sustained by the plaintiff in consequence of the act of Smith in forcing her back into the room where she was employed. The evidence justified the jury in finding that she was violating the rules of the defendant in leaving her work and standing in or near the door preparatory to leaving the factory when the noon signal should be given; that Smith had immediate charge of the room and was charged with the duty of requiring the help, including the plaintiff, "to stay in the room or near their work until the whistle blew at 12 o'clock;" that at the time of the assault he was attempting to enforce this rule, and not to punish the plaintiff to gratify his personal spite; and that while thus engaged in the defendant's

service and in the performance of his duty of superintendent of the help he used more force upon the plaintiff than was reasonably necessary or justifiable, which resulted in the injuries complained of. Much of the argument for the defendant is based upon the assumption of facts which, upon the evidence, the jury were not only not bound to find, but were at liberty to negative; as, for instance, that Smith's assault upon the plaintiff was vindictive, and not resorted to as a means of performing his duty to the defendant. That there was evidence to the contrary is not open to doubt.

It is argued that the evidence does not warrant the finding of negligence on the part of the defendant. This contention is based upon the assumption that the use of any force by Smith was wilful and vindictive, and so an act of trespass, and not merely careless and unintentional and a negligent act. But the assumption is unsound. Because Smith used unrea-

sonable force, it does not follow that he was not negligent, in the means he adopted to perform his service of superintendence. There was ample evidence that he was engaged in doing what he had a right to do, and that he was not actuated by malice toward the plaintiff or by a desire to punish her, or to inflict bodily injury upon her. The jury was justified in finding his use of unwarranted force was due to his want of ordinary care in rightfully attempting to use such force as his employment authorized. But the law of the trial was that the action was one for negligence, and no exception was interposed by the defendant to the charge of the court, which was

Master and servant—act of superintendent—use of unreasonable force.



clearly predicated upon that theory.

**Appeal—objec-  
tion to theory of  
case.**

To delay raising that objection until the case is before this court would seem to preclude the defendant from taking that position. *Gage v. Boston & M. R. Co.* 77 N. H. 289, 296, L.R.A.1915A, 363, 90 Atl. 855. The same ruling applies to the argument that Smith and the plaintiff were fellow servants. That point was not specifically referred to at the trial, was not submitted to the jury, and cannot now be profitably discussed. The inference is that it was understood the fellow-servant doctrine had no application. A forced construction of the language used by the court or by counsel does not overcome the conclusion that the case was not tried upon that theory, and that the jury did not understand that that issue was submitted. Nor was any request made for its submission.

The law applicable to the facts which the jury were justified in finding, upon the question of the defendant's liability, is not open to serious doubt in this jurisdiction.

"The master is responsible for the acts of the servant, while engaged in his master's work, which are done as a means and for the purpose of performing that work, and this is so whether the wrong is done by

**Master and  
servant—liabil-  
ity for wanton  
act of servant.**

the servant's performing his master's business in a negligent manner or by a wanton or reckless purpose to accomplish it in an unlawful manner." *Rowell v. Boston & M. R. Co.* 68 N. H. 358, 359, 44 Atl. 488; *Cordner v. Boston & M. R. Co.* 72 N. H. 413, 57 Atl. 234.

"However it may be in other jurisdictions, in this state the test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial." *Danforth*

*v. Fisher*, 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Patenaude v. Boston & M. R. Co.* 77 N. H. 74, 87 Atl. 249.

The same principle is applicable when the assaulted party is a coem- <sup>—assault by  
superintendent  
—liability.</sup> ployee, and not what is termed a stranger, or third party. *4 Labatt, Mast. & S. § 1466.*

But it is argued that while this principle of law may be sound when the assaulting servant is authorized to use reasonable physical force upon or against a stranger to accomplish the master's purpose, as in the case of a railroad conductor in removing a trespasser from the train, it does not apply when the use of force is not authorized either expressly or impliedly by the master. But this is nothing more than saying that, when no degree of physical force is reasonable or to be expected in the proper or usual method of performing the required service or work, it would be unreasonable to infer that the use of force was authorized, or to hold that the jury could find that fact. This view of the law is illustrated by cases cited by the defendant; as in *Crelly v. Missouri & K. Teleph. Co.* 84 Kan. 19, 33 L.R.A. (N.S.) 328, 113 Pac. 386, 3 N. C. C. A. 854, when a local manager of a telephone exchange assaulted an operator because she refused to sign a voucher for her pay; and in *Sunderland v. Northern Exp. Co.* 133 Minn. 158, L. R. A. 1916E, 1151, 157 N. W. 1085, where a servant in seeking to collect a bill due his master assaulted the debtor because he used abusive language. If the master's liability is conceded to depend upon the question of authority reasonably incident to the work in hand, the jury might have found that the defendant authorized Smith to use some degree of force in keeping the help in the room engaged in the performance of their work. When the plaintiff quitted her work, it was Smith's duty to call her attention to her violation of the rule of the room and in some way to request her

to resume her proper place. To make the request verbally would have been ineffective because she did not understand the English language, the only language he could use. He was obliged to resort to some other means of informing her of his request, as, for instance, by putting his hand upon her and leading or pushing her back to the position she had wrongfully left. The

**Evidence—  
authority of  
superintendent  
to use force.**

use of some degree of physical force might reasonably be found to have been authorized by the defendant, and it follows, in accordance with the defendant's argument and the authorities above referred to, that the defendant would be liable for the excessive and unreasonable force used by Smith in the performance of his duty to the defendant.

But the principle applied in cases of this character has been stated to depend, not upon the question whether the master authorized the employee or agent to use force, but upon the question whether the latter used the force complained of as a means of doing what he was employed to do. *Grant v. Singer Mfg. Co.* 190 Mass. 489, 6 L.R.A.(N.S.) 567, 77 N. E. 480, 20 Am. Neg. Rep. 351; *Patenaude v. Boston & M. R. Co.* supra. When there is evidence that the assaulting party was engaged within the scope of his employment under his contract with the master, and some degree of physical force becomes reasonably necessary toward another servant for the accomplishment of the master's purpose, the use of excessive force may render the master liable, as it would in the case of a trespasser ejected by similar violent means; especially where the fellow-servant doctrine is not invoked, as it was not in the trial of this case.

**Master and  
servant—scope  
of employment—  
use of excessive  
force.**

The acts of the servant under such circumstances, though amounting to an unlawful assault in violation of the express orders of the master, may be found by the

jury to be within the scope of his employment. "The simple test is, whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By authorized is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders." *Wood, Mast. & S. § 307.*

If, on the other hand, it appears that the unlawful act was in no proper sense incident to the servant's employment, although it may have been with a purpose to promote the master's interest (*Cordner v. Boston & M. R. Co.* and *Patenaude v. Boston & M. R. Co.* supra), the plaintiff is not entitled to recover, in the absence of ratification by the master, for the reason that the servant's act was not within the scope of his employment even incidentally, and consequently was unauthorized.

The principal difficulty in cases of this character has arisen not so much in statements of the law involved, as in its application to the facts of particular cases. That the master is only liable when the servant's act was within the scope of his employment is recognized in practically all the cases: but the absence of a clear and definite definition of that phrase has caused much confusion and apparent conflict in the authorities. *Penas v. Chicago, M. & St. P. R. Co.* 112 Minn. 203, 223, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926. See 27 L.R.A. 161, note. But since it presents a mixed question of law and fact it is doubtful if it is susceptible of exact definition as a legal proposition. Such acts as are reasonably incident to the service the servant is employed to render are within the scope of his employment, in the sense that the master's duty to a third party

may be violated by the servant's negligent or malicious conduct in attempting to perform them. In this view it may not be inaccurate to say that as against the injured party the master authorized the servant to do the act causing the injury, although he may have expressly instructed the servant not to do it. If the act causing the injury is connected with or grows out of the service the servant is doing, the latter is within the scope of his employment and the

master is liable. If **—disobedience of orders—effect.** therefore the service may reasonably

require the exercise of force, under some circumstances force is authorized, and the master may be liable for its excessive or unreasonable use, upon the ground that the servant was within the scope of his employment, which has naturally resulted in injury to another, to whom the master owed the duty of abstaining from unnecessary violence.

In this connection it should be noted that while the use of reasonable force as a means of performing the required service may be incidental thereto, and while the use of an unreasonable degree of force could not be justified as an incident to the service, the master's liability rests on the theory that, having authorized the use of reasonable force as a means for the accomplishment of the service, he is responsible for its negligent or wilful abuse by the servant. He is responsible, not because the use of force was an incident of the service, but because its abuse caused the injury. In support of these general propositions the following additional authorities may be cited: *Citizens' Assur. Co. v. Brown* [1904] A. C. 423, 6 B. R. C. 675, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176; *Dickson v. Waldron*, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Hudson v. Missouri, K. & T. R. Co.* 16 Kan. 470; *Crelly v. Missouri & K. Teleph. Co.* 84 Kan. 19, 33 L.R.A. (N.S.) 328, 113 Pac. 386, 3 N. C. C. A. 854; *Sunderland v. Northern Exp.*

*Co.* 133 Minn. 158, 159, L.R.A. 1916E, 1151, 157 N. W. 1085; *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 573, 48 N. W. 669; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; *Compber v. Missouri & K. Teleph. Co.* 127 Mo. App. 553, 106 S. W. 536; *Grant v. Singer Mfg. Co.* 190 Mass. 489, 6 L.R.A. (N.S.) 567, 77 N. E. 480, 20 Am. Neg. Rep. 351; *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744; *Turley v. Boston & M. R. Co.* 70 N. H. 348, 47 Atl. 261, 8 Am. Neg. Rep. 484; *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L.R.A. (N.S.) 475, 93 S. W. 598. The case of *Jones v. St. Louis, N. & P. Packet Co.* 43 Mo. App. 398, holding that where the second mate of a boat assaulted a deck hand for the purpose of making him work, the defendant is not liable for the wrong done, is particularly relied upon by the defendant in support of the argument that Smith was not within the scope of his employment. But that case is not only distinguishable from the present case, but as an authority it has been repudiated in *Collette v. Rebori*, 107 Mo. App. 711, 720, 82 S. W. 552, and in *Compber v. Missouri & K. Teleph. Co.* 127 Mo. App. 553, 106 S. W. 536, and is contrary to the holdings in *Jebeles-Colias Confectionery Co. v. Booze*, 181 Ala. 456, 62 So. 12; *Avondale Mills v. Bryant*, 10 Ala. App. 507, 63 So. 932; *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 573, 48 N. W. 669; *The General Rucker* (D. C.) 35 Fed. 152.

Little doubt can be entertained upon the evidence that Smith at the time of the assault was in charge of the room as superintendent, and that it was one of his duties to the master to see that the help, including the plaintiff, attended to their work during working hours. When the plaintiff left her machine and stood in the door preparatory to leaving the mill, she was not attending to her work, as Smith understood the rules of the mill and the duties of her employment. It thereupon became his duty to insist upon her returning to her work and remaining

at her machine until the noon signal was given. The use of reasonable physical force as a means of performing this duty was incidental thereto. If he had taken her by the arm and led her back without unnecessary violence, as he says he attempted to do, it could not be said that he was not acting within the scope of his employment as a superintendent. Especially is this true in view of the fact that a verbal request to her would have been ineffective as above suggested. The use of some degree of force would seem to be necessarily implied under such circumstances from his employment.

—authority to lay hands on employees.

The situation is no different in principle than it would have been if the plaintiff had been totally deaf, or if there had been so much noise and confusion in the room that Smith's voice was inaudible. Something more than verbal orders or requests would be necessary to induce the plaintiff to attend to the duties of her employment.

The act of Smith was an act of superintendence, performed for the benefit of the master, and was incidental to the work he was employed to do. *Compher v. Missouri & K. Teleph. Co.* 127 Mo. App. 553, 106 S. W. 536. It was not an act done merely to gratify his spite toward the plaintiff, nor was it done for the purpose of administering punishment to her. The verdict negatives any such inferences of fact. If Smith was authorized under the circumstances to use a reasonable degree of force to compel the plaintiff to attend to her work, there is no escape from the conclusion that the defendant is responsible for his negligence in using unreasonable force. The motions for a nonsuit and for a directed verdict were properly denied.

The defendant excepted to the instruction given to the jury that "if Smith had been invested with apparent authority to enforce discipline, the defendant is responsible for

Smith's acts while he was engaged in the exercise of that authority."

In another place in the charge the question for the jury to decide was stated as follows: "In the event of disobedience of the orders, did Smith have the apparent authority to enforce their execution for the purpose of maintaining discipline in the room?"

The sense in which the word "apparent" was used was not explained; it was not defined; and the defendant now insists that the court erred in using the expression "apparent authority." It does not appear that the defendant asked for special instructions upon this point, or intimated to the court the ground upon which it was claimed the charge was wrong. It is evident if such an explanation had been made the court might have substituted other language for the expression now objected to by the defendant, and thus have cured the assumed error. As the defendant remained silent after taking a general exception and failed to call attention to this expression of which they now complain, so that the court might have corrected what appeared to have been said, the defendants take nothing by their general exception. *Bourassa v. Grand Trunk R. Co.* 75 N. H. 359, 362, 74 Atl. 590. Such is the general rule in this state, which has been applied in numerous cases, some of which are cited in the above case. Upon the ground of waiver the defendant's exception to the charge is unavailing.

Appeal—erroneous expression in instruction—mode of preserving question for review.

Exceptions overruled; judgment on the verdict.

Peaslee, J., did not sit.

Plummer, J., dissents. The others concur.

A motion for rehearing having been filed, Walker, J., on March 2, 1920, handed down the following additional opinion:

The amendments of the case desired by the defendant appear to be unnecessary. The facts are fully

reported in the case, so far as they are material. A rehearsal of the evidentiary facts requested does not show that the court committed any error in denying the motion.

The defendant's argument that the fellow-servant doctrine is open for discussion, because its exception to the denial of its motion for a nonsuit nominally raised the question, is futile, for the reason that the grounds upon which it based the motion when it was made and the course of the trial do not indicate that it relied upon that defense, but upon the claim that at the time the plaintiff was injured Smith was not acting within the scope of his authority and did not represent the master. No specific reference to the defense of fellow service was made. Nor was any specific instruction

*Trial-waiver of defense.*

on that point requested. It is clear that the defendant waived any right it might have had to present that view of the case. The brief remarks of the court in its charge upon the subject of vice principalship were not excepted to by the defendant. Indeed, it seems to have been conceded that Smith was the vice principal of the defendant, who was liable for Smith's acts of superintendence.

The alleged error of the court in using the expression "apparent authority" in the charge cannot now be taken advantage of by the defend-

ant, for the reason stated in the former opinion. But in addition to that it appears that the defendant's position is unsound; for upon a reasonable interpretation of the language objected to, viewed in connection with the rest of the charge, it cannot be doubted that the court used the word "apparent" in the sense of the word "implied," and that the jury understood they might find from the character of the service Smith was employed to perform that the defendant invested him with authority to see that the regulations in regard to the time when the employees should be attending to their work should be observed by them; that is, that it was apparent to the defendant, as it would

*Appeal—ambiguous words in instruction—effect.*

be to reasonable men in the same situation, that such authority, if not expressly given, existed as a necessary incident of the employment of Smith as a superintendent of the room.

As the defendant's last exception cannot be sustained, and as the motion for a rehearing is unavailing, the result is

Exception overruled.

Former order affirmed.

Parsons, Ch. J., and Peaslee, J., did not sit.

Young, J., concurs.

Plummer, J., dissents on last order.

## ANNOTATION.

### Master's liability for injury of one servant by another in enforcing discipline.

- I. The general rule, 1432.
- II. Application of the rule, 1433.
- III. Miscellaneous, 1436.
- IV. Under maritime law, 1436.

#### *I. The general rule.*

The principle is well established that a master is liable for an injury wrongfully inflicted by one servant upon another, in an attempt to enforce discipline, where the act is done within the general scope of his employment.

In applying this rule to the divergent facts of the various cases there has been, as stated in the reported case (*RICHARD V. AMOSKEAG MFG. CO.* ante, 1426), some apparent conflict in the authorities, due to the absence of a clear and definite definition of the phrase "scope of employment." It may, however, be partially defined, in the light of the adjudged cases, as an act performed by the servant in the line of his duty as a means of further-

ing his master's business, and not for a purpose personal to himself. The master's liability, in this class of cases, rests on familiar principles drawn from the law of agency and on the ancient maxims "respondeat superior" and "qui facit per alium facit per se."

The general rule was recognized in the following cases:

**United States.**—*Spencer v. Kelley* (1887) 32 Fed. 838; *The General Rucker* (1888) 35 Fed. 152; *Gabrielson v. Waydell* (1895) 67 Fed. 342; *Memphis & N. Packet Co. v. Hill* (1903) 58 C. C. A. 610, 122 Fed. 246.

**Alabama.**—*Palos Coal & Coke Co. v. Benson* (1905) 145 Ala. 664, 39 So. 727; *Jebeles-Colias Confectionery Co. v. Booze* (1913) 181 Ala. 456, 62 So. 12; *Avondale Mills v. Bryant* (1913) 10 Ala. App. 507, 63 So. 932.

**Arkansas.**—*Tillar v. Reynolds* (1910) 96 Ark. 358, 30 L.R.A.(N.S.) 1043, 131 S. W. 969.

**Georgia.**—*Brown v. Smith & K. Co.* (1913) 12 Ga. App. 214, 76 S. E. 1082; *Smith v. Seaboard Air Line R. Co.* (1916) 18 Ga. App. 399, 89 S. E. 490.

**Illinois.**—*Arasmith v. Temple* (1882) 11 Ill. App. 39.

**Kansas.**—*Crelly v. Missouri & K. Teleph. Co.* (1911) 84 Kan. 19, 33 L.R.A.(N.S.) 328, 113 Pac. 386, 3 N. C. C. A. 854.

**Louisiana.**—*Dyer v. Rieley* (1876) 23 La. Ann. 6.

**Minnesota.**—*Campbell v. Northern P. R. Co.* (1892) 51 Minn. 488, 53 N. W. 768; *Sunderland v. Northern Exp. Co.* (1916) 133 Minn. 158, L.R.A.1916E, 1151, 157 N. W. 1085.

**Mississippi.**—*McCoy v. McKowen* (1853) 26 Miss. 487, 59 Am. Dec. 264; *Alabama & V. R. Co. v. Harz* (1886) 88 Miss. 681, 42 So. 201; *Indianola Cotton Oil Co. v. Crowley* (1920) — Miss. —, 83 So. 409.

**Missouri.**—*Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398; *Compher v. Missouri & K. Teleph. Co.* (1907) 127 Mo. App. 553, 106 S. W. 536; *Sooby v. Postal Teleg.-Cable Co.* (1920) — Mo. App. —, 217 S. W. 877.

**New Hampshire.**—*RICHARD v. AMOS-KEAG MFG. Co.* (reported herewith) ante, 1426.

**New York.**—*Gabrielson v. Waydell*

(1892) 135 N. Y. 1, 17 L.R.A. 228, 31 Am. St. Rep. 793, 39 N. E. 969.

**North Carolina.**—*Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375; *Fleming v. Tarboro Knitting Mills* (1913) 161 N. C. 436, 77 S. E. 309.

**Tennessee.**—*Puryear v. Thompson* (1844) 5 Humph. 397; *Smith v. Memphis & A. C. Packet Co.* (1886) — Tenn. —, 1 S. W. 104.

**Texas.**—*Echols v. Dodd* (1857) 20 Tex. 191.

**Wisconsin.**—*Rogahn v. Moore Mfg. & Foundry Co.* (1891) 79 Wis. 573, 48 N. W. 669.

## II. Application of the rule.

In the following cases it was held that the assaults complained of were committed by the superior servant within the scope of his employment and in the furtherance of the master's business, and that the latter was liable therefor:

A general manager of a corporation who assaulted a bookkeeper when the latter hesitated to permit him to inspect the books and accounts of the company, and to leave the safe open and the books out for that purpose, was held in *Indianola Cotton Oil Co. v. Crowley* (1920) — Miss. —, 83 So. 409, to act within the scope of his employment and about the master's business in so doing, although the particular account that he desired to inspect was his individual account with the master.

In *Fleming v. Tarboro Knitting Mills* (1913) 161 N. C. 436, 77 S. E. 309, where a foreman violently assaulted an employee with whom he had just remonstrated about his work, and his failure to start up his machines, the test of the master's responsibility is said to be, not whether the act was done during the existence of the employment, but whether it was done in the prosecution of the master's business. The question was held properly submitted to the jury, which found in favor of the injured employee.

Evidence that an employee, directly after his discharge by the manager of a corporation because of the manner in which he performed his work, was

assaulted by the manager while leaving the premises, was held in *Jebeles-Colias Confectionery Co. v. Booze* (1913) 181 Ala. 456, 62 So. 12, to authorize a finding that the assault was committed in the course of the manager's employment and in the line of his assigned duties, where it does not appear that the assault grew out of anything other than the dispute between them and some temper evolved from the fact and manner of the dismissal.

Of course, if the wrongful act committed by one servant against another is not done within the scope of his employment or the line of his duty, and has no relation to the business of the employer, it is an independent tort for which the latter is not liable.

Thus, a mining company is not liable in damages for an assault made by its general superintendent upon the driver of a car in the mine while the superintendent was riding upon the car, where supervision of the drivers formed no part of his duty. *Palos Coal & Coke Co. v. Benson* (1905) 145 Ala. 664, 39 So. 727.

Similarly, the owners of a steamboat are not liable for the acts of the mate who, observing some of the crew standing near whisky barrels forming part of the cargo, threw a pine knot which struck one of them in the eye, where it does not appear that it was part of the duty of the mate to guard the whisky or that he had orders to do so. *Dyer v. Rieley* (1876) 28 La. Ann. 6.

So, an employer was held not liable in *Brown v. Smith & K. Co.* (1913) 12 Ga. App. 214, 76 S. E. 1082, for an assault committed by its foreman upon an employee whom he had discharged because the latter demanded the wages due him and threatened to complain to the employer.

A railroad company is not liable in damages for an assault committed by a chief clerk upon a former employee whose discharge he had procured three days previously because of a dispute between them as to the payment of money. *Alabama & V. R. Co. v. Harz* (1906) 88 Miss. 681, 42 So. 201.

Similarly, a brakeman who was as-

saulted by the conductor while on his way to the cab to get a lantern belonging to him, after being discharged by the conductor for failure to stop a moving car in time to prevent it from striking another car, was held not entitled to recover damages from the railway company in *Smith v. Seaboard Air Line R. Co.* (1916) 18 Ga. App. 399, 89 S. E. 490.

A railroad company is not liable for an assault made by a yardmaster upon an employee during a personal quarrel between them, because of a correction which the yardmaster had administered to the employee for a mistake in switching cars. *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A. (N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375.

An express company is not liable for an act of its assistant auditor who, after an argument with an office clerk concerning a demand for more salary, in which warm words were used, followed the clerk and kicked him for language which he considered insolent. *Sunderland v. Northern Exp. Co.* (1916) 133 Minn. 158, L.R.A.1916E, 1151, 157 N. W. 1085.

Averments that a physician employed by a railroad beneficial association assaulted one of his assistants employed by the association, while both were in the performance of their several duties at a hospital, which act is alleged to have been done in the course of his employment and while in the discharge of his duty, and to have been the act of his principal, are insufficient on demurrer, since they do not show the assault to have been other than an independent tort. *Campbell v. Northern P. R. Co.* (1892) 51 Minn. 488, 53 N. W. 768.

In some of the earlier cases it was considered that a master was not liable for the torts of the servant committed without the master's authority, and on this principle it was determined in *McCoy v. McKowen* (1853) 26 Miss. 487, 59 Am. Dec. 264, that a master who hired a slave from another was not liable in damages for the death of the slave because of a beating inflicted upon her by an overseer whose violence was not authorized by

the master, but was the result of the overseer's imprudence.

Similarly, one who directed his overseer to give a hired negro slave a good whipping, which would humble him, was held liable in damages to the owner of the slave in *Puryear v. Thompson* (1844) 5 Humph. (Tenn.) 397, where the latter died from the effects of the whipping administered, if the overseer intended only to chastise the negro until he be humbled, in pursuance of the master's directions; but if he abandoned the purpose to chastise until the negro should be humbled, and employed instruments of torture to gratify his malice, intending to kill him, it was determined that the master would not be liable.

The preceding case was followed in *Smith v. Memphis & A. C. Packet Co.* (1886) — Tenn. —, 1 S. W. 104, which held that a packet company was not liable for the unauthorized act of its mate who, after ordering a deck hand to walk faster in carrying in boxes of freight, engaged in an altercation with him and struck him.

But it is said in *Avondale Mills v. Bryant* (1913) 10 Ala. App. 507, 63 So. 932, that the later and better rule is that the master is liable for the acts of the servant wilfully and intentionally done in the general scope and line of his employment, although without the command, authorization, or ratification of the master, because he has failed to make good, to the party injured, his assumption, for the servant, that the latter would execute the master's service in a lawful manner. In this case the employer was held liable for an assault committed by its foreman upon an employee who had moved into one of the houses in the mill village without the permission of the foreman who had charge of them, since such wrongful act was done while the foreman was acting in the general line and scope of his employment in and about his duties as such foreman.

Similarly, a master is liable for the act of a servant who forcibly ejects another servant from the master's premises, if he acts therein bona fide as such servant and in the line of his

employment, although the act may have been malicious and in the manner of doing it unlawful, and in fact against the master's will. *Arasmith v. Temple* (1882) 11 Ill. App. 39.

A master who directs his servant to render service which reasonably requires the exercise of force thereby impliedly authorizes him to use force when necessary, in executing the master's orders or in conducting and superintending his business, and necessarily leaves it to him to decide what degree of force he shall use, and the master is responsible in damages to another employee whom the servant injures by the use of excessive force.

This is the doctrine of the reported case (*RICHARD v. AMOSKEAG MFG. CO.* ante, 1426), in which the employer was held liable for the act of its superintendent in using unreasonable force in attempting to compel a female employee, in compliance with a rule of the employer, to return to her work and to remain at her machine until the noon signal was given.

So, in *Rogahn v. Moore Mfg. & Foundry Co.* (1891) 79 Wis. 573, 48 N. W. 669, an employer was held liable for an assault committed by its foreman upon an employee whom he had discharged on account of his refusal to do certain work, the assault being committed in an effort to remove the discharged employee from the shop upon his refusal to depart at once.

An overseer whose employment confers on him the right to decide when chastisement of a hired slave is necessary, and to inflict punishment when necessary, acts in the course of his employment when he beats the slave so negligently and recklessly that death ensues, and the master is liable in damages to the owner of the slave for the overseer's wrongful act. *Echols v. Dodd* (1857) 20 Tex. 191.

The owner of a convict farm was held liable in damages in *Tillar v. Reynolds* (1910) 96 Ark. 358, 30 L.R.A.(N.S.) 1043, 181 S. W. 969, for the act of the warden in charge of the farm, and who had authority to punish, in chastising a convict so severely that he died from the effects thereof.

A telegraph company was held lia-



ble in *Sooby v. Postal Telegr.-Cable Co.* (1920) — Mo. App. —, 217 S. W. 877, for an injury to a messenger boy due to the acts of other messenger boys, who pushed him from his bicycle while trying to bring him back to the office in pursuance of a direction given by a telegraph operator that they compel him to return to work.

A telephone company is liable in damages for the act of its chief operator who, after being annoyed by the conduct of some of the employees who were laughing and talking, angrily took hold of the revolving chair of a switchboard operator and turned it about so as to make her face the switchboard, and, when so doing, inflicted severe injuries upon her when she collided with the substructure of the switchboard. *Compber v. Missouri & K. Teleph. Co.* (1907) 127 Mo. App. 553, 106 S. W. 536.

The decision in *Jones v. St. Louis, N. & P. Packet Co.* (Mo.) *infra*, was disapproved in this case in so far as it is inconsistent therewith.

When no degree of physical force is reasonable or to be expected in the proper or usual method of performing the required service or work, it cannot be inferred that the master has authorized the servant to use force, and the former is not liable for the use of force by the latter. This rule was applied in *Crelly v. Missouri & K. Teleph. Co.* (1911) 84 Kan. 19, 33 L.R.A. (N.S.) 328, 113 Pac. 386, 8 N. C. C. A. 854, which held that a telephone company was not liable for an assault committed by its local manager upon an operator who was about to quit the service, when she refused to sign a voucher for the compensation due her.

Similarly, the owners of a steamboat were held not liable for the acts of a mate in beating a deck hand for the purpose of making him work, in *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398, on the ground that the direction of one servant by another, where both are freemen, does not imply the use of force, and its exercise is not within the scope of the superior servant's employment.

### III. Miscellaneous.

A master is under obligation to his servants to exercise due care and caution in the selection of his representative or alter ego, who orders, commands, and controls those committed to his charge.

So, it was held in *Lamb v. Littman* (1901) 128 N. C. 361, 53 L.R.A. 852, 38 S. E. 911, that an employer is liable for personal injuries inflicted upon a child in his employ, by his overseer, due to violent handling in urging the child to the proper performance of his work, where the overseer, by conduct extending back for a period of years, has established a reputation for being high tempered and cruel to children and other help, and who is therefore incompetent for the position in which he is placed.

A railway company is not liable under a statute declaring persons intrusted with the authority of superintendence, control, or command of other servants, or authority to direct them in the performance of their duties, to be vice principals, for an assault committed by the assistant foreman of a bridge gang upon a workman because of delay in the execution of a task, due to conflicting orders, where the assistant foreman was expected to lead in the work, and, in the absence of the foreman, tell the men what they should do in carrying out the instructions given him by the foreman, but who had no authority to employ or discharge men. *Missouri, K. & T. R. Co. v. Day* (1911) 104 Tex. 237, 34 L.R.A. (N.S.) 111, 136 S. W. 435.

### IV. Under maritime law.

To make the owner of a vessel liable to a seaman for an assault committed upon him by the master, it must be shown that in the infliction of the injury the master was acting within the scope of his duty as master and in the exercise of his control over the seaman.

Thus, if a seaman is guilty of disobedience in refusing to leave the pilot house or change the position of the wheel, the master has a right to use such force as is reasonably necessary to remove him or compel change

of the wheel, and if he uses more force than is reasonably necessary for that purpose, the shipowners will be liable; but the master has no right to punish a seaman for disobedience of orders or want of proper discharge of his duty after the acts have been done, nor has he a right to take the law into his own hands and punish a seaman for disobedience of orders that have passed by, and if he does so after the emergency has passed, he does not do it in the line of his duty, and the shipowners are not responsible therefor. *Spencer v. Kelley* (1887) 32 Fed. 838.

The liability of the owner of a vessel for the wilful torts of an officer of the ship was upheld in *The General Rucker* (1888) 35 Fed. 152, where it was decided that a roustabout employed in loading a vessel under the command of the mate, and who was wounded by the blows of the mate, given because he did not obey his orders, was entitled to recover from the shipowner, since that act was committed within the scope of the mate's employment.

The liability of the owner of a steamer for the wilful torts of an officer extends to the act of a deck hand who was placed in temporary command of the other hands, and who, for the purpose of making one of them work more rapidly, struck him on the arm with a heavy stick, breaking his arm. *Memphis & N. Packet Co. v. Hill* (1903) 58 C. C. A. 610, 122 Fed. 246.

In *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969, a wilful and malicious attack with kicks and blows made on the high seas by the captain of a vessel upon a seaman, merely because he said he was sick when ordered to go on deck, was held not within the scope of the captain's employment or authority so as to render the owners of the vessel liable therefor, where it did not appear that the act of the captain was required by the pressing emergencies of the occasion or that he had not indulged his passions by a vindictive treatment of the seaman. But in a subsequent action based on the same injuries the owners of the vessel were held liable as principals

for the acts of their agent placed over others. *Gabrielson v. Waydell* (1895) 67 Fed. 342.

The ship is liable for the acts of the master in punishing a seaman with unnecessary cruelty by placing him in irons and making him fast to a stanchion, with his hands above his head, and striking him in the face while he is in that position. *Belyea v. Cook* (1908) 162 Fed. 180.

In *The Eva B. Hall* (1902) 114 Fed. 755, the owner of a vessel was held liable for the act of the master in compelling a seaman suffering from a broken arm to perform, under a threat of putting him in irons, duties about the ship which would naturally result in an aggravation of the injury. In this case it is said that the liability of a vessel to her crew ordinarily does not include any compensation or allowance for the resulting effects of an injury received while in her service, but is limited to the expenses of the care, attendance, and cure of the seaman. Where, however, there has been misconduct or neglect by the officers in the treatment of the seaman after he has been wounded in the service of the ship, an additional cause of action arises against the ship for consequential damages.

Under U. S. Rev. Stat. § 4596, as amended by the Act of December 21, 1898, 30 Stat. at L. 760, chap. 28, § 19, Comp. Stat. § 8380, 9 Fed. Stat. Anno. 2d ed. p. 215, authorizing the punishment of seamen by placing them in irons for wilful disobedience to any lawful command at sea, the ship is not liable for the act of the master, who punished a seaman who refused to scrub the mast, as a penalty for fighting, by placing him in irons with his wrists below his knees and a stick placed under his knees, where no appreciable suffering was caused the seaman, who was released after about forty-five minutes, at his own request and on promise of good behavior. *The Thrasher* (1909) 97 C. C. A. 424, 173 Fed. 258.

A ship is not liable for the act of the master, who placed seamen who refused to go to work, on bread and water, and confined them in irons, and

thereafter ran a chain which was suspended 4 or 5 feet above deck, between the arms of each man, since such punishment was within the authority given by U. S. Rev. Stat. § 4596, as amended by Act of December 21, 1898, chap. 28, § 19. *The John and Winthrop* (1910) 106 C. C. A. 1, 182 Fed. 380.

A ship is not liable in damages for the act of the master in placing in irons a seaman who returned from shore leave in an intoxicated condition and refused to go forward, or for forcibly resisting the attack which the seaman made upon him. *The David Evans* (1911) 109 C. C. A. 623, 187 Fed. 775. This action was brought upon a breach of the shipping articles and for not treating libellant with proper kindness. The assault was justified, not upon the authority of the captain to punish, but upon his right to repel the attack in defense of his person.

The liability of a ship for injuries sustained by a seaman because of the negligence of the master was affirmed in the earlier cases, but subsequently denied.

It was held in *The Marion Chilcott* (1899) 95 Fed. 688, that it is the duty of the captain to maintain proper discipline on the ship and protect a member of the crew from unnecessary and unjustifiable chastisement at the hands of a subordinate officer, and that neglect to perform his duty in that regard renders the ship liable for the effect of such abuse.

Similarly, it was decided in *The Lizzie Burrill* (1902) 115 Fed. 1015,

that the failure of the master of the ship to protect an inexperienced seaman from bad treatment and violence committed by the mate and boatswain, such acts on occasion being encouraged by the master, renders the ship and its owners liable for the injuries sustained by the seaman. But these cases were both superseded by the later decision in *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, which held, in an action to recover damages for injuries sustained by a seaman through the negligence of the master, that a seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

In conformity with this decision it has been held that the owners of a ship are not liable for the neglect of the master to protect a seaman from abuse at the hands of subordinate officers and from blows inflicted by them for alleged impertinence or failure to obey orders. *The Astral* (1905) 134 Fed. 1017.

A steamboat is not liable to seizure under the Water Craft Law of Ohio (Act of February 26, 1840) for a wilful assault committed by the mate of the boat upon a deck hand, when the act was in no way connected with the business of the boat or authorized by the owners. *The Messenger v. Pressler* (1862) 13 Ohio St. 255.

A. W. R.

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UNITED STATES OF AMERICA, Plff. in Err.,

v.

UNION BANK OF CANADA.

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SAME, Plff. in Err.,

v.

ROYAL DUTCH WEST INDIA MAIL COMPANY.

*United States Circuit Court of Appeals, Second Circuit — December 10, 1910.*

(262 Fed. 91.)

Allen — contract labor — what is.

An accountant in a bank and a clerk in a steamship office are not laborers

within the meaning of the Act of Congress of 1907, penalizing anyone assisting the importation of contract labor.

[See note on this question beginning on page 1442.]

**ERROR** to the District Court of the United States for the Southern District of New York to review judgments in favor of defendants in actions brought to recover penalties for violations of the contract labor provisions of the Immigration Acts. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Messrs. Francis G. Caffey and Vincent H. Rothwell, for the United States:

Schilling was a contract laborer within the meaning of the Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; Re Ellis, 124 Fed. 637; United States ex rel. Barlin v. Rodgers, 112 C. C. A. 382, 191 Fed. 970; United States ex rel. Buccino v. Williams, 190 Fed. 897; Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; Ex parte Kunihiro Toguchi, 238 Fed. 632.

Schilling was not within one of the exempted classes.

United States ex rel. Barlin v. Rodgers, 112 C. C. A. 382, 191 Fed. 970; United States v. Great Falls & C. R. Co. 53 Fed. 77; Scharrenberg v. Dollar S. S. Co. 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28.

The answer admits a cause of action and the separate defense is sufficient in law.

United States v. Great Falls & C. R. Co. 53 Fed. 77.

Messrs. Carter, Ledyard, & Milburn and Walter F. Taylor, for defendant in error Union Bank:

Schilling was not a contract laborer within the meaning of the Act of February 20, 1907.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; 27 Ops. Atty. Gen. 383; Scharrenberg v. Dollar S. S. Co. 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28.

Schilling was a member of a learned profession within the meaning of § 2

of the Act of February 20, 1907, excepting members of learned professions from the operation of the act.

United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998.

Messrs. Burlingham, Veeder, Masten, & Fearey and William Paul Allen, for defendant in error mail company:

Mook, in respect of whose coming to this country the defendant is charged with violation of the provisions of § 5 of the Immigration Act, was not a "laborer," and did not come to this country to "perform labor" within the purview of that section.

United States v. Craig, 28 Fed. 795; United States v. Laws, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; Re Ellis, 124 Fed. 637; Scharrenberg v. Dollar S. S. Co. 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28; Church of the Holy Trinity v. United States, 143 U. S. 463, 36 L. ed. 229, 12 Sup. Ct. Rep. 511, 36 Fed. 303.

The defendant did not prepay the transportation or in any way induce, assist, encourage, or solicit the transportation or migration of Mook within the intent of the prohibition of § 5.

Darnborough v. Joseph Benn & Sons, 109 C. C. A. 270, 187 Fed. 580; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Johnson v. Southern P. Co. 196 U. S. 1, 17, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Ex parte Kunihiro Toguchi, 238 Fed. 632; United States v. Great Falls & C. R. Co. 53 Fed. 77.

The coming of Mook to this country for a temporary stay only, for the purpose of gathering information as to the conditions at the New York office, and then proceeding to the post in Paramaribo, where he was to be employed as assistant local agent, did not constitute a migration to the United States, and any inducement by the defendant to come under such

condition was not an inducement to migrate within the prohibition of § 5.

United States v. Michigan C. R. Co.  
48 Fed. 365.

Ward, Circuit Judge, delivered the opinion of the court:

In the first case there is a writ of error to a judgment in favor of the defendant directed by Augustus N. Hand, J., in an action brought by the United States against the Union Bank of Canada to recover a penalty of \$1,000 for violation of § 4 of the Immigration Act of February 20, 1907, which reads: "Section 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in § 2 of this act." [34 Stat. at L. 900, chap. 1134, Comp. Stat. § 4248, 3 Fed. Stat. Anno. 2d ed. p. 654.]

Section 2 provides for the exclusion of contract laborers, the relevant portions being: "Section 2. That the following classes of aliens shall be excluded from admission into the United States: . . . Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled: . . . And provided further, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or

persons employed strictly as personal or domestic servants."

The defendant bank, a corporation of the Dominion of Canada, having opened a branch in New York city, brought from its branch in Toronto one Schilling, agreeing to employ him at a salary as assistant accountant in its New York office, and paying the cost of his transportation. The question is whether Schilling was a contract laborer within the meaning of the act.

The first legislation on the subject was in chapter 164, Laws 1885, § 3 of which made it an offense subject to a penalty of \$1,000 to encourage in any way the importation of any alien "to perform labor or service of any kind under contract or agreement" in the United States.

Section 5 provided exceptions as follows: ". . . Nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: Provided, That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants." [23 Stat. at L. 333, chap. 164.]

While this act was in force Reverend E. Walpole Warren was called by the Church of the Holy Trinity to the city of New York as its pastor. The government brought suit against the church for the penalty, and the defendant demurred. We overruled the demurrer (36 Fed. 303) in view of the language of the act—§ 3, "labor or service of any kind,"—and of the specific exceptions (§ 5) which did not include ministers. But the Supreme Court (143 U. S. 457, 36 L. ed 226, 12 Sup. Ct. Rep. 511) reversed the judgment, holding that the title of the act, "An Act to Prohibit the Importation and Migration of For-

eigners and Aliens under Contract or Agreement to Perform Labor in the United States, Its Territories, and the District of Columbia," and the mischief which Congress intended to prevent, as shown by the reports of committees of Congress on the subject, demonstrated that only manual laborers were intended to be excluded.

Chapter 551, Laws 1891, § 5, amending § 5 of the Act of 1885, added to the exemptions these words: "Nor to ministers of any religious denomination nor to persons belonging to any recognized profession nor professors for colleges or seminaries."

In the case of *United States v. Laws*, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998, the defendant *Laws* brought a chemist from Germany to Louisiana, under contract to perform services there. The circuit court of appeals of the sixth circuit certified the question whether this was within the prohibition of the Act of 1885. The court answered the question in the negative, referring to the amendment of 1891, which had been subsequently passed, as making the intention of Congress, as found in the case of *Holy Trinity Church*, still plainer.

Chapter 1134, Laws 1907, entitled "An Act to Regulate the Immigration of Aliens into the United States," by § 2, prohibits the entry of aliens under contract "to perform labor in this country of any kind, skilled or unskilled;" the last two provisos being: "And provided further, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

Section 4 made it a misdemeanor  
8 A.L.R.—91.

to assist the entry of such contract laborers in any way, "unless such contract laborer or laborers are exempted under the terms of the last two provisos contained in § 2 of this act."

These provisions, taken together, make a strong support for the argument that all contracts for labor are within the prohibition of the act, unless specifically exempted. This was the view taken by Judge Neterer in *Ex parte Kunijiro Toguchi* (D. C.) 238 Fed. 632. Nevertheless, we think the decision in *Scharrenberg v. Dollar S. S. Co.* 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28, holds that the Act of 1907, like the prior acts on the subject, prohibits only the entry of manual laborers under contract to perform labor in the United States. In that case the defendant brought nineteen Chinamen from Shanghai to San Francisco, there to ship as seamen on the American registered steamship *Mackinaw*. The court held, Mr. Justice Clarke writing, that these men were not under contract to perform labor in the United States, but on the high seas, which would have been enough to dispose of the case; but he also held as a second ground that a seaman was not a laborer. If so, an alien imported to perform labor as a seaman on vessels enrolled for the coasting trade or the inland waters of the United States would not be a contract laborer, within the prohibition of the act. Without inquiring whether an accountant, as defined by the defendant's rules, is a member of a learned profession, we affirm the judgment on the ground that *Schilling* was not a laborer within the meaning of the act.

Alien—contract labor—what is.

In the second case there is a writ of error to a judgment directed for the defendant by the same judge, in an action for a penalty under § 5 of chapter 29, Laws 1917 (Comp. Stat. § 4289½c, Fed. Stat. Anno. Supp. 1918, p. 218), which differs in

no material respect as to contract laborers from the Act of 1907. The defendant sent a clerk named Mook from its office in Amsterdam to be employed in its office in New York at a salary of \$1,250 per annum, and paid the expenses of his transportation. There was an expectation to send him from New York to its office at Paramaribo, Dutch Guiana, after he had familiarized himself

with the New York business. The grounds on which the verdict was directed were: First, that this employment at New York was a temporary one, in a business of an international character; and, second, that Mook was not a contract laborer at all. Without considering the first reason, we concur in the second.

Judgment affirmed in each case.

## ANNOTATION.

### Who is "laborer" within Federal acts excluding contract laborers.

- I. Introductory, 1442.
- II. Statutory provisions, 1442.
- III. Construction of statutes:
  - a. Generally, 1443.
  - b. Statutory exceptions, 1446.

#### I. Introductory.

The purpose of this annotation is to review the cases determining the question, who is a "laborer," within the provisions of the Federal Immigration Laws excluding alien contract laborers from admission into the United States. The latest statute on the subject is the Act of February 5, 1917 (Comp. Stat. § 4289½a, Fed. Stat. Anno. Supp. 1918, pp. 212 et seq.), quoted *infra*, III. b. Most of the decisions reviewed were handed down in cases arising under earlier statutes, of which the Act of 1917 is a re-enactment. The re-enactment, however, has changed the earlier statutes, practically, only by addition, so that the decisions interpret provisions which are still law, and are, therefore, still of practical value.

#### II. Statutory provisions.

The provisions of the Act of 1917 pertinent to the subject of contract labor are as follows:

##### Classes of aliens excluded.

"Section 3. The following classes of aliens shall be excluded from admission into the United States: . . . Persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether

such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled. . . . Provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed as domestic servants: Provided further, That whenever the President shall be satisfied that passports issued by any foreign government to its citizens or subjects to go to any country other than the United States, or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holder to come to the continental territory of the United States to the detriment of labor conditions therein, the President shall refuse to permit such citizens or subjects of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone. . . . Provided further, That nothing in the contract labor or reading test provisions of this act shall be construed to prevent, hinder, or restrict any alien exhibitor, or holder of concession or privilege for any fair or exposition authorized by act of Congress, from bringing into the United

States, under contract, such otherwise admissible alien mechanics, artisans, agents or other employees, natives of his country, as may be necessary for installing or conducting his exhibit or for preparing for installing or conducting any business authorized or permitted under any concession or privilege which may have been or may be granted by any such fair or exposition in connection therewith, under such rules and regulations as the Commissioner General of Immigration, with the approval of the Secretary of Labor, may prescribe both as to the admission and return of such persons."

The foregoing section of the Act of 1917 is a re-enactment and extension of § 2 of the Act of February 20, 1907 (chap. 1134, 34 Stat. at L. 898, Comp. Stat. § 4244, 3 Fed. Stat. Anno. 2d ed. p. 640), which act was itself an enlargement and re-enactment of the Act of March 3, 1903 (chap. 1012, 32 Stat. at L. 1213). Previous legislation, containing somewhat similar provisions as to the classes of aliens excluded, was the Act of March 3, 1875 (§§ 3, 5, 18 Stat. at L. 477, chap. 141); Act of August 3, 1882 (chap. 376, § 2, 22 Stat. at L. 214); Act of February 26, 1885 (chap. 164, §§ 1, 5, 6, 23 Stat. at L. 332, 333); and Act of March 3, 1891 (chap. 551, § 1, 26 Stat. at L. 1084).

#### **Prohibition of importation of contract laborers.**

"Section 5. It shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the fifth proviso of section three of this act, or have been imported with the permission of the Secretary of Labor in accordance with the fourth proviso of said section, and for every violation of any of the provisions of this section the person, partnership, company, or corporation

violating the same shall forfeit and pay for every such offense the sum of \$1,000, which may be sued for and recovered by the United States, as debts of like amount are now recovered in the courts of the United States. For every violation of the provisions hereof the person violating the same may be prosecuted in a criminal action for a misdemeanor, and on conviction thereof shall be punished by a fine of \$1,000, or by imprisonment for a term of not less than six months nor more than two years; and under either the civil or the criminal procedure mentioned separate suits or prosecutions may be brought for each alien thus offered or promised employment as aforesaid. The Department of Justice, with the approval of the Department of Labor, may from any fines or penalties received pay rewards to persons other than government employees who may furnish information leading to the recovery of any such penalties, or to the arrest and punishment of any person, as in this section provided."

The foregoing section is a re-enactment and enlargement of the corresponding section of the previous act (Act of February 20, 1907, chap. 1134, § 4, 34 Stat. at L. 900, Comp. Stat. § 4248, 3 Fed. Stat. Anno. 2d ed. p. 654), which was as follows: "It shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act."

Similar provisions were contained in the Act of March 3, 1903, chapter 1012, § 4 (32 Stat. at L. 1214), which was repealed by § 43 of the Act of February 20, 1907.

### *III. Construction of statutes.*

#### *a. Generally.*

The prevailing view seems to be that the intention of the various acts relating to the importation of contract



labor has been to prohibit only the entry of manual laborers.

**Act of 1885.**

*Church of the Holy Trinity v. United States* (1892) 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Laws* (1896) 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; *United States v. Gay* (1899) 37 C. C. A. 46, 95 Fed. 226; (1901) 23 Ops. Atty. Gen. 331.

**Act of 1907.**

*Scharrenberg v. Dollar S. S. Co.* (1917) 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28, affirming (1916) 144 C. C. A. 252, 229 Fed. 970, Ann. Cas. 1917C, 258; (1907) 27 Ops. Atty. Gen. 383. And see the reported case (*UNITED STATES v. UNION BANK*, ante, 1438. Compare *Ex parte Kunijiro Toguchi* (1916) 238 Fed. 632.

**Act of 1917.**

*Tatsukichi Kuwabara v. United States* (1919) — C. C. A. —, 260 Fed. 104.

Thus, the Act of 1885, prior to its amendment so as to exempt "ministers of any religious denomination" from the excluded classes of aliens, was held not to include the case of a contract made by an incorporated religious society with an alien, by which he was to remove to this country and enter into the service of the society as its rector and pastor. *Church of the Holy Trinity v. United States* (U. S.) supra, wherein the court said: "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words, 'labor' and 'service,' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and further, as noticed by the circuit judge in his opinion, the 5th section which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be

reached by the 1st section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . Among other things which may be considered in determining the intent of the legislature is the title of the act. . . . Now, the title of this act is, 'An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories and the District of Columbia.' Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the Gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms, 'labor' and 'laborers,' does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors. Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States v. Union F. R. Co.* (1875) 91 U. S. 72, 79, 23 L. ed. 224, 228. The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when, as district judge, he decided the case of *United States v. Craig* (1886) 28 Fed. 795, 798: 'The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this

country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, on the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.' It appears also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act."

So, contract to work as a chemist on a sugar plantation in Louisiana was held not to be a contract to perform labor or services as prohibited by the Act of 1885. *United States v. Laws* (1896) 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998.

Likewise, the Act of 1885 was held not to include the case of one engaged to work as a draper, window dresser, and dry goods clerk. *United States v. Gay* (1899) 37 C. C. A. 46, 95 Fed. 226.

In *Scharrenberg v. Dollar S. S. Co.* (1917) 245 U. S. 122, 62 L. ed. 189, 38 Sup. Ct. Rep. 28, affirming (1916) 144 C. C. A. 252, 229 Fed. 970, Ann.

Cas. 1917C, 258, it was held that a seaman was not a laborer within the purview of the Act of 1907. See also *United States ex rel. Anderson v. Burke* (1899) 99 Fed. 895.

So, the Act of 1907 was held not to apply to an alien induced to come to the United States by promise of employment as superintendent of a lumbering company, conditioned that he must be a competent woodsman, logger, and mill man, and a first-class mechanic, provided the agreement did not require him to perform manual labor. (1909) 27 Ops. Atty. Gen. 383.

In the reported case (*UNITED STATES v. UNION BANK*, ante, 1438), it is held that the Act of 1907, like the prior acts on the subject, prohibits only the entry of manual laborers under contract to perform labor in the United States, and that neither an assistant accountant, imported for employment in a bank, nor a clerk, imported for employment in a business office, is a contract laborer within the statute. See also *United States v. Royal Dutch West India Mail* (1918) 250 Fed. 913.

An alien who seeks to enter the United States for the purpose of teaching "the Japanese language, history, geography, and arithmetic" cannot be excluded under the Act of 1917, since his purpose in entering the United States is not to perform "labor." *Tatsukichi Kuwabara v. United States* (1919) — C. C. A. —, 260 Fed. 104.

Manual labor, as used in the present connection, should be construed, according to an opinion given by the Attorney General in 1901, as including both skilled and unskilled labor. In that opinion, the decision in *Church of the Holy Trinity v. United States* (1892) 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, supra, was exhaustively considered, and it was declared that the proper distinction to be observed, founded on that case, was the distinction between manual labor, including the mechanical trades, on the one side, and the professions on the other. Accordingly, it was held that alien lace makers, if not entitled to admission into the United States under some special provision of the Act of 1885, or acts supplemental thereto,

should be excluded as manual laborers, skilled or unskilled, who had come to this country in order to perform labor or service.

By one court, it has been urged with much force that all contracts for labor should be considered as within the prohibition of the statutes, unless specifically exempted. Thus, in *Ex parte Kunihiro Toguchi* (1916) 238 Fed. 632, which was an application for a writ of habeas corpus, it appeared that the petitioner came from Japan to the United States to take a position as salesman in the store of his uncle, who conducted a Japanese silk and dry goods and bamboo business in Detroit. The uncle sent to the petitioner \$100 to apply on his expenses, and told him to apply for more money on landing, if needed. No salary was agreed on to be paid to the petitioner. The Board of Immigration found that he came to the United States in violation of the alien contract labor provision of the Immigration Act of 1907, rejected him on that ground, and ordered his deportation to Japan. The Secretary of Labor affirmed the finding of the board. It was contended that the intent of Congress was to restrict the prohibition to manual laborers, and not to apply it to those engaged in other employment. But, in denying the writ, the court held that all persons were excluded who did not come within the exemptions specified in the provisions of § 2; that the provisions were not limited to "labor" or "service," but were limited expressly by the exemptions; and that the fact that no salary was agreed on was immaterial, as a reasonable compensation would be implied.

In *Ex parte George* (1910) 180 Fed. 785, although the ground for the decision was not stated, it was declared that the evidence showed, without conflict, that the petitioner in the case was a "contract laborer" within the Act of 1907, the following facts appearing: The owner of a shoe-shining establishment agreed to employ

the petitioner in his establishment if he would come to America, agreeing to pay him \$20 a month, and to lend him the money needed for the trip, taking as security for the loan a mortgage on the petitioner's land in Greece, the loan to be repaid from his wages when employed. The lender and the petitioner came over together on the same steamship, and the petitioner continued in the lender's service for a year, repaying the loan.

*b. Statutory exceptions.*

The Act of 1903 expressly excepted from its provisions persons belonging to any "recognized learned profession," and an exactly similar exception is found in the Act of 1917. Expert accountants, it seems, are not within the exception. *Re Ellis* (1903) 124 Fed. 637. But it has been held that a teacher of the Japanese language, history, geography, and arithmetic may be properly regarded as belonging to a "recognized learned profession." *Tatsukichi Kawabara v. United States* (1919) — C. C. A. —, 260 Fed. 104.

An exception in the Act of 1885 (found also in the subsequent statutes), in favor of "professional artists," has been held not to apply to a milliner. *United States v. Thompson* (1889) 41 Fed. 28.

The exception in the Act of 1885, in favor of "persons employed strictly as personal or domestic servants" (which exception appears in the Act of 1917, with a slight difference in the wording), was held not to include a person contracting to labor as a farm servant or dairyman. *Re Cummings* (1887) 32 Fed. 75. But it was held that an under coachman, who did no work on the farm, or in the garden, or in the dairy, but, under the direction of his employer's family, performed services which ministered exclusively to their personal comfort and enjoyment, was employed "strictly as a personal or domestic servant." *Re Howard* (1894) 63 Fed. 263.

H. N. G.

STEPHEN WHITTLE, Respt.,  
v.  
WILLIAM SCHLEMM, Appt.

*New Jersey Court of Errors and Appeals — March 1, 1920.*

(— N. J. —, 109 Atl. 305.)

**Husband and wife — separation agreement — effect of adultery.**

The right of a wife, while living separate and apart from her husband, to secure funds provided for her support in a separation agreement, persists even after the commission of an act of adultery by her, unless there is an express stipulation and limitation in the agreement that payment shall cease in the event that she becomes unchaste; for without such provision the common-law obligation of a husband to support his wife continues, unless and until he procures a divorce from her.

[See note on this question beginning on page 1452.]

Headnote by WALKER, Ch.

(Swayze, Minturn, White, and Heppenheimer, JJ., dissent.)

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of the District Court of Hoboken in favor of plaintiff in an action brought to recover an amount alleged to be due under a claim entered into between defendant and his wife and plaintiff as trustee for the latter. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. Emil Walscheid, for appellant:

All rights of Louisa Schlemm and of her trustee under the agreement have been forfeited by the act of adultery committed by her on October 25, 1915.

Devine v. Devine 89 N. J. Eq. 51, 104 Atl. 370; Rennie v. Rennie, 85 N. J. Eq. 1, 95 Atl. 571; Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062; Ireland v. Ireland, 43 N. J. Eq. 312, 12 Atl. 184; Calame v. Calame, 25 N. J. Eq. 548; Bradbury v. Bradbury, — N. J. Eq. —, 74 Atl. 150; Howey v. Howey, 77 N. J. Eq. 591, 78 Atl. 696; White v. White, 87 N. J. Eq. 355, L.R.A. 1917D, 639, 100 Atl. 235; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Hunter v. Boucher, 3 Pick. 289; Simpson v. Wood & Son, 57 L. J. Q. B. N. S. 485, 59 L. T. N. S. 218, 36 Week. Rep. 734, 52 J. P. 822; Culley v. Charman, L. R. 7 Q. B. Div. 489, O L. J. Mag. Cas. N. S. 111, 45 L. T. N. S. 28, 29 Week. Rep. 803, 45 J. P. 68; Bostock v. Smith, 34 Beav. 57, 55 Eng. Reprint, 553; Roth v. Roth, 77

Misc. 673, 138 N. Y. Supp. 573, 26 Cyc. 826, note; State v. Lash, 16 N. J. L. 380, 32 Am. Dec. 397.

The agreement is void and will not be enforced because it did not operate in præsenti, but dealt with a future separation.

Emmett v. Norton, 8 Car. & P. 506; Keller v. Phillips, 39 N. Y. 351; Zimmer v. Settle, 124 N. Y. 37, 21 Am. St. Rep. 638, 26 N. E. 341; Ireland v. Ireland, 43 N. J. Eq. 314, 12 Atl. 184; Mercein v. People, 25 Wend. 77, 35 Am. Dec. 653; Rex v. Mead, 1 Burr. 542, 97 Eng. Reprint, 440; Rogers v. Rogers, 4 Paige, 516, 27 Am. Dec. 84; Winter v. Winter, 191 N. Y. 470, 16 L.R.A. (N.S.) 710, 84 N. E. 382; Pettit v. Pettit, 107 N. Y. 677, 14 N. E. 500; Galusha v. Galusha, 116 N. Y. 635, 6 L.R.A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114.

The agreement has been avoided by a reconciliation and resumption of the marital relation.

21 Cyc. 1597, notes 63 and 64; Zimmer v. Settle, 124 N. Y. 37, 21 Am. St. Rep. 638, 26 N. E. 341; Shelthar v.

Gregory, 2 Wend. 422; Carson v. Murray, 3 Paige, 482; Knapp v. Knapp, 95 Mich. 474, 55 N. W. 353.

Messrs. Weller & Lichtenstein, for respondent:

The district court has jurisdiction over a cause of action brought by a trustee for the nonpayment of money, under the terms of a separation agreement.

Buttlar v. Buttlar, 71 N. J. Eq. 671, 65 Atl. 485; Mockridge v. Mockridge, 62 N. J. Eq. 570, 50 Atl. 182; Emery v. Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541; Carey v. Mackey, 82 Me. 516, 9 L.R.A. 113, 17 Am. St. Rep. 500, 20 Atl. 516; Patterson v. Patterson, 111 Ill. App. 342; Grime v. Borden, 166 Mass. 198, 44 N. E. 216; Nurse v. Craig, 2 Bos. & P. N. R. 155, 127 Eng. Reprint, 583.

The trustee in a separation agreement is the proper party to bring suit for its enforcement.

Clark v. Fosdick, 118 N. Y. 7, 6 L.R.A. 132, 16 Am. St. Rep. 733, 22 N. E. 1111, 23 N. E. 136; Dupre v. Rein, 56 How. Pr. 228; Galusha v. Galusha, 116 N. Y. 635, 6 L.R.A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114; Lord v. Lord, 68 Hun, 537, 22 N. Y. Supp. 1004; 39 Cyc. 614; Hill, Trustees, 4th ed. p. 671; Grime v. Borden, 166 Mass. 198, 44 N. E. 216.

Adultery does not affect nor defeat recovery on a separation agreement.

Devine v. Devine, 89 N. J. Eq. 51, 104 Atl. 370; 15 Harvard L. R. pp. 638-656; 17 Am. L. Rev. 74; Rex v. Lister, 1 Strange, 478, 93 Eng. Reprint, 645; Fearon v. Aylesford, L. R. 14 Q. B. Div. 792, 54 L. J. Q. B. N. S. 33, 52 L. T. N. S. 954, 33 Week. Rep. 331, 49 J. P. 596; Hart v. Hart, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8; Bradley v. Bradley, L. R. 7 Prob. Div. 237, 51 L. J. Prob. N. S. 87, 47 L. T. N. S. 355, 31 Week. Rep. 200; Charlesworth v. Holt, L. R. 9 Exch. 38, 43 L. J. Exch. N. S. 25, 29 L. T. N. S. 647, 22 Week. Rep. 94; Sweet v. Sweet [1895] 1 Q. B. 12, 64 L. J. Q. B. N. S. 108, 15 Reports, 146, 71 L. T. N. S. 672, 43 Week. Rep. 303, 59 J. P. 373; Galusha v. Galusha, 116 N. Y. 635, 6 L.R.A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114; Halstead v. Halstead, 74 N. J. Eq. 596, 70 Atl. 928; Randolph v. Field, 165 App. Div. 279, 150 N. Y. Supp. 823, 84 Misc. 403, 146 N. Y. Supp. 247; Roth v. Roth, 77 Misc. 673, 138 N. Y. Supp. 573; 9 R. C. L. p. 532;

Devine v. Devine, 89 N. J. Eq. 51, 104 Atl. 370; Dixon v. Dixon, 24 N. J. Eq. 133, 23 N. J. Eq. 316; Lister v. Lister, 35 N. J. Eq. 49; Krug v. Krug, 81 Wash. 461, 142 Pac. 1136; Labbe v. Abat, 2 La. 553, 22 Am. Dec. 151; Babcock v. Smith, 39 Mass. 61; Bent v. Bent, 44 Vt. 555; Orr v. Orr, 8 Bush, 156; Kinzey v. Kinzey, 115 Mo. 496, 20 L.R.A. 222, 22 S. W. 497; Jackson v. Jackson, 91 U. S. 122, 23 L. ed. 258.

A separation agreement is not affected by a subsequent divorce, even though the divorce is for adultery.

Halstead v. Halstead, 74 N. J. Eq. 596, 70 Atl. 928; Buttlar v. Buttlar, 71 N. J. Eq. 671, 65 Atl. 485; Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700; Galusha v. Galusha, 116 N. Y. 635, 6 L.R.A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114; Randolph v. Field, 84 Misc. 403, 146 N. Y. Supp. 247; Grant v. Budd, 80 L. T. N. S. 319, 22 Week. Rep. 544; Hunt v. Hunt [1897] 2 Q. B. 547, 67 L. J. Q. B. N. S. 18, 77 L. T. N. S. 421, 14 Times L. R. 52; Carey v. Mackey, 82 Me. 516, 9 L.R.A. 113, 17 Am. St. Rep. 500, 20 Atl. 84; Kremelberg v. Kremelberg, 52 Md. 553; 14 Cyc. 728.

A separation agreement providing for the care of the wife and minor child is a perfectly valid instrument.

People ex rel. Lee v. Lee, 93 Misc. 677, 157 N. Y. Supp. 821; Adams v. Adams, 32 Pa. Super. Ct. 353; Efray v. Efray, 110 App. Div. 545, 97 N. Y. Supp. 286; Titus v. Titus, 66 Wash. 345, 119 Pac. 813, Ann. Cas. 1913C, 343.

There was no reconciliation or resumption of marital relations after the separation agreement was entered into.

Daniels v. Benedict, 38 C. C. A. 592, 97 Fed. 367; Alleman v. Alleman, 2 Dauphin Co. Rep. 209; Hughes v. Cuming, 36 App. Div. 302, 55 N. Y. Supp. 260; Buttlar v. Buttlar, 70 N. J. Eq. 675, 64 Atl. 110; 9 R. C. L. 535.

Walker, Ch., delivered the opinion of the court:

The plaintiff-respondent commenced an action in the district court of Hoboken to recover sixteen weeks' instalments, of \$25 each, due from the defendant-appellant to the plaintiff-respondent as trustee, named in articles of agreement for separation entered into between the defendant and his wife. The plaintiff recovered judgment for \$400,

and the defendant appealed to the supreme court, where the judgment was affirmed. *Whittle v. Schlemm*, — N. J. L. —, 106 Atl. 819. We agree with the conclusion reached by the supreme court for the reasons given in its opinion, except that we wish to emphasize the fact that a married man is, in law, bound to support his wife while the marital relation remains undissolved, and wish to correct certain mistakes in the opinion.

*Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926, was a suit in equity to specifically enforce articles of separation entered into between a husband and wife with a third party as trustee. The court of chancery decreed specific performance, which this court affirmed as to the payment of the allowance for the support of the wife and children stipulated in the agreement, but reversed as to enforcement of the agreement to separate. The decision in this court was unanimous, and the opinion was by Chief Justice Beasley. It is a leading case. The learned chief justice observed, at page 303 of 49 N. J. Eq.: "And it would be singular indeed if the court should refuse to carry into effect stipulations of this character, for as there is nothing illegal in the fact of the husband and wife living apart by mutual assent, and inasmuch as under such conditions the husband would be liable for the maintenance of the wife, it is difficult to see why equity should not enforce the payment of the sum of money that both parties have agreed to be a reasonable amount for that end."

The reference to equity enforcing such a stipulation was made because that suit was one brought in equity directly by the wife against the husband, ignoring the trustee, and she could not, and of course did not, sue at law. The trustee might have done that.

While courts will not compel a husband to pay maintenance to the wife, provided for in articles of separation, while the parties are

living together, yet, when living separate under the articles, such payment will be enforced; and this notwithstanding the adultery of the wife, unless and until the husband obtains a divorce from her.

Husband and wife—separation agreement—effect of adultery.

The supreme court observed that the alleged adultery of the wife in the case at bar was no defense at law to the action on the contract, and differentiated this case from that of *Devine v. Devine*, 89 N. J. Eq. 51, 104 Atl. 370, remarking that that case dealt with an equitable situation, in which the court supplied by implication a condition not in the contract the wife was seeking to enforce, namely, that she would remain chaste, and observed that that case was not controlling, as it appeared to be inconsistent with *Halstead v. Halstead*, 74 N. J. Eq. 596, 70 Atl. 928, where the contract was enforced in equity after alleged adultery, and until the wife applied for and was allowed alimony in divorce proceedings pending against her. From this language of the supreme court it would appear that that tribunal's view of the *Halstead Case* was that the wife had committed adultery after entering into articles with her husband, and that the allowance was enforced after the adultery was shown to have been committed. This is incorrect. In the *Halstead Case* the wife sued on an agreement dated June 21, 1904, which the vice chancellor read in connection with a previous agreement, and which, taken together, he said, provided that the husband should pay to the wife \$7 a week; that defendant made payments to October 31, 1904, and one in November; that on March 7, 1905, the wife commenced an action for divorce against the husband for desertion and adultery, and on November 20, 1905, an order was made in the divorce suit that the husband pay to the wife, pending the determination of that suit, the sum of \$5 per week. The demand in the *Halstead Case*

was for \$7 per week from October 31, 1904 (with credit of \$7), to October 20, 1905, and for the sum of \$2 per week from the last-mentioned date to the filing of the bill, or the date of the final decree, as the court should determine; the sum of \$2 being the difference between \$7 provided in the agreement and the \$5 provided in the order for alimony pendente lite in the divorce suit. The vice chancellor decided that the wife was entitled to the full amount under the agreement up to the order for temporary alimony, and that after that she could not enforce the agreement during the operation of that order.

In the Devine Case the vice chancellor, at page 55 of 89 N. J. Eq., at page 371 of 104 Atl., observed that the legal obligation of a husband to support his wife exists only as long as she shall remain chaste, citing *Bradbury v. Bradbury*, — N. J. Eq. —, 74 Atl. 150. He goes on to say that this is so unless it shall be held that the burden of the agreement for support contained in a separation agreement survives that period, namely, the period of chastity. In our judgment the *Bradbury* Case is not authority for the proposition of the learned vice chancellor. In the first place, there was no agreement for maintenance involved. In the second place, the case was on final hearing on bill for alimony, in which adultery was not pleaded as a defense. It was observed by the vice chancellor in the *Bradbury* Case that adultery, if pleaded and proved, is a good defense to a bill for maintenance without a divorce being procured, — citing *Maas v. Maas*, 34 N. J. Eq. 113; *Perkins v. Perkins*, 59 N. J. Eq. 515, 46 Atl. 173. The assertion was dictum; and each of the cases cited was a suit for maintenance, and in each the defense of adultery was set up, but failed of proof. In neither was there an adjudication in terms that adultery was a good defense in such suits, although it was treated as valid. That question is not involved in the case sub judice. The

proceedings in the *Bradbury*, *Maas*, and *Perkins* Cases were ones for maintenance under the statute, now § 26 of the Divorce Act (Pamph. Laws 1907, p. 482, 2 Comp. Stat. p. 2038, § 26), and were governed by the statutory provisions.

The section referred to provides as follows: "In case a husband, without any justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall be lawful for the court of chancery to decree and order such suitable support and maintenance, to be paid and provided by the said husband for the wife and her children or any of them, by that marriage, or to be made out of his property, and for such time as the nature of the case and circumstances of the parties render suitable and proper in the opinion of the court."

It may well be that the adultery of the wife is a good defense in a proceeding brought under this section, because, if a wife commits adultery, her husband is justified in separating from her and bringing suit for divorce. So, even if adultery of the wife be a good defense by the husband, when he is sued by her for maintenance under § 26 of the Divorce Act, that does not alter the rule which obtains in reference to a suit by a wife to enforce the terms of an agreement for maintenance while the parties are living in a state of separation.

The learned vice chancellor who wrote the opinion in *Devine v. Devine* concedes that in England the adjudications from an early date have been to the effect that the adultery of the wife, committed after the execution of a separation agreement, would not deny to her the right of recovery of the stipulated payments falling due after the fact, unless the agreement expressly provided that they should be made only so long as she remained chaste, and that no such covenant would be imported into the agreement by implication; and he adds that those adjudications cannot be appropriately

disregarded, unless conditions exist in our state which deny to them the force they would otherwise possess. The difference between our law and that of England, laid hold of by the vice chancellor as making a different rule here than that in England, is that a contract between husband and wife to live apart is not here restricted to the period of their mutual assent, and that such contract for separation may there be specifically enforced; while in New Jersey an agreement for separation cannot confer on either party the right to live away from the other against the other's will. He deduces from this that it is the policy of the law that the period for which persons in this jurisdiction may contract, touching their separation, is limited to the period of their future mutual assent, and that accordingly, in the absence of wrongdoing on the husband's part, he may require his wife's return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will operate to deny her any right to support from him, notwithstanding the existence of an agreement; and that the wife's act of adultery, while thus living separate from her husband pursuant to the terms of a separation agreement, operates to deny to her husband the right to require her return to him unless he condones the act; and that, therefore, the legal obligation of the husband to support his wife exists only so long as she shall remain chaste.

We are unable to concur in the reasoning of the learned vice chancellor, or to agree that there is any different rule in New Jersey from that which obtains in England with reference to the right of the wife, while living separate and apart from her husband, to secure the funds provided for her support in a separation agreement, even after the commission of an act of adultery by her, because, in our opinion, the husband's liability persists, unless there is an express stipulation and limitation in the separa-

tion agreement that payment shall cease in the event of her becoming unchaste; for, without such provision, the common-law obligation of a husband to support his wife continues, unless and until he procures a divorce from her. The question is one of construction of the agreement, and where husband and wife are living apart under separation articles, there is nothing in the situation which calls for the importation into their contract of a *dum casta* clause, as it is called; on the contrary, the situation, namely, the wife's dependence and the husband's liability for her support while she continues to be his wife, repels such a construction.

At the conclusion of its opinion the supreme court states that it is urged that the trial court refused to charge certain specific requests, and observes that there is nothing in that, because the reviewing court has assumed that all of the requests were charged favorably to the plaintiff. This is a mistake. If they were charged favorably to the plaintiff they would have to be reviewed, as it is the defendant who appeals; but there were no requests to charge, for there was no charge, the case having been submitted to the district court without a jury. What occurred was that the defendant requested a finding of certain facts, which the court did not do, but gave a general judgment for plaintiff. We think there is no doubt but that the district court would have rendered the judgment it did, even if specific findings were made in favor of defendant, as requested. And if such were the state of the record before us we would affirm the Supreme Court. This gives the defendant the benefit of the finding he requested, and he is therefore not harmed on this branch of the case.

The judgment under review will be affirmed, with costs.

Swayze, Minturn, White, and Heppenheimer, JJ., dissent.

Swayze, J., dissenting:

My vote for reversal is solely upon



the ground that I think the separation agreement is either an attempt at a contract with the wife alone, or, at best, for the plaintiff, with the wife and trustee jointly. In either case it seems to me unenforce-

able at law. Recourse, I think, must be had to the court of chancery, as in *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926, and *Buttler v. Buttler*, 57 N. J. Eq. 645, 73 Am. St. Rep. 648, 42 Atl. 755.

## ANNOTATION.

### Unchastity of wife as affecting prior separation agreement.

As to defenses available to husband in civil suit by wife for support, see note to *Hubbard v. Hubbard*, 6 A.L.R. 6.

It was held in the reported case (*WHITTLE v. SCHLEMM*, ante, 1447) that the right of a wife, while living separate and apart from the husband, to secure funds provided for her support in a separation agreement, persists even after the commission of an act of adultery by her, unless there is an express stipulation and limitation in the agreement that payment shall cease in the event that she becomes unchaste; for, without such a provision the common-law obligation of a husband to support his wife continues, unless and until he procures a divorce from her. The court said that the question was one of construction of the agreement, and that, where husband and wife were living apart under separation articles, there was nothing in the situation which called for the importation into the contract of a *dum casta* clause. The holding in this case is supported by the following authorities, to the effect that the subsequent unchastity of the wife does not relieve the husband from his obligations under a separation agreement, if there is no express provision in this regard in the agreement: *Dixon v. Dixon* (1873) 23 N. J. Eq. 316, subsequent proceedings to same effect in (1873) 24 N. J. Eq. 133; *Forrest v. Forrest* (1859) 9 Abb. Pr. (N. Y.) 289 (obiter); *Hann v. De Freest* (1919) 178 N. Y. Supp. 414; *Randolph v. Field* (1914) 165 App. Div. 279, 150 N. Y. Supp. 822, affirming on this point in (1914) 84 Misc. 403, 146 N. Y. Supp. 247; *A. v. C.* (1908) 18 Pa. Dist. Ct. 88; *Muhr's Estate* (1915) 59 Pa. Super. Ct. 393; *Field v. Serres* 1804) 1 Bos. &

P. N. R. 121, 127 Eng. Reprint, 405; *Jee v. Thurlow* (1824) 2 Barn. & C. 547, 107 Eng. Reprint, 487, 4 Dowl. & R. 11, 2 L. J. K. B. 81, 26 Revised Rep. 453; *Baynon v. Batley* (1832) 8 Bing. 256, 131 Eng. Reprint, 400, 1 L. J. C. P. N. S. 75, 1 Moore & S. 339; *Evans v. Carrington* (1860) 2 De G. F. & J. 481, 45 Eng. Reprint, 707, 7 Jur. N. S. 197, 30 L. J. Ch. N. S. 364, 4 L. T. N. S. 65; *Charlesworth v. Holt* (1873) 43 L. J. Exch. N. S. (Eng.) 25, L. R. 9 Exch. 38, 29 L. T. N. S. 647, 22 Week. Rep. 94; *Fearon v. Aylesford* (1884) L. R. 14 Q. B. Div. (Eng.) 792, 49 J. P. 596, 54 L. J. Q. B. N. S. 33, 52 L. T. N. S. 954, 33 Week. Rep. 331; *Sweet v. Sweet* [1895] 1 Q. B. (Eng.) 12, 59 J. P. 373, 43 Week. Rep. 303, 71 L. T. N. S. 672, 64 L. J. Q. B. N. S. 108, 15 Reports, 146; *Wasteney v. Wasteney* [1900] A. C. (Eng.) 446, 69 L. J. P. C. N. S. 83; *Gordon v. Gordon* (1916) — Ont. —, 32 D. L. R. 626.

*Roth v. Roth* (1912) 77 Misc. 673, 138 N. Y. Supp. 573, is in conflict with the above cases, it being held in this case that the adultery of the wife was a defense to an action brought by her for an instalment due on a separation agreement. But this case was disapproved in *Randolph v. Field* (1914) 165 App. Div. 279, 150 N. Y. Supp. 822, supra.

The case of *Devine v. Devine* (1918) 89 N. J. Eq. 51, 104 Atl. 370, holding that in separation agreements between husband and wife there is an implied condition that the wife should remain chaste, is overruled by the reported case (*WHITTLE v. SCHLEMM*, ante, 1447).

A separation deed, if good at its execution and delivery, will not be set aside for adultery or any misconduct

of the wife thereafter. *Dixon v. Dixon* (1873) 23 N. J. Eq. 316, *supra*.

In *A. v. C.* (Pa.) *supra*, the court took the view that the covenant for support, contained in articles of separation between husband and wife, is the affirmance of an existing obligation on the part of the husband to support the wife rather than the creation of a new obligation, and that, however bad her conduct, this primary duty of support remains until legally discharged by divorce.

It was held in *Field v. Serres* (1804) 1 Bos. & P. N. R. 121, 127 Eng. Reprint, 405, *supra*, in an action of debt on a bond given to secure an annuity to the defendant's wife, that the defendant, having pleaded the general issue, should not be permitted to withdraw that plea, and plead, first, that the wife for whose maintenance the annuity was given had committed adultery, and at the time the action was begun was living in adultery, and, second, that before the making of the bond the wife had committed adultery, and that the bond was given by the defendant in ignorance of such adultery, since the pleas proposed would not be a defense to the action.

That the wife, subsequent to execution of the agreement for separate maintenance, has committed adultery, in consequence of which the husband has secured a divorce, was held in *Hann v. De Freest* (1919) 178 N. Y. Supp. 414, *supra*, not to be a defense to an action by her on the agreement.

And a divorce obtained by the husband on the ground of the wife's adultery was held in *Muhr's Estate* (1915) 59 Pa. Super. Ct. 393, *supra*, not to terminate the separation agreement.

It will be observed that the two preceding decisions go farther than is necessary to the determination of the question herein considered, the annotation not covering the effect of divorce, even though it is obtained on the ground of the wife's adultery. See also *Goslin v. Clark* (1862) 12 C. B. N. S. 681, 142 Eng. Reprint, 1310, 31 L. J. C. P. N. S. 330, 9 Jur. N. S. 520, 6 L. T. N. S. 824, holding that a divorce obtained by the husband on the ground of the wife's adultery did

not relieve him from payment of an annuity, according to the terms of a separation deed; but in this case the deed expressly referred to the adultery as the cause of the separation, and contained a provision for future chastity on the part of the wife, which it was not shown she had violated.

The adultery of the wife after the execution of the separation agreement, although followed by the birth of a spurious child, is not a defense to an action by the wife to recover arrears due on the agreement, there being no implied term in such an agreement that the wife shall remain chaste. *Fearon v. Aylesford* (1884) L. R. 14 Q. B. Div. (Eng.) 792, 49 J. P. 596, 54 L. J. Q. B. N. S. 83, 52 L. T. N. S. 954, 33 Week. Rep. 331, *supra*.

Nor is such adultery or the birth of a spurious child a breach of a covenant in the agreement against molestation, although it seems that, if the wife holds out the child as that of the husband, the jury may find that there has been a breach of the covenant against molestation. *Ibid*.

It was held also in *Sweet v. Sweet* [1895] 1 Q. B. (Eng.) 12, 59 J. P. 373, 43 Week. Rep. 308, 71 L. T. N. S. 672, 64 L. J. Q. B. N. S. 108, 15 Reports, 146, *supra*, that, in an action for arrears of an annuity payable under a separation deed, it was not a defense that the wife had been guilty of adultery, resulting in the birth of a child.

And adultery, resulting in the birth of a child, was held in *Sweet v. Sweet* (Eng.) *supra*, not a breach of a provision in the agreement by which the wife covenanted not to molest, annoy, or interfere with the husband.

The court in *Seagrave v. Seagrave* (1807) 13 Ves. Jr. 439, 33 Eng. Reprint, 358, apparently considered the subsequent adultery of the wife as not relieving the husband from liability on a separation bond executed by the husband and a trustee for the wife. The court retained the bill with liberty to the plaintiff to bring an action at law in the name of her trustee who, it was admitted, had destroyed the bond on the ground that the wife had forfeited her rights because of the adultery.

Where the husband and wife compromised a divorce suit, under an arrangement by which a deed of separation should be executed "with usual covenants," it was held that the term "usual covenants" did not include a provision that the annuity for which the husband became liable by the deed should be payable only while the wife remained chaste. *Hart v. Hart* (1881) L. R. 18 Ch. Div. (Eng.) 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8.

And where the court, after dissolution of the marriage, ordered the preparation of a deed for securing an annuity to the wife, and refused to order the inclusion in the deed of a *dum casta* clause, it was held in *Bradley v. Bradley* (1883) 51 L. J. Prob. N. S. (Eng.) 87, L. R. 7 Prob. Div. 237, 47 L. T. N. S. 355, 31 Week. Rep. 230, that the court did not have the power later to order the cancelation of the deed, on account of the subsequent unchastity of the wife.

In *Scholey v. Goodman* (1823) 1 Car. & P. 36, 8 J. B. Moore, 350, 1 Bing. 349, 130 Eng. Reprint, 141, the defense of the wife's subsequent adultery was set up in an action for breach of a separation agreement, but the decision turns on questions of pleading and the admissibility of evidence.

It was held in *Gordon v. Gordon* (1916) — Ont. —, 32 D. L. R. 626, that, as adultery did not, in Ontario, entitle the husband or wife to a dissolution of the marriage, the adultery of the wife, after the execution of a separation deed, did not terminate the deed, under a clause therein that in case the marriage should at any time thereafter be dissolved, or in case the wife should be guilty of any act which should entitle the husband to obtain a dissolution of the marriage, the payments provided therein should cease.

Attention is called to the ruling in several cases, among possibly others, on the question of the effect of the wife's prior unchastity on the validity of the separation agreement.

Thus, in addition to holding that the wife's adultery subsequent to the making of the agreement was not a defense to an action by her on the

agreement, the court, in *Randolph v. Field* (1914) 165 App. Div. 279, 150 N. Y. Supp. 822, supra, held that in such an action a defense was insufficient, which alleged that the wife had committed adultery before the execution of the agreement, and that this fact was unknown to the defendant; since such an allegation was not the equivalent of an allegation of fraud perpetrated by direct representation or concealment, and the court would not assume as matter of law that, had the defendant known the truth, he would not have entered into the agreement.

The deed of separation between husband and wife was held fraudulent and void in its inception, in *Evans v. Carrington* (1860) 2 De G. F. & J. 481, 45 Eng. Reprint, 707, 7 Jur. N. S. 197, 30 L. J. Ch. N. S. 364, 4 L. T. N. S. 65, supra, on the ground that the wife, who before the marriage had had illicit intercourse, induced the husband to execute the deed in contemplation of a renewal of that intercourse, that she might carry it on with more facility. And the court was of the opinion that the deed would be invalidated also if the wife committed adultery between the time of the marriage and the date the deed was executed, if the husband was ignorant of the adultery at the time of making the deed. The latter question was not, however, expressly decided, as it was held that the evidence was insufficient to show such adultery.

For a case where fraudulent representations as to the wife's chastity at the time the agreement was made were held to be a defense to an action on a separation agreement, see *Evans v. Edmonds* (1853) 13 C. B. 777, 138 Eng. Reprint, 1407, 1 C. L. R. 653, 22 L. J. C. P. N. S. 211, 17 Jur. 883, 1 Week. Rep. 412.

The general proposition that a separation agreement is not affected by a subsequent act of adultery of one of the parties is supported by *Galusha v. Galusha* (1889) 116 N. Y. 635, 6 L.R.A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114, the court stating that as to the making of the agreement, it was not in the power of either party, act-

ing alone and against the will of the other, to do an act which would destroy or affect the contract. But in this case the adultery was on the part of the husband, and the action was by the wife for divorce.

And although not strictly in point, attention is called to *Ross v. Ross* [1908] 2 Ir. R. 339, holding that the subsequent adultery of the husband would not prevent him from enforcing the covenants in a separation deed, by which the wife, in consideration of the payment of a certain sum, released the husband from all claims for support, and agreed not to molest or disturb him.

Also in *Gandy v. Gandy* (1882) L. R. 7 Prob. Div. (Eng.) 168, 51 L. J. Prob. N. S. 41, 46 L. T. N. S. 607, 30

Week. Rep. 673, it was held that the husband, because of his subsequent adultery, did not forfeit his rights under a separation deed.

But see *Morrall v. Morrall* (1881) L. R. 6 Prob. Div. (Eng.) 98, 50 L. J. Prob. N. S. 62, 29 Week. Rep. 897, holding that the incestuous adultery of the husband created a state of things not in contemplation of the parties when the deed of separation was executed, and that the wife was not, therefore, by a provision in the deed against suing the husband for support or alimony except as therein provided, restrained from suing for a dissolution of the marriage, and might be entitled to all the incidents of that suit, including an allowance based on the husband's income R. E. H.

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**MILDRED MULLER**, by Guardian ad Litem, Respt.,  
v.

**FRANCIS HILLENBRAND**, Appt.

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**MARY FINK**, Respt.,

v.

**SAME**, Appt.

*New York Court of Appeals—January 6, 1920.*

(227 N. Y. 448, 125 N. E. 808.)

**Master and servant — authority of janitor — ejecting child from sidewalk.**

1. The janitor of an apartment building has no implied authority to eject from the sidewalk in front thereof children using the walk for roller skating, which will render the owner of the property liable for injury caused by his attempt to exercise such authority.

[See note on this question beginning on page 1458.]

**Highway — right of property owner from the sidewalk in front of his**  
— ejecting child from sidewalk. property a child using it for roller

2. One has no authority to eject skating.

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**APPEAL** by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, modifying and affirming a judgment of a Trial Term for New York County, Part IX. (Platzek, J.) in favor of plaintiffs, in consolidated actions brought to recover damages for personal injuries alleged to have been caused by an assault by defendant's servant, and for damages for loss of services resulting from such injuries; and from orders denying motions for new trial. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Stephen P. Anderton and Ewing R. Philbin, with Mr. Alfred W. Meldon, for appellant:

In determining whether an assault committed by a servant was within the scope of his employment, the law considers only the precise situation at the time of the assault itself.

Girvin v. New York C. & H. R. R. Co. 166 N. Y. 289, 59 N. E. 921, 9 Am. Neg. Rep. 547; McKay v. Hudson River Line, 56 App. Div. 201, 67 N. Y. Supp. 651; Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Rep. 448.

Neither Friedman's assumed "desire to further the interests of his employer by preventing the annoyance of the tenants of which they had complained, and endeavoring to promote their comfort and to keep them contented," nor the supposed benefit to defendant of his assault, suffice to bring his act within the scope of his employment.

Kaiser v. McLean, 20 App. Div. 326, 46 N. Y. Supp. 1038; Kennedy v. White, 91 App. Div. 475, 86 N. Y. Supp. 852; Connor v. Benenson Realty Co. 152 N. Y. Supp. 700; Grimes v. Young, 51 App. Div. 239, 64 N. Y. Supp. 859; Brown v. Jarvis Engineering Co. 166 Mass. 75, 32 L.R.A. 605, 55 Am. St. Rep. 382, 43 N. E. 1118; Limpus v. London General Omnibus Co. 1 Hurlst. & C. 526, 158 Eng. Reprint, 993, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; 26 Cyc. 1534; Katz v. Lutz, 176 App. Div. 460, 163 N. Y. Supp. 562.

Mr. Henry Siegrist, with Messrs. Hoody, Lauterbach, & Johnson, for respondents:

The question was properly submitted to the jury, whose province it was to choose between conflicting inferences, if any there were, and to determine as a fact whether Friedman was acting within the scope of his employment and in the furtherance of his master's business.

Mott v. Consumers' Ice Co. 73 N. Y. 543; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Girvin v. New York C. & H. R. R. Co. 166 N. Y. 289, 59 N. E. 921, 9 Am. Neg. Rep. 547; Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Rep. 448; Magar v. Hammond, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474, 19 Am. Neg. Rep. 445;

Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169; Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L.R.A. 136, 23 Am. St. Rep. 632, 30 N. E. 1001; Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141; Becker v. Borck, 157 N. Y. Supp. 505; Herrman v. New York Edison Co. 175 App. Div. 535, 162 N. Y. Supp. 145; Katz v. Lutz, 176 App. Div. 460, 163 N. Y. Supp. 562; Kennedy v. White, 91 App. Div. 475, 86 N. Y. Supp. 852; Kurland v. Roche, 165 N. Y. Supp. 807; 6 Labatt, Mast. & S. § 2364; Dealy v. Coble, 112 App. Div. 296, 98 N. Y. Supp. 452.

If Friedman lost his temper, as his language seems to indicate, that does not relieve his master of liability.

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Dealy v. Coble, 112 App. Div. 296, 98 N. Y. Supp. 452.

McLaughlin, J., delivered the opinion of the court:

The infant plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by reason of an assault committed upon her by defendant's janitor. The other action is by the infant's mother, to recover damages resulting from such injuries. Each plaintiff had a verdict upon which judgment was entered for a substantial amount, and which, in each case was modified by the appellate division, and, as modified, affirmed. Defendant appeals to this court.

On the 9th of September, 1914, the defendant was the owner of two seven-story apartment houses in the city of New York, of which one Friedman was the janitor. His duties, as such, were those usually performed by a janitor, and included keeping the halls and sidewalks clean, washing the windows, and showing the apartments to prospective tenants. The infant plaintiff, at the time of the assault, was eleven years of age. No testimony was offered at the trial as to the actual authority conferred upon the janitor by the defendant, except that the janitor testified, on one occasion when he informed defendant that boys playing ball on the sidewalk had broken some windows, the defendant then instructed him that at

any time thereafter, when he saw boys playing ball and breaking windows, to call a police officer on the beat.

The evidence adduced at the trial tended to establish, and justified the jury in finding, that the tenants had been annoyed by the noise caused by children roller skating on the sidewalk in front of the apartments, and had complained to the janitor and his wife with reference thereto. Acting on such complaints, he had endeavored to prevent children from roller skating on the walks. On the day named the testimony on the part of the plaintiff, which is corroborated by two of her companions, shows that immediately prior to the assault, she and three girls about her own age had been roller skating on the sidewalk for some considerable time; that the janitor went upon the sidewalk, and, addressing the plaintiff, who was then standing on the walk with her roller skates on, told her to get off the walk; that she refused to do so; that he then told her if she did not get off he would throw her off, and her reply was, "I would like to see you;" that he then grabbed her by the arm, threw or shoved her from the walk to the street, causing her to fall, and as she did so her back struck the curbstone and inflicted very serious injuries. Actions were thereafter brought against the owner of the apartment houses, with the result as above indicated.

The janitor, in assaulting the infant plaintiff, was not acting within

Highway—right of property owner—ejecting child from sidewalk.

the actual or apparent scope of his employment. Had the defendant been present he would

have had no authority to do what the janitor did, and what he could not legally do he could not, in a legal sense, authorize the janitor to do for him. *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309; *Pollock, Torts*, 10th ed. 97, 98.

8 A.L.R.—92.

The rule of liability of a master for the acts of his servant is tersely stated in *Mott v. Consumers' Ice Co.* 73 N. Y. 543, 547. It is that "for the acts of the servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even wilfully. . . . But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible."

To the same effect is *Girvin v. New York C. & H. R. R. Co.* 166 N. Y. 289, 59 N. E. 921, 9 Am. Neg. Rep. 547.

The infant plaintiff had a right to be upon the sidewalk, and, so far as appears, to use it for roller skating, though she was not, at the time the assault was committed, using it for that purpose. If the act of their skating created such an annoyance to tenants as to, in effect, amount to a nuisance, then the janitor, if authorized by the owner of the apartments so to do, should have proceeded in a lawful way to abate the nuisance, instead of taking the law into his own hands and committing the assault which he did. He appreciated, on a former occasion, when boys were playing ball on the sidewalk, that he had no authority to throw them off, and when the master's attention was called to it, he told him what to do in the future.

It may very well be that the noise caused by roller skating on the sidewalk was annoying to the tenants, and that the janitor supposed he was furthering the master's interests by trying to prevent the annoyance, but this did not change the legal relation of the parties, or confer upon him authority which the master himself did not possess. As

the janitor was not engaged in performing any act connected with his employment, at the time of the assault, his act is not chargeable to the defendant. The plaintiff's remedy, if they have any, is against the janitor, and not the defendant.

Master and servant—authority of janitor—ejecting child from sidewalk.

Each judgment, therefore, should be reversed, and each complaint dismissed, with costs in all courts.

Collin, Hogan, Cardozo, Pound, and Elkus, JJ., concur.

Hiscock, Ch. J., absent.

Petition for rehearing denied.

## ANNOTATION.

### Liability of employer for acts of janitor.

The general principles applicable to cases under consideration in the present annotation are comparatively simple and well established, it being generally conceded that a master is responsible for injuries occasioned to third persons by any negligence or wilful misconduct upon the part of his servant, while acting within the scope of his employment, and that the master is not responsible when the act of the servant is not within the scope of his employment or in obedience to the master's orders.

Applying this rule, the following cases hold that a master is liable for the acts of his janitor which are within the scope of his employment while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest: *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Stevenson v. Joy* (1890) 152 Mass. 45, 25 N. E. 78; *Montgomery v. Sartirano* (1897) 16 App. Div. 95, 44 N. Y. Supp. 1066, 2 Am. Neg. Rep. 758; *Ellefson v. Singer* (1909) 132 App. Div. 89, 116 N. Y. Supp. 453; *Kavanagh v. Vollmer* (1903) 84 N. Y. Supp. 475; *Foley v. Y. M. C. A.* (1904) 90 N. Y. Supp. 406; *Kurland v. Roche* (1917) 165 N. Y. Supp. 807; *Whaley v. Citizens' Nat. Bank* (1905) 28 Pa. Super. Ct. 531; *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445; *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 454; *Malcolm v. McNichol* (1906) 16 Manitoba L. R. 411. And this "whether the particular act was or was not directly authorized,

and whether it was or was not lawful." *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, *supra*. And notwithstanding the injury was the result of a wrongful act of one hired by the janitor to do his work without the knowledge or consent of the master (*Ellefson v. Singer* (1909) 132 App. Div. 89, 116 N. Y. Supp. 453), as well as where the master knows of the hiring (*Foley v. Y. M. C. A.* (1904) 90 N. Y. Supp. 406). And it has been held that the fact that the janitor had positive orders not to touch the appliance or do the act which caused the injury does not change the situation, provided, of course, that the act was one within the general course of his employment. *Whaley v. Citizens' Nat. Bank* (1905) 28 Pa. Super. Ct. 531; *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445.

The following cases, which involve the question of the liability of an employer for the acts of his janitor, lay down and apply that part of the general rule which excuses the master from responsibility where the act complained of was regarded as outside of the janitor's employment: *Sherwood v. Warner* (1906) 27 App. D. C. 64, 4 L.R.A. (N.S.) 651, 7 Ann. Cas. 98; *Gibson v. International Trust Co.* (1900) 177 Mass. 100, 52 L.R.A. 928, 58 N. E. 278; *MULLER v. HILLENBRAND* (reported herewith) ante, 1455; *Montgomery v. Sartirano* (1897) 16 App. Div. 95, 44 N. Y. Supp. 1066, 2 Am. Neg. Rep. 758; *Kennedy v. White* (1904) 91 App. Div. 475, 86 N. Y.

Supp. 852; *Foley v. Y. M. C. A. (N. Y.) supra*.

However, the real difficulty consists in the proper application of the general rule to the facts and circumstances of the individual cases. In other words, the task is to determine what acts are to be regarded as within the scope of a janitor's employment so as to render the master liable, and what acts are outside of his employment so as to excuse the master from liability. Each decision, of course, depends largely upon the particular facts and circumstances involved in the case, so that little more can be done than to set out the cases by way of illustration.

Taking up those cases which have determined that the specific act or acts under consideration were done while the janitor was acting within the general scope of his employment and in the interest of his master, it was held in *Montgomery v. Sartirano* (1897) 16 App. Div. 95, 44 N. Y. Supp. 1066, 2 Am. Neg. Rep. 758, that if the porter of a lodging house, in discharging his duty to his master to maintain order and eject intruders, violated his instructions and used excessive force in ejecting a drunken person, the master would be liable for the resulting injury. And again, in *Kurland v. Roche* (1917) 165 N. Y. Supp. 807, it was held that the owner of an apartment house was liable for an assault by his janitor upon a deliveryman who, at the request of a tenant, had delivered goods by the front entrance in violation of a rule requiring deliveries to be made through the basement, and was leaving the building at the time of the assault. In this case, it was the duty of the janitor to enforce the rules of the building, and the court held that the assault was done in the prosecution of the work for which the janitor was hired, even though it did not prevent the breaking of the rule in the instant case, saying: "The defendant seeks to sustain this judgment on the ground that, at the time the assault was made, the plaintiff had already delivered the beer, and that consequently the janitor did not make the assault for the purpose of

preventing the plaintiff from breaking a rule of the defendant's apartment house, and that only if the assault was made for this purpose would it be within the scope of his authority. The defendant is, however, responsible if the assault was done in the prosecution of the work for which the janitor was employed. That work included the care of the house and, in general, the enforcement of the rules governing the rights of people to come on the premises. In the absence of any other explanation, it certainly seems a fair inference that, when the janitor took away the case of empty bottles and assaulted the plaintiff, he was acting in attempted pursuance of his duties to see that 'people do not come into the house that do not belong there,' and to enforce the rule of deliveries through the dumb-waiter by violently driving out one who made the delivery in a different manner, even if he could not act in time to stop such delivery."

And in *Dickson v. Waldron (Ind.) supra*, the proprietor of a theater was held liable for the acts of his janitor and door man in wrongfully assaulting a person who, following a dispute, was being beaten by the ticket seller. In this case it appeared that one of the duties of the offending servant was to preserve order in the theater and to remove offensive persons, and the court, in holding that the injuries were inflicted by the servant while acting in the course of his employment, said: "The trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket seller and the doorkeeper acted within the business of their employment, maintaining that side of the controversy which was in their master's interest." It further appears in this case that the servant who made the assault was a special or house policeman, but this element did not enter into the decision, for the reason, as stated by the court, that the assault was made while the servant was acting as janitor and door man, and before he attempted to exercise any of his powers as an officer.

So, in *Whaley v. Citizens' Nat. Bank*



(1905) 28 Pa. Super. Ct. 531, where defendant bank extended a brass rail across the front of its building to protect it from persons congregating on the sidewalk, and connected the same with an electric current with a control inside of the building, and a person was injured at night by a shock received on coming in contact with the rail, the court went so far as to hold that the bank could be held liable for the injury, where the current had been turned on by the janitor, although he had been instructed not to use or meddle with the apparatus. It argued that the rule as to scope of employment was "broad enough to make the appellant [bank] liable, even though the janitor turned on the electricity contrary to positive orders," it being said that "the janitor had charge of the bank building, and the battery was one of the appliances therein, and it was used for the purpose of shocking people on the street." And the rule that a violation of instructions does not necessarily exonerate the master was again applied in *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445, and *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 454, where the janitor of a building, whose duty it was to gather and burn waste paper, in violation of the master's instructions to burn the same in the furnace, burned them in a near-by vacant lot, to the serious injury of a child playing near by. The court said: "That the master must answer for the act of his servant, done by his order or direction, is a principle so widely recognized that none will gainsay it. But the people generally who deal with such servant, or are affected by his acts, cannot know the nature of the instructions specially given by the master. If it be true that, where the master directs his servant to perform all the duties of his employment with diligence and care, he thereby relieves himself from any liability for the failure of the servant to obey such instructions, the general principle already adverted to would have but little force or significance. The law whose life resides

in the spirit, rather than in the letter of the language in which its principles are expressed, places a broader construction on the obligations of the master. Where the act of the servant complained of is done in the performance of the duty he owes to his master or in furtherance of the business of the latter, in legal contemplation he is acting under the direction of the master, and the latter cannot escape liability for the consequences of such act, even though the manner of doing it violated the instructions which the servant had received. If, therefore, it appears that the act from which the injury resulted was one done in execution of the duty which the master had imposed on his servant, it is no defense for the former to show that the manner of doing the act was without his knowledge or assent, or, indeed, against his positive direction. And this conclusion seems to follow from two considerations. If the master leave to his servant a discretion as to the manner in which his duty is to be performed, he must be responsible for the manner in which that discretion is exercised. If he undertake to determine for himself the manner in which his servant shall perform his prescribed duties, the obligation is on him to see that such instructions are carried out, and that the servant does not substitute his own methods for those of his master. . . . Applying this principle to the case in hand, we are met at once with the conceded fact that the gathering of the waste papers and the burning of them was the very work which the defendant's servant was employed to do. It was while doing this act, to wit, burning the papers that he had gathered, that he caused the injury complained of. The servant was performing the duty for which he was employed. He was doing it in obedience to the direction of his master and in discharge of the duties imposed on him, and it was only in the manner of the performance of this duty that he failed to obey his master's directions. We are of the opinion, therefore, that the master is not exempted from liability for the

consequences of his servant's act on this account."

In *Stevenson v. Joy* (1890) 152 Mass. 45, 25 N. E. 78, supra, where plaintiff fell through a coalhole in the sidewalk in front of defendant's building, which coalhole and building were admittedly under the care of a janitor, the defendant was held liable for the janitor's negligent performance of his duty with respect to the use and care of the coalhole.

And in *Kavanagh v. Vollmer* (1903) 84 N. Y. Supp. 475, the master was held liable to a pedestrian who was injured by falling upon the sidewalk as a result of slipping on ice formed through the use of water by defendant's servant, whose duty it was to keep the walk cleaned, and this although the defendant had not directed that water be used. In the latter connection the court said: "While the defendant did not direct the use of water, the servant made use of it not in the course of a departure from her duties, but simply because she saw other servants do the same thing, and to facilitate the cleaning. Her general duty being to sweep, and the object of sweeping being to clean, the use of water for that object, and concededly to no other end, was within the scope of the employment, under well-settled rules."

In *Ellefson v. Singer* (1909) 132 App. Div. 89, 116 N. Y. Supp. 453, the master was held liable for damages caused by a board being thrown from the roof of the defendant's tenement house.

In *Malcolm v. McNichol* (1906) 16 Manitoba L. R. 411, the janitor neglected to see that the valves on the steam pipes were closed before turning on the steam, and plaintiff's goods were damaged by escaping steam. This neglect of duty was held to render the master liable.

In a considerable number of the cases a contrary conclusion has been reached, it having been held that the act or acts complained of were outside of the servant's scope of employment as janitor, and without regard to the interests of the master. Thus, in *Herwood v. Warner* (1906) 27 App.

D. C. 64, 4 L.R.A. (N.S.) 651, 7 Ann. Cas. 98, the court, in applying the general rule that to make a master liable for an injury caused by his servant's negligence the servant must either have done the act causing the injury in the service of the master, or by his direction, held that the owner of a building was not liable for the negligent act of his janitor, who, at the request of persons sent by a contractor to repair the elevator, undertook to aid in releasing one of them, who had been caught in the machinery. This was upon the theory that where a general employee assists a third person in doing an act which the master is not bound to do, without the latter's knowledge or consent, the servant cannot be regarded as having acted within the scope of his authority. The court said: "The case under the evidence presents but one question necessary for determination: Was Conn, the janitor, the servant of the appellee in endeavoring to release the appellant, so as to make appellee liable for his negligence? That he was in the general employ of the appellee is admitted; yet such a service does not make the master liable except for acts done for the master. While rendering such general service he may be the servant of another. As the New York court of appeals said, in *Wyllie v. Palmer* (1893) 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381: 'Servants who are employed and paid by one person may, nevertheless, be ad hoc the servants of another in a particular transaction, and that, too, where their general employer is interested in the work.' We think the proposition founded on reason and well established that, to make a master liable for an injury caused by his servant's negligence, the servant must either have done the act causing the injury in the service of the master, and in doing an act which the master was bound to perform, or which was done by his direction. The evidence in this case fails to show that the act done by appellee's servant was done in appellee's service, and was either one which appellee was bound to perform or directed by him to be per-

formed. Conn was not employed by appellee to assist in repairing the elevator, or, while the elevator was out of service, to operate it, or try to operate it. On the other hand, it is clear that he was acting under the direction of appellant, or appellant's assistant. His movements were directed by them. In *Higgins v. Western U. Teleg. Co.* (1898) 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500, it was said, in speaking of a case very similar to this: "The true test in such cases is to ascertain who directs the movements of the person committing the injury." . . . If Conn was not loaned to appellant, he, so far as the appellee is concerned, acted as a volunteer in coming to appellant's assistance, and at appellant's request. Appellee was under no obligation to furnish his servants as assistants to those engaged in making repairs. There is no evidence to warrant such a conclusion. . . . In the case at bar appellant was not being carried as a passenger when the accident occurred, and the elevator was not being used by appellee for any purpose whatever. The facts are not such as require us to determine the measure of the liability of the owner of a passenger elevator to the passengers carried therein. The elevator was in the hands of appellant, or his employers, for repairs, and so far as shown, appellee had no control over it, and his servants were not engaged in operating it for him, or in their regular line of employment. Owners of buildings are daily engaging parties to make repairs to the apparatus and fixtures in them, and, in the absence of any agreement to furnish their servants as assistants to the parties making repairs, it would be carrying the rule applicable to the liability of masters for the negligence of their servants altogether too far to extend their liability to cases where the repairers solicit such servants to aid them in their work. If my servant, who takes charge of my furnace, happens to be around when repairs are being made to it by a contractor employed for that purpose, and at the request of the contractor, assists him in the repairs,

without my agreement to furnish his aid, it would be unjust to hold me responsible for his negligence. In rendering such assistance he becomes the servant of the contractor. . . . The facts in the present case make it comparatively easy to apply the legal principle to them. As we have said, the elevator was incapable of use as a passenger elevator when the accident occurred; and was not in use. The appellee was under no agreement to furnish any assistance in making the repairs. The janitor acted solely upon the request of appellant or his representative, and appellee's servant was not in the regular line of his employment when he rendered the service which resulted in the injury. Under this state of facts the rule is that the general employer is not liable." And in *Gibson v. International Trust Co.* (1900) 177 Mass. 100, 52 L.R.A. 928, 58 N. E. 278, it was held that the removal of the chair of an elevator conductor from its place by a janitor, who was not in control of the elevator, but was merely riding in it as a passenger, was not an act within the scope of his employment so as to render the proprietor liable for an injury to another passenger caused by the involuntary starting of the elevator by the conductor as he grasped the mechanism to save himself from falling, as he attempted to sit down without knowing that his chair had been removed.

And in the reported case (*MULLER v. HILLENBRAND*, ante, 1455) it is held that the janitor of an apartment building had no actual or implied authority to eject from the sidewalk in front thereof children using the walk for roller skating, so as to render the owner of the property liable for an assault in throwing a child off the sidewalk, even though the skating was annoying to the tenants, who had complained to the janitor, who supposed that he was furthering the master's interest by trying to prevent the annoyance. It will be remembered that the court pointed out that the owner himself could not have ejected the child from the walk, and therefore that he could not have authorized the

janitor to do so; that the latter, in ejecting the child, was not engaged in performing any act connected with his employment. So in *Kennedy v. White*, (1904) 91 App. Div. 475, 86 N. Y. Supp. 852, where a crowd of boys were creating a disturbance in front of a tenement building, and the janitor ran out and hurled a stick at and struck a boy on the opposite side of the street, who he must have known was a mere onlooker, it was held that no inference could be drawn that the janitor was acting or intended to act for his master in striking the injured boy, who had not even participated in the disturbance, but rather that it must be assumed that he went outside his employment and, without regard to his service, committed a trespass.

And in *Montgomery v. Sartirano* (1897) 16 App. Div. 95, 44 N. Y. Supp. 1066, 2 Am. Neg. Rep. 758, where plaintiff was injured by being violently pushed down the stairs of a lodging house by the porter, whose duty it was to maintain order and eject intruders, it was held that if the injury resulted from the wanton act of the porter acting in anger at insults heaped upon him by the plaintiff, rather than in the service of the master in ejecting him, the defendant was not liable.

Of course, where the evidence as to authority, scope of duty, etc., of the janitor is conflicting, the question is one for the jury. A case of this kind is *Foley v. Y. M. C. A.* (1904) 90 N. Y. Supp. 406. G. J. C.

CHARLES S. ASHLEY  
v.  
WILLIAM C. WAIT et al.

*Massachusetts Supreme Judicial Court—July 30, 1917.*

(Ashley v. Three Justices, 228 Mass. 63, 116 N. E. 961.)

**Jury — suit between persons — contesting election.**

1. An election contest provided by statute is not a suit between two or more persons within the meaning of a constitutional provision preserving the right of trial by jury in such suits, where the contest is brought by persons who are merely qualified voters.

[See note on this question beginning on page 1476.]

**Pleading — complaint — election contest — interest of petitioners.**

2. An allegation in a petition to contest an election that petitioners are inhabitants, taxpayers, and qualified voters in the election district is sufficient to show the right to vote for the officer whose election is contested, where the petition must be filed within two months of the election by qualified voters.

**Election — contest — appointment of judges.**

3. Failure to appoint judges to hear election contests until a contest is suggested does not destroy the jurisdiction of the judges, although the statute provides that such contests shall be heard by judges who shall be appointed immediately after the election.

**Judges — appointment — chief judge.**

4. Providing for the assignment by the chief justice of judges to hear election contests does not contravene a constitutional provision that all judicial officers shall be appointed by the governor.

**Jury — election contest.**

5. An election contest is not within a constitutional provision preserving the right of trial by jury in all controversies concerning property.

[See 16 R. C. L. 205.]

**— criminal proceeding.**

6. That the penalty for corrupt practice at an election is forfeiture of the right to hold office and disqualification to vote does not make an election contest a criminal proceeding, within the provision of the Constitu-

tion preserving jury trial in such proceedings.

**Venue — election contest — power of legislature.**

7. Constitutional power conferred upon the legislature to erect and constitute judicatories and courts of record authorizes it to require all election contests in the state to be tried in one county.

— right to justice.

8. The constitutional right of a successful candidate for office to obtain right and justice freely is not impaired by requiring him to go to another county to answer an election contest.

**Election — qualification — corrupt practices.**

9. Providing for disqualification for office of one guilty of corrupt practices does not contravene a constitutional provision that all qualified inhabitants have an equal right to be elected for public employment.

**Constitutional law — equal protection — law applicable only to successful candidate.**

10. Providing disqualification for office and disfranchisement only for successful candidates for public office who are guilty of corrupt practices does not deprive them of the equal protection of the laws.

— venue of different proceedings.

11. There is no deprivation of the equal protection of the laws by requiring election contests to be heard only in one county of the state, while criminal proceedings for violation of the Election Laws may be heard in the counties where the offenses occur.

— exemption of town officers.

12. Exempting from a Corrupt Practices Act town officers elected in towns of less than 10,000 inhabitants does not violate the constitutional guaranty of equal protection of the laws.

[See 6 R. C. L. 388.]

**Courts — constitutional power — supreme court.**

13. The constitutional power of the supreme judicial court is not impaired by a provision conferring final authority in election contests upon judges of the superior court, unless they report questions for the consideration of the supreme court.

**Jury — Federal Constitution — state courts.**

14. The 7th Amendment of the Federal Constitution, preserving trial by jury, applies only to Federal courts.

[See 6 R. C. L. 458; 16 R. C. L. 201.]

— due process of law.

15. Trial by jury is not essential to the due process of law guaranteed by the 14th Amendment of the Federal Constitution.

[See 6 R. C. L. 458.]

**Constitutional law — due process — office as property.**

16. The right to hold a public office and to vote is not property within the meaning of the 14th Amendment of the Federal Constitution, so as to require due process of law for deprivation thereof.

[See 6 R. C. L. 461.]

**Statute — invalid in part — validity of remainder.**

17. The invalidity of a portion of a statute conferring jurisdiction upon the courts of contests of elections to the legislature, for corrupt practices, does not invalidate the portions relating to other offices.

[See 6 R. C. L. 121, 133.]

**Prohibition — when lies — interfering with jurisdiction.**

18. Prohibition does not lie to prevent a court taking jurisdiction of a proceeding merely because the subpoena was made returnable later than the date prescribed by statute, where the tribunal before which the proceeding is pending has not passed upon that objection.

**REPORT** by the Supreme Judicial Court for Bristol County for determination by the full court of a petition for a writ of prohibition to enjoin respondents from proceeding to hear an election petition brought against petitioner. *Petition dismissed.*

The facts are stated in the opinion of the court.

Messrs. John W. Cummings and Charles R. Cummings, for petitioner:

The tribunal deciding election petitions is a summary and special one.

State ex rel. Schumacher v. Markham, 162 Wis. 55, 155 N. W. 917; Douglas v. Hutchinson, 183 Ill. 323, 55 N. E. 628; Devous v. Gallatin County, 244

(*Ashley v. Three Justices*, 228 Mass. 63, 116 N. E. 961.)

Ill. 40, 91 N. E. 102, 18 Ann. Cas. 422; Wade v. Murry, 2 Sneed, 50; Harmon v. Tyler, 112 Tenn. 8, 83 S. W. 1041.

Prohibition is the proper remedy.

Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338; Ex parte Roundtree, 51 Ala. 42; Chambers v. Jennings, 2 Salk. 553, 91 Eng. Reprint, 469, 8 Bacon, Abr. 228; London v. Cox, L. R. 2 H. L. 239, 36 L. J. Exch. N. S. 225, 16 Week. Rep. 44; Appo v. People, 20 N. Y. 531; State ex rel. Funkhouser v. Spencer, 166 Mo. 271, 65 S. W. 981; Ramsey v. Huck, 267 Mo. 333, 184 S. W. 966; Crisler v. Morrison, 57 Miss. 791.

The petitioners, having failed to make the necessary averments, cannot now supply the lack by introducing evidence, or by amending their petition or their application.

Morse v. Presby, 25 N. H. 302; Greenough v. Police Comrs. 30 R. I. 212, 136 Am. St. Rep. 953, 74 Atl. 785; Edwards v. Knight, 8 Ohio, 375; Minor v. Kidder, 43 Cal. 229; People ex rel. Rogers v. Spencer, 55 N. Y. 1; People ex rel. Green v. Smith, 55 N. Y. 135; Wellsborough v. New York & C. R. Co. 76 N. Y. 182; Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1; Batterton v. Fuller, 6 S. D. 257, 60 N. W. 1071; Schwarz v. County Ct. 14 Colo. 44, 23 Pac. 84; Smith v. Smith, — N. J. L. —, 41 Atl. 753; Daugherty v. Carnine, 61 Ill. 366, 103 N. E. 1003; Masteron v. Reed, 172 Ill. 37, 49 N. E. 488; Ramsey v. Huck, 267 Mo. 333, 184 S. W. 966; Gillespie v. Dion, 18 Mont. 83, 33 L.R.A. 703, 44 Pac. 954.

A subpoena not returnable at the statutory time is void; the court issuing it does not have jurisdiction; and the defect cannot be supplied by an amendment or a new writ.

Whittier v. Farmington, 115 Minn. 32, 131 N. W. 1079; Odegard v. Lequire, 107 Minn. 315, 119 N. W. 1057;avanaugh v. McConochie, 134 Ill. 516, 5 N. E. 674; Greenwood v. Murphy, 31 Ill. 604, 23 N. E. 421; Vigil v. Radt, 5 N. M. 161, 20 Pac. 795; Ramsey v. Huck, 267 Mo. 333, 184 S. W. 966; Insurance Co. of Valley of Virginia v. Mordecai, 21 How. 195, 16 L. l. 94; Puget Sound Agri. Co. v. Pierce county, 6 Wall. 246, 18 L. ed. 739; nited States v. Curry, 6 How. 106, L. ed. 363; Bell v. Austin, 13 Pick. 1; Bergen v. Jones, 4 Met. 371; Crisler v. Morrison, 57 Miss. 791; Williams Tenby, L. R. 5 C. P. Div. 135, 49 L.

J. C. P. N. S. 325, 42 L. T. N. S. 187, 28 Week. Rep. 616, 44 J. P. 348.

The remedy by election petition is not exclusive.

McCrary, Elections, 4th ed. p. 294.

The statute is unconstitutional.

Ex parte Roundtree, 51 Ala. 42; Com. ex rel. Atty. Gen. v. Conyngham, 65 Pa. 76; Com. v. Anthes, 5 Gray, 185.

Disqualification imposed by statute is an infamous punishment.

United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283.

Since the suit is between two or more persons petitioner is entitled to a jury trial.

Worcester Color Co. v. Henry Wood's Sons Co. 209 Mass. 105, 95 N. E. 392; State ex rel. Schumacher v. Markham, 160 Wis. 431, 152 N. W. 161; Atty. Gen. v. Sullivan, 163 Mass. 446, 28 L.R.A. 455, 40 N. E. 843; 15 Cyc. 402.

The petitioner's right to vote for Representatives and for Senators in Congress, and to vote in presidential elections, is protected by the 14th Amendment to the Constitution of the United States.

Crandall v. Nevada, 6 Wall. 36, 18 L. ed. 745; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

Mr. H. E. Woodward for respondent Hathaway.

Mr. C. W. Mulcahy, Assistant Attorney General, for the Attorney General.

Rugg, Ch. J., delivered the opinion of the court:

This is a petition for a writ of prohibition. The petitioner is the respondent in an election petition filed under the Corrupt Practices Act. Stat. 1913, chap. 835, as amended by Stat. 1914, chap. 783. That election petition charged the respondent therein, the present petitioner, who hereafter will be called the petitioner, with having violated provisions of the Corrupt Practices Act in connection with his election in December, 1916, as mayor of New Bedford. The respondents are three judges of the superior court who have been assigned to hear such election petitions. The grounds alleged for the issuance of

the writ of prohibition in the petition at bar, succinctly stated, are:

(1) That the election petition is fatally defective in jurisdictional allegations not susceptible of being cured by amendment; (2) that the respondents have no jurisdiction to hear the election petition because not legally assigned therefor in accordance with the statute; (3) that the statute under which the election petition is brought is unconstitutional in several respects; (4) that no legal subpoena issued to summon the respondent into court, in that, while the statute required that the subpoena "be returnable fourteen days after the date on which the petition is filed," it was in fact made returnable fifteen days thereafter.

In their answer the respondents admit that the petitioner was declared elected, and was inaugurated mayor of New Bedford, and aver that they were assigned in accordance with the statutes to hear election petitions, that they were at the time of the filing of the present petition intending and proceeding to hear the election petition brought against the present petitioner, and that the papers on file show that the subpoena on the election petition was returnable fifteen days after the filing of the petition, and that the petitioner, as respondent therein, appeared specially, and filed a motion to dismiss the election petition on the ground that the subpoena was not issued according to the statute, and he had not been rightly summoned, and that no action has been taken by them upon his motion to dismiss, only seven days having elapsed between its filing and the bringing of the present petition, whereupon they immediately directed all proceedings in the election petition case to be suspended until the further order of the supreme judicial court on the present petition.

The first of the petitioners in the election petition, and the attorney general, have been allowed to intervene. The case was reserved upon

the petition and answer for the determination of the full court.

These several grounds urged in support of the issuance of prohibition will be examined in the order stated above.

1. The first is the fatally defective nature of the election petition.

That petition alleges that the petitioners therein named are "inhabitants, taxpayers, and qualified voters in the city of New Bedford." This is a sufficient averment that the petitioners had a right to vote for mayor at the election in question in a proceeding of this sort, where the petition, by Stat. 1914, chap. 783, § 10 (b), must be filed within two months after the date of the election to which it relates, in view of other requirements of law as to registration of voters and the well-known customs of registrars. But if the allegations were not sufficient, they might be corrected by amendment. See *Tucker v. Fisk*, 154 Mass. 574, 578, 28 N. E. 1051; *Dartmouth v. Bristol County*, 153 Mass. 12, 26 N. E. 425; *Crafts v. Sikes*, 4 Gray, 194, 64 Am. Dec. 62. The decisions relied on by the petitioner need not be reviewed. They are by courts of other jurisdictions, where doubtless the policy of the law is more insistent upon niceties of pleading than it is in this commonwealth.

Pleading—  
complaint—  
election contest  
—interest of  
petitioners.

2. The second ground urged by the petitioner is that the respondents have not been legally assigned as the three judges to hear election petitions in accordance with the statute, and hence are without jurisdiction in the premises.

The words of Stat. 1914, chap. 783, § 10 (c), are that "election petitions . . . shall be heard and determined by three justices of the superior court who shall each year, immediately following the annual state election, be assigned by the chief justice of said court for the hearing and determination of all matters arising under election petitions during the ensuing year."

The annual state election in 1916 was held on November 7. The three judges were not assigned by the chief justice of the superior court until January 27, 1917, which was the day following the granting of the order by the superior court judge to the effect that there was reasonable cause to believe that a corrupt practice had been committed by the petitioner. It does not appear that there had been any occasion for the assignment of the three judges earlier than this date, or that there had been any suggestion upon the records of the court that any corrupt practice had been committed in the commonwealth. The word "shall," as used in this statute, cannot be thought to have compulsory signification in the sense that the rights of parties and the public fail utterly of possibility of enforcement if there has been a delay in making the assignment of the judges. Important public and private interests ordinarily are not intended to be made dependent wholly upon the performance of a duty by a public officer at a given moment of time. When the word "shall" is used for fixing the time for the performance of official duty, where private rights are not directly concerned, it commonly is construed to be directory rather than mandatory. The act imposes an imperative obligation upon the chief justice to make the assignment. It indicates the time when the assignment ought to be made. But the jurisdiction of the court over the parties is not impaired if the assignment of the three judges is made in season to perform the duties established by the statute. *Cheney v. Coughlin*, 201 Mass. 204, 211, 212, 87 N. E. 744, where earlier cases of this and other courts are collected and reviewed. *Rutter v. White*, 204 Mass. 59, 90 N. E. 401; *Pevey v. Aylward*, 205 Mass. 102, 91 N. E. 315; *Rea v. Everett*, 217 Mass. 427, and cases cited at 430, 105 N. E. 618.

It follows that the respondents are not without jurisdiction on this ground to consider the election petition.

3. It is argued that the Corrupt Practices Act is unconstitutional on several grounds.

(a) The provision that three judges of the superior court "for the hearing and determination of all matters arising under election petitions during the ensuing year," "shall each year, immediately following the annual state election," "be assigned by the chief justice of said court," does not contravene chap. 2, § 1, art. 9, of the Constitution, to the effect that "all judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council."

The election petitions established by the Corrupt Practices Act are proceedings in the superior court. The act provides that all election petitions shall be brought in the superior court in the county of Suffolk, that they can be brought only by permission granted by a superior court judge after an ex parte preliminary hearing, and that they shall be entered in a separate docket by the clerk of the superior court for Suffolk county. They are to be heard and determined by three judges of the superior court. From beginning to end the matter is conducted by the judges, recorded upon the records, and the papers are kept in the custody of the clerk, of the superior court. No new court is established. No new tribunal is created. A new kind of procedure is created. In some respects the practice is regulated in considerable detail, and is made radically different from that heretofore prevailing in more familiar classes of litigation. But the jurisdiction is conferred upon an existing court.

The legislature may provide that particular causes may be tried before one or more judges of any court. The history of statutory

Judges—appointment—chief judge.



changes respecting the trial of indictments for capital offenses, from the original requirement that all such trials must be before this court sitting in

**Jury—election  
contest.**

banc, to the present provision that they be had before a single judge of the superior court, is an illustration of the power of the legislature in this regard. *Com. v. Phelps*, 210 Mass. 78, 37 L.R.A.(N.S.) 567, 96 N. E. 349, Ann. Cas. 1912C, 1119. The authority of the legislature to transfer jurisdiction from justices of the peace to the judges of the police court and conferring upon the latter a new name was confirmed by *Wales v. Belcher*, 3 Pick. 508. *Brien v. Com.* 5 Met. 508. It was held in *Dearborn v. Ames*, 8 Gray, 1, that jurisdiction over insolvency matters, previously vested in elective officers whose election was provided for by the Constitution, might be transferred to a regularly constituted court.

There are numerous instances where the hearings must be had before two or more judges. Allusion has already been made to trials of capital cases. Jurisdiction was conferred by Rev. Laws, chap. 201, § 2, upon three judges of the superior court, to hear claims against the commonwealth in excess of \$1,000. Provision is made by Rev. Laws, chap. 157, § 5, for trial of certain civil causes before three judges of the superior court. The assignments of the judges to hold the court in all these cases must of necessity be made by the chief justice. It is expressly provided by Stat. 1912, chap. 649, § 8, that the three judges of the municipal court of the city of Boston, to hold that appellate division of that court thereby established, shall "be designated from time to time by the chief justice" of that court. It never has been suggested in any of the numerous cases which have been appealed from the appellate division of that court that there was anything unconstitutional in its organization. The most ancient and fa-

miliar illustration of division of work is in the supreme judicial court, where constantly certain justices are sitting as the quorum of the full court and others are holding court as single justices. It requires no argument to demonstrate that the designation of the justices to sit as the full court is a judicial duty.

The circumstance, that under the instant statute the three judges assigned are to hear all the election petitions brought during the year, is immaterial in this connection. It is a well-known practice for the assignments of judges to specific duties to be made for the period of a year.

It is an appropriate function of the office of chief justice to make such assignments as are required by this statute. It is a detail in the efficient administration of justice by courts composed of several judges that the chief justice should arrange a division of work among the different judges in such way as to promote the transaction of the business of the court in the most satisfactory manner. It is the performance of a strictly judicial duty.

No new court is established and no new judges are required by the Corrupt Practices Act. An existing court is given jurisdiction of a new kind of litigation, and provision is made for designation in the ordinary way of judges already commissioned, to perform the duties arising from the new kind of jurisdiction. The conclusion is imperative that the act is not violative of the constitutional requirement that all judges shall be appointed by the governor.

It is not necessary to inquire whether the subject of elections is so much in the nature of a political question that the legislature is unlimited in its power to establish tribunals and fix their jurisdiction to deal with election to public office, and may even treat it as an executive or administrative function and not so judicial in character as necessarily to be vested in the courts.

See in this connection, *State v. Lewis*, 51 Conn. 118; *Williamson v. Lane*, 52 Tex. 335; *Lynch v. Chase*, 55 Kan. 367, 371, 40 Pac. 666; *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 109, 5 N. E. 228; *Ewing v. Filley*, 43 Pa. 384, 390. Nor is it necessary to consider whether the principle of *Young v. Blaisdell*, 138 Mass. 344, may be applicable.

(b) The right of trial by jury, as secured by the Constitution, is not denied by the act. The Declaration of Rights by art. 15 holds

—suit between  
persons—  
contesting  
election.

sacred the right to  
a trial by jury,  
“in all contro-  
versies concerning

property and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised.” It was decided in *Atty. Gen. v. Sullivan*, 163 Mass. 446, 451, 452, 28 L.R.A. 455, 40 N. E. 843, that a public office like that of mayor is not “property,” as that word is used in the Declaration of Rights. A public office does not possess the attributes of private property. Any office created by the general court, and not established by name or tenure by the Constitution, “may be regulated, limited, enlarged, or terminated by law, as public exigency or policy may require.” *Taft v. Adams*, 3 Gray, 126, 130. A public office is not the private property of the person elected to it. It is a public trust, to be held and administered entirely and absolutely for the benefit and in the interest of the people. This rule prevails generally. *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 367, 23 L.R.A. 399, 41 Am. St. Rep. 606, 58 N. W. 311; *People ex rel. Devery v. Coler*, 173 N. Y. 103, 65 N. E. 956; *Prince v. Skillin*, 71 Me. 361, 365, 36 Am. Rep. 325; *Donahue v. Will County*, 100 Ill. 94; *Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745, Ann. Cas. 1913C, 155; *Mason v. State*, 58 Ohio St. 30, 41 L.R.A. 291, 50 N. E. 6; *Moore v. Strickling*, 46 W. Va. 515, 518, 50 L.R.A. 279, 33 S. E. 274; *State v. Douglas*, 26 Wis. 428, 432, 7 Am.

Rep. 87; *Hawkins v. Roberts & Son*, 122 Ala. 130, 27 So. 327; *Gray v. McLendon*, 134 Ga. 224, 251, 252, 67 S. E. 859. Therefore, it follows that so far as concerns the question of property no jury trial need be provided in trials as to the title to a public office.

The right to vote also is in its nature political, and not property. *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *Cooley*, Const. Lim. 7th ed. 901. See cases collected in 1 L.R.A. 111, note.

The election petition provided by the Corrupt Practices Act is not a “suit between two or more persons” in the sense in which those words are used in the Declaration of Rights. The right to contest an election in the manner and to the extent set forth in the instant statute is not, either in form or in substance, a common-law right. It is not in its essence a controversy between two parties in the sense of ordinary litigation. It is in its nature an inquiry into the purity of the election. A corrupt practice is defined by § 368 of the act as amended.<sup>1</sup>

The election petition must be confined to a request for an investigation respecting the matters enumerated in this section of the act. It must be brought by five persons, whose only qualification as petitioners is that they were voters qualified by law to vote at the election as to which complaint is made. They have no private interest to subserve. The purity and freedom of elections are fundamental in a republican form of government. Scarcely anything can be conceived of more vital to the public welfare than free and honest elections. An election petition cannot be brought without leave first obtained from a judge, who must certify after hear-

<sup>1</sup> The provisions referred to are as follows: “A candidate shall be deemed to have committed a corrupt practice who shall, either by himself or by another, violate the provisions of section three hundred and forty-eight relative to the expenditure of money in excess of the amounts therein authorized; who shall

ing that he is satisfied that there is reasonable cause not only to believe that a corrupt practice was committed with reference to the particular election, but also that upon the evidence obtainable the corrupt practice may be successfully proved. An election petition once entered in court cannot be discontinued without the consent of the attorney general. § 366. The judgment entered at the conclusion of the proceeding, if a corrupt practice is found to have been committed, is not in the nature of a remedy for a private wrong, but a vindication of an outrage upon the public and a purging of public office from a foul stain. The election is to be declared void, and the respondent ousted from office and the office declared vacant. Section 369, as amended by Stat. 1914, chap. 783, § 10. The whole proceeding, throughout, is public rather than private in character. It is in the nature of a quo warranto proceeding. The public, instead of being

—criminal  
proceeding.

represented at the initiatory stages by the attorney general, is in effect represented by the five voters, acting not wholly upon their own volition, but upon authorization from the court; and after the bringing of the petition the attorney general has a limited control over the proceedings. It is no more a suit between persons than is a petition for quo warranto, which in *Atty. Gen. v. Sullivan*, 163 Mass. 446, 451, 28 L.R.A. 455, 40 N. E. 843, was held not to be such suit. In this respect the case at bar is governed by that decision, and the

petitioner has suffered no legal wrong in being denied a trial by jury. *Kansas v. Ziebold*, 123 U. S. 623, 673, 31 L. ed. 205, 214, 8 Sup. Ct. Rep. 273. See also *Carleton v. Rugg*, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55. Since this is not a pursuit of an individual right, but essentially an inquest into a matter of public import, it does not come within the definition of suit given in *Worcester Color Co. v. Henry Wood's Sons Co.* 209 Mass. 105, 95 N. E. 392.

(c) The election petition is not criminal in its form. It is expressly provided that such petitions shall be governed by the rules of equity practice and procedure, so far as applicable, in the absence of special rules of court. The act makes distinct provisions in other sections for criminal prosecutions, and the election petition throughout is treated as civil in its nature. Since it is in the nature of a quo warranto, it is a civil proceeding and not a criminal prosecution. That has been decided. *Atty. Gen. v. Sullivan*, 163 Mass. 446, 449, 28 L.R.A. 455, 40 N. E. 843; *Ames v. Kansas*, 111 U. S. 449, 460, 28 L. ed. 482, 487, 4 Sup. Ct. Rep. 437. See also *State ex rel. Brandt v. Thompson*, 91 Minn. 279, 97 N. W. 887, and *State ex rel. Broatch v. Moores*, 56 Neb. 1, 76 N. W. 530. But it is contended that a punishment criminal and infamous in its nature is imposed by the act, and hence that it is obnoxious to art. 12 of the Declaration of Rights, which guarantees a trial by jury in such cases. It is provided by § 497 of the act as amended

make a false return in any statement filed in accordance with sections three hundred and sixty-two and three hundred and sixty-three of this act; who shall, either by himself or another, pay or give, or directly or indirectly promise to a voter any gift or reward to influence his vote or to induce him to withhold his vote; who shall, either by himself or another, aid or abet a person, who is not entitled to vote, in voting or attempting to vote at a primary or election, or in voting or attempting to vote under a name other than his own, or in casting or attempting to

cast more than one ballot; who shall, either by himself or another, fraudulently and wilfully obstruct and delay a voter; who shall, either by himself or another, interfere with, hinder or prevent an election officer from performing his duties; forge an indorsement upon, or alter, destroy or deface a ballot; or who shall, either by himself or another, tamper with or injure or attempt to injure any voting machine or ballot box to be used or being used in an election, or shall prevent or attempt to prevent the correct operation of such machine or box."

(Ashley v. Three Justices, 228 Mass. 63, 116 N. E. 961.)

by Stat. 1914, chap. 783, § 12, that 'whoever is found by final judgment upon an election petition . . . to have committed a corrupt practice, and shall, in accordance with such finding, forfeit the office to which he has been elected, or whoever is convicted in a criminal proceeding of violating any provision of law relating to corrupt practices in elections shall be disqualified as a voter for a period of three years following the date of his conviction, and shall be deemed ineligible to hold public office for the said period.'

It is urged that deprivation of the right to vote and to hold public office for a period of three years, as a consequence of the finding of a corrupt practice having been committed by the defendant in an election petition, is a criminal or infamous punishment.

This question must not be treated by itself alone, but must be considered in connection with the 40th amendment to the Constitution, which became operative in 1912. That amendment added a new class to those citizens from whom the right of franchise is withheld by art. 3 of the amendments, namely, 'persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections.' The effect of this amendment was to confer upon the general court power to declare by general law disfranchisement as an accompaniment to the commission of corrupt practices in elections. It did not confine or limit its powers in this respect to the establishment of the fact of corrupt practice by criminal rather than by civil proceedings. It conferred by implication the power in broad terms. It gave ample discretion to the legislature as to the means to be employed for the ascertainment of the fact, by any constitutional means, of a corrupt practice having been committed. It authorized the legislature to attach disfranchisement to one who had been found by any

constitutional means, to have violated his public duty by corrupt practices. It places disfranchisement for corrupt practices in connection with elections upon the same footing as disfranchisement because of being a pauper or under guardianship. Manifestly, a trial by jury is not required to determine whether one shall be a pauper or placed under guardianship, simply because deprivation of the right to vote follows as a result of that status. See *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033; *Sporza v. German Sav. Bank*, 192 N. Y. 8, 84 N. E. 406. Pauperism and guardianship as matter of common knowledge have been generally established by proceedings in which there is no trial by jury. The circumstance that the 40th amendment does not automatically attach disqualification from voting to all persons found to have committed corrupt practices, but leaves that matter to be settled from time to time by general law, gives no additional constitutional rights to the individual. He cannot demand on that account, as a constitutional right, that this matter be settled by a jury when he is not otherwise entitled to it. Therefore, it is needless to consider the bearing in this connection of *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283, and *People ex rel. Akin v. Kipley*, 171 Ill. 44, 72, 41 L.R.A. 775, 49 N. E. 229, relied on by the petitioner, or to discuss whether deprivation of the right to vote and to hold office, as an isolated factor, without the imposition of fine or imprisonment, constitutes infamous punishment.

Of course the legislature cannot, by a mere change of name or of form, convert that which is in its nature a prosecution for a crime into a civil proceeding, and thus deprive parties of their right to a trial by jury. The Constitution cannot thus be trifled with. *Stockbridge v. Mixer*, 215 Mass. 415, 102 N. E. 646.

Venue—election  
contest—power  
of legislature.

But there is nothing to prevent the legislature from enlarging proceedings and remedies in their nature civil, so as to include new matters of the same general character. *Brown's Case*, 173 Mass. 498, 53 N. E. 998; *Young v. Blaisdell*, 138 Mass. 344; *Renado v. Lummus*, 205 Mass. 155, 158, 91 N. E. 144. In view of the principles declared in *Atty. Gen. v. Sullivan*, 163 Mass. 446, and *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437, and in other cases before cited, it is unnecessary to examine *State ex rel. Schumacher v. Markham*, 160 Wis. 431, 152 N. W. 161, s. c. 162 Wis. 55, 155 N. W. 917, and kindred decisions, or to determine whether, in the light of differing constitutional provisions, they are inconsistent with the conclusion here reached.

(d) Nothing contrary to the Constitution is perceived in the further provision that one found to have committed corrupt practices shall be deemed ineligible to hold public office. The privilege of voting is so closely connected with the right to hold office that power to deprive of the former may well include the latter. See opinion of Justices, 7 Mass. 523; *State ex rel. Perine v. Van Beek*, 87 Iowa, 569, 19 L.R.A. 622, 43 Am. St. Rep. 397, 54 N. W. 525; *State ex rel. Off v. Smith*, 14 Wis. 497. Moreover, the power of the legislature to determine the qualifications required of those elected to fill municipal offices is ample, and need not be uniform throughout the commonwealth. *Graham v. Roberts*, 200 Mass. 152, 154, 155, 85 N. E. 1009; *Cole v. Tucker*, 164 Mass. 486, 29 L.R.A. 668, 41 N. E. 681. It follows that the act imposes no unconstitutional limitations upon the right to vote or to hold office.

(e) It is not open to serious question that the acts described in the statute as corrupt practices are well within the scope of those words as used in the 40th amendment.

(f) The provision that election petitions shall be entered in the su-

perior court in Suffolk county is not violative of any constitutional provision. The general court is given full power and authority by chap. 1, § 1, art. 3, of the Constitution, "to erect and constitute judicatories and courts of record or other courts."

This ample grant includes by necessary implication power to fix the territorial limits within which such courts shall exercise jurisdiction and the places in which they shall <sup>—right to justice.</sup> be held. Having created by the instant statute a new kind of civil litigation, there is no basis in the Constitution for limiting the right of the legislature to say that such causes shall be entered in Suffolk county, where the superior court always is in session. The right of the petitioner "to obtain right and justice freely," as guaranteed by art. 11 of the Declaration of Rights, is not impaired thereby. The superior court being a court of general jurisdiction, there is nothing to prevent the respondents, in the exercise of their discretion, from hearing election petitions where the public interests require.

(g) It follows from what has been said, without further discussion, that there is nothing in the challenged portions of the act which is in conflict with art. 9 of the Declaration of Rights to the effect that "all elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." The whole purpose of the act is to promote and insure the freedom of elections by discouraging the improper influence of elections and the pollution of the ballot through corrupt practices. <sup>Election—qualification—corrupt practices.</sup>

(h) The contention that the petitioner is denied the equal protection of the laws is untenable. It is ele-

mentary that the general court may make reasonable classifications in selecting the subjects of legislation and determining what shall be included within designated inhibitions. Such classification does not violate the constitutional requirement for equal protection of the laws, unless "plainly and grossly oppressive and unequal, or contrary to common right." *Oliver v. Washington Mills*, 11 Allen, 268, 279. A classification, general in its nature, will not be held to be unequal when there appears to be reasonable ground for it, but only when it seems to be simply arbitrary, based upon no sound distinction, and not founded upon any natural difference or rational discrimination. See *Com. v. Libbey*, 216 Mass. 356, 358, 49 L.R.A.(N.S.) 379, 103 N. E. 923, *Ann. Cas.* 1915B, 659; *Young v. Duncan*, 218 Mass. 346, 353, 106 N. E. 1; *Bogni v. Perotti*, 224 Mass. 152, 157, L.R.A. 1916F, 831, 112 N. E. 853; *Tax Comr. v. Putnam (Trefry v. Putnam)* 227 Mass. 522, L.R.A. 1917F, 806, 116 N. E. 904, and cases cited in each of these decisions. It is impossible, in the nature of things, to remove from office as a consequence of corrupt practices any except those who have been elected. Disfranchisement and ineligibility to hold office attach equally to everybody convicted of the violation of the criminal provisions of the act. The circumstance that no like civil proceeding is provided against defeated

Constitutional law—equal protection—law applicable only to successful candidate.

candidates for public office does not render the act unequal in a constitutional sense. The successful perpetration of a wrong ordinarily is punished in law by a more severe penalty than a thwarted attempt to commit the same wrong. This is true even in prosecutions for crimes, although the moral turpitude may be as great in one case as in the other.

(i) There is no constitutional inequality in the provision that

election petitions shall be brought and may be heard in Suffolk county, while prosecutions for criminal violation of the Election Laws must be <sup>—venue of different proceedings.</sup> in the county where the crime is alleged to have been committed. Misdemeanors may be tried and finally disposed of in local courts, while felonies of a certain magnitude can be disposed of finally only at the county seat, even upon plea of guilty. Similar differences as to places of trial are found between the probate courts, the land court, the superior court, and the supreme judicial court sitting at nisi prius.

(j) The limitation in § 371 of the act as amended by Stat. 1914, chap. 783, § 11, excepting from its operations elections of town officers in towns of less than 10,000 inhabitants, does not impair the constitutional validity of the act. The New England town meeting system of elections and government in comparatively small communities is proverbial as one of the finest illustrations of practical democracy. The intimate knowledge that each voter in such comparatively small communities is likely to possess, touching the honesty and general qualifications of his fellows and of all candidates for <sup>—exemption of town officers.</sup> election to public office well may have been regarded as the best security against political corruption. The difference in this respect between large and small municipalities furnishes a manifestly reasonable line of demarcation. The precise point at which that line is drawn in the present instance clearly is not irrational. *Cole v. Tucker*, 164 Mass. 486, 29 L.R.A. 668, 41 N. E. 681; *Opinion of Justices*, 138 Mass. 601, 603; *Cunningham v. Cambridge*, 222 Mass. 574, 577, 111 N. E. 409, *Ann. Cas.* 1917C, 1100; *Brown's Case*, 173 Mass. 498, 53 N. E. 998; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup.

Ct. Rep. 730, 15 Am. Crim. Rep. 241; Ocampo v. United States, 234 U. S. 91, 58 L. ed. 1231, 34 Sup. Ct. Rep. 712.

(k) The act is not in derogation of the constitutional powers of the supreme judicial court. It is not necessary to discuss this subject at large. This court is recognized as the court of highest final decision by § 10 (d) of said chap. 783. It is not necessary to determine the extent or nature of the powers of this court to correct errors of law committed by the judges of the superior court, if in any case there should be an unreasonable refusal

Courts—  
constitutional  
power—  
supreme court.

to report a question to this court. This conclusion does not shake in any degree what was said by Chief Justice Shaw in *Com. v. Anthes*, 5 Gray, 185, 232-236, as to the basis in the Constitution for the supreme judicial court and the scope of its general powers. The strength of that discussion and reasoning stands unimpaired.

(l) The act is not in conflict with any provision of the Federal Constitution.

The trial by jury secured by the 7th Amendment to the Federal Constitution relates only to the courts of the United States. *Bothwell v. Boston Elev. R. Co.* 215 Mass. 467, and cases cited at page 471, L.R.A.1917F, 167, 102 N. E. 665, Ann. Cas. 1914D, 275; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

(m) Trial by jury is not essential to the due process of law secured by the 14th Amendment to the United States Constitution.

*Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 171, 38 L. ed. 398, 400, 14 Sup. Ct. Rep. 506; *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033. The instant act purports to afford to all defendants in election petitions a full and fair trial before impartial judges according to fixed laws, ap-

plicable alike to all persons similarly situated. This is a sufficient compliance with the 14th Amendment. *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894.

(n) The right to hold an elective public office is not a property right within the meaning of the 14th Amendment to the Federal Constitution. If the petitioner should be deposed from the office of mayor by act of the legislature, or by any judicial proceeding in the courts founded on such act, no property right secured by that amendment would be invaded. That was settled after great deliberation, with ample review of the authorities and a full discussion of fundamental principles, in *Taylor v. Beckham*, 178 U. S. 548, 575, 577, 44 L. ed. 1187, 1199, 1200, 20 Sup. Ct. Rep. 890; 1009; *Atty. Gen. v. Tillinghast*, 203 Mass. 539, 545, 89 N. E. 1058, 17 Ann. Cas. 449.

Constitutional  
law—due process  
—office as  
property.

(o) It was said by Chief Justice Field in *Stone v. Smith*, 159 Mass. 413, 34 N. E. 521: "It is settled that the right to vote is not one of the privileges or immunities of citizens of the United States within the meaning of art. 14 of the Amendments to the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627." It follows that the provisions of the present act as to deprivation of the right to vote and to hold office are not in contravention of the United States Constitution. *Guinn v. United States*, 238 U. S. 347, 362, 363, 59 L. ed. 1340, 1346, 1347, L.R.A. 1916A, 1124, 35 Sup. Ct. Rep. 926; *Myers v. Anderson*, 238 U. S. 368, 59 L. ed. 1349, 35 Sup. Ct. Rep. 932.

(p) It was held in *Dinan v. Swig*, 223 Mass. 516, 112 N. E. 91, that so much of Stat. 1914, chap. 783, § 10,

(*Ashley v. Three Justices*, 228 Mass. 63, 116 N. E. 961.)

as undertakes to impose upon the courts the duty of inquiry into corrupt practices of members of the general court, was contrary to chap. 1, § 3, art. 10 (and see chap. 1, § 2, art. 4), of the Constitution, which makes each branch of the general court the final judge of the returns, elections, and qualifications of its own members. It is a well settled principle of constitutional law that one part of a statute may be contrary to the Constitution, while the rest may stand as valid, provided the two parts are distinct and in their nature separable the one from the other, and are not so interwoven and mutually dependent as to require the belief that the legislature would not have enacted the one without the other.

Statute—  
invalid in part—  
validity of  
remainder.

Warren v. Charlestown, 2 Gray, 84, 98, 99; Com. v.

Petranich, 183 Mass. 217, 220, 66 N. E. 807; Berkshire County v. Cande, 222 Mass. 87, 90, 91, 109 N. E. 838; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 380, 46 L.R.A.(N.S.) 1196, 102 N. E. 619; Berea College v. Kentucky, 211 U. S. 45, 55, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; International Textbook Co. v. Pigg, 217 U. S. 91, 113, 54 L. ed. 678, 688, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103. It seems plain that the provisions as to corrupt practices of members of the general court are quite distinct and separable from the rest of the act, and have no necessary and inherent connection with its other parts. The section in question dealt with that matter differently from the way in which the act dealt with other corrupt practices. The legislature evidently recognized that they constituted two different classes of officers under the Constitution, and must be treated differently. The failure of the effort to include members of the legislature has little connection with the rest of the statute, which can stand precisely as enacted in its application to a large number of highly important offices. A similar decision

upon this point was made in *Diehl v. Totten*, 32 N. D. 131, 155 N. W. 74, Ann. Cas. 1918A, 884.

It is manifest that the election petition against the petitioner does not raise questions as to the right to free speech and freedom of the press. Although he has referred to these questions, he has not argued them at any length, and doubtless they are not open to him. *McGlue v. Essex County*, 225 Mass. 59, and cases collected at page 60, 113 N. E. 742; *Rail & River Coal Co. v. Yapple*, 236 U. S. 338, 349, 59 L. ed. 607, 615, 35 Sup. Ct. Rep. 359. It is, therefore, unnecessary to consider them. See *Adams v. Lanadon*, 18 Idaho, 483, 110 Pac. 280; *State v. Pierce*, 163 Wis. 615, 158 N. W. 696; *Ex parte Harrison*, 212 Mo. 83, 16 L.R.A.(N.S.) 950, 126 Am. St. Rep. 557, 110 S. W. 709, 15 Ann. Cas. 1.

4. It has been assumed in favor of the petitioner in the discussion thus far, but without examining critically the matter of remedy, that prohibition would be open to him. But it is plain that the fourth general point urged by him—namely, that, the subpoena having been made returnable fifteen instead of fourteen days after the filing of the petition, he cannot be held to answer the election petition—cannot properly be considered on a petition for a writ of prohibition. The principles which govern the issuance of that extraordinary writ are well settled. It will not be granted if the court or tribunal against which it is sought has jurisdiction of the cause or matter which it proposes to adjudicate. Prohibition lies only to restrain a clear excess of jurisdiction about to be committed against one who has not submitted thereto, where there is no other adequate remedy. It does not issue to correct or restrict errors or irregularities of a tribunal which is acting within its jurisdiction, although proceeding improperly in the exercise of that jurisdiction. It can be invoked to

Prohibition—  
when interven-  
ing with  
jurisdiction.



prevent a court from exercising a jurisdiction which it does not possess. It will not be granted to remedy the errors of a judicial tribunal acting within its jurisdiction, but lies only to restrain such tribunal from acting outside its jurisdiction. *Washburn v. Phillips*, 2 Met. 296, 298, 299; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Hyde Park v. Wiggin*, 157 Mass. 94, 99, 31 N. E. 693; *Tehan v. Justices of Municipal Ct.* 191 Mass. 92, 77 N. E. 313; *Welch v. Fox*, 205 Mass. 113, 91 N. E. 145; *Somerville v. Justices of Police Ct.* 220 Mass. 393, 396, 107 N. E. 937; *Re Oklahoma*, 220 U. S. 191, 208, 55 L. ed. 431, 435, 31 Sup. Ct. Rep. 426. It has been held in the application of these principles that, where a tribunal is acting under an unconstitutional statute, it may thus be restrained. *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338. It already has been pointed out that the election petition here complained of is pending before a legally constituted court, which has jurisdiction over the subject-matter. The petitioner has appeared specially in answer to the election petition and has pleaded specially the matter of which he here complains. But he brought his present petition within a few days after filing that special appearance and plea, without waiting for the superior court to pass upon its merits. It appears from the record that immediately upon the filing of

the present petition all proceedings upon the election petition were suspended. The matters set out in the special plea of the petitioner in the election petition are clearly within the jurisdiction of that court. It is provided by the Corrupt Practices Act, § 369, as amended by Stat. 1914, chap. 783, § 10 (d), that "upon an election petition the decision of the three justices of the superior court assigned as aforesaid, or of a majority of them, shall be final and conclusive upon all matters in controversy, whether interlocutory or final, and whether in matters of fact or matters of law. But the said justices, or a majority of them, may in their discretion, after a finding of facts, either of their own motion or at the request of either party, report the case to the supreme judicial court for determination by the full court." Without passing upon the scope or signification of these provisions, it is not open to question that jurisdiction of this matter is vested in the superior court. There is no suggestion that the petitioner's special plea will not be considered on its merits by the superior court and decided according to its view of the law. It is an indubitable result of well-settled principles that this point is not open to the petitioner in this proceeding. Petition dismissed.

Dismissed by the Supreme Court of the United States, November 10, 1919. (U. S. Adv. Ops. 1919-20, p. 63) 250 U. S. 652, 68 L. ed. 1190, 39 Sup. Ct. Rep. 53.

## ANNOTATION.

### Right to jury trial in proceeding for removal of public officer.

There seems to have been no decision, since the preparation of the note in 3 A.L.R. 282, with respect to the right to a jury trial in a proceeding to remove a public officer. The decision in the reported case (*ASHLEY v. WAIT*) that there is no right to a trial by jury in such a proceeding has, since the publication of that note, become final by the dismissal of proceed-

ings for review. In *Oklahoma*, it would seem from the recent case of *Phillips v. State* (1919) 75 Okla. 46, 181 Pac. 713, that proceedings for the removal of a public officer may be initiated by an accusation by the grand jury, and that a jury trial is had thereon. No question as to the right to a jury was, however, determined in that case. W. A. S.

COPPER PROCESS COMPANY, Plff. in Err.,  
v.  
CHICAGO BONDING & INSURANCE COMPANY.

*United States Circuit Court of Appeals, Third Circuit — January 5, 1920.*

(262 Fed. 66.)

**Fraud — denial of advances — fraud on bonding company.**

1. One having a contract for purchase of pig iron from a manufacturer is guilty of fraud when, in giving personal and financial aid to the manufacturer in securing a bond against breach of the contract, it assures the bonding company that it has made no advances to the manufacturer under the contract, when in fact it has permitted a large amount of its funds to be placed to the credit of the manufacturer in a bank, which fact the bank uses to aid in establishing its reliability.

[See note on this question beginning on page 1485.]

**Appeal — wrong conception of case by trial judge.**

2. When a trial judge is wrong in his conception of the issues, or of the principles of law applicable to them, his errors are likely to be many and also to be prejudicial.

**Evidence — proof of fraud.**

3. When fraud is alleged great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible.

[See 12 R. C. L. 429.]

**Fraud — how committed.**

4. Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood.

[See 12 R. C. L. 305.]

**— concealment.**

5. As a general rule, to constitute fraud by concealment or suppression of truth there must be something more than mere silence or a mere failure to disclose known facts.

[See 12 R. C. L. 306.]

**Evidence — to prove fraud — agreement for advances.**

6. Upon the question of fraud by a purchaser from a manufacturer, in denying advances under the contract to a bonding company from which it was aiding the manufacturer to secure bonds to insure performance of

the contract, an agreement between purchaser and manufacturer, under which the former had placed in bank to the credit of the latter a large amount of its own funds, is admissible in evidence.

**Trial — order of proof — proof of fraud.**

7. Upon the question of fraud on the part of a purchaser from a manufacturer in aiding the latter in defrauding a bonding company into issuing bonds to secure performance of the contract, evidence of misrepresentations by the manufacturer without the knowledge of the purchaser is admissible, before showing the purchaser's connivance in the fraud.

**Evidence — fraud — subsequent acts of parties.**

8. To show the relation between a purchaser and manufacturer at the time they are alleged to have defrauded a bonding company into executing a bond to secure performance of the contract by the manufacturer, evidence is admissible of subsequent acts between purchaser and manufacturer.

**Appeal — harmless error — effect.**

9. A judgment will not be disturbed for the erroneous admission of evidence which is harmless.

[See 2 R. C. L. 247.]

ERROR to the District Court of the United States for the Eastern District of Pennsylvania (Thompson, J.) to review a judgment in favor of defendant in consolidated actions brought to recover on five certain bonds

given by defendant to plaintiff to secure performance of five certain contracts for the delivery of pig iron. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington and Woolley, Circuit Judges, and Morris, District Judge.

Messrs. William Findlay Brown and Francis Shunk Brown, for plaintiff in error:

If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or is ignorant of facts materially affecting the risk, the creditor is not bound to seek the surety and inform him of the facts, but he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be.

Pingrey, Suretyship, 2d ed. §§ 141, 142; Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623; Loughney v. Huntsman Constr. Co. 252 Pa. 131, 97 Atl. 179; Fels v. Massachusetts Bonding & Ins. Co. 48 Pa. Super. Ct. 27; Whitcomb v. Shultz, 138 C. C. A. 510, 223 Fed. 269; Hamilton v. Watson, 12 Clark & F. 109, 8 Eng. Reprint, 1339; Pidcock v. Bishop, 3 Barn. & C. 605, 107 Eng. Reprint, 857, 5 Dowl. & R. 505, 3 L. J. K. B. 109, 27 Revised Rep. 430; North British Ins. Co. v. Lloyd, 10 Exch. 523, 156 Eng. Reprint, 545, 3 C. L. R. 264, 24 L. J. Exch. N. S. 14, 1 Jur. N. S. 45; Stone v. Compton, 5 Bing. N. C. 142, 132 Eng. Reprint, 1059, 6 Scott, 846; Barclay v. Deckerhoof, 151 Pa. 374, 24 Atl. 1067; National Surety Co. v. Lincoln County, 151 C. C. A. 555, 238 Fed. 705; Atlantic Trust & D. Co. v. Laurinberg, 90 C. C. A. 274, 163 Fed. 690; Baglin v. Title Guaranty & S. Co. 16 Fed. 356, affirmed in 102 C. C. A. 182, 178 Fed. 682; United States Fidelity & G. Co. v. United States, 102 C. C. A. 192, 178 Fed. 692; Pittsburg-Buffalo Co. v. American Fidelity Co. 135 C. C. A. 488, 219 Fed. 818; American Bonding Co. v. United States, 147 C. C. A. 300, 233 Fed. 364; United States Fidelity & G. Co. v. Golden Pressed Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623.

Fraud practised by the principal alone upon the surety will not affect the surety's liability, as no duty is imposed upon the obligee to seek out

the surety and ascertain whether it has been misled.

32 Cyc. 64; Pingrey, Suretyship, § 126; Rothermal v. Hughes, 134 Pa. 510, 19 Atl. 677; Stearns, Suretyship, § 108; Wallace v. Wilder, 13 Fed. 707; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Mason Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. ed. 1072; Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746; Kulp v. Brant, 162 Pa. 222, 29 Atl. 729.

Messrs. Layton M. Schoch and Harry S. Ambler, Jr., for defendant in error.

Woolley, Circuit Judge, delivered the opinion of the court:

These writs of error bring here for review five judgments of the district court, entered on verdict in a proceeding wherein five actions were consolidated and tried as one. The Copper Process Company was plaintiff; the Chicago Bonding & Insurance Company was defendant. The actions were on bonds of the defendant company, each for \$52,400, given the plaintiff company to assure performance by the Bird Coal & Iron Company of its undertakings in the same number of contracts between it and the copper company, for the sale and delivery of pig iron. The iron company defaulted on all five contracts. The copper company sued the bonding company on all its corresponding bonds; verdicts were rendered and judgments entered for the bonding company, whereupon the copper company sued out these writs of error.

The record is a large one; the specifications of error are fifty-nine in number. Of these, twelve are directed to the judge's charge; the remaining forty-seven concern rulings on the admission and exclusion of testimony. Whether any particular ruling or instruction involved error, and if so, whether such error was prejudicial or harmless, it is impossible to determine by considering each ruling or instruction separately and alone. It is only possible after reading the whole record in order to ascertain the real

issues and to find the theory on which the trial judge tried them. Experience shows that when a trial judge is wrong in his conception of the issues, or of the principles of law applicable to them, his errors are likely to be many and also to be prejudicial; but if, on the other hand, the trial judge has properly grasped the issues, and has tried them under applicable law, his errors are likely to be few and harmless.

On this theory of review, we shall follow the case in outline as pleaded and tried.

The copper company's statements of claim filed in the five actions are identical, except as the contracts for whose performance the several bonds were given called for pig iron deliveries in different months of the year 1917, beginning with the month of June and ending with the month of October. In each statement of claim it appears that the copper company declared on the indemnity bond of the iron company, as principal, and the bonding company, as surety, for \$52,400, alleging, first, the execution of the bond, and, second, its breach by the iron company, making the bond, by reference, a part of the pleading. The bond assures the performance of the contract in customary terms, and by reference embodies the contract. The contract provides for the purchase by the copper company and sale by the iron company of 4,000 tons of Talladega pig iron of a given analysis during a given month, at the price of \$13.10 per ton, delivered f. o. b., Talladega, Alabama, payments to be made on a given date.

The contracts bear date March 13, 1917; the bonds April 3, 1917.

Turning to the record, it appears that at the trial the copper company, to support the averments of its pleadings, formally and briefly proved the execution of the bonds, the breach of the contracts by the iron company, and the resultant damages, and rested on the liability

of the bonding company for indemnity.

The copper company has assigned but one error in the trial of its case in chief. This relates to a ruling of the trial judge in allowing the bonding company to lay grounds for contradiction. We dispose of this assignment here as involving no error.

So far, there was nothing in the case out of the ordinary. The trouble began with the bonding company's defense, and its defense began with its pleadings.

The defense of the bonding company, as pleaded, was, in the main, twofold:

First. That the contracts appended to the bonds, when sued on, were not the contracts appended to and covered by the bonds when issued; and that, in consequence, the contracts of indemnity sued on are not the contracts of indemnity which it executed and delivered.

Second. That it was induced to enter into the bonds by fraud of the iron company, with the knowledge and connivance of the copper company.

These defenses, as pleaded, were, in a word, non est factum and fraud.

To sustain the first defense, the bonding company introduced evidence tending to show that the bonds of indemnity into which it entered with the copper company did not cover contracts between the copper company and the iron company for the purchase and sale monthly, of 4,000 tons of pig iron, at \$13.10 a ton, as declared by the copper company in its pleadings; but covered, on the contrary, other contracts purported to have been entered into by the copper company and iron company, for the purchase and sale, monthly, of 2,000 tons of pig iron at \$26.20 a ton; that copies of the supposed contracts between the two companies, containing the items last given, were certified to the bonding company by the iron company, and were appended to the bonds when they were executed and delivered to the copper company; that between the time of their de-

livery and the bringing of these suits, the copies of the contracts so appended were removed from the bonds and copies of the real contracts substituted for them, during all of which time the bonds and accompanying copies of contracts were in the possession and control of the copper company. By this evidence, the bonding company offered to support its charge that there was a substitution of contracts, and that the substitution was the act of the copper company. This evidence was, of course, controverted. On this issue of substitution there was ample evidence, properly admitted under the pleadings, for a finding by the jury in favor of the bonding company. As the jury's verdict for the bonding company was based either on this issue of substituted contracts or on the next issue of fraud, the copper company is concluded by the verdict on this issue.

That the bonding company was induced to enter into its indemnifying undertakings by fraud and gross misrepresentations of the iron company is not seriously disputed by the copper company. Its position is that it was not a party to the fraud and was ignorant of the misrepresentations. In its case in chief, the bonding company, in order to sustain its defense of fraud by the iron company and connivance by the copper company, first introduced testimony of the iron company's fraud and misrepresentations, to which many of the copper company's exceptions were noted and errors assigned, and then introduced testimony to show the relation of the copper company to the iron company by the acts of their officers and to show also the part which the copper company, through its officers, took in conniving at the fraud of the iron company. Obviously, no exception can be taken to this order of establishing connivance by one party in the fraud of another.

The substance of this testimony was that the copper company was not at any time concerned in any

business other than its transactions with the iron company; and that the iron company had as its one asset an interest in an option or arrangement with Ladenburg, Thalman & Company of New York, for the operation of a blast furnace at Talladega, Alabama, which had long been out of use. When the iron company was practically without funds or tangible assets, it entered into the five contracts with the copper company on March 13, 1917, whereby it undertook to sell and deliver to the copper company, monthly, for a period of five months, 4,000 tons of pig iron at \$13.10 a ton; a price, in the Birmingham district, little, if any, above cost of production. With these contracts made, the two companies entered into another contract, referred to at the trial as the "underlying agreement," or the "Y" agreement, reciting the five contracts just mentioned, and providing, in consideration thereof, for an advance or payment by the copper company to the iron company of the sum of \$50,000, and a further sum of \$25,000, both sums to be placed to the credit of the iron company in the Commercial Trust Company at Philadelphia; the latter sum, however, to be drawn on by the iron company by voucher checks, showing that the money was to be paid for certain purposes specified in the agreement, the one pertinent to this case being "Premium on surety bond, believed to be \$2,700." This agreement, the one pertinent to this the iron company should be prevented by fire, strikes, riot, mob, or earthquake from making deliveries on the 20,000 tons of pig iron covered by the five contracts referred to, then the iron company would sell and deliver to the copper company its full production of pig iron of whatever grade and quality, at a price of \$7.50 per ton below the market price. The curious feature of this agreement is that nowhere in it is there provision for repayment or return to the copper company of the moneys it agreed to advance to the iron company.

This agreement was signed sometime in March, 1917, and in part performance the copper company placed \$75,000 in bank to the credit of the iron company.

With these contracts made and outstanding, the iron company, in carrying out its undertaking to give the copper company bonds assuring the performance of its sales contracts, applied to the bonding company for five bonds of \$52,400 each. To induce the bonding company to enter into these bonds, an officer of the iron company supplied the bonding company with certified copies of what purported to be its pig iron contracts with the copper company, which showed that the sale and delivery covered, not 4,000 tons a month at the suspiciously low price of \$13.10 a ton, as actually called for by the contracts, but 2,000 tons a month at what was then about the market price of \$26.20 a ton. On this representation, Evans, an agent of the bonding company, went to Philadelphia and met one Wilson, an insurance broker, through whom the iron company was negotiating for bonds. Evans was shown what purported to be an engineer's report of the property, and an inventory and a financial statement of the iron company. He was informed that the iron company had \$75,000 to its credit in the Commercial Trust Company (verified by letter from the depository), which was represented as money arising from the sale of stock; owned 2,511.5 acres of ore land; and possessed total assets of \$1,360,650. In addition to statements previously made by the iron company in its application for bonds, and by Wilson, the insurance broker, that no advance of any character had been made the iron company by the copper company under the contracts, an officer of the bonding company asked the secretary of the copper company, prior to the delivery of the bonds, whether his company had made any advance payments against iron deliveries under these contracts, to which the secretary replied, "Absolutely not."

To aid the iron company in carrying out its undertaking in the "Y" agreement, to obtain indemnity bonds for the protection of the copper company on the sales contracts, for which the copper company had provided \$2,700, the president and secretary of the copper company went to the bank with Wilson, who had received from the iron company a check drawn to his order for \$6,000. There the president of the copper company indorsed Wilson's \$6,000 check, and got from the bank a draft for a like sum. With the bonds prepared for signature, and with this \$6,000 draft, the secretary of the copper company accompanied Wilson to Detroit. On arriving in that city, the secretary had the draft cashed at a local bank, and turned the whole \$6,000 over to Wilson. What Wilson did with it does not appear. This large sum of money was drawn and disbursed supposedly for the payment of premiums on the bonds, when, in fact, the aggregate amount of all premiums was but \$655. Only this sum reached the bonding company. After the money had been paid Wilson, Evans, an agent of the bonding company at its Detroit office, delivered the bonds to the secretary of the copper company, in the possession of which concern they remained until suit. The bonds were executed on or about April 3.

When the transactions were reported to its home office on or about May 1, 1917, the bonding company immediately made disclaimer, and also made formal tender of the premiums paid.

The iron company breached its first contract in June; in fact, it delivered no iron under any of the five contracts. Testimony was offered and admitted of acts and conduct of officers of the copper company, following the transactions concluded by the bonding company's disclaimer and the iron company's breaches, tending to show the close relationship of the two companies and their control by the same officers. The evidence was, substantially, that the

president of the copper company assumed control of the funds of the iron company on its failure to perform its sales contracts; stopped payment on checks at his will; controlled its directorate by his nominees; and in July and August caused it to vote for his protection a bond issue of \$500,000, and notes to the amount of \$750,000.

It was in the admission of evidence tending to establish these facts that most of the court's rulings now assigned as error were made. While there is a great number of assignments of error, the errors assigned may fairly be grouped, as was done in the plaintiff's brief, according to the subject-matter to which they relate, as follows:

(1) Exception to the so-called "underlying agreement," admission of evidence relating thereto, and charge to the jury as to the effect thereof.

(2) Exceptions to admission of evidence of misrepresentations made to the bonding company by officers and agents of the iron company, without the copper company's knowledge, and charge to the jury as to the effect thereof.

(3) Exceptions to admission of evidence of subsequent transactions between the copper company and the iron company, and charge to the jury as to the effect thereof.

The record shows that the judge had a thorough grasp of the case; that he carefully kept in mind throughout the trial the precise issues made by the pleadings; and that in his rulings he was liberal in admitting testimony to sustain them. These issues and the manner in which they should be tried are nowhere better stated than by counsel for the copper company himself, when addressing the judge on an objection to an offer of testimony. He said: "The questions that arise in this case are these: First, as I understand it, were the bonds executed? Second, was there any fraud in the procurement of the bonds? Third, has there been any

variation of the terms of the contract since the bonds were executed, to release the surety? These are the three questions involved in this case, and *any evidence that directly or indirectly bears on that is entirely appropriate.*"

This statement is in accord with the practice everywhere that, when fraud is alleged, <sup>Evidence—proof of fraud.</sup> great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. Any such fact, no matter how insignificant, may be shown, provided it bears at all on the point in issue. Accordingly, it is proper to prove a party's participation in the fraud by showing what was said and done leading up to the transaction. (*DeRuiter v. DeRuiter*, 28 Ind. App. 9, (91 Am. St. Rep. 107, 62 N. E. 100) what was said and done at the time the fraud was committed (*Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116, 3 Mor. Min. Rep. 454), and, within certain limits, what was said and done after the commission of the fraud (*Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; 12 R. C. L. 429, 430, and cases).

It is of the manner in which the trial judge applied these familiar principles of law in his rulings that the copper company complains. Its most serious complaint relates to the admission in evidence of the "Y" agreement, which, it asserts, was error, first, because the agreement had no relation to the fraud and misrepresentations of the iron company; and, second, because no duty rested on the copper company voluntarily to disclose its existence or its provisions to the bonding company. This contention—which covers the first group of assignments of error—raises the question whether the copper company was guilty of fraud by suppressing facts which the bonding company was entitled to know.

Fraud may be committed by the

suppression of truth as well as by the suggestion of falsehood. 12 R. C. L. 305, and cases.

But the law distinguishes between passive concealment and active concealment, the distinction being that in active concealment there is implied a purpose or design. As a general rule, to constitute fraud by concealment or suppression of the truth,

there must be something more than mere silence, or a mere failure to disclose known facts. There must be some occasion or some circumstance which imposes on one person the legal duty to speak, in order that another dealing with him may be placed on an equal footing. Then a failure to state a material fact is equivalent to concealment of the fact, and amounts to fraud equally with an affirmative falsehood. *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291; 12 R. C. L. 305-308, and cases.

We are not prepared to say—assuming the relations of the two companies otherwise free from fraud—that, if the copper company had allowed the iron company to negotiate alone for the bonds, it would have been its duty to seek out the bonding company and inform it of the “Y” agreement. But that was not what happened. The copper company was rendering personal as well as financial aid to the iron company in securing the bonds which it exacted for its own benefit. Its officer came into direct communication with an officer of the bonding company, and discussed the bonds. In that discussion, the bonding company was endeavoring to ascertain what risks it would incur on entering into the proposed indemnifying obligations. The bonding company, speaking through an officer, asked the copper company, addressing its secretary, whether any advances had been made against the contracts it was about to assure. To that question, the copper company, through its secretary, responded: “Absolutely not.” If the secretary made that

reply (which he denied), he made it with full knowledge of the “Y” agreement.

What bearing had the “Y” agreement on the bonding company’s indemnity risks? That agreement provided for an advance by the copper company to the iron company of \$75,000. Just the character of the agreement it is difficult to define—whether an advance against contract deliveries of pig iron, an out-and-out loan of money, or a partnership contribution; at any event, the copper company paid the iron company \$75,000, and recited as a “consideration” for this payment the five sales contracts in question.

These facts appearing in the “Y” agreement itself, connected with the unusual feature that nowhere in it was there provision for the repayment or return of the money so advanced, show several things. Linking the sales contracts to the “Y” agreement by express recital, and making the sales contracts a consideration for the “Y” agreement, show an intimate relation between them. But for the existence of the five sales contracts there would have been no reason for making the “Y” agreement. Whatever its character, whether an advance against iron deliveries, or a loan, the copper company was in position, when monthly deliveries began, to deduct at will from its monthly payments the sum or parts of the sum the iron company owed it. If, in the last analysis, the advance was in the nature of a partnership contribution, it was even more material to the risk. With a contract outstanding, having all these provisions and possible constructions, the copper company, when asked by the bonding company concerning advances, was under legal obligation to tell about it. That question was the *circumstance* that raised in the copper company a legal duty to speak, and, on its failure, transformed what otherwise might have been passive silence into active concealment. The bonding company

Fraud—how committed.

—concealment.

—denial of advances—  
fraud on bonding company.



was seeking facts affecting the degree of its responsibility. The "Y" agreement was such a fact. It was, therefore, the legal duty of the copper company, when responding to the inquiry, to disclose it and to disclose it fully. The question having been asked for the purpose of ascertaining the risks involved in the situation, any equivocal, evasive, or misleading answer, calculated to convey a false impression, even though literally true as far as it went, was fraud. *Pidcock v. Bishop*, 3 Barn. & C. 605, 107 Eng. Reprint, 857, 5 Dowl. & R. 505, 3 L. J. K. B. 109, 27 Revised Rep. 430, 12 R. C. L. 309-311, and cases. It will not do for the copper company to say that it answered correctly when its secretary said, on his own construction of the instrument, that no advances had been made against iron deliveries. Even if this be its correct construction, the answer given was but a half truth, for the "Y" agreement was a fact which showed the financial and contractual relations of the two companies. As such, it was material to the risks which the bonding company would incur in assuring to one the undertaking of the other. Failure to disclose this fact, under the circumstance of being asked for it, was an active concealment of the fact. As the fraudulent character of the concealment was provable only by the admission in evidence of the thing

**Evidence—to prove fraud—agreement for advances.**

concealed, we are of opinion that admission of the agreement was not error, and that the agreement, together with the circumstance of its concealment, constituted evidence sufficient to sustain a finding of fraud by the jury.

In the second group of exceptions we find no error in the admission of

evidence of misrepresentations made by the iron company without the plaintiff's knowledge. This, because it was necessary, first, to show the iron company's fraud and misrepresentations before it was possible to show the copper company's connivance therein. Evidence of connivance was present, and was sufficient, we think, to submit to the jury.

**Trial—order of proof—proof of fraud.**

In the third group of exceptions, covering the admission of evidence of subsequent acts of the copper company and the iron company, we find no error. The admission of evidence of this kind must ordinarily be guarded, but it was admissible in this case for the purpose of showing by its outgrowth what was the relation of the two companies at the time the fraud was committed. *Salmon v. Richardson*, 30 Conn. 360, 379, 79 Am. Dec. 255.

**Evidence—fraud—subsequent acts of parties.**

In our review of this entire record, we have considered singly and in groups the rulings of the court assigned as error, and find only a few open to question, any one of which, if technically error, is harmless error. We recognize that in the theory of the law, erroneous rulings in jury trials are presumptively injurious, yet the tendency is to enlarge the sphere of the trial judge in the admission

**Appeal—harmless error—effect.**

and exclusion of testimony, and not to disturb the judgment when it affirmatively appears that his rulings, if erroneous, were harmless. *Fillippon v. Albion Vein Slate Co.* 250 U. S. 76, 63 L. ed. 853, 39 Sup. Ct. Rep. 435; *Norfolk & W. R. Co. v. Gillespie*, 139 C. C. A. 552, 224 Fed. 316, 320, 11 N. C. C. A. 981.

The judgment below is affirmed.

## ANNOTATION.

**Obligee's concealment of facts or evasive answers as fraud against surety.**

- I. Introduction, 1485.
- II. Statement of rules in general:
  - a. Duty to disclose, 1485.
  - b. Absence of duty to disclose; nondisclosure not amounting to fraud, 1490.
  - c. Applicability to sureties for consideration, 1498.
- III. Opportunity for disclosure, 1494.
- IV. Duty of surety to make inquiry; obligee's duty when inquiry is made, or information volunteered, 1495.

**I. Introduction.**

The present annotation treats of the general principles relating to the discharge of sureties through the concealment or nondisclosure of information by the obligee, and shows the application of these principles in various classes of contracts of suretyship. It does not cover cases, generally, dealing with fidelity bonds and insurance, or security for agents and employees, except as these cases are of general value on the principles of fraudulent concealment, the application of the principles herein considered to fidelity bonds and insurance being reserved for future annotation. Fraudulent concealment, as herein considered, should be distinguished from the making of direct positive affirmations which are untrue. The subject under annotation is a phase of the question of release of the surety by the fraud of the obligee; another phase, which is not therein treated, being affirmative assertions, by word or conduct, which prove to be false. The annotation does not cover such cases as *National Provincial Bank v. Glanusk* [1913] 3 K. B. (Eng.) 385, 82 L. J. K. B. N. S. 1033, 109 L. T. N. S. 108, 29 Times L. R. 593, involving the question of the duty of the obligee to make disclosures to the surety of facts arising after the making of the contract of suretyship.

As a matter of convenience in following the practice of the courts, the terms "discharged" and "released" are used in the annotation to indicate

- V. Motive for nondisclosure, 1497.
- VI. Nature of information concealed, 1497.
- VII. Illustrations:
  - a. Matters relating to solvency and credit of principal in general, 1498.
  - b. Contractors' bonds, 1502.
  - c. Contracts of sale, 1503.
  - d. Loans; usury or secret commission, 1505.
  - e. Composition agreements, 1507.
  - f. Miscellaneous, 1507.

that the surety is not liable on the contract, although the terms are more appropriately used, it would seem, where there was originally a liability, rather than where, as in the class of cases under consideration, the contract, if void or voidable, is so in its inception, and the surety is never liable thereon.

**II. Statement of rules in general.****a. Duty to disclose.**

It is well settled that fraud on the part of the obligee such as will avoid the contract of suretyship is not confined to positive affirmations which are untrue, but may consist in the concealment or withholding by him from the surety, at the time the contract of suretyship is executed, of material facts affecting the risk, which the obligee has the opportunity, and which it is his duty, to disclose.

**United States.**—*Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699 (see also *Rose's Notes* to this case); *First Nat. Bank v. Terry* (1905) 135 Fed. 621; *COPPER PROCESS Co. v. CHICAGO BONDING & INS. Co.* (reported herewith), ante, 1477.

**Alabama.**—*Evans v. Keeland* (1846) 9 Ala. 42.

**California.**—*Guardian Fire & Life Assur. Co. v. Thompson* (1885) 68 Cal. 208, 9 Pac. 1; *Union Oil Co. v. Pacific Surety Co.* (1920) — Cal. —, 187 Pac. 14.

**Colorado.**—*First Nat. Bank v. Clark* (1915) 59 Colo. 455, 149 Pac. 612.

**Connecticut.**—*Doughty v. Savage*

(1859) 28 Conn. 146; Watertown Sav. Bank v. Mattoon (1905) 78 Conn. 388, 62 Atl. 722.

**Delaware.**—Pickering v. Day (1867) 3 Houst. 474, 95 Am. Dec. 291.

**Georgia.**—Lewis v. Brown (1892) 89 Ga. 115, 14 S. E. 881; Harrington v. Findley (1892) 89 Ga. 385, 15 S. E. 483; Howard v. Johnson (1892) 91 Ga. 319, 18 S. E. 132; Denton v. Butler (1896) 99 Ga. 264, 25 S. E. 624; Prather v. Smith (1897) 101 Ga. 283, 28 S. E. 857; Vaughan v. Farmers & M. Bank (1916) 146 Ga. 51, 90 S. E. 478; Whilden v. Milledgeville Bkg. Co. (1907) 3 Ga. App. 69, 59 S. E. 336; Hancock v. Bank of Tifton (1909) 6 Ga. App. 678, 65 S. E. 784; Morris v. Reed (1914) 14 Ga. App. 729, 82 S. E. 314; Bank of Omega v. Ford (1917) 20 Ga. App. 496, 93 S. E. 106; Duckett v. Martin (1919) 28 Ga. App. 630, 99 S. E. 151.

**Illinois.**—Booth v. Storrs (1874) 75 Ill. 438; Comstock v. Gage (1878) 91 Ill. 328; Roper v. Sangamon Lodge (1879) 91 Ill. 518, 33 Am. Rep. 60; Drabek v. Grand Lodge, B. S. B. S. (1887) 24 Ill. App. 82.

**Indiana.**—Wilson v. Monticello (1882) 85 Ind. 10; Springfield Engine & Thresher Co. v. Park (1891) 3 Ind. App. 173, 29 N. E. 444; Fasanacht v. Emsing Gagen Co. (1897) 18 Ind. App. 80, 63 Am. St. Rep. 322, 46 N. E. 45, 47 N. E. 480; Indiana & O. Live Stock Ins. Co. v. Bender (1904) 32 Ind. App. 287, 69 N. E. 681.

**Iowa.**—Miller v. Gardner (1878) 49 Iowa, 234; Conger v. Bean (1882) 58 Iowa, 321, 12 N. W. 284; Klamman v. Malvin (1883) 61 Iowa, 752, 16 N. W. 356; Bank of Monroe v. Anderson Bros. Min. & R. Co. (1885) 65 Iowa, 692, 22 N. W. 929, later appeal (1887) 72 Iowa, 750, 32 N. W. 669; Benton County Sav. Bank v. Boddicker (1898) 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 316, 75 N. W. 632; Barnes v. Century Sav. Bank (1910) 149 Iowa, 367, 128 N. W. 541; Lingenfelter Bros. v. Bowman (1912) 156 Iowa, 649, 137 N. W. 946; Selma Sav. Bank v. Harlan (1914) 167 Iowa, 673, 149 N. W. 882; Sherman v. Smith (1918) — Iowa, —, 169 N. W. 216.

**Kentucky.**—Peck v. Durett (1840) 9

Dana, 486; Burks v. Wonterline (1869) 6 Bush, 20; Graves v. Lebanon Nat. Bank (1873) 10 Bush, 23, 19 Am. Rep. 50; Hubble v. First Nat. Bank (1888) 9 Ky. L. Rep. 766; First Nat. Bank v. Mattingly (1892) 92 Ky. 650, 18 S. W. 940; Gano v. Farmers' Bank (1898) 103 Ky. 508, 82 Am. St. Rep. 596, 45 S. W. 519; Smith v. First Nat. Bank (1899) 107 Ky. 257, 53 S. W. 648; Julius Winter, Jr. & Co. v. Forrest (1911) 145 Ky. 581, 140 S. W. 1005.

**Louisiana.**—See Lachman v. Block (1895) 47 La. Ann. 505, 28 L.R.A. 255, 17 So. 153 (on rehearing judgment was set aside on other grounds, without determination of point).

**Maine.**—Franklin Bank v. Cooper (1853) 36 Me. 179, later appeal in (1855) 39 Me. 542; Bryant v. Crosby (1853) 36 Me. 562, 58 Am. Dec. 767; Franklin Bank v. Stevens (1855) 39 Me. 532.

**Maryland.**—Lake v. Thomas (1897) 84 Md. 608, 36 Atl. 437; Wright v. German Brewing Co. (1906) 103 Md. 377, 63 Atl. 807.

**Michigan.**—Beath v. Chapoton (1898) 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806.

**Minnesota.**—Traders' Ins. Co. v. Herber (1897) 67 Minn. 106, 69 N. W. 701; Powers Dry-Goods Co. v. Harlin (1897) 68 Minn. 193, 64 Am. St. Rep. 460, 71 N. W. 16; Capital F. Ins. Co. v. Watson (1899) 76 Minn. 387, 77 Am. St. Rep. 657, 79 N. W. 601.

**Missouri.**—Third Nat. Bank v. Owen (1890) 101 Mo. 558, 14 S. W. 632; Home Sav. Bank v. Traube (1878) 6 Mo. App. 221; Harrison v. Lumbermen & M. Ins. Co. (1879) 8 Mo. App. 87.

**Montana.**—Palatine Ins. Co. v. Crittenden (1896) 18 Mont. 413, 45 Pac. 555.

**New Mexico.**—Wells, F. & Co's Exp. v. Walker (1897) 9 N. M. 170, 50 Pac. 353, 923, later appeal in (1898) 9 N. M. 456, 54 Pac. 875; Putney v. Schmidt (1911) 16 N. M. 400, 120 Pac. 720.

**New York.**—Howe Mach. Co. v. Farrington (1880) 82 N. Y. 121; Bestwick v. Van Voorhis (1883) 91 N. Y. 353; Farmers' Nat. Bank v. Van Slyke (1888) 49 Hun, 7, 1 N. Y. Supp. 503;

United States L. Ins. Co. v. Salmon (1895) 91 Hun, 535, 36 N. Y. Supp. 380, affirmed without opinion in (1898) 157 N. Y. 682, 51 N. E. 1094; Damon v. Empire State Surety Co. (1914) 161 App. Div. 875, 146 N. Y. Supp. 996.

North Dakota.—Ætna Indemnity Co. v. Schroeder (1903) 12 N. D. 110, 95 N. W. 436.

Ohio.—Dinsmore v. Tidball (1878) 34 Ohio St. 411; Smith v. Josselyn (1884) 40 Ohio St. 409; Commonwealth Bldg. & L. Co. v. Fromlet (1897) 7 Ohio N. P. 194, 6 Ohio S. & C. P. Dec. 184.

Pennsylvania.—Frisch v. Miller (1847) 5 Pa. 310; Wayne v. Commercial Nat. Bank (1866) 52 Pa. 343; Laver Brewing Co. v. Riley (1900) 195 Pa. 449, 46 Atl. 71; Park Paving Co. v. Kraft (1918) 262 Pa. 178, 105 Atl. 39; Bolz v. Stuhl (1896) 4 Pa. Super. Ct. 52; Goebel Brewing Co. v. McLean (1900) 15 Pa. Super. Ct. 38.

Rhode Island.—Atlas Bank v. Brownell (1869) 9 R. I. 169, 11 Am. Rep. 231.

South Carolina.—Wilmington, C. & A. R. Co. v. Ling (1882) 18 S. C. 116; Greenville-Carolina Power Co. v. United States Fidelity & G. Co. (1909) 83 S. C. 90, 64 S. E. 518, 964.

Tennessee.—Johnson v. Ivey (1867) 4 Coldw. 608, 94 Am. Dec. 206; Bradley v. Kesse (1867) 5 Coldw. 223, 94 Am. Dec. 246; Domestic Sewing Mach. Co. v. Jackson (1885) 15 Lea, 418; Hebert v. Lee (1906) 118 Tenn. 183, 12 L.R.A.(N.S.) 247, 121 Am. St. Rep. 989, 101 S. W. 175, 11 Ann. Cas. 1029.

Texas.—Screwmen's Benev. Asso. v. Smith (1888) 70 Tex. 168, 7 S. W. 793.

Utah.—Jungk v. Holbrook (1897) 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305.

Vermont.—Richmond v. Standclift (1842) 14 Vt. 258; Connecticut General L. Ins. Co. v. Chase (1900) 72 Vt. 176, 53 L.R.A. 510, 47 Atl. 825.

Virginia.—Atlantic Trust Co. v. Union Trust & T. Corp. (1909) 110 Va. 286, 135 Am. St. Rep. 937, 67 S. E. 182.

West Virginia.—Warren v. Branch (1879) 15 W. Va. 21.

Wisconsin.—Ætna L. Ins. Co. v. Mabbett (1864) 18 Wis. 667; Remington Sewing Mach. Co. v. Kezertee

(1880) 49 Wis. 409, 5 N. W. 809; Brillion Lumber Co. v. Barnard (1907) 131 Wis. 284, 111 N. W. 483.

England.—Cecil v. Plaistow (1793) 1 Anstr. 203, 145 Eng. Reprint, 845; Pidcock v. Bishop (1825) 3 Barn. & C. 605, 107 Eng. Reprint, 857, 5 Dowl. & R. 505, 3 L. J. K. B. 109, 27 Revised Rep. 430; Stone v. Compton (1838) 5 Bing. N. C. 142, 132 Eng. Reprint, 1059, 6 Scott. 846; Pendlebury v. Walker (1841) 4 Younge & C. Exch. 424, 160 Eng. Reprint, 1072; Railton v. Mathews (1844) 10 Clark & F. 934, 8 Eng. Reprint, 993; Hamilton v. Watson (1845) 12 Clark & F. 109, 8 Eng. Reprint, 1339; Willis v. Willis (1850) 17 Sim. 218, 60 Eng. Reprint, 1112, 14 Jur. 404; Stokesleigh Parish v. Stoddart (1853) 2 Week. Rep. 14; Owen v. Homan (1853) 4 H. L. Cas. 997, 10 Eng. Reprint, 752, 17 Jur. 861, 1 Eq. Rep. 370; Small v. Currie (1853) 2 Drew, 102, 61 Eng. Reprint, 657, appeal in (1854) 5 De G. M. & G. 141, 43 Eng. Reprint, 824, 2 Eq. Rep. 639, 23 L. J. Ch. N. S. 746, 18 Jur. 731; Wythes v. Labouchere (1859) 3 De G. & J. 593, 44 Eng. Reprint, 1397, 5 Jur. N. S. 499, 7 Week. Rep. 271; Pledge v. Buss (1860) Johns. V. C. 663, 70 Eng. Reprint, 585, 6 Jur. N. S. 695; Blest v. Brown (1862) 3 Giff. 450, 66 Eng. Reprint, 486, 8 Jur. N. S. 187, 5 L. T. N. S. 663, affirmed in (1862) 8 Jur. N. S. 602, 4 De G. F. & J. 367, 45 Eng. Reprint, 1225, 6 L. T. N. S. 620, 10 Week. Rep. 569; Lee v. Jones (1864) 17 C. B. N. S. 482, 144 Eng. Reprint, 194, 34 L. J. C. P. N. S. 131, 11 Jur. N. S. 81, 12 L. T. N. S. 122, 13 Week. Rep. 318; Greenfield v. Edwards (1865) 2 De G. J. & S. 582, 46 Eng. Reprint, 501, 11 Jur. N. S. 419, 12 L. T. N. S. 411, 13 Week. Rep. 668; Stiff v. Eastbourne (1867) 17 Week. Rep. 68, 19 L. T. N. S. 408, on appeal (1869) 17 Week. Rep. 428, 20 L. T. N. S. 339; Phillips v. Foxall (1872) L. R. 7 Q. B. 666, 41 L. J. Q. B. N. S. 293, 27 L. T. N. S. 231, 20 Week. Rep. 900; Davies v. London & P. M. Ins. Co. (1878) L. R. 8 Ch. Div. 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794; Mackreth v. Walmesley (1884) 51 L. T. N. S. 19, 32 Week. Rep. 819; Welton v. Somes (1888) 5 Times L. R.

46; *Seaton v. Heath* [1899] 1 Q. B. 782, 68 L. J. Q. B. N. S. 631, 47 Week. Rep. 487, 80 L. T. N. S. 579, 15 Times L. R. 297, 4 Com. Cas. 193, per *Romer, L. J.*, reversed on other grounds in [1900] A. C. 135; *London General Omnibus Co. v. Holloway* [1912] 2 K. B. 72, 81 L. J. K. B. N. S. 603, 106 L. T. N. S. 502, Ann. Cas. 1912D, 1280.

**Scotland.**—*Smith v. Bank of Scotland* (1818) 1 Dow, P. C. 272, 3 Eng. Reprint, 697.

**Canada.**—*Cashin v. Perth* (1859) 7 Grant, Ch. (U. C.) 340; *Cunningham v. Buchanan* (1864) 10 Grant, Ch. (U. C.) 523; *East Zorra Twp. v. Douglas* (1870) 17 Grant, Ch. (U. C.) 462; *Peers v. Oxford County* (1870) 17 Grant, Ch. (U. C.) 472; *British Empire, etc., Assur. Co. v. Luxton* (1893) 9 Manitoba L. R. 169; *Niagara Dist. Fruit Growers Stock Co. v. Stewart* (1896) 26 Can. S. C. 629.

Very little said by the obligee which ought not to have been said, and very little left unsaid which ought to have been said to a surety, are sufficient to discharge the latter, especially where there is no consideration for the contract of suretyship. *Davies v. London & P. M. Ins. Co.* (1878) L. R. 8 Ch. Div. (Eng.) 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794.

It is a well-known rule of equity that if the creditor conceals from one about to become a surety any material facts, whereby his risk is increased, and suffers the surety to enter into the contract under a false impression as to the real state of facts, such concealment will amount to a fraud, and will release the surety. *Springfield Engine & Thresher Co. v. Park* (1891) 3 Ind. App. 173, 29 N. E. 444.

And in *Home Sav. Bank v. Traube* (1878) 6 Mo. App. 221, it was said: "To accept a surety known to be acting on a belief that there are no unusual circumstances by which his risk is materially increased, whilst the party thus accepting him knows that there are such circumstances and withholds the knowledge from the surety, is a legal fraud by which the surety is discharged."

If the circumstances are such that

it can be clearly inferred that the surety imposed confidence in the obligee, and the latter suffered the former to act under a material delusion, the contract of suretyship will be avoided. *Harrison v. Lumberman & M. Ins. Co.* (1879) 8 Mo. App. 37.

It is a clear and well-settled principle, said the court in *Doughty v. Savage* (1859) 28 Conn. 146, that a security given by a surety is voidable on the ground of fraud, if there is, with the knowledge or assent of the creditor, such a concealment from the surety of the transaction between the creditor and his debtor that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased. The rule laid down in this case was approved in *Powers Dry-Goods Co. v. Harlin* (1897) 68 Minn. 193, 64 Am. St. Rep. 460, 71 N. W. 16.

It is elementary that fraudulent concealment of material matters is equivalent to affirming a fact that does not exist; and this doctrine applies quite strictly in favor of sureties. *Sherman v. Smith* (1918) — Iowa, —, 169 N. W. 216.

To accept a surety known to be acting on the belief that there are no unusual circumstances by which his risk will be materially increased, while the party thus accepting knows there are such circumstances and withholds the knowledge from the surety, although having suitable opportunity to communicate it, will release the surety. *Franklin Bank v. Cooper* (1853) 36 Me. 179, later appeal in (1855) 39 Me. 542.

The rule that concealment by the obligee of material facts affecting the risk may amount to fraud, discharging the surety, seems especially applicable where the circumstances are such as raise, or should raise, a suspicion in the mind of the obligee that the principal has obtained the surety's signature by fraud. In this connection, attention is called to the fact that there are some cases which approach somewhat closely the class of cases herein considered, but which

lead beyond the scope of the present annotation. Reference is made to those cases involving the release of the surety who, to the knowledge of the obligee, occupies a confidential relationship to the principal, and is induced to sign the contract by the principal's undue influence or fraud. For example, see *Canada Furniture Co. v. Stephenson* (1910) 19 *Manitoba L. R.* 618, where a wife signed as surety for her husband, at his request, knowing that the document which she signed was in some way one purporting to assist him in his business, and without asking any questions about it, and the obligee knew that she was not at that time in a condition physically to take much interest in any document presented to her for signature.

The rule was laid down in *Warren v. Branch* (1879) 15 *W. Va.* 21, that if the dealings are such as clearly to lead the creditor, if a reasonable man, to believe that the principal must have used fraud in procuring the surety to enter into the contract, and such fraud has been used, it will vitiate the contract as to the surety, although actual fraud is not traced to the creditor.

If the obligee knows, or has good grounds for believing, that the surety is being deceived or misled, and that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and the obligee has opportunity, before accepting the undertaking, to inform the surety of such facts, good faith and fair dealing demand that he should make the disclosure; and if he accepts the contract without doing so, the surety may afterward avoid it. *Bank of Monroe v. Anderson Bros. Min. & R. Co.* (1885) 65 *Iowa*, 692, 22 *N. W.* 929.

See, in this connection, *Fassnacht v. Emsing Gagen Co. (Ind.)* under VII. c, *infra*, where the obligee in a sales contract knew that the surety was acting under a misunderstanding.

So, although a creditor may not be bound to inquire in every case under what circumstances the debtor has obtained the concurrence of a surety, yet if the dealings are such as fairly

to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, the creditor is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject; if one abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaged is tainted with fraud, his want of knowledge of the fraud will afford no excuse. *Owen v. Homan* (1853) 4 *H. L. Cas.* 997, 10 *Eng. Reprint*, 752, 17 *Jur.* 861, 1 *Eq. Rep.* 370.

And in *Farmers' Nat. Bank v. Van Slyke* (1888) 49 *Hun*, 7, 1 *N. Y. Supp.* 508, the court said: "Where a person taking security knows the facts and is personally present, having an opportunity to inform the proposed surety, and having reason to believe that the proposed surety does not know the facts and is being deceived and defrauded into becoming such, it is his duty to post him, and the acceptance of him as surety or indorser under such circumstances would be a fraud which would avoid the contract."

The surety is discharged where the agreement guaranteed, because of omissions or otherwise, is materially different from that which the written contract executed by him purports on its face, and the surety is ignorant of the real contract. *Union Oil Co. v. Pacific Surety Co.* (1920) — *Cal.* —, 187 *Pac.* 14; *Damon v. Empire State Surety Co.* (1914) 161 *App. Div.* 875, 146 *N. Y. Supp.* 996; *Park Paving Co. v. Kraft* (1918) 262 *Pa.* 178, 105 *Atl.* 39; *Atlantic Trust Co. v. Union Trust & T. Corp.* (1909) 110 *Va.* 286, 185 *Am. St. Rep.* 937, 67 *S. E.* 182.

And even though, before the execution of the contract by the surety, he and the obligee have no direct dealings, it seems that the circumstances may be such as to require the obligee to disclose to the surety the real situation, where the obligee knows that the contract, the performance of which is secured, is, on its face, calculated to mislead the surety to his prejudice. This appears to be the situation in

**Damon v. Empire State Surety Co.** (1914) 161 App. Div. 875, 146 N. Y. Supp. 996, *supra*, where the contract purported an agreement made as of the date of the contract, whereas it was but a renewal agreement of a previous contract, as to which the principal was in default.

The court in **Jungk v. Holbrook** (1897) 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305, approved the rule laid down in **Brandt on Suretyship**, that "one who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know that such will be his understanding, and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risks will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

*b. Absence of duty to disclose; nondisclosure not amounting to fraud.*

To discharge the surety on the ground that the obligee has concealed or withheld from him material facts affecting the risk, there must be a duty on the part of the obligee to make disclosure, it being well settled that, unless this duty arises under the circumstances of the particular case, the surety will not be released from his obligation by the mere fact that he did not have information which the obligee possessed, affecting the risk, and which would have probably prevented his signing the contract; in other words, there is nothing in the mere nature of the contract of suretyship itself which requires the obligee to disclose to the proposed surety all the material facts affecting the risk.

**United States.**—**Magee v. Manhattan L. Ins. Co.** (1876) 92 U. S. 93, 23 L. ed. 699 (see also *Rose's Notes* to this case); **Frelinghuysen v. Baldwin** (1883) 16 Fed. 452; **Citizens' Trust & G. Co. v. Globe & R. F. Ins. Co.** (1915) 143 C. C. A. 446, 229 Fed. 326, Ann. Cas. 1917C, 416; **Whitcomb v. Shultz** (1915) 138 C. C. A. 510, 223 Fed. 268, petition for a writ of certiorari denied in (1915) 238 U. S. 682, 59 L. ed. 1493, 35 Sup. Ct. Rep. 937; **COPPER PROCESS CO. v. CHICAGO BONDING & INS. CO.** (reported herewith) *ante*, 1477.

**Alabama.**—**Van Arsdale v. Howard** (1843) 5 Ala. 596.

**Connecticut.**—**Watertown Sav. Bank v. Mattoon** (1905) 78 Conn. 388, 62 Atl. 622.

**Delaware.**—**Pickering v. Day** (1867) 3 Houst. 474, 95 Am. Dec. 291.

**Illinois.**—**Booth v. Storrs** (1874) 75 Ill. 438; **Roper v. Sangamon Lodge** (1879) 91 Ill. 518, 33 Am. Rep. 60.

**Indiana.**—**Coats v. McKee** (1886) 26 Ind. 223; **Ham v. Greve** (1870) 34 Ind. 18; **Stedman v. Boone** (1875) 49 Ind. 469.

**Iowa.**—**Home Ins. Co. v. Holway** (1881) 55 Iowa, 571, 39 Am. Rep. 179, 8 N. W. 457; **Bank of Monroe v. Anderson Bros. Min. & R. Co.** (1885) 65 Iowa, 692, 22 N. W. 929, later appeal in (1887) 72 Iowa, 750, 32 N. W. 669; **Sherman v. Harbin** (1904) 125 Iowa, 174, 100 N. W. 629; **Selma Sav. Bank v. Harlan** (1914) 167 Iowa, 673, 149 N. W. 882.

**Kentucky.**—**Burks v. Wontersline** (1869) 6 Bush, 20; **Hubble v. First Nat. Bank** (1888) 9 Ky. L. Rep. 766; **Smith v. First Nat. Bank** (1899) 107 Ky. 257, 53 S. W. 648; **Sebald v. Citizens' Deposit Bank** (1907) 31 Ky. L. Rep. 1244, 14 L.R.A.(N.S.) 376, 105 S. W. 130.

**Louisiana.**—**Tooke v. Burke** (1917) 141 La. 746, 75 So. 668.

**Maryland.**—**Lake v. Thomas** (1897) 84 Md. 624, 36 Atl. 437; **Wright v. German Brewing Co.** (1906) 103 Md. 377, 63 Atl. 807.

**Mississippi.**—**Southwestern Co. v. Wynnegar** (1916) 111 Miss. 412, 71 So. 737.

**Missouri.**—**Harrison v. Lumbermen & M. Ins. Co.** (1879) 8 Mo. App. 37.

**Montana.**—Palatine Ins. Co. v. Crittenden (1896) 18 Mont. 413, 45 Pac. 555.

**New York.**—Western New York L. Ins. Co. v. Clinton (1876) 66 N. Y. 326; Howe Mach. Co. v. Farrington (1880) 82 N. Y. 121; Bostwick v. Van Voorhis (1883) 91 N. Y. 353.

**North Dakota.**—Ætna Indemnity Co. v. Schroeder (1903) 12 N. D. 110, 95 N. W. 436.

**Ohio.**—Higgins v. Drucker (1901) 22 Ohio C. C. 112, 12 Ohio C. D. 220.

**Pennsylvania.**—Goebel Brewing Co. v. McLean (1900) 15 Pa. Super. Ct. 38.

**Rhode Island.**—Atlas Bank v. Brownell (1869) 9 R. I. 169, 11 Am. Rep. 231.

**South Carolina.**—Greenville-Carolina Power Co. v. United States Fidelity & G. Co. (1909) 83 S. C. 90, 64 S. E. 518, 964.

**Tennessee.**—Hubbard v. Fravell (1883) 12 Lea, 304; Domestic Sewing Mach. Co. v. Jackson (1885) 15 Lea, 418.

**Texas.**—Screwmen's Benev. Asso. v. Smith (1888) 70 Tex. 168, 7 S. W. 798; United States Fidelity & G. Co. v. Means & F. Iron Works (1910) — Tex. Civ. App. —, 132 S. W. 536.

**Virginia.**—Atlantic Trust & D. Co. v. Union Trust & Title Corp. (1909) 110 Va. 286, 135 Am. St. Rep. 937, 67 S. E. 182.

**Washington.**—Oregon Nat. Bank v. Gardner (1895) 13 Wash. 154, 42 Pac. 545.

**West Virginia.**—Warren v. Branch (1879) 15 W. Va. 21.

**Wisconsin.**—Ætna L. Ins. Co. v. Mabbett (1864) 18 Wis. 667.

**England.**—Hamilton v. Watson (1845) 12 Clark & F. 109, 8 Eng. Reprint, 1839; Stokesleigh Parish v. Stoddart (1853) 2 Week. Rep. 14; North British Ins. Co. v. Lloyd (1854) 10 Exch. 523, 156 Eng. Reprint, 545, 3 C. L. R. 264, 24 L. J. Exch. N. S. 14, 1 Jur. N. S. 45; Wythes v. Labouchere (1859) 3 De G. & J. 593, 44 Eng. Reprint, 1897, 5 Jur. N. S. 499, 7 Week. Rep. 271; Pledge v. Buss (1860) Johns. V. C. 663, 70 Eng. Reprint, 585, 6 Jur. N. S. 695; Greenfield v. Edwards (1865) 2 De G. J. & S. 582, 46 Eng.

Reprint, 501, 11 Jur. N. S. 419, 12 L. T. N. S. 411, 18 Week. Rep. 668; Davies v. London & P. M. Ins. Co. (1878) L. R. 8 Ch. Div. 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794; Welton v. Somes (1888) 5 Times L. R. 46; Seaton v. Heath [1899] 1 Q. B. 782, 68 L. J. Q. B. N. S. 631, 47 Week. Rep. 487, 80 L. T. N. S. 579, 15 Times L. R. 297, 4 Com. Cas. 193, per Romer, L. J., reversed on other grounds in [1900] A. C. 135.

**Ireland.**—Roper v. Cox (1882) Ir. L. R. 10 C. L. 200.

**Scotland.**—Royal Bank v. Green-shields [1914] S. C. 259, 51 Scot. L. R. 260 [1914] 1 Scot. L. T. 74, Scots Dig. 1904-14, col. 142, Mews, Eng. Case Law Dig. 1911-15, col. 1213.

**Canada.**—Cunningham v. Buchanan (1864) 10 Grant, Ch. (U. C.) 523; East Zorra Twp. v. Douglas (1870) 17 Grant, Ch. (U. C.) 462; Peers v. Oxford County (1870) 17 Grant, Ch. (U. C.) 472; British Empire, etc., Assur. Co. v. Luxton (1893) 9 Manitoba L. R. 169; Niagara Dist. Fruit Growers Stock Co. v. Stewart (1896) 26 Can. S. C. 629.

We think, said the court in *Atlas Bank v. Brownell* (1869) 9 R. I. 169, 11 Am. Rep. 231, that it is going too far to say that the creditor is in all cases, and without being inquired of, bound to communicate everything that it is important for the surety to know, and that would increase his risk; that the safe rule is that, to avoid the bond, there must be, on the part of the creditor, a fraudulent concealment or withholding of something material for the surety to know; and that ordinarily, the concealment, to make void a contract, must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent.

So, it was said in *Harrison v. Lumbermen & M. Ins. Co.* (1879) 8 Mo. App. 37, that although passages not infrequently occur in the authorities apparently supporting the statement that the duty of the obligee is to disclose to the surety every fact that materially affects the latter's risk, or



that is of a nature to prevent a prudent man from undertaking the obligation, this is certainly not the rule.

It is well settled that, to discharge the surety on the ground of the concealment or withholding of information by the obligee, the concealment must in fact or in law be fraudulent, and unless the nondisclosure amounts to fraud the surety is not released. This proposition is supported by the cases generally, being frequently implied rather than directly stated. See, on the point, the following authorities:

**United States.**—*Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699.

**Alabama.**—*Van Arsdale v. Howard* (1843) 5 Ala. 596.

**California.**—*Anaheim Union Water Co. v. Parker* (1894) 101 Cal. 483, 35 Pac. 1048.

**Connecticut.**—*Watertown Sav. Bank v. Mattoon* (1905) 78 Conn. 388, 62 Atl. 622.

**New York.**—*Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121; *Bostwick v. Van Voorhis* (1883) 91 N. Y. 353.

**North Dakota.**—*Ætna Indemnity Co. v. Schroeder* (1903) 12 N. D. 110, 95 N. W. 436.

**Rhode Island.** — *Atlas Bank v. Brownell* (1869) 9 R. I. 169, 11 Am. Rep. 231.

**Tennessee.**—*Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea, 418.

**Texas.**—*Screwmen's Benev. Asso. v. Smith* (1888) 70 Tex. 168, 7 S. W. 793; *United States Fidelity & G. Co. v. Means & F. Iron Works* (1910) — Tex. Civ. App. —, 132 S. W. 536.

**England.** — *Hamilton v. Watson* (1845) 12 Clark & F. 109, 8 Eng. Reprint, 1339; *Stokesleigh Parish v. Stoddart* (1853) 2 Week. Rep. 14; *Wythes v. Labouchere* (1859) 3 De G. & J. 593, 44 Eng. Reprint, 1397, 5 Jur. N. S. 499, 7 Week. Rep. 271; *Pledge v. Buss* (1860) Johns. V. C. 663, 70 Eng. Reprint, 585, 6 Jur. N. S. 695; *Welton v. Somes* (1888) 5 Times L. R. 46.

**Ireland.**—*Roper v. Cox* (1882) Ir. L. R. 10 C. L. 200.

**Canada.**—*East Zorra Twp. v. Doug-*

*las* (1870) 17 Grant, Ch. (U. C.) 462; *Peers v. Oxford County* (1870) 17 Grant, Ch. (U. C.) 472; *British Empire, etc., Assur. Co. v. Luxton* (1893) 9 Manitoba L. R. 169.

And the rule which prevails in some classes of contracts, such as those of marine insurance, that all material circumstances known to the assured must be disclosed, and that the omission to do so avoids the policy, though the concealment is not fraudulent, does not apply to an ordinary contract of guaranty or suretyship. *Whitcomb v. Shultz* (1915) 138 C. C. A. 510, 223 Fed. 268, petition for a writ of certiorari denied in (1915) 238 U. S. 632, 59 L. ed. 1498, 35 Sup. Ct. Rep. 937; *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121; *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418; *North British Ins. Co. v. Lloyd* (1854) 10 Exch. 523, 156 Eng. Reprint, 545, 3 C. L. R. 264, 24 L. J. Exch. N. S. 14, 1 Jur. N. S. 45; *Davies v. London & P. M. Ins. Co.* (1878) L. R. 8 Ch. Div. (Eng.) 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794; *Niagara Dist. Fruit Growers Stock Co. v. Stewart* (1896) 26 Can. S. C. 629; *British Empire, etc., Assur. Co. v. Luxton* (Manitoba) *supra*.

The basis of the defense of nondisclosure is fraud, and if the noncommunication is not fraudulent in fact or law, the defense is not established. *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121.

"Concealment or failure to disclose becomes fraudulent only when it is the duty of a party having knowledge of the facts, to discover them to the other party." *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418.

And concealment, to be fraudulent and material, it was said in *Ætna L. Ins. Co. v. Mabbett* (1864) 18 Wis. 667, must be a concealment of something which the party concealing is bound to disclose; in order that he may be so bound, there must, in general, exist some relation of trust and confidence between the immediate parties; and in most cases, at least, the silence of the party must import as much as a direct affirmation, and

must be deemed the equivalent thereof.

"The concealment or nondisclosure of facts, which amounts to a fraud, must be of those facts and circumstances which one party is under some legal or moral obligation to communicate to the other; and which the latter has a right, not merely in *foro conscientie*, but *juris et de jure*, to know." *Van Arsdale v. Howard* (1843) 5 Ala. 596.

And it was said in *Watertown Sav. Bank v. Mattoon* (1905) 78 Conn. 388, 62 Atl. 622, that the term "conceal" implies something more than a mere failure to disclose; that we do not in general speak of a person's concealing a thing, unless he is in some way called upon to produce it; that, as a general rule, mere nondisclosure of a fact does not amount to fraud, unless the party not disclosing was called upon by the other party to disclose, or his relation to that party was such as to make it his legal or equitable duty to disclose, all material facts. And it was held in this case that the facts showed the nondisclosure of a material fact, rather than the concealment of it.

To discharge the surety because of the concealment of the obligee, the facts concealed must be such as are peculiarly within the knowledge of the obligee, and such as the surety has the right to rely upon the obligee for information concerning. *Hubble v. First Nat. Bank* (1888) 9 Ky. L. Rep. 766.

Where parties are contracting, each may, unless there is a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those maintaining the duty to disclose, to show that such duty existed. This duty may, however, arise from pre-existing relationship between the parties, or from circumstances which occurred during the negotiation, as, for example, if during the negotiations one party discovers that a statement which he has made, and which at the time he believed was true, is in fact false, he is under an obligation to correct the erroneous

statement; or if a statement, which at the time he made it was true, has become untrue during the course of the negotiations because of a change of circumstances, he is under the duty to disclose such change to the other party. *Davies v. London & P. M. Ins. Co.* (1878) L. R. 8 Ch. Div. (Eng.) 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794.

Usually, it was said in *British Empire, etc., Assur. Co. v. Luxton* (1893) 9 Manitoba L. R. 169, the question whether the concealment is fraudulent is one of fact for the jury.

It was held in *Burks v. Wonterline* (1869) 6 Bush (Ky.) 20, that general allegations of concealment in a pleading are insufficient, it being necessary also to aver that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed; that otherwise an allegation merely of fraudulent concealment is only the pleader's deduction. To the same effect is *Lake v. Thomas* (1897) 84 Md. 608, 36 Atl. 437.

The obligee is not, in the absence of special circumstances, bound to explain to the surety the terms or effect of the proposed obligation. *Small v. Currie* (1853) 2 Drew. 102, 61 Eng. Reprint, 657, affirmed on this point on appeal in (1854) 5 De G. M. & G. 141, 43 Eng. Reprint, 824, 2 Eq. Rep. 639, 23 L. J. Ch. N. S. 746, 18 Jur. 731.

*c. Applicability to sureties for consideration.*

Many of the cases cited in the annotation involve sureties for hire, and it is assumed, apparently, that the rules herein set forth are applicable to this class of sureties. The assumption that the ordinary rules apply in the case of a surety for consideration seems important, in view of the possible ground for contention that the duty of disclosure on the part of the obligee does not arise, to the same extent at least, in the case of a surety for hire, as in the case of a voluntary surety. The point was made in *Barnes v. Century Sav. Bank* (1910) 149 Iowa, 367, 128 N. W. 541, that a distinction

should be made in the case of a surety for hire, as regards the application of the rule that concealment by the obligee may amount to fraud discharging the surety; but the court overruled the contention, and regarded the ordinary rules as applicable.

### *III. Opportunity for disclosure.*

Whether or not the obligee is bound to make disclosure to the surety of facts affecting the risk may depend largely on the obligee's opportunity to make disclosure. The same duty may not rest upon the obligee where the surety is procured by the principal, and the obligation, signed by the surety, is delivered by the principal to the obligee, without any communication between the latter and the surety, as where the parties are all present at the time the contract of suretyship is signed. And if, in the obligee's presence, the principal makes false statements to the surety, good faith, of course, requires the obligee to speak and disclose the true situation. The same is true where the surety, by a statement made in the obligee's presence at the time of signing the contract of suretyship, shows that he is laboring under a false impression of a material fact affecting the risk. In other words, while, as a general rule, it cannot be said abstractly that as matter of law the obligee is bound to disclose to the proposed surety all the material facts affecting the risk, yet the obligee is held to a very high degree of good faith, and his opportunity to make disclosure may be a material element in the determination of the question whether he has exercised that good faith toward the surety which the law requires.

The obligee is not required ordinarily to search for the surety and inform him of facts affecting the risk, or warn him of the danger of the step he is about to take. *Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699; *Sherman v. Harbin* (1904) 125 Iowa, 174, 100 N. W. 629; *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121; *Wythes v. Labouchere* (1859) 3 De G. & J. 593, 44 Eng. Reprint, 1897, 5 Jur. N. S. 499, 7 Week.

*Rep.* 271; *Welton v. Somes* (1838) 5 Times L. R. (Eng.) 46; *Cunningham v. Buchanan* (1864) 10 Grant, Ch. (U. C.) 523.

Nor is the obligee ordinarily bound to seek out the sureties and explain to them the nature and extent of their obligations, at the risk of losing the security. *Western New York L. Ins. Co. v. Clinton* (1876) 66 N. Y. 326; *Atlantic Trust & D. Co. v. Union Trust & Title Corp.* (1909) 110 Va. 286, 135 Am. St. Rep. 937, 67 S. E. 182.

It was said in *Bank of Monroe v. Anderson Bros. Min. & R. Co.* (1885) 65 Iowa, 692, 22 N. W. 929: "If there is nothing in the circumstance to indicate that the surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risks, the creditor is not bound to seek him out, or, without being applied to, communicate to him information as to the facts within his knowledge. But in such case he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be."

To discharge the surety because of the obligee's concealment, there must be opportunity for disclosure. *Lachman v. Block* (1895) 47 La. Ann. 505, 28 L.R.A. 255, 17 So. 153; *Burks v. Wonerline* (1869) 6 Bush (Ky.) 20.

All authorities are agreed, said the court in *Sherman v. Harbin* (1904) 125 Iowa, 174, 100 N. W. 629, that nothing need be done by the obligee, unless a fit opportunity is afforded.

The duty of the obligee is to make disclosure where proper opportunity is presented. *Julius Winter, Jr. & Co. v. Forrest* (1911) 145 Ky. 581, 140 S. W. 1005; *Graves v. Lebanon Nat. Bank* (1873) 10 Bush (Ky.) 23, 19 Am. Rep. 50.

And the rule was laid down in *Bryant v. Crosby* (1858) 36 Me. 562, 58 Am. Dec. 767, that a concealment which discharges a surety is one of facts known to the other party, and not known to the surety, and known to be of a character to increase materially the risk beyond that assumed in the usual course of business of that

kind, where there is a suitable opportunity to make known such facts to the surety.

Where the obligee resides in a city distant from that of the residence of the principal and the sureties, and the contract of suretyship is procured by the principal, and no inquiry made by the surety of the obligee, the latter is not ordinarily required to volunteer information to the surety, but may assume that the principal has disclosed the facts. *Ætna L. Ins. Co. v. Mabbett* (1864) 18 Wis. 667.

To a similar effect is *Booth v. Storrs* (1874) 75 Ill. 438, holding that where the surety and the obligee reside in distant cities, the one from the other, and the obligee accepts the contract from the principal, signed by a surety, in the usual course of business, the obligee may presume ordinarily, in the absence of inquiry, that the surety is informed of the facts.

Also in *Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 98, 28 L. ed. 699, it was held that if there is no opportunity for the obligee to make disclosures, or any inquiry by the surety, before the delivery of the obligation, as, for instance, if the obligee resides in a distant city, and the contract, executed by the principal and surety, is sent to the obligee by mail, the latter may presume that the surety knew all that he desired to know, and was content to give the instrument without further information, and he is not under an obligation to make any communication to the surety; in other words, if there is no misrepresentation by the obligee, mere nondisclosure under these circumstances will not amount to a fraud on the surety.

And where the surety's signature was procured by the principal, who delivered the contract to the obligee, and the surety and the obligee were not in each other's presence, and had no communication, it was held in *Smith v. First Nat. Bank* (1899) 107 Ky. 257, 53 S. W. 648, that the surety was not released on the ground of concealment by the obligee.

But whether a failure of an obligee to disclose facts known to him is fraudulent depends largely on the

character of the facts concealed, and cases may arise in which it is the duty of an obligee to disclose to the surety facts known to the former, notwithstanding the surety makes no inquiry. *Screwmen's Benev. Asso. v. Smith* (1888) 70 Tex. 168, 7 S. W. 793.

And that the nondisclosure by the obligee may amount to fraud, discharging the surety, even though there is no prior communication between them, if the contract signed by the surety is on its face such as would likely mislead the surety, see *Damon v. Empire State Surety Co.* (1914) 161 App. Div. 875, 146 N. Y. Supp. 996, under II. *supra*.

And if the obligee stands by in silence when in its presence, at the time of executing the contract of suretyship, material misrepresentations are made by the principal to the surety, to induce him to sign the contract, and the statements made are known to the obligee to be false, the surety is discharged. *First Nat. Bank v. Terry* (1905) 135 Fed. 621.

So, if the obligee stands by in silence when the surety, at the time of executing the contract, shows by statements that he is under a misapprehension of a material fact affecting the contract of suretyship, the nondisclosure by the obligee of the truth is a fraud on the surety, and may relieve him from the contract. *Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882.

And if the obligee and surety were brought into such connection with each other as to make the concealment of material facts on the part of the former equivalent to an assertion by him of the nonexistence of the facts concealed, the contract of suretyship will be avoided. *Harrison v. Lumbermen & M. Ins. Co.* (1879) 8 Mo. App. 37.

#### *IV. Duty of surety to make inquiry; obligee's duty when inquiry is made, or information volunteered.*

While the obligee must act in entire good faith, yet the surety has no right ordinarily to rely for information upon the obligee's duty to make disclosure of all the facts affecting the risk, but must himself make in-

quiry. The authorities generally support the view that the surety must make inquiry, ordinarily, if he desires further information. See on this point the following, among other cases:

**United States.**—*Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699.

**New Mexico.**—*Wells, F. & Co's Exp. v. Walker* (1898) 9 N. M. 456, 54 Pac. 875.

**New York.**—*Western New York L. Ins. Co. v. Clinton* (1876) 66 N. Y. 326; *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121; *Bostwick v. Van Voorhis* (1883) 91 N. Y. 853.

**Ohio.**—*Higgins v. Drucker* (1901) 12 Ohio C. D. 220, 22 Ohio C. C. 112.

**Texas.**—*United States Fidelity & G. Co. v. Means & F. I. Works* (1910) — Tex. Civ. App. —, 132 S. W. 536.

**Washington.**—*Oregon Nat. Bank v. Gardner* (1895) 13 Wash. 154, 42 Pac. 545.

**West Virginia.**—*Warren v. Branch* (1879) 15 W. Va. 21.

**England.**—*Kirby v. Duke of Marlborough* (1831) 2 Maule & S. 18, 105 Eng. Reprint, 289, 14 Revised Rep. 573; *Stokesleigh Parish v. Stoddart* (1853) 2 Week. Rep. 14; *Welton v. Somes* (1888) 5 Times L. R. 46; *Seaton v. Heath* [1899] 1 Q. B. 782, 68 L. J. Q. B. N. S. 631, 47 Week. Rep. 487, 80 L. T. N. S. 579, 15 Times L. R. 297, 4 Com. Cas. 193, per Romer, L. J., reversed on other grounds in [1900] A. C. 135.

**Canada.**—*Cunningham v. Buchanan* (1864) 10 Grant, Ch. (U. C.) 523.

It was said in *Magee v. Manhattan L. Ins. Co.* (U. S.) *supra*, that while the rights of the surety are zealously guarded, and the slightest fraud on the part of the obligee, touching the contract of suretyship, annuls it, there is a duty on the part of the surety to make inquiry; he must not rest supine, close his eyes, and fail to seek important information within his reach; and if he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the obligee, set up as a defense facts then first learned, which he ought to have known and considered before entering into the contract.

And it is said in *Stedman v. Boone* (1875) 49 Ind. 469, that while strict integrity and complete fairness are, as a rule of law, due from creditors to one who is about to become surety for the debtor, yet this does not excuse the surety from reasonable attention to the circumstances and reasonable diligence to inform himself as to the prudence of the act he is about to do; and that where he may ascertain from those present all the facts necessary to shield himself from fraud, and is put on his guard by the circumstances, he should make inquiry.

The fact that a guaranty is required should put the guarantor on the alert, unless he is prepared to place entire confidence in the principal. *Cunningham v. Buchanan* (1864) 10 Grant, Ch. (U. C.) 523.

And in *Screwmen's Benev. Asso. v. Smith* (1888) 70 Tex. 168, 7 S. W. 793, approved in *United States Fidelity & G. Co. v. Means & F. I. Works* (Tex.) *supra*, it was said that the fact that surety is required, of itself, would seem to be sufficient notification, to one proposing to become surety, that the obligee is not willing to trust solely to the skill, diligence, or honesty of the person of whom security is required.

Where the surety was put on inquiry, and referred by the obligee to persons from whom he could have obtained information regarding a transaction between the principal parties, on which he relied for release from liability subsequently incurred, but neglected to investigate, it was held that he was not discharged. *Wason v. Wareing* (1852) 15 Beav. 151, 51 Eng. Reprint, 494.

But where the obligee is applied to by the proposed surety for information, and he assumes to answer the inquiry at all, or where the obligee volunteers information to the surety, he must make a full and frank communication of the material facts within his knowledge bearing on the risk; otherwise, the surety may avoid liability on the ground of fraud. *Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699; *COOPER PROCESS CO. v. CHICAGO BONDING & INS. CO.* (re-

ported herewith), ante, 1477; *Bank of Monroe v. Anderson Bros. Min. & R. Co.* (1885) 65 Iowa, 692, 22 N. W. 929; *Barnes v. Century Sav. Bank* (1910) 149 Iowa, 367, 128 N. W. 541; *Lingenfelter Bros. v. Bowman* (1912) 156 Iowa, 649, 187 N. W. 946; *Putney v. Schmidt* (1911) 16 N. M. 400, 120 Pac. 720; *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418; *Remington Sewing Mach. Co. v. Kezer-tee* (1880) 49 Wis. 409, 5 N. W. 809; *Brillion Lumber Co. v. Barnard* (1907) 131 Wis. 284, 111 N. W. 483.

*V. Motive for nondisclosure.*

While, as above shown, to discharge the surety the nondisclosure on the part of the obligee must amount to fraud, yet it is not necessary that he should be guilty of actual fraud. If he conceals facts which under the particular circumstances it is his duty to disclose, the concealment will be deemed fraudulent in law, though it may not be so in fact.

If facts material to the surety are concealed by the obligee when it is his duty to disclose them, his motive in concealing the same is immaterial; and an instruction is erroneous that the concealment, to discharge the surety, must be wilful and intentional, with a view to the obligee's advantage. *Railton v. Mathews* (1844) 10 Clark & F. 934, 8 Eng. Reprint, 993.

And the rule is recognized in *Jungk v. Holbrook* (1897) 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305, that the surety may be discharged because of the fraudulent concealment of material facts by the obligee, although the concealment was not wilful or intentional on the part of the obligee, or with a view of advantage to himself.

To the same effect is *Harrison v. Lumbermen & M. Ins. Co.* (1879) 8 Mo. App. 37.

The concealment which will avoid a guaranty need not necessarily have been with a view to the advantage of the obligee, if it prejudices the surety. *Howe Mach. Co. v. Farrington* (1880) 82 N. Y. 121; *Damon v. Empire State Surety Co.* (1914) 161 App. Div. 875, 146 N. Y. Supp. 996.

See also *Warren v. Branch* (1879) 15 W. Va. 21, to the effect that if the

dealings between parties are such as to lead the obligee, if a reasonable man, to believe that the principal must have used fraud in procuring the surety to enter into the contract, and such fraud has been used, it will vitiate the contract as to the surety, although actual fraud is not traced to the obligee.

*VI. Nature of information concealed.*

There are a number of cases to the effect that the obligee is not bound voluntarily to communicate to the surety circumstances not connected with the transaction between the obligee and principal, to which the suretyship relates; and this seems ordinarily to be the rule, even though the extraneous facts not disclosed might render the position of the surety more hazardous, and would, if known by him, probably have an important influence on his decision whether or not to execute the contract. *Magee v. Manhattan L. Ins. Co.* (1876) 92 U. S. 93, 23 L. ed. 699; *Harrison v. Lumbermen & M. Ins. Co.* (1879) 8 Mo. App. 37; *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418; *Jungk v. Holbrook* (1897) 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305; *Warren v. Branch* (1879) 15 W. Va. 21; *Wythes v. Labouchere* (1859) 3 De G. & J. 593, 44 Eng. Reprint, 397, 5 Jur. N. S. 499, 7 Week. Rep. 271. See, in this connection, VII. a, supra.

The facts concealed must, of course, be material. *Chace v. Brooks* (1849) 5 Cush. (Mass.) 43; *Whitcomb v. Shultz* (1915) 138 C. C. A. 510, 223 Fed. 268, petition for a writ of certiorari denied in (1915) 238 U. S. 632, 59 L. ed. 1498, 35 Sup. Ct. Rep. 987.

And in order for the concealment to be material so as to release the surety, it must be of some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. *Franklin Bank v. Stevens* (1855) 39 Me. 532; *Hubble v. First Nat. Bank* (1888) 9 Ky. L. Rep. 766; *Lachman v. Block* (1895) 47 La. Ann. 505, 28 L.R.A. 255, 17 So. 153.

Neither misrepresentation as to, nor

concealment of, an immaterial matter, will release a surety; the concealment must be material or inducing. *Sherman v. Smith* (1918) — Iowa, —, 169 N. W. 216, where the indebtedness not disclosed was trifling in comparison with the amount of the business.

If the facts concealed do not increase the surety's risk, and cannot fairly be considered as likely to influence the surety in deciding whether or not it would accept the risk, failure of the obligee to disclose such facts cannot be regarded as fraud. *Baglin v. Title Guaranty & S. Co.* (1909) 166 Fed. 356, affirmed in (1909) 102 C. C. A. 182, 178 Fed. 682. See this case, under VII. f, *infra*.

Before the omission to disclose a material fact by the creditor will operate as a fraud and discharge the surety for the debtor, the fact must be such as in some way to affect the liability of the surety, to his detriment. *Springfield Engine & Thresher Co. v. Park* (1891) 3 Ind. App. 173, 29 N. E. 444.

And it was said in *Comstock v. Gage* (1878) 91 Ill. 328, that in order that failure to communicate a fact to a surety should have the effect of a fraud upon him, and vitiate the contract, it must be a fact which necessarily would have the effect of increasing the responsibility of the surety, or operating to the prejudice of his interests.

#### VII. Illustrations.

##### a. Matters relating to solvency and credit of principal in general.

As to failure of the obligee to disclose to a proposed surety for a contractor that the latter was already in default, see VII. b, *infra*; and as to undisclosed pre-existing debts, see, for cases of contracts of sale, VII. c, *infra*, and, for cases of loans generally, VII. d, *infra*. In this connection, see also VI. *supra*.

The cases in general hold that the obligee is not ordinarily bound voluntarily to communicate to a proposed surety matters affecting the credit and solvency of the principal.

In *Van Arsdale v. Howard* (1843) 5 Ala. 596, the court declined to adopt

the broad principle, assumed in an instruction, that when one is taking a note or obligation with security, and happens to know circumstances unfavorable to the credit, solvency, or responsibility of the principal, which are unknown to the person becoming security, and does not communicate them to the latter, such omission to make disclosure is a fraud which vitiates the contract.

The obligee is not bound voluntarily to inform the surety of any matter affecting the general credit of the principal. *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418.

The rule that mere nondisclosure on the part of the obligee will not discharge the surety, even though the latter acts in ignorance of the true situation, unless there is a duty under the particular circumstances for the obligee to make disclosure, is illustrated in cases involving the question of the duty of one taking a note to communicate the fact of the principal's insolvency to one assuming the obligation of surety. The authorities hold that there is no duty on the payee of a note, unsolicited, to communicate to an intended surety the fact of the principal's insolvency. *Ham v. Greve* (1870) 34 Ind. 18; *Sebald v. Citizens Deposit Bank* (1907) 31 Ky. L. Rep. 1244, 14 L.R.A.(N.S.) 376, 105 S. W. 130; *First Nat. Bank v. Johnson* (1903) 133 Mich. 700, 103 Am. St. Rep. 468, 95 N. W. 975; *Farmers' & D. Nat. Bank v. Braden* (1891) 145 Pa. 473, 22 Atl. 1045. See also *Palatine Ins. Co. v. Crittenden* (1896) 18 Mont. 413, 45 Pac. 555, and *Warren v. Branch* (1879) 15 W. Va. 21.

The rule is stated in *Roper v. Sangamon Lodge* (1879) 91 Ill. 518, 33 Am. Rep. 60, as follows: "If a person, knowing another to be utterly insolvent, proposed to credit him if he would procure sureties, he cannot be held to have acted in bad faith by failing to apprise the surety that his principal is utterly insolvent. We presume no one would regard such a failure to apprise the surety of the fact of the insolvency of the principal, as a fraud, and yet, had the surety known the fact, he would probably not have

indorsed for the principal. And this is held not to be a fraud, because it was the folly of the surety not to have learned the financial standing of the principal. The avenues of information were open to him, and it was his duty to have used the means to inform himself, and, failing to do so, he must suffer the consequences of his inaction. In such a case, however, if the person extending the credit were to use any artifice to throw the surety off his guard, and to lull him into a false security, and he was thereby deceived, that would amount to a fraud. But mere failure to communicate the fact in such a case does not amount to bad faith."

The principle was applied in *Bank of Monroe v. Gifford* (1887) 72 Iowa, 750, 32 N. W. 669, in holding that the apprehended or known insolvency of a stockholder and manager of a corporation, who procured the signature of another as surety to a promissory note made by the corporation, and to which the manager was not a party, did not affect with suspicion the undertaking of the surety so as to charge the creditor receiving the note with any duty to inform the surety as to the extent of the risk he was about to assume.

In *Farmers' & D. Nat. Bank v. Braden* (Pa.) *supra*, it was held that, where a bank took a note from one of its depositors to cover an overdraft of his account, it was not bound to communicate the depositor's impaired credit to the sureties on the note, where they made no inquiry of the bank as to their principal's financial condition, or the state of his account.

So, in *First Nat. Bank v. Johnson* (1903) 133 Mich. 700, 103 Am. St. Rep. 468, 95 N. W. 975, *supra*, the liability, on a renewal note, of a surety who had also signed the original note, was held not to be affected by the payee's failure to inform him that one of the principals had lost her property since the making of the first note.

So far as the general character or reputation of the principal is concerned, it is to be assumed that the surety has informed himself, or, if not, that he is willing to take the risk

involved in such knowledge as he may have. *Sebald v. Citizens Deposit Bank* (1907) 31 Ky. L. Rep. 1244, 14 L.R.A. (N.S.) 376, 105 S. W. 130, *supra*.

And the mere fact that the principal is indebted to the obligee does not impose on the latter the duty to volunteer information thereof to the surety. *Goebel Brewing Co. v. McLean* (1900) 15 Pa. Super. Ct. 38.

That the obligee did not disclose to the surety, when the latter guaranteed an account, that the principal was already indebted to the obligee in a large sum on account of default in a previous contract, for the performance of which also the same sureties were responsible, no inquiry with reference thereto having been made, was held in *Southwestern Co. v. Wynnegar* (1916) 111 Miss. 412, 71 So. 737, not to discharge the surety, for the obligee had the right to presume that the surety had ascertained from the principal the state of the previous contract.

The surety on a bond given to secure advances to the principal should make inquiry at the time he executes the bond, if he desires to know whether the account between the parties is clear at that time, and it seems that he is not discharged on account of the existence of a debt between the parties which is not disclosed to him, in the absence of inquiry. *Kirby v. Marlborough* (1813) 2 Maule & S. 18, 105 Eng. Reprint, 289, 14 Revised Rep. 573.

And it was held in *Cunningham v. Buchanan* (1864) 10 Grant, Ch. (U. C.) 523, that in the absence of inquiry by the surety, or evidence of communication between him and the obligee, or of the wilful or designed suppression of facts by the obligee, the surety was not discharged because of the nondisclosure of an indebtedness from the principal to the obligee, at the time the contract of suretyship was executed.

So, the fact that the obligee did not disclose to the surety, at the time the contract of suretyship was made, that the principal was indebted to the obligee, was held in *Stokesleigh Parish v. Stoddart* (1853) 2 Week. Rep.



(Eng.) 14, not to discharge the surety, if the obligee was not guilty of falsehood or deception.

It was held also in *Domestic Sewing Mach. Co. v. Jackson* (1885) 15 Lea (Tenn.) 418, that fraud could not be inferred so as to discharge the surety, from the fact that the obligee did not disclose an indebtedness of the principal existing at the time the contract of suretyship was made, on a prior transaction between the principal and obligee, in the absence of inquiry by the surety on the matter, even though the obligee had opportunity to make the disclosure.

Mere nondisclosure of a bank to a surety on a cash account of its customer, of a prior indebtedness from the customer to the bank, which the latter anticipated would be paid through the opening of the new account, it was held in *Hamilton v. Watson* (1845) 12 Clark & F. 109, 8 Eng. Reprint, 1839, would not discharge the surety, in the absence of allegations and proof that there was a secret contract that the new credit should be applied on the old debt.

And it was held that there was no duty of disclosure on the part of the obligee, and that the surety was not discharged, where one whose bank account was overdrawn, and who was also indebted to the bank in a large amount in respect to certain accommodation bills, requested an acquaintance, having no knowledge of the former's financial position nor his indebtedness to the bank, to guarantee his account to the bank, and the surety signed the contract, believing that the overdraft was the sole debt, the bank not disclosing the indebtedness on the bills. *Royal Bank v. Greenshields* [1914] S. C. 259, 51 Scot. L. R. 260, [1914] 1 Scot. L. T. 74, Scot's Dig. 1904-14, col. 142, Mews, Eng. Case Law Dig. 1911-15, col. 1213.

It was held that a surety who guaranteed payment of any deficiency in sums advanced by a bank to a planter was not discharged by failure of the bank to disclose to the surety, at the time the contract of suretyship was executed, that the principal had written to the bank, informing it of an

estimated deficiency, where the surety was procured by the principal, and not by the bank, and made no inquiry of the latter. *Welton v. Somes* (1888) 5 Times L. R. (Eng.) 46.

And it was held in *Van Arsdale v. Howard* (1843) 5 Ala. 596, that a surety whose signature to a note was obtained by the principal was not discharged from his obligation, by the mere fact that one who was agent of the obligee to obtain the security permitted the surety to sign the contract, without disclosing to him the fact that he, the agent, had a mortgage on the property of the principal to secure himself personally, of which mortgage the surety was not aware.

The obligee is under no obligation to inform the intended surety of matters affecting the credit of the principal, not connected with the transaction in question. *Wythes v. Labouchere* (1859) 3 De G. & J. 593, 44 Eng. Reprint, 1397, 5 Jur. N. S. 499, 7 Week. Rep. 271.

Where a creditor agreed to continue an action brought by him against the debtor, if the latter would procure sureties for the debt, which he did, it was held that the sureties were not discharged because the obligee did not disclose to them the fact that he had already obtained a judgment against the debtor in another court, since the duty to make disclosure did not arise in the absence of inquiry by the sureties. *Oregon Nat. Bank v. Gardner* (1895) 13 Wash. 154, 42 Pac. 545.

The rule that before the omission to disclose a material fact by the creditor will operate as a fraud and discharge the surety for the debtor, the fact must be such as in some way to affect the liability of the surety to his detriment, was applied in *Springfield Engine & Thresher Co. v. Park* (1891) 3 Ind. App. 173, 29 N. E. 444, where it was held that a surety on a note was not discharged by the concealment by the payee, at the time of its execution, that the latter had taken other notes from the debtor, all of which, including the note signed by the surety, were secured by a chattel mortgage of certain property of the

debtor, the mortgage providing that, in the event any of the notes should not be fully paid at maturity, all the notes should, at the option of the mortgagee, become due, even though, on the failure to pay one of the other notes, this option was exercised and the mortgage foreclosed prior to the maturity of the surety's obligation.

And an accidental omission by the creditor of a small amount from the statement of indebtedness, when applied to by the intending guarantor, which does not increase the latter's liability nor affect the guaranty, will not discharge him. *Chace v. Brooks* (1849) 5 Cush. (Mass.) 43.

It was held that the surety was not discharged, where the obligee's agent represented to the proposed surety that the principal was indebted to it in the sum of \$4,500 only, whereas the principal had, without the knowledge of the obligee or its agent, unlawfully obtained possession of personal property of the obligee in a large amount, and was liable to it in an action for tort or on indebitatus assumpsit, since such liability was not, strictly speaking, a debt, and, the obligee not being aware of it, but having, in good faith, stated the amount of the indebtedness of the principal, the language used should be construed in its natural meaning, and not as evasive or fraudulent through concealment of the facts. *Isaac Harter Co. v. Pearson* (1904) 26 Ohio C. C. 601.

In an action against a surety who had guaranteed payment of rent, it was held in *Roper v. Cox* (1882) Ir. L. R. 10 C. L. 200, that a plea was subject to demurrer, which alleged that prior to the making of the contract of guaranty the principal had been a tenant of the obligee for the same premises, and had been guilty of gross irregularities and delay in payment of rent, and, at the time of the making of the guaranty, was in arrears in a large sum, all of which was known to the obligee, who did not disclose it to the surety, although the latter was ignorant of the same and would not have entered into the contract had he known of it. The decision is based

on the ground that the plea did not show a fraudulent concealment necessary to avoid the contract.

But it was held in *Cashin v. Perth* (1859) 7 Grant, Ch. (U. C.) 340, that the surety on a bond of a lessee of tolls was entitled to have the bond delivered up for cancelation because of the nondisclosure by the obligee, at the time the contract of suretyship was made, that the principal was in default for the same tolls during the preceding year.

If the obligee undertakes to give proposed sureties information in regard to the principal's financial condition, he must disclose all the facts and circumstances affecting the risk, within his knowledge. *Putney v. Schmidt* (1911) 16 N. M. 400, 120 Pac. 720. See, in this connection, IV. *supra*.

And in some other cases of the class considered at this point, the circumstances have been such that the obligee's nondisclosure has been held to discharge the surety.

Thus, it was held in *First Nat. Bank v. Terry* (1905) 135 Fed. 621, that a creditor of a corporation, which stood by in silence and permitted a stockholder to sign an agreement securing the debt, in reliance on representations made by the president of the corporation in the creditor's presence, as to the corporation's solvency, which, to the knowledge of the creditor, were false and fraudulent, could not hold the stockholder liable on the contract.

And where a bank, upon discovering that notes held by it contained a forged indorsement, investigated the financial condition of the maker of the notes, whom it found to be insolvent, and had opportunity to disclose the fact of the forgery to a third person proposed by the maker as surety for other notes, but did not make the disclosure, although there was evidence from which the jury might have found that the bank had reason to believe that the proposed surety thought he was indorsing merely renewal notes in the ordinary course of business, by one in good standing at the bank, it was held error to direct a verdict for the bank in an action against the sure-

ty. *Farmers' Nat. Bank v. Van Slyke* (1888) 49 Hun, 7, 1 N. Y. Supp. 508. The court applied the rule that, where one taking security knows the facts and is personally present, having an opportunity to inform the proposed surety, and having reason to believe that the latter does not know the facts and is being deceived and defrauded into becoming a surety, it is the obligee's duty to inform him of the facts, and the acceptance of him as surety without such disclosure is a fraud availing the contract.

Also, where a bank made an additional loan to its creditor, knowing that he was insolvent, for the purpose of securing an illegal preference and of obtaining security for prior unsecured indebtedness, and, as a part of the new loan, accepted notes of the debtor with surety, without disclosing to the latter the circumstances of the transaction, it was held that the latter would be presumed to have acted on the belief that the transaction was one occurring in the usual course of business, subjecting him to the ordinary risk attending it, and that the failure of the bank to advise the surety of the facts, which materially increased his risk, was such a fraud on the surety as released him from the contract. *First Nat. Bank v. Clark* (1915) 59 Colo. 455, 149 Pac. 612.

So, it was held that the surety was discharged, where the contract of suretyship purported to have reference to an agreement made as of the date of the contract, whereas in fact the agreement was merely a renewal of a previous contract, as to which the principal was in default. *Damon v. Empire State Surety Co.* (1914) 161 App. Div. 875, 146 N. Y. Supp. 996.

If the obligee stands by in silence when the surety, at the time of executing the contract, by a statement as to the principal's indebtedness, shows that he is laboring under a misapprehension as to the amount of such indebtedness, which is known to the obligee to be a much larger amount, such concealment amounts to a fraud on the surety, relieving him from his contract. *Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882,

where a statement as to the amount of the principal's indebtedness was made in the presence of a bank cashier, by one signing as surety on a note to the bank.

And where the obligee concealed material facts so that the principal was held out as a trustworthy person about to embark in a profitable business, whereas the business had been in existence for some time, and had been so disastrous as to extinguish the principal's credit, and, when the surety hesitated to sign the obligation, the obligee, anticipating further inquiry, represented that it was "all right," it was held that the surety was discharged. *Goebel Brewing Co. v. McLean* (1900) 15 Pa. Super. Ct. 38.

#### *b. Contractors' bonds.*

Different conclusions have been reached on the question whether a surety on a contractor's bond is discharged because of the nondisclosure by the obligee of facts known to him, the result being dependent on the application of the rules previously considered, to the circumstances of the particular case.

Where a guaranty company became surety on a contractor's bond four months after the date for completion of the contract, performance of which the company guaranteed, it was held that the surety was put on notice of nonfulfilment of the contract up to that time, and it was its duty to make inquiry if it desired further information as to the reasons therefor, and was not discharged because the obligee failed to disclose circumstances known to it, tending to show that the contractor was negligent, dilatory, or unskilful. *United States Fidelity & G. Co. v. Means & F. Iron Works* (1910) — Tex. Civ. App. —, 132 S. W. 536.

And sureties on a contractor's bond were held liable in *Tooke v. Burke* (1917) 141 La. 746, 75 So. 668, where the contractor's bid of \$4,640 was considerably less than any other bid, and the architects had informed the obligee that the building could not be constructed for less than \$7,000, and that the materials alone would cost as much as the bid, there being no

misrepresentation on the obligee's part, although she had reason to know, because of the circumstances stated, that the contractor was bound to lose. The obligee, under these circumstances, upon the delivery to her of the bond for the building contract, was held not bound to investigate to ascertain whether the signatures of the sureties had been obtained by fraud.

So, where a surety on a contractor's bond had its expert make an estimate of the value of the work which the principal had undertaken to perform, and could, as well as the obligee, have determined whether the principal was liable to default because of too low a contract price, it was held that the surety could not be discharged on the ground that the obligee was aware that the price was too low, and withheld this information from the surety at the time the latter executed the bond. *Higgins v. Drucker* (1901) 22 Ohio C. C. 112, 12 Ohio C. D. 220.

But it was held in *Stiff v. Eastbourne* (1868) 17 Week. Rep. (Eng.) 68, 19 L. T. N. S. 408, that a surety on a contractor's bond for the construction of drainage works was discharged, where the contract provided for the making of payments on the certificate of the surveyor of the obligee, and the latter did not disclose to the surety the existence of a prior contract made by it with a third person interested in the property through which the drain passed, by which the latter's surveyor was to be associated with that of the obligee in joint superintendence and control. The injunction granted against enforcement of the bond was dissolved on appeal, reported in (1869) 17 Week. Rep. 428, 20 L. T. N. S. 339, on the ground, among others, that the defense of concealment was equally open at law by way of plea.

And it was held that the surety was discharged, where a bond given to secure performance of a street paving contract on its face indicated that it was given to secure faithful performance of future work, and neither the principal nor the obligee, although they both had knowledge thereof, in-

formed the surety, who was ignorant of that fact, that the contractor had already defaulted. *Park Paving Co. v. Kraft* (1918) 262 Pa. 178, 105 Atl. 39.

The question whether the surety company's risk was so increased by concealment of the amount of the contract price as to relieve the company from liability on the contractor's bond, it was held in *Equitable Surety Co. v. Muddy Bottom Swamp Land Dist.* (1916) 145 C. C. A. 221, 231 Fed. 38, should have been submitted to the jury, where there was evidence tending to show that the written contract, which specified a price of \$19,500, was shown to the surety company before it executed the bond, when, as a matter of fact, the principal was to be paid only \$18,000.

The principle that a surety on a contractor's bond, guaranteeing performance of the contract, is discharged if the obligee fails to disclose the existence of a "side agreement," varying the time and amount of the instalment payments fixed in the disclosed contract, is approved in *Union Oil Co. v. Pacific Surety Co.* (1920) — Cal. —, 187 Pac. 14. But in this case it was held that the "side agreement" was not that of the obligee, an oil company, but that of another corporation, a transportation company, although 60 per cent of the stock of the latter was owned by the oil company, and the same person was vice president and general manager of both corporations; so that the evidence did not justify the finding that the real terms of payment to be made by the obligee were not those disclosed.

#### *c. Contracts of sale.*

The doctrine that the failure to state a material fact, when there is some occasion or circumstance imposing the legal duty to speak, is equivalent to concealment of the fact and amounts to fraud equally with an affirmative falsehood, was applied in the reported case (*COPPER PROCESS CO. v. CHICAGO BONDING & INS. CO.* ante, 1477), to a case where an obligee in a bond for the performance of a contract of sale failed to disclose, when

asked by the bonding company whether any advances had been made against the contract it was about to assure, an underlying agreement by which the purchaser had deposited a large sum of money to the credit of the seller, even if, on the purchaser's construction of this contract, it had not made advances to the seller and its answer that no advance had been made might be literally true. The court said that, the question having been asked for the purpose of ascertaining the risks involved in the situation, any equivocal, evasive, or misleading answer, calculated to convey a false impression, even though literally true as far as it went, was fraud; that the agreement was a fact which showed the financial and contractual relations of the two companies, material to the risks which the bonding company incurred, and that failure to disclose this fact, under the circumstances of being asked for it, was an active concealment of the fact.

In the case of a contract of sale on credit, if a secret bargain is made between the creditor and principal, based upon the consideration of the sale, or upon any other valuable consideration, whereby a longer time is to be given for payment than that stipulated in the contract seen and signed by the surety, the concealment of such bargain will discharge the surety from his obligation. *Peck v. Durett* (1840) 9 Dana (Ky.) 486.

And it was held that the surety was discharged where one who guaranteed payment by the vendee, in a contract for the purchase of iron, was not informed of a secret agreement between the vendor and the vendee for payment by the latter of 10 shillings per ton beyond the market price, the extra payment to be applied on an old debt between the parties, since the effect of this secret agreement was to divert a portion of the vendee's funds, rendering him less able to perform the contract, and thereby increasing the responsibility of the surety. *Pidcock v. Bishop* (1825) 3 Barn. & C. 605, 107 Eng. Reprint, 857, 5 Dowl. & R. 505, 3 L. J. K. B. 109, 27 Revised Rep. 430.

It was held in *Jackson v. Duchaire*

(1790) 3 T. R. 551, 100 Eng. Reprint, 727, that a private agreement between a vendor and purchaser for payment of a larger sum, not disclosed to one who advanced money to the purchaser under the belief that the sum advanced was the entire purchase price, was a fraud on the party making the advancement, and was not enforceable.

And where a surety on a bond for purchase money set up as a defense to an action on the bond that the principal had given a bond for an additional sum, which he and the obligee agreed should be kept secret from the surety, the jury were instructed that if the surety was induced to execute the contract by the concealment of the other bond, and the obligee was a party to the concealment, the surety was not liable. *Spencer v. Handley* (1842) 4 Mann & G. 414, 134 Eng. Reprint, 169, 11 L. J. C. P. N. S. 250. In this case, however, the surety was held liable on the ground that the obligee was not shown to be a party to the fraud.

It was held also that the surety was discharged, where a secret partner in two firms negotiated a contract of sale and purchase between the firms, and obtained a surety for the performance of the contract who was ignorant of the double relationship, the obligee being chargeable with notice thereof, but concealing it from the surety. *Jungk v. Holbrook* (1897) 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305.

If the payee of a note obtains the signature of a surety thereto, knowing that the latter believes that she is executing a note which, for its full amount, is for goods then purchased by her son, the principal debtor, from the payee, when the note in fact includes a pre-existing debt owing by the principal to the payee, the failure to disclose the facts amounts to a fraud on the surety, releasing her from the contract. *Fassnacht v. Emsing Gagen Co.* (1897) 18 Ind. App. 80, 63 Am. St. Rep. 322, 46 N. E. 45, 47 N. E. 480.

But the rule that, to discharge the surety because of the concealment of

the obligee, the facts concealed must be such as are peculiarly within the knowledge of the obligee, and such as the surety has the right to rely on the obligee for information regarding, was applied in *Hubble v. First Nat. Bank* (1888) 9 Ky. L. Rep. 766, in holding that the contract of suretyship was enforceable where a surety for money advanced by the seller of a mill for use in stocking the mill relied on false representations of the seller, made to him in another independent transaction, as to the value and earning capacity of the mill, although the surety was ignorant of the facts and relied on the representations, since the true value of the property and its unfitness for successful operation were matters about which the surety could inform himself, and it was his duty to investigate.

And where there was nothing on the face of the bond given by a surety to secure the purchase price of land, which would naturally induce him to believe that the vendor's lien was to be reserved, it was held that the contract of suretyship was not vitiated as to the surety by failure of the vendor, unsolicited, to communicate to the surety the fact of waiver of the lien, if the vendor had no fraudulent motive in withholding the information. *Warren v. Branch* (1879) 15 W. Va. 21.

*d. Loans; usury or secret commission..*

It was held that the surety was discharged, where one who guaranteed repayment of a loan was not informed that the entire amount of the loan was not advanced to the principal, but that approximately one third of it was retained by the lender in payment of an old debt to him, and the surety was led to believe, through the reading to him in the presence of the principal and the obligee, of recitals on a deed given to secure the loan, that the old debt had been paid. *Stone v. Compton* (1838) 5 Bing. N. C. 142, 182 Eng. Reprint, 1059, 6 Scott, 846. It will be observed that this case presents a situation in which it seems that the obligee might be said not only to have concealed material facts, but to have fraudulently misrepresented the facts.

And it was held that the surety was discharged, where the obligee, which had made a loan of \$70,000, at 6 per cent, entered into a contract with a surety for repayment of the loan, the contract reciting the above facts, but failing to disclose the additional fact, of which the surety was ignorant, that the obligee had retained the sum of \$1,400 as a commission for making the loan. *Atlantic Trust & D. Co. v. Union Trust & Title Corp.* (1909) 110 Va. 286, 135 Am. St. Rep. 937, 67 S. E. 182.

But it is held in *Coats v. McKee* (1866) 26 Ind. 223, that the fact that a lender of money accepts a note of the borrower with surety, without volunteering information to the latter that the borrower has given or is to give another note for interest on the first note, at the rate of 14 per cent, will not discharge the surety.

And an alleged secret agreement by the principal of a note, to pay 10 per cent interest instead of 8 per cent, as stipulated in the note, was held in *Fisher v. Denver Nat. Bank* (1896) 22 Colo. 373, 45 Pac. 440, not to release the surety on the note, among the grounds of the decision being the fact that the payee was not shown to be a party to the fraud, if there was any, and was justified in supposing that the surety knew of the arrangement for the payment of extra interest.

It should be observed that consideration of the question whether secret usury will discharge the surety leads beyond the scope of the present annotation, because the question may apparently depend on the effect of usury rather than on the effect of the concealment. For instance, if the usury merely renders the contract void as to any claim for payment beyond the legal rate, the surety may not be discharged, as some courts have held, because his risk is not thereby increased. The usurious part of the contract may seemingly, so far as the surety is concerned, be disregarded as surplusage. Attention is called to this class of cases, without any intention to cover exhaustively the question of the effect on the surety of undisclosed usury.

Thus, in *Richmond v. Standclift* (1842) 14 Vt. 258, it was held that the surety on a note was not discharged by the fact that the principal and the payee had made a secret agreement for the payment of usurious interest, since the agreement to pay the additional interest beyond the legal rate was not a valid agreement, and did not increase the risk or responsibility of the surety.

And the concealment from the surety of the fact that usurious interest was calculated on the amount borrowed, and included in the amount shown on the face of the note given by the borrower, was held in *Samuel v. Withers* (1852) 16 Mo. 532, not to discharge the surety on the note.

But it was held in *Denton v. Butler* (1896) 99 Ga. 264, 25 S. E. 624, that a surety on a promissory note secretly tainted with usury, of which fact the surety had no knowledge, is discharged from liability, if the note contains a waiver of homestead, because the usury makes the waiver void, and thus renders the surety's risk greater than it would otherwise have been. To a similar effect are *Lewis v. Brown* (1892) 89 Ga. 115, 14 S. E. 881; *Harrington v. Findley* (1892) 89 Ga. 385, 15 S. E. 483; *Howard v. Johnson* (1892) 91 Ga. 319, 18 S. E. 132; *Prather v. Smith* (1897) 101 Ga. 283, 28 S. E. 857; *Vaughan v. Farmers & M. Bank* (1916) 146 Ga. 51, 90 S. E. 478; *Whilden v. Milledgeville Bkg. Co.* (1907) 3 Ga. App. 69, 59 S. E. 336; *Hancock v. Bank of Tifton* (1909) 6 Ga. App. 678, 65 S. E. 784; *Norris v. Reed* (1914) 14 Ga. App. 729, 82 S. E. 314; *Bank of Omega v. Ford* (1917) 20 Ga. App. 496, 93 S. E. 106; *Duckett v. Martin* (1919) 23 Ga. App. 630; 99 S. E. 151.

Among possibly other cases in Georgia, supporting the proposition that in an action on such a note it is incumbent on the plaintiff, in order to hold a surety liable, to prove affirmatively that the surety signed the note with knowledge of the usury, are *Denton v. Butler* (Ga.) *supra*; *Prather v. Smith* (1897) 101 Ga. 283, 28 S. E. 857, and *Bank of Omega v. Ford*

(1917) 20 Ga. App. 496, 93 S. E. 106, *supra*.

It was held also in *Harrington v. Findley* (1892) 89 Ga. 385, 15 S. E. 483, *supra*, that the discharge of the surety in such a case did not depend on actual loss, but on the risk of loss to which he was exposed by reason of the concealed usury, and that therefore the surety was not prevented from taking advantage of the usury as a ground of discharge by the fact that the principal failed to plead it, or to assert his right to homestead and exemption on account of it, but submitted to a judgment against himself for the whole debt.

The above cases turn not so much on the duty of the obligee to disclose to the surety the real transaction, as on the effect on the contract of the facts concealed. This distinction is close in some cases, but it should be observed that it is impracticable in the present annotation to cover the various phases of the question as to the effect on the surety's contract of the concealed matter. There are other cases in Georgia which make this clearer. For example, see *First Nat. Bank v. McEntire* (1900) 112 Ga. 232, 37 S. E. 381, which holds that a surety who signs a note containing a waiver of homestead, and secretly tainted with usury, is not discharged from liability when the note is payable to a national bank, since his risk has not been increased, in view of the fact that the law of the state, to the effect that a waiver of homestead, when part of a usurious contract, is void, is not applicable to national banks.

See also *Weldon v. Ayers* (1902) 116 Ga. 181, 42 S. E. 473, holding that a surety on a note, who signs the same in ignorance of the fact that the contract between the payee and the maker is one providing for the payment of usury, is not, because this fact is concealed from him, discharged altogether from liability on the note; although, by a plea of usury, he may prevent a recovery against him of a sum greater than the principal of the debt and legal interest thereon.

*c. Composition agreements.*

Where a bank pretended to accept a certain percentage of its debt, the same as other creditors, with a view to induce them to enter into a composition, representing its willingness to advance, on security, a sum of money to pay the composition and to enable the debtor to carry on business, but secretly stipulated for payment of its debt in full, it was held that the concealment amounted to a fraud on the other creditors and on the guarantors, entitling the latter to release from the contract. *Pendlebury v. Walker* (1841) 4 Younge & C. Exch. 424, 160 Eng. Reprint, 1073.

So, it was held that the surety on a note, given by a debtor pursuant to a composition agreement with creditors, was discharged, where the basis of the settlement included a liability of a third party for which the debtor was not liable, and the debtor also gave his note for the balance of the amount which he owed, in addition to the percentage specified in the composition agreement, these facts not being disclosed to the surety. *Doughty v. Savage* (1859) 28 Conn. 146.

And it was held that the surety was discharged where an insolvent debtor entered into a composition agreement with all of his creditors, one of whom, instead of receiving his percentage in cash, as did the other creditors, accepted notes of the debtor, with sureties, and, by a secret agreement, concealed from the sureties, who were induced to sign in the belief that by the composition the debtor was released from the indebtedness, that the creditor received from the debtor a note for the balance of the indebtedness, with an agreement to surrender such note on being paid 25 per cent of its face value. *Powers Dry-Goods Co. v. Harlin* (1897) 68 Minn. 193, 64 Am. St. Rep. 460, 71 N. W. 16.

But where the surety, who resided in Chicago, solicited no information from the creditor, who resided in New York, and took the debtor's note, indorsed by the surety, in the usual course of business, it was held that the creditor had the right to suppose that the surety was informed of all

the facts, and was not guilty of fraud in not disclosing to the surety that he had not entered into an agreement, as most of the other creditors had done, to compromise his claim on a 50 per cent basis by accepting notes of the debtor indorsed by the surety, but had accepted the debtor's individual note for the balance of his claim. *Booth v. Storrs* (1874) 75 Ill. 438.

And where an arrangement was made between a debtor and his creditor that the debtor should give a note with surety for 60 per cent of the indebtedness, and his individual note for the remaining 40 per cent, it was held that the sureties were not discharged by the failure of the creditor, of whom no inquiries were made by the sureties, to disclose the fact to the sureties that the debtor had given his individual note for the remainder of the indebtedness. *Hubbard v. Fravell* (1883) 12 Lea (Tenn.) 304.

*f. Miscellaneous.*

The rule that if an obligee makes a statement to a surety which, at the time it is made, is true, but which becomes untrue during the course of the negotiations because of a change of circumstances, the obligee, if aware of the change, is under a duty to disclose the same to the proposed surety, was applied in *Davies v. London & P. M. Ins. Co.* (1878) L. R. 8 Ch. Div. (Eng.) 469, 47 L. J. Ch. N. S. 511, 38 L. T. N. S. 478, 26 Week. Rep. 794, so as to discharge the sureties, where an insurance company, having discovered that one of its agents had failed to account for premiums collected, ordered the agent's arrest, whereupon friends of the latter offered to deposit a sum of money with the company to indemnify it, all the parties believing that there was probable cause for prosecution, and the company permitted the sureties to consummate the contract without disclosing to them a change of circumstances occurring during the negotiations, in that the company was advised by counsel that there was not ground for prosecution, and had withdrawn orders for the arrest.

The rule that the surety must make



inquiry, where he may ascertain from those present at the time the contract is executed all the facts necessary to shield himself from fraud, and is put on his guard by circumstances, was applied in *Stedman v. Boone* (1875) 49 Ind. 469, where the surety for a debtor alleged fraud in the execution of the contract, in that he was not informed that the debtor at the time was under arrest.

And the rule that if the fact concealed does not increase the surety's risk, and is one that cannot fairly be considered as likely to influence the surety in deciding whether it would accept the risk, failure of the obligee to disclose the same cannot be regarded as fraud, was applied in *Baglin v. Title Guaranty & S. Co.* (1909) 166 Fed. 356, affirmed in (1909) 102 C. C. A. 182, 178 Fed. 682, where, a surety company having become bound for the return to the plaintiff of certain government bonds, it was held that failure of the plaintiff to disclose to the company an agreement that the principal might pay cash instead of returning the bonds would not relieve the surety, since the existence of this option on the part of the principal was not a material fact, and did not increase the risk, and since the surety company, even in the absence of such an agreement, would have had the option of payment in cash.

In an action by the payee against the surety of a note, it was held in *Miller v. Gardner* (1878) 49 Iowa, 234, that the surety was not liable if he signed the note, thinking that it was a renewal merely of other notes on which he was liable as surety, and

which were renewed on the same day, if the plaintiff knew, or had good reason to believe, that he was signing the note under this mistake, and did not disclose the facts to him.

It was held in *Conger v. Bean* (1882) 58 Iowa, 321, 12 N. W. 284, that one who signed a note as surety after it had been executed by the principal was not liable thereon, if the payee, at the time he obtained the surety's signature, concealed from him the fact that the maker had refused to give a note with him as surety.

And in the absence of evidence of fraud on the part of the obligee in withholding information of the change of suretyship, it was held in *North British Ins. Co. v. Lloyd* (1854) 10 Exch. 523, 156 Eng. Reprint, 545, 3 C. L. R. 264, 24 L. J. Exch. N. S. 14, 1 Jur. N. S. 45, that the nondisclosure to a proposed surety of the fact that he was becoming surety in place of the brother of the principal, who had requested the obligee to release him, would not discharge the surety, although he was ignorant of the former suretyship, where he executed the contract at the request of the principal, on representation by the latter that, unless additional security was procured, shares of stock owned by him and held as collateral would be sacrificed, although the form of the contract was prepared by the obligee.

The fact that the surety was misled as to the legal effect of the bond cannot be shown under the plea of non est factum. *Edwards v. Brown* (1831) 1 Comp. & J. 307, 148 Eng. Reprint, 1436, 1 Tyrw. 182, 9 L. J. Exch. 84, 3 Younge & J. 423, 148 Eng. Reprint, 1244. R. E. H.

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CHARLES F. BOSS, SR., Appt.,

v.

HARLAN W. HAGAN et al.

*District of Columbia Court of Appeals—November 3, 1919.*

(— App. D. C. —, 261 Fed. 254.)

**Costs — security by nonresident — waiver.**

1. The statutory provision requiring security for costs as a condition to the commencement of an action by a nonresident is waived by pleading to the merits.

[See note on this question beginning on page 1510.]

**Pleading — variance — description of tenant.**

2. Proof of tenancy by sufferance is not a variance from an allegation of monthly tenancy in a complaint to recover possession of leased property.

**Landlord and tenant — notice to quit — excessive time — effect.**

3. A tenant cannot complain that he is given longer notice to quit than the law requires.

**APPEAL** by defendant from a judgment of the Supreme Court affirming a judgment of the Municipal Court in favor of plaintiffs in an action brought to recover possession of certain leased property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. P. H. Marshall and C. H. Merillat for appellant.

Mr. Charles Linkins for appellees.

Mr. Chief Justice Smyth delivered the opinion of the court:

The Hagans brought action in the municipal court against Boss to recover possession of certain premises, alleging that their vendor had rented the premises to Boss as a monthly tenant; that the premises had been purchased by them for their home and were necessary for that purpose; that one of them was a war worker; and that the tenancy had been terminated by a due notice to quit.

Boss appeared specially and asserted that the Hagans were non-residents of the District of Columbia, and moved to dismiss the complaint because they had failed to give security for costs. The motion was overruled, and he entered a general appearance and defended on the merits. There was a judgment for the plaintiffs, and Boss appealed to the supreme court of the District.

The Hagans filed in that court an affidavit of merit under rule 19, and asked for judgment. To this Boss responded with an answering affidavit in which he renewed his claim that the Hagans were nonresidents of the District at the time of commencing the action in the lower court, and denied the jurisdiction of that court to try the case, because of their failure to give security for costs. He also challenged the sufficiency of the notice to quit; asserted that there was a material variance between the tenancy as alleged in the complaint and the one disclosed in the Hagan affidavit, and attacked the sufficiency of the affidavit under

rule 19. The supreme court held that his affidavit was insufficient to raise any question of fact, and gave judgment for the Hagans.

The first question presented relates to the jurisdiction of the municipal court. Section 11 of the Code provides that "nonresidents shall not commence a suit before a justice of the peace [now municipal court] without first giving security for costs." This goes to the jurisdiction of the court over the person of the defendant, and he has a right to insist upon it; but it is a personal privilege which may be waived by him, Costs—security by nonresident—waiver. and this Boss did

by pleading to the merits. "The defendant had a right," said this court in *Guarantee Sav. Loan & Invest. Co. v. Pendleton*, 14 App. D. C. 387, "to appear specially to take the objection to the proceeding of the justice, without the condition precedent having been complied with by the plaintiff. But having interposed that objection, he could not go farther and plead to the merits of the case, without thereby waiving compliance by the plaintiff with the condition which required him to give security for the costs before bringing his suit." See also *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 38 L. ed. 98, 100, 14 Sup. Ct. Rep. 286; *Costello v. Palmer*, 20 App. D. C. 210.

In many jurisdictions it is the law that a person who in proper time challenges the jurisdiction of the court over his person, and after the challenge has been overruled pre-

serves the objection in his answer, does not waive it by answering over and going to trial on the merits. *Arroyo Ditch Co. v. Superior Ct.* 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54; 7 R. C. L. 78; *Lower v. Wilson*, 62 Am. St. Rep. 865, and note (9 S. D. 252, 68 N. W. 545). But this is not the Federal rule, as is pointed out by Mr. Chief Justice Alvey in the *Pendleton Case*, supra. It was there urged that, since the objection was renewed and preserved in the subsequent proceeding, the defendant had not waived it by defending on the merits. The learned chief justice said that the defendant, by appearing and contesting the case on the merits, lost "his right to contest the ruling of the court below on his objection to the jurisdiction on appeal."

If the defendant desired to have the ruling of the court reviewed he should have applied to the supreme court for a writ of certiorari. *Degge v. Hitchcock*, 35 App. D. C. 218; *United States v. West*, 34 App. D. C. 12; *Bond v. Carter Hardware Co.* 15 App. D. C. 72.

Nor do we think that there is any merit in the contention that there is a variance between the allegations of the complaint and those of the Hagan affidavit with respect to the character of the tenancy. The complaint alleges that Boss was "a monthly tenant," while the affidavit asserts that he held the property "as a monthly tenant." Boss, on the other hand, says that while he entered into the occupancy of the premises under a written agreement

as a monthly tenant, the agreement was subsequently changed, and an oral arrangement was made by which the amount of his rent was increased \$2 a month, and that by virtue of this he became a tenant by sufferance. If we concede his claim he could still be described with accuracy as a monthly tenant, for

Pleading—  
variance—  
description of  
tenant.

§ 1034 of the Code provides that "all verbal hirings by the month, or at any specified rate per month, shall be deemed estates by sufferance." But the tenant is nevertheless a monthly tenant, for he holds "by the month."

The argument with respect to the alleged insufficiency of the notice is based on the fact that it gave Boss a longer time than the required thirty days. The tenancy, it was conceded, commenced on the first day of the month, and the notice to quit expired on the first day of the following month instead of the last day of the month in which it was given, thus allowing the tenant one day more than the law required. We have held that a notice which gave the tenant more than thirty days (the time required by the Code) to surrender the premises was valid. *Bliss v. Duncan*, 44 App. D. C. 93. The giving of the additional day was an advantage to the defendant; of this he has no just cause for complaint.

Landlord and  
tenant—notice to  
quit—excessive  
time—effect.

The judgment must be affirmed with costs.

## ANNOTATION.

### Waiver of statute or court rule requiring nonresident plaintiff to give security for costs.

#### I. Waiver of right to security:

- a. Generally, 1511.
- b. Application after extension of time to answer, 1511.
- c. Application after demurrer, 1512.
- d. Application after answer, 1512.

#### I.—continued.

- e. Application after case ready for trial, 1517.
- f. Application after case called for trial, 1521.
- g. Application during progress of trial, 1522.

## I.—continued.

h. Application after judgment or decree, 1525.

i. Application after judgment opened to permit defendant to plead, 1525.

j. Application after appeal, 1526.

k. Rule in New York, 1527.

## II. Waiver of right to dismissal:

a. Application after continuance, 1528.

b. Application after demurrer, 1529.

c. Application after answer, 1530.

d. Application after case ready for trial, 1532.

e. Application after verdict, 1533.

f. Application after appeal, 1533.

## I. Waiver of right to security.

## a. Generally.

In England, and in practically every American jurisdiction, a nonresident plaintiff is required by statute or rule of court to give a bond for costs. These statutes and rules are ordinarily deemed to be directory, and the benefit thereof is waived by the failure of the defendant to make prompt application for an order for such a bond. See 7 R. C. L. p. 786.

Both by the express terms of the statutes or rules, and in the absence of any express provision, the rule in most jurisdictions seems to be that a cost bond is waived by a failure to apply therefor before the expiration of the time allowed to the defendant to plead, and before any defensive pleading is filed. See the cases cited throughout this note. Consequently, in most of the cases within the scope of this note, the right to a bond has been held to have been waived, and for illustrative purposes the cases are arranged with reference to the time when the application for a bond was actually made.

## b. Application after extension of time to answer.

It has been held in England and Canada that the right to a cost bond from a nonresident plaintiff is waived if the bond is not applied for before obtaining an extension of the time to answer. *Wood v. Reg.* (1876) 7 Can. S. C. 631; *Meliorucchy v. Meliorucchy* (1750) 2 Ves. Sr. 24, 28 Eng. Reprint, 17; *Craig v. Bolton* (1789) 2 Bro. Ch. C. 609, 29 Eng. Reprint, 334; *Anonymous* (1804) 10 Ves. Jr. 287, 32 Eng. Reprint, 854. Compare *Swanzy v. Swanzy* (1858) 4 Kay & J. 237, 70 Eng. Reprint, 99, 27 L. J. Ch. N. S. 419, 4 Jur. N. S. 1013, 6 Week. Rep.

414; *Fry v. Wills* (1834) 3 Dowl. P. C. (Eng.) 6; *Wilson v. Minchin* (1831) 1 Dowl. P. C. (Eng.) 299, 2 Crompt. & J. 87, 149 Eng. Reprint, 37, 2 Tyrw. 166, 1 L. J. Exch. N. S. 39; *Gurney v. Key* (1835) 3 Dowl. P. C. (Eng.) 559, 1 Harr. & W. 203; *Dowling v. Harman* (1840) 6 Mees. & W. 131, 151 Eng. Reprint, 352, 8 Dowl. P. C. 165, 9 L. J. Exch. N. S. 53, 4 Jur. 43.

The reason for this view was thus stated in *Atkins v. Cook* (1857) 3 Jur. N. S. (Eng.) 283: "What is the principle upon which a defendant who is entitled to require the plaintiff to give security for costs waives that right by moving for time to answer? It is this, that the very ground is that the defendant has the right to say: 'I am not to enter the lists with you until you have given security for costs.' And if he does take any step, it is held that he is inconsistent in saying: 'Give me security for costs.' He has waived all right, and has prepared himself for the combat. That, I believe, is the reason upon which it is held that a defendant waives his right to security by taking the least step in the cause."

So, where an application for security for costs was not made within the time allowed for filing the statement of defense, but an extension was obtained, and thereafter the Crown moved for security, it was held that the right had been waived. *Wood v. Reg.* (Can.) *supra*.

Similarly, in the case of *Anonymous* (1804) 10 Ves. Jr. 287, 32 Eng. Reprint, 854, it was held that where a defendant had secured an order for an extension of time, he had waived his right to demand security of a nonresident plaintiff.

On the other hand, in *Swanzy v. Swanzy* (1858) 4 Kay & J. 237, 70

Eng. Reprint, 99, the defendant, in applying for time to answer, discovered from information contained in affidavits used in connection with that motion that the plaintiff was a non-resident. It was held that the defendant had not waived his right to obtain security for costs by application made after the order extending the time to answer had been granted. The court said: "There can be no doubt that after a defendant has taken active steps in a cause, with the knowledge of his right to have security for costs, it is too late for him to avail himself of a right which would have been of course at an earlier stage. . . . In this case it does not necessarily appear upon the face of the bill that the defendant is entitled to security for costs. If he had made inquiry, and coupled the result of that inquiry with the statement in the bill of permanent residence, and discovered that the residence was only for a limited period, no doubt he would have been entitled to come here and make this application; but if the facts on which the right to security rests do not appear upon the face of the bill, an application cannot be made except upon affidavit. The defendant says when he made the application for time to answer he heard that the plaintiff intended to go away as soon as the matter was disposed of, and that put him upon inquiry. I am not prepared to say that he was bound to make that inquiry before. Upon the facts as they originally stood at the filing of the bill, he would have been entitled to security for costs if he had come here at once; but now, in addition to those, there is the fact that the plaintiff has changed her quarters and her name. The only doubt was whether the defendant had waived his right by taking a step before he ascertained all this. I think the application for time ought not to prejudice this application. He comes here the moment he finds the difficulty, and I shall direct the plaintiff to give security for costs."

Similarly, in *Fry v. Wills* (1834) 3 Dowl. P. C. (Eng.) 6, it was held that although the defendant had obtained

an extension of time to plead he had not waived his right to demand security for costs. The court said: "I think the rule of Hilary term gives the court a discretion, although a fresh step has been taken by the defendant after a knowledge of the plaintiff's absence from the country has reached him. I do not think the defendant was bound to take any step towards obtaining security for costs until he perceived that the plaintiff, by declaring, was in earnest. Here the plaintiff sued out his writ in the month of June, and never declared until the month of October. I think, therefore, the defendant is entitled to have his rule made absolute." See to the same effect, *Wilson v. Minchin* (1831) 1 Dowl. P. C. (Eng.) 299, 2 Crompt. & J. 87, 149 Eng. Reprint, 37, 2 Tyrw. 166, 1 L. J. Exch. N. S. 39; *Gurney v. Key* (1835) 3 Dowl. P. C. (Eng.) 559, 1 Harr. & W. 203; *Dwelling v. Harman* (1840) 6 Mees. & W. 131, 151 Eng. Reprint, 352, 8 Dowl. P. C. 165, 9 L. J. Exch. N. S. 53, 4 Jur. 43.

*c. Application after demurrer.*

A motion to require security for costs will be denied where the defendant has demurred before the motion was made. *Randolph v. Emerick* (1851) 13 Ill. 344. In that case, an action of assumpsit, the defendant demurred to the complaint, and subsequently, the demurrer being overruled, a motion was made to require the plaintiff, a nonresident, to give security for costs. It was held that, the objection being of a dilatory character, it was to be considered as waived if not insisted on at the proper time, and that the motion came too late.

*d. Application after answer.*

Where a defendant delays moving for security for costs until after the service of his answer, the right to require the security is waived.

Arkansas. — *Lincoln v. Hancock* (1844) 5 Ark. 703.

Connecticut. — *Ormsbee v. Davis* (1844) 16 Conn. 567.

Illinois. — *Dunning v. Dunning* (1865) 37 Ill. 306. Compare *Kimbark v. Blundin* (1880) 6 Ill. App. 539.

**Indiana.**—Jeffersonville, M. & I. R. Co. v. Hendricks (1872) 41 Ind. 48, 3 Am. Neg. Cas. 106.

**Iowa.**—Sprague v. Haight (1880) 54 Iowa, 446, 6 N. W. 693; Gilbert v. Hoffman (1885) 66 Iowa, 205, 55 Am. St. Rep. 263, 23 N. W. 632.

**Kentucky.**—Tibbs v. Clarkson (1841) 2 B. Mon. 34.

**Maryland.**—Compare Watson v. Glassie (1902) 95 Md. 658, 53 Atl. 428.

**New Jersey.**—Roumage v. Mechanics Ins. Co. (1830) 12 N. J. L. 95; Newman v. Landrine (1862) 14 N. J. Eq. 291, 82 Am. Dec. 249. See also Reed v. Benzine-ated Soap Co. (1907) 72 N. J. Eq. 622, 65 Atl. 1008.

**North Dakota.**—Compare Naderhoff v. Benz (1913) 25 N. D. 165, 47 L.R.A.(N.S.) 852, 141 N. W. 501.

**Ohio.**—See Johnson v. Ralph (1817) Tappan, 133

**Pennsylvania.**—Bickford v. Ice Co. (1880) 8 W. N. C. 106.

**England.**—Dyott v. Dyott (1815) 1 Madd. Ch. 187, 56 Eng. Reprint, 70; Kasten v. Plaw (1827) 1 Moore & P. 30; Watson v. Pim (1839) 2 Ir. Eq. Rep. 26, Sausse & Sc. 642; Eyre v. Dwyer (1840) Sausse & Sc. 653; Whitehead v. Murat (1724) Bunbury, 183, 145 Eng. Reprint, 641; Atkins v. Cook (1857) 3 Jur. N. S. 283, 3 Drew. 694, 61 Eng. Reprint, 1068, 26 L. J. Ch. N. S. 353, 5 Week. Rep. 381. See also White v. Greathead (1808) 15 Ves. Jr. 2, 33 Eng. Reprint, 655. Compare Duncan v. Stint (1822) 5 Barn. & Ald. 702, 106 Eng. Reprint, 1347, 1 Dowl. & R. 348; Ex parte Siedler (1841) 12 Sim. 106, 59 Eng. Reprint, 1071; Murrow v. Wilson (1850) 12 Beav. 497, 50 Eng. Reprint, 1151; Fletcher v. Lew (1835) 5 Nev. & M. 351, 3 Ad. & El. 551, 111 Eng. Reprint, 523, 1 Harr. & W. 430; Ex parte Tull (1833) 3 Deac. & C. Bankr. Cas. 503, 1 Mont. & Ayr. 80, 3 L. J. Bankr. 30; Edinburgh & L. R. Co. v. Dawson (1839) 7 Dowl. P. C. 573, 1 W. W. & H. 561, 3 Jur. 55; Re Smith (1896) 75 L. T. N. S. 46; Wyllie v. Ellice (1848) 11 Beav. 99, 50 Eng. Reprint, 754.

**Canada.**—Tiers v. Triggs (1860) 5 Lower Can. Jur. 25; Smith v. Dey (1869) 2 Ch. Chamb. Rep. (U. C.) 456; Rousseau v. Trudeau (1869) 13

Lower Can. Jur. 138; Melles v. Swales (1878) 22 Lower Can. Jur. 271; Cruickshank v. Lavoie (1880) 24 Lower Can. Jur. 59. Compare Stalker v. Hammond (1864) 8 Lower Can. Jur. 137; Ganson v. Finch (1871) 3 Ch. Chamb. Rep. (U. C.) 296; Smerling v. Kennedy (1903) 5 Ont. L. Rep. 430.

The reason for the rule was aptly stated by way of dictum in the case of *Re Smith* (1896) 75 L. T. N. S. (Eng.) 47, wherein the court said: "The old practice of the court of chancery was perfectly well settled as to this matter, and was founded on common sense, and in effect it was this: A defendant sued by a plaintiff out of the jurisdiction was entitled to say: 'I will not engage in litigation with you because if your bill is ultimately dismissed with costs I shall have no means of enforcing the payment of those costs against you out of the jurisdiction.' Of course there are answers to that such as, 'There is a share of the estate, or there is available property in this country, and there is no substance in the statement.' The point was that the defendant was entitled to say, 'I will not engage in litigation with you.' If, therefore, the defendant making the objection took any step, he had commenced to engage in litigation, and he was not allowed to go back. It was not really an application of the doctrine of election, but it was something of a similar character, and that frequently operated with great hardship."

In *Ormsbee v. Davis* (1844) 16 Conn. 567, a nonresident plaintiff brought an action without filing the necessary bond for costs. The defendant failed to make any objection, but pleaded to the merits of the action. In holding the statutory provision to have been waived, the court said: "The provision was made solely for the benefit of the defendant in that suit; and the omission to give such bond, being merely an irregularity in the process which, at most, made it voidable only, and not void, was a matter pleadable only in abatement. By not interposing such plea, but pleading to the merits of the action, the defendant waived

the irregularity, which he clearly had a right to do."

In *Dunning v. Dunning* (1865) 37 Ill. 306, wherein a defendant, after pleading to the merits, objected that the plaintiff, a nonresident, had filed no cost bond, it was held that the motion was made at too late a date, and had been waived by pleading to the merits. It may be noted, however, that in *Kimbark v. Blundin* (1880) 6 Ill. App. 539, under a statute expressly providing that "the right to require security for costs shall not be waived by any proceeding in the cause," it was held that the right of the defendant to apply for a rule to compel the plaintiff to give security was not waived by his having pleaded to the action.

In *Jeffersonville, M. & I. R. Co. v. Hendricks* (1872) 41 Ind. 48, 3 Am. Neg. Cas. 106, at the time the action was commenced, a rule of the trial court required "application for security for costs to be made before answering to the complaint, unless answer is made in ignorance of the nonresidence, or the plaintiff has become a nonresident since answering." The defendant, subsequent to the service of an amended complaint, moved to require the plaintiff to give bond for costs, which motion was overruled. On appeal the court held that the decision was correct, as the defendant had answered the original complaint, and therefore did not come within any of the exceptions to the rule. The counsel for the defendant contended that "the rule is an unreasonable, arbitrary, and harsh rule,—one not fit to be made." In discussing this contention the appellate court said: "The 14th section of the act organizing circuit courts provides that the said courts shall adopt rules for conducting the business therein, not repugnant to the laws of this state, etc. 2 Gavin & H. 8. . . . A rule might be 'repugnant to the laws of this state,' which was not in conflict with any statute of the state. A rule which would deprive a party of any right secured to him by the Constitution or the principles of the common law in force in this state would be repugnant to the laws of this state. A

rule of court should be reasonable, and adapted to a prompt and just administration of justice. The statute requires many things to be done, without prescribing the time when, or the manner in which, they shall be done, such as granting continuances, and changing the venue, and the filing of pleadings, or the like. It is also competent for the court to determine by rule when an application for security for costs shall be made. If the court below had adopted a rule that 'no application for security for costs should be made after an answer had been filed,' we should have regarded such a rule as unreasonable and repugnant to every principle of justice, and therefore repugnant to the laws of this state; for under such a rule a defendant might answer honestly, believing that the plaintiff was still a resident of the state, when in fact he had become a nonresident of the state, without the knowledge of the defendant, before he had commenced his action; or he might remove from the state after an answer had been filed. The rule of the court below properly guards against such contingency. We cannot see that any injustice is done to a defendant who has full knowledge that the plaintiff is a nonresident of the state, but answers the complaint without asking an order for security for costs, by depriving him of the right of making an application for such order afterwards."

In *Sprague v. Haight* (1880) 54 Iowa, 446, 6 N. W. 693, an action to foreclose a mortgage, some of the defendants appeared and asked for an extension of time until the following morning to file a motion for security for costs, which time was given by the court. They failed to file the application for security in the time given them, and the court required them to answer by noon of the same day. They did not comply with this order, but on the next day filed the motion, which was overruled because not filed within the time fixed by the court. On appeal the ruling was held to be correct, the appellate court saying: "The ruling of the court in refusing to entertain a motion for security for costs,

filed after the time fixed therefor, was undoubtedly correct. Counsel for appellants contends that under § 2927 of the Code they had the right to file such motion at any time before answering. But when some pleading was required on the second day of the term, the defendants neither filed their answer nor motion, but the case passed till the next day without either. On the third day they were given until the morning of the fourth to file their motion. This they did not do, and they were ordered to answer. The statute does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something. If he chooses to make the motion, he must make it instant, or within such time as is given him by the court. If he fails without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur."

In *Roumage v. Mechanics Ins. Co.* (1830) 12 N. J. L. 95, an application was made to require the plaintiff to furnish costs, the affidavit stating that the plaintiff had left the state and resided out of the same. It was held that the application was made too late, as the affidavit did not show that the plaintiff had left the state since the issue was joined, or that the application might not have been made at the usual time. *Newman v. Landrine* (1862) 14 N. J. Eq. 291, 82 Am. Dec. 249, presented a similar question. At the commencement of the suit the complainant resided in the state, but subsequently removed to a foreign state. About three months after his removal from the state, the defendant obtained an order extending the rule for closing testimony. From the statements in the defendant's affidavit it did not appear whether he had notice of the complainant's removal before obtaining that order. The court held that under the circumstances there should have been a full and explicit denial by the defendant, of notice of the complainant's change of residence at the time of taking the last order

in the cause, and the motion to require security was denied.

In *Tibbs v. Clarkson* (1841) 2 B. Mon. (Ky.) 34, an action of ejectment, the defendant was admitted to defend in the place of the casual ejector, under an agreement to confess lease, entry, and ouster, and plead the general issue, and rely on his title only. Subsequently he exhibited and filed a plea in abatement, alleging that the lessors of the plaintiffs were nonresidents and had not given security for costs. It was held that, while as a general rule plaintiffs who were nonresidents could be required to execute a bond with security for costs, such a motion should not be allowed after the defendant had appeared and been admitted to defend on the terms of defending on the merits. The court said: "Had he desired to plead in abatement, he should have asked leave of the court to appear specially, or to have him admitted a defendant upon the usual confession of lease, entry, and ouster, with the reservation of his right to plead in abatement the matter presented in his plea. To allow him to plead this matter, after he has been admitted a defendant upon the express terms of relying upon his title only, is to allow him to contradict his own agreement, previously entered on the record. We do not feel disposed to extend the privilege of pleading such matter in abatement farther than it has already been carried, especially as the defendant at any time, upon motion, might have availed himself of it."

Where a notice that motion for security for costs would be made on the first day of an ensuing term of court was given after the fourth day from the date of appearance, it was held that the motion came too late and should be rejected. *Tiers v. Trigg* (1860) 5 Lower Can. Jur. 25. See to the same effect, *Rousseau v. Trudeau* (1869) 13 Lower Can. Jur. 138; *Melles v. Swales* (1878) 22 Lower Can. Jur. 271; *Cruickshank v. Lavoie* (1880) 24 Lower Can. Jur. 59.

In *Kasten v. Plaw* (1827) 1 Moore & P. (Eng.) 30, where a motion requiring the plaintiff to give security



for costs was not made until after the plea was filed, the motion was discharged because of delay. See to the same effect, *Whitehead v. Murat* (1724) *Bunbury*, 183, 145 *Eng. Reprint*, 641. So, where an answer was filed by mistake, it was held that the defendant had waived his right to require security of the plaintiff, who had gone abroad. *Dyott v. Dyott* (1815) 1 *Madd. Ch.* 187, 56 *Eng. Reprint*, 70. However, it has been held that a defendant was entitled to security on filing an affidavit stating that, at the time he pleaded, he was unaware that the plaintiff was a non-resident. *Duncan v. Stint* (1822) 5 *Barn. & Ald.* 702, 106 *Eng. Reprint*, 1347, 1 *Dowl. & R.* 348. See to the same effect, *Ex parte Tull* (1833) 3 *Deacon & C. Bankr. (Eng.) Cas.* 503, 1 *Mont. & Ayr Bankr.* 80, 3 *L. J. Bankr. N. S.* 30. So, where a petitioner was out of the jurisdiction of the court, and the respondent had answered the affidavit in support of the petition, it was held that the latter had not waived the right to require the petitioner to give security for costs. *Ex parte Siedler* (1841) 12 *Sim.* 106, 59 *Eng. Reprint*, 1071. See to the same effect, *Murrow v. Wilson* (1850) 12 *Beav.* 497, 50 *Eng. Reprint*, 1151. Likewise, in *Wyllie v. Ellice* (1848) 11 *Beav.* 99, 50 *Eng. Reprint*, 754, 12 *Jur.* 711, 17 *L. J. Ch. N. S.* 378, it appeared that, when the original bill was filed, the defendant served notice of motion for security for costs, on the ground that the plaintiff resided out of the jurisdiction, but the motion was abandoned and the defendant filed an answer, it appearing that the plaintiff was within the jurisdiction. Subsequently, the plaintiff amended his bill, describing himself as a nonresident, whereupon the defendant applied for and obtained an order requiring the plaintiff to furnish security for costs. The court held that there had been no waiver by the defendant. In *Fletcher v. Lew* (1835) 3 *Ad. & El.* 551, 111 *Eng. Reprint*, 523, 1 *Harr. & W.* 430, 5 *Nev. & M.* 351, a stay of proceedings was obtained until the plaintiff should give security for costs. The evidence showed that the plaintiff was a resi-

dent abroad, and the defendant, after service of the summons, had entered an appearance. Under the rule of court then in force it was provided that "an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined." The court accordingly made the rule absolute, although the defendant had pleaded. See to the same effect, *Edinburgh & L. R. Co. v. Dawson* (1839) 7 *Dowl. P. C. (Eng.)* 573, 1 *W. W. & H.* 561, 3 *Jur.* 55. And in the case of *Re Smith* (1896) 75 *L. T. N. S. (Eng.)* 46, it was held that, although the old rule in chancery provided that an order for security for costs must be applied for before the answer to a bill was delivered, under order 65, there was no hard-and-fast rule to prevent an application for security for costs from being made at any stage of the proceedings. The court reversed a decision denying a motion for security for costs from a nonresident plaintiff, although the defendant had delivered his statement of defense.

In Maryland, a statutory provision that "in all cases in chancery a rule security for costs may be laid at any time before decree is passed" has been held to entitle the defendant to such security, although the bill has been answered. *Watson v. Glassie* (1902) 95 *Md.* 658, 53 *Atl.* 428.

In *Naderhoff v. Benz* (1913) 25 *N. D.* 165, 47 *L.R.A. (N.S.)* 853, 141 *N. W.* 501, the summons had been served on the defendant by service on the secretary of state. The defendant appeared by its attorney, and served a motion for dismissal of the action on the ground that the plaintiff was a nonresident of the state and had not filed security for costs as required by law. The time for the hearing of the motion was fixed two days after the expiration of the thirty-day period for service of answer or demurrer, and, neither of these papers being served by the defendant, the plaintiff took judgment by default. The defendant promptly moved to open the judgment, which motion was granted, and the plaintiff appealed. In holding the defendant not to be entitled to security

for costs after having failed to plead, the court said: "The only way, under our practice, defendant could avail himself of this right to security for costs at any time before judgment, was by motion, which, when made, was the assertion by him of the legal right in the manner prescribed by statute, and upon which he had a right to be heard at any time before judgment. But proper practice on defendant's part would have been to have answered, or demurred, or procured additional time within which to have pleaded after the ruling on the motion to dismiss for want of security for costs. The period for answer and demurrer expiring before the time at which the motion for security for costs was noticed for hearing and argument, the right of defendant to require of plaintiff such security lapsed and expired immediately when he became in default in answer. The right to security for costs is that defendant may recover his costs and disbursements assessable at law should his defense prevail or plaintiff's cause of action fail, and to urge the right for such purposes he must be in a position to interpose a defense or question the right of plaintiff to prevail on the merits, which he cannot do when he is in default in answer or demurrer. . . . For the foregoing reasons, and on an analysis of the authorities, we decide that the pendency of this motion for security for costs undisposed of would not, of itself, extend the time within which defendant was obliged to answer or demur, or stand in default thereof; and when he is so in default because of his failure to present an issue on the merits, thereby conceding the merit of plaintiff's cause of action and his right of recovery, a defendant, then, has no right to ask or be heard to insist upon security for costs, when, under every presumption, plaintiff is then entitled to judgment against him, and defendant would be asking for something which could avail him nothing, and for something concerning which he then could have no rights, having waived his defense by failure to plead or demur."

*e. Application after case ready for trial.*

Where a defendant in an action commenced by a nonresident plaintiff neglects to move for security for costs until the case is ready for trial, the right is held to be waived.

**United States.**—*Prince v. Towns* (1887) 33 Fed. 161.

**Delaware.**—*Bennett v. Shute* (1837) 2 Harr. 197.

**Montana.**—*Brazell v. Cohn* (1905) 32 Mont. 556, 81 Pac. 339.

**New Jersey.**—*Compare Den v. Wilson* (1819) 5 N. J. L. 680.

**Ohio.**—*Boucher v. Lindsley* (1851) 1 Ohio Dec. Reprint, 457.

**Pennsylvania.**—*Castelo v. Binns* (1837) 2 Miles, 86; *M'Garry v. Crispin* (1845) 3 Clark, 25; *Bogardus v. Williams* (1873) 1 Pa. Co. Ct. 673; *Fuchs v. Wright* (1878) 6 W. N. C. 157; *Southmayd v. Henderson* (1883) 13 W. N. C. 78; *Mason v. Frick* (1883) 12 W. N. C. 570; *Smart v. Chamberlin* (1890) 26 W. N. C. 272; *Voss v. Sensenig* (1894) 14 Pa. Co. Ct. 631. *Compare Hallahan v. Murray* (1876) 3 W. N. C. 44; *Rathbone v. Stetson* (1877) 4 W. N. C. 55; *Kirk v. Korn* (1883) 13 W. N. C. 281; *Hickok v. Park Asso.* (1883) 14 W. N. C. 12; *Germain Fruit Co. v. Roberts* (1896) 18 Pa. Co. Ct. 144; *Shaw v. Wallace* (1792) 2 Dall. 179, 1 L. ed. 339, 1 Yeates, 176.

**Texas.**—*See International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342, 18 S. W. 700.

**Washington.**—*Swift v. Stine* (1888) 3 Wash. Terr. 518, 19 Pac. 63.

**Canada.**—*Fogo v. Pypher* (1864) 3 Ont. Pr. Rep. 309. *Compare Baynes v. Metcalf* (1886) 6 Can. L. T. 310; *Gumm v. McDonald* (1906) 4 West. L. R. 149; *Dodd v. Mathieson* (1913) — Sask. —, 9 D. L. R. 636, 23 W. L. R. 711; *Wood v. Bellisle* (1849) 1 C. L. Chamb. Rep. (U. C.) 130; *Cameron v. Royal Bank* (1914) 7 Sask. L. R. 301, 30 West. L. R. 157.

**England.**—*Muller v. Gernon* (1810) 3 Taunt. 273, 128 Eng. Reprint, 108; *Montellano v. Garcias* (1822) 1 Bing. 67, 130 Eng. Reprint, 28; *Michel v. Pareski* (1796) 2 H. Bl. 593, 126 Eng. Reprint, 722, 3 Revised Rep. 512. *Compare West v. Cooke* (1845) 1 C.

B. 312, 135 Eng. Reprint, 560, 2 Dowl. & L. 834, 14 L. J. C. P. N. S. 151.

In *Bennett v. Shute* (Del.) *supra*, the defendant moved for an order to stay proceedings until the plaintiff gave security for costs. The plaintiff objected to the granting of the order on the ground that the application for it was too late, as the defendant had appeared and pleaded, issue had been joined, the witnesses were summoned, and the case stood for trial at the next term. The court denied the motion, stating that the rule was in the discretion of the court, and although the rule would not be established that application for security for costs must be made at the appearance term, yet a motion would not be granted to the delay or prejudice of the other party, and as the granting of the motion would necessarily continue the cause and increase the expense, it should be denied.

So, in *Brazell v. Cohn* (Mont.) *supra*, after the cause was set for trial, the defendants filed and served on the plaintiff a written demand for security for costs, supported by affidavit showing that the plaintiff was then a nonresident, and asked the court to stay all proceedings until such security should be given. The plaintiff thereupon agreed to give security for costs as required by law, within thirty days, whereupon the court overruled the motion for a stay and proceeded with the trial. The Code provided for security for costs in case the plaintiff was a nonresident of the state, and that, when required, all proceedings in the action must be stayed until an undertaking was given. It was also provided that, after the lapse of thirty days from the service of notice that security was required, the action must be dismissed if the security was not given. The court, in affirming a judgment for the plaintiff, held that as the application for security was not made until the day set for trial, and no previous notice of the demand had been given, the trial court was justified in denying the motion as coming too late.

In *Shaw v. Wallace* (1792) 2 Dall. (Pa.) 179, 1 L. ed. 339, 1 Yeates, 176,

a motion to require the nonresident plaintiff to file security for costs was made after the cause was set down for trial and a continuance had. The court, in granting the order, stated that it was never too late to grant the motion when it would not delay the trial. See to the same effect, *Rathbone v. Stetson* (1877) 4 W. N. C. (Pa.) 55; *Hallahan v. Murray* (1876) 3 W. N. C. (Pa.) 44. The rule as established in the three foregoing cases was not followed in *M'Garry v. Crispin* (1845) 3 Clark (Pa.) 25, wherein a rule on the plaintiff to give security for costs was not made until after an award of arbitrators against the defendant, and judgment thereon. It was held that the defendant's application was made too late. In delivering the opinion of the court, Judge King said: "The rule giving the defendant security for costs has been transplanted into common law from the practice in equity. In courts of equity it has long been held that, if the plaintiff is resident abroad, the court will, on the application of the defendant, order him to give security for costs, and in the meantime direct all proceedings to be stayed. . . . But in order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes any further step in the cause. Should the plaintiff's nonresidence appear from the face of his bill, the defendant must make his motion before he puts in his answer or applies for time, either of which acts will be considered as a waiver of his right to security. . . . In the case before us, the affidavit does not sufficiently declare when the plaintiff's removal from the state came to the knowledge of the defendant. This is required in order to enable us to judge whether the defendant has manifested the alacrity necessary to entitle him to the indemnity against loss, which he invokes by his rule for security for costs. But what is decisive of the application at this time is the fact that it is made after an award of arbitrators against the defendant, and judg-

ment thereon, which award remains unappealed from, and which we do not know ever will be appealed from. Until the cause is brought back to us on such appeal, we have no right to interfere with the plaintiff's realization of the fruit of his judgment. He has established his right as well to his debt as his costs of suit. To require him to give security for costs to his adversary, against whom he has prevailed, and to stay his further procedure until such security is entered, would be a somewhat anomalous proceeding." A like decision was made in *Bogardus v. Williams* (1878) 1 Pa. Co. Ct. 673, wherein the court expressly overruled the cases, beginning with *Shaw v. Wallace* (Pa.) *supra*, which held that it was never too late to grant the rule when it would not delay the trial. In the *Bogardus* Case, suit was commenced more than nine years before the motion was made. In holding the defendant not to be entitled to security, the court said: "The present action was brought more than nine years ago. At that time the plaintiff resided in the state. The affidavit recites that since then he has removed from the state. When he thus removed we are not informed, and, for all that we know to the contrary, it may have been the next day after the bringing of the suit. If he did, and the defendant then knew of his removal, as we have a right to infer in the absence of any statement to the contrary, then the present application comes very late,—too late, we think, to entitle the defendant to the security he asks for. Having slept for so long a time upon a right which he might have had for the asking, we do him no injustice by holding that he must be considered as having waived it. It follows that the rule upon the plaintiff to give security for costs must be discharged." But in *Kirk v. Korn* (1883) 13 W. N. C. (Pa.) 281, the defendant moved to require the plaintiff to give security for costs, and the evidence showed that the case had been set down for trial, but was not reached, owing to the illness of the judge who was to preside. In holding the defendant to be entitled

to security, the court said: "This application comes after the time when it would usually be allowed; but it appears that defendant, having once prepared for trial and brought his witnesses to court, is now, without any fault of his and from causes beyond his control, compelled to undergo the same expense a second time. This being an unexpected and future expense, we think it reasonable that he should be allowed to secure himself as to costs." See to the same effect, *Hickok v. Park Asso.* (1883) 14 W. N. C. (Pa.) 12; *Germain Fruit Co. v. Roberts* (1896) 18 Pa. Co. Ct. 144.

In *Boucher v. Lindsley* (1851) 1 Ohio Dec. Reprint, 457, the defendant moved to have security for costs furnished by the plaintiff. The motion was denied by the court, not having been made until the afternoon of the day preceding the trial.

In *International & G. N. R. Co. v. Williams* (1891) 82 Tex. 342, 18 S. W. 700, the plaintiff announced ready for trial, and the defendant presented a motion for a rule requiring the plaintiff to give security for costs, which was denied. It was held that, although the statute provided that such motions could be made at any time before final judgment, it would seem that since judgment went against the defendant, fixing on it liability for all costs, there should not be a reversal unless it was shown that some injury resulted from the ruling.

In *Swift v. Stine* (1888) 3 Wash. Terr. 518, 19 Pac. 63, a motion requiring the plaintiff to file security for costs was made after issue was joined and the cause had been sent to a referee for trial. The Code provided that a plaintiff could give security for costs, "when required to do so by defendant." The plaintiff claimed that the motion was made at too late a date, but the defendant contended that the motion could be made at any time. The court held that this latter contention was not correct, stating that if such were the case a defendant could wait until a jury had been called and sworn, and then require security for costs and obtain a stay of proceedings. The court said: "The defendant may

require security for costs of a nonresident, but he must exercise his right in time and before answer, or at least with diligence. He cannot delay until, from the developments of the trial, he seriously apprehends defeat, and then assert it. His application then becomes dilatory, and cannot be favored. He must be held, under such circumstances, to have waived it. It is true that in a case where the fact came to his knowledge after answer to the merits, it would excuse his neglect, and his right would remain unimpaired; but as such showing was made here, and the application on which the judgment was granted being certified to this court and recited in the judgment, we cannot presume it was made on other ground. Upon the merits here disclosed, we cannot give our assent to the judgment made, or to the order preceding it, requiring security for costs; and it is directed that said judgment and order be vacated and the cause be remanded for further proceedings."

In *New Jersey*, in an action of ejectment, an order for security for costs may be entered at any time, unless the purpose is delay or oppression. It was accordingly held in *Den v. Wilson* (1819) 5 N. J. L. 680, that a rule for such security was properly granted after issue was joined.

In *Fogo v. Pypher* (1864) 3 Ont. Pr. Rep. 309, it was held that a delay of nearly three years after the defendant demanded security for costs precluded him from obtaining the security after the plaintiff had given notice of trial. However, there is a class of cases beginning with *Wood v. Bellisle* (1849) 1 C. L. Chamb. Rep. (U. C.) 130, wherein the delay was satisfactorily accounted for, and the plaintiff was required to furnish security. In that case the court said: "The usual practice with us is to require the application to be made before plea, unless the delay be satisfactorily accounted for. Here a conflict of proceeding has arisen by reason of the cause being conducted in the district office at Sandwich, western district, and particular steps necessarily taken here, without time to communicate.

Measures appear to have been taken in due time and bona fide to apply for security for costs; but the state of the proceedings at Sandwich may have constrained the defendant to plead before the application was made; and Mr. Reid [defendant] gives a good reason for its not being made earlier here. . . . The application should be made as soon as the defendant can reasonably do it after knowledge of the fact of the plaintiff's residence abroad. And, governed by this rule, I think that the present application is not too late under the circumstances." Similarly, in *Cameron v. Royal Bank* (1914) 7 Sask. L. R. 301, 30 West. L. R. 157, an application for security for costs by the defendant was denied by the judge to whom the application was made. On appeal it did not appear from the record why the application was refused, but the court dealt with it as having been denied because made at too late a date. The evidence showed that security was applied for eleven days before the date fixed for the trial of the action. The court held that the plaintiff would not be inconvenienced by having to give security for costs at that stage of the proceedings, and the order dismissing the application was reversed. It was said: "In *Lydney & W. Iron Ore Co. v. Bird* (1883) L. R. 23 Ch. Div. (Eng.) 358, 52 L. J. Ch. N. S. 640, it was made after notice of trial was given, that being the stage in this case when the application was made, and in *Re Smith* (1896) 75 L. T. N. S. (Eng.) 46, the court of appeal came to the same decision. Lopes, L. J., says, at p. 48: 'I do not think that under order 65 there is any hard-and-fast rule to prevent an application for security for costs from being made at any stage of the proceedings. Nothing here has happened to preclude the propriety of ordering security for costs to be given.' I am of the opinion that this language applies to this case. It might have been in this case that, if the learned judge had granted the order, he might have exercised his discretion in not staying proceedings, the plaintiff having made arrangements for his witnesses in Manitoba

to attend the trial, which was fixed for the 20th October, 1914, the application having been made on the 9th of that month; but that time having now passed, there is no necessity for considering the making of that a term of the order." And in *Baynes v. Metcalf* (1886) 6 Can. L. T. 310, the defendant obtained a *præcipe* order for security for costs, with a stay of proceedings. The plaintiff, treating the order as a nullity, noted the bill pro confesso, whereupon the defendant applied to the referee for another order of security, which was granted, and from it the plaintiff appealed on the ground that the bill was taken pro confesso against the defendant, and that the defendant had waived his right to security. It was held that the defendant had not waived his right to security by having moved to stay proceedings until the costs of a prior suit had been paid. So, in *Dodd v. Mathieson* (1913) — Sask. —, 9 D. L. R. 636, 23 West. L. R. 711, it appeared that the pleadings had been closed, and the case was on the trial list, when a motion was made by the defendant for an order requiring the plaintiffs to give security for costs. The plaintiffs contended that the defendant was too late in making the motion, and that security should not be ordered at that stage of the proceedings. The court disagreed with this contention, and in granting an order for security said: "Our rules 714 and 715 are similar to English rule 981. Under that rule, in *Lydney & W. Iron Ore Co. v. Bird* (Eng.) *supra*, security for costs was ordered after the defense was filed and notice of trial given. This case was followed in *Re Smith* (Eng.) *supra*, where the court of appeal held that security for costs might be ordered at any stage of the proceedings. There is also an unreported judgment of Newlands, J., in *St. John v. Friel*, decided on the 23d December, 1905, in which the above cases were followed and security ordered, although the defense was filed and the action set down for trial. There will, therefore, be an order that the plaintiffs give security for the defendant's costs in the sum of \$300,

either by bond or by cash deposit." *Gumm v. McDonald* (1905) 4 West. L. R. (Can.) 149, presented a somewhat similar case, the evidence showing that the plaintiff was a resident of the territory when the action was commenced, but that he subsequently removed therefrom. The action had been ready for trial, but had been postponed because of the defendant's illness. Several months later a motion was made by the defendant to require security for costs. The court held that the defendant's delay had not been such as to deprive him of costs to accrue subsequently to the time of making the motion.

In *Muller v. Gernon* (1810) 3 Taunt. 272, 128 Eng. Reprint, 108, the plaintiff, who was a foreigner and the captain and owner of a ship trading between England and the Baltic, brought suit and then sailed with his vessel. Thereafter the defendant obtained a judge's order for time to plead, on the usual terms of pleading issuably and taking short notice of trial. Subsequently the defendant pleaded, and the plaintiff gave notice of trial. The court held that as the defendant had undertaken to accept short notice of trial, the nonresident plaintiff could not be compelled to furnish security for costs. See to the same effect, *Montellano v. Garcias* (1822) 1 Bing. 67, 130 Eng. Reprint, 28; *Michel v. Pareski* (1796) 2 H. Bl. 593, 126 Eng. Reprint, 722, 3 Revised Rep. 512. But in *West v. Cooke* (1845) 1 C. B. 312, 135 Eng. Reprint, 560, 2 Dowl. & L. 834, 14 L. J. C. P. N. S. 151, the court held that the general rule was that a defendant could move for security for costs at any time before issue was joined, and as issue had not been joined, the rule requiring security would be made absolute, although the defendant had taken short notice of trial.

#### *1. Application after case called for trial.*

The right given by a statute or court rule requiring security for costs from a nonresident plaintiff is waived if not taken advantage of before the case is called for trial. *Hawkins v. Willbank* (1822) 4 Wash. C. C. 285, Fed. Cas. No. 6,247; *Wilkinson v. Cox*

(1907) 228 Ill. 306, 81 N. E. 1020; *Beymer v. Endly* (1817) Tappan (Ohio) 184; *Wheeler v. Taylor* (1859) 2 Ohio Dec. Reprint, 96; *Sciutti v. Union P. Coal Co.* (1906) 30 Utah, 462, 85 Pac. 1011, 8 Ann. Cas. 942.

In *Sciutti v. Union P. Coal Co.* (Utah) *supra*, an action to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant, it appeared by the complaint that the plaintiff was a nonresident, but the defendant filed an answer on the merits without making any demand for security. When the case was called for trial the defendant moved to require the plaintiff to give security for costs, and on such motion being overruled the defense proceeded to trial without further objection. The court held that under the circumstances the defendant had waived the statutory right to demand security for costs.

In *Wilkinson v. Cox* (1907) 228 Ill. 306, 81 N. E. 1020, a motion was made after the case had been taken on the regular call of the docket, for a rule on the plaintiff to give security for costs as a nonresident, and for an order of dismissal against the plaintiff on failure to comply with such rule. The court held that the motion, being a dilatory one, and having been made when the case was in too advanced a stage, the rule was properly refused.

In *Beymer v. Endly* (1817) Tappan (Ohio) 134, the defendant, knowing the plaintiff to be a nonresident, appeared, entered into the common rule, pleaded to the cause of action, consented to one or more continuances, and when the cause came to trial interposed a motion requiring the plaintiff to give security. The court held that the motion came too late, having been waived by the defendant's laches. So, in *Wheeler v. Taylor* (1859) 2 Ohio Dec. Reprint, 96, the record showed that the action was brought before a justice and summons issued. At the time fixed for trial the parties appeared and on motion of the defendant, it appearing that the plaintiff was a nonresident of the township, the plaintiff was ruled to give security

for costs, and such security not being given, the action was dismissed. The present appeal was the result of such order and judgment, and the court, in reversing the judgment and holding that the defendant was not entitled to security for costs, said: "This power is not peremptory; it is discretionary with the justice whether he shall require such security; he may or may not require this security for costs in the case of a nonresident plaintiff. And this discretion is to be exercised before he issues the process; when he has once issued the process the action is rightly brought. . . . A nonresident plaintiff is not absolutely required to give this security; he is to give it if the justice sees fit, before issuing process, to require it; but if the justice does not require it, then a nonresident plaintiff is under no obligation to give such security. The justice must exercise this discretion before the process is issued; if he then fails to require this security, he decides that the plaintiff may sue without giving it. When the justice once issues the process without requiring this security, his jurisdiction over the matter is at an end; he cannot afterwards require the plaintiff to give security, and, on his failure to do so, dismiss his action."

In *Hawkins v. Willbank* (Fed.) *supra*, a demand for security for costs, made when a cause was brought up for trial, was held to be made at too late a date to entitle the defendant to have security furnished.

#### *g. Application during progress of trial.*

Where a defendant waits until the trial of the action is commenced before moving for security for costs, the right is deemed to have been waived and the motion is properly refused.

**United States.**—*Foster v. Swasey* (1846) 2 Woodb. & M. 217, Fed. Cas. No. 4,984 (Massachusetts); *Karns v. W. L. Imlay Rapid Cyanide Process Co.* (1910) 181 Fed. 751 (Pennsylvania).

**Arkansas.**—*Wallace v. Collins* (1848) 5 Ark. 41, 39 Am. Dec. 359.

**Connecticut.**—*Phelps v. Phelps* (1787) Kirby, 344.

**Illinois.**—*Edwards v. Helm* (1842)

5 Ill. 143; *Frasure v. Zimmerly* (1860) 25 Ill. 202.

Indiana.—*Pancoast v. Travelers Ins. Co.* (1881) 79 Ind. 172.

Iowa.—*Adae v. Zangs* (1875) 41 Iowa, 586.

Kentucky. — *Wheelin v. Kertley* (1808) Hardin, 540.

Maryland. — *Spencer v. Trafford* (1875) 42 Md. 1.

Michigan.—*Harris v. Doyle* (1902) 130 Mich. 470, 90 N. W. 293; *Hirsh v. Fisher* (1904) 138 Mich. 95, 101 N. W. 48.

Mississippi. — *Welch v. Hannie* (1916) 112 Miss. 79, 72 So. 861, Ann. Cas. 1918C, 325.

West Virginia.—*Hulings v. Jones* (1908) 63 W. Va. 696, 60 S. E. 874; *Murphy v. Fairweather* (1913) 72 W. Va. 14, 77 S. E. 321. See also *Rutter v. Sullivan* (1885) 25 W. Va. 427.

Wisconsin.—*Conrad v. Cole* (1862) 15 Wis. 547.

England. — *Wainwright v. Bland* (1835) 2 Crompt. M. & R. 740, 150 Eng. Reprint, 313, 4 Dowl. P. C. 547, 1 Tyrw. & G. 137, 1 Gale, 383.

In *Foster v. Swasey* (Fed.) *supra*, a suit in equity based on fraud, a motion was made by the defendant before argument on the merits, but after the close of the pleadings and publication of the evidence, to require the nonresident plaintiff to give security for costs. The court denied the motion because of the delay in moving, as it appeared that the place of the plaintiff's residence appeared in the bill, and was known several terms before the motion was made. The court said: "Cases exist where being resident in Ireland or Scotland has been regarded as 'abroad' for this purpose. But those countries are under distinct judicial tribunals, and in some respects under different laws; while in this case the plaintiff resides not out of the United States, nor even out of this circuit, but in the state of Maine. I think it would, at this late day in the case, and under the circumstance of his living within this circuit, be unjustifiable to require him to furnish security, as coming either within our practice or that of England. The 44th rule provides, if the plaintiff lives

without the state, the defendant may require security for cost, if moving it at the first term. But the motion is not made in season to come within this rule, and, being founded only on the general practice in chancery, must by that be refused."

Similarly, in *Karns v. W. L. Imlay Rapid Cyanide Process Co.* (1910) 181 Fed. 751, it was held that the defendant's right to have security for costs furnished by a nonresident plaintiff was waived, where the motion therefor was not made until after issue was joined and the taking of testimony was nearly completed. The court said: "A defendant's right or privilege to ask for security may undoubtedly be waived by laches, as clearly appears in several of the foregoing references; and, while the decisions differ concerning the point of time at which the defendant's delay will bar his right or privilege, I am not advised of any case in which security was exacted at so late a stage of the proceeding as the present controversy had attained when the motion under consideration was made. The foreign residence of the plaintiff appeared on the face of his bill; but, although the case has been pending for several months, and the defendants have answered fully, and although an unusual number of motions have been presented to the court for decision, and although the parties have taken several hundred pages of testimony and have almost finished the preparation of the case for final hearing, no effort was made until very recently to require the entry of security. If a real need for security existed, it must have been apparent long ago. No peculiar situation and no special circumstances are averred; and in my opinion, therefore, the defendants must be held to have waived whatever right they may have had originally to ask for protection."

A court rule was invoked in *Pancoast v. Travelers Ins. Co.* (1881) 79 Ind. 172, which provided as follows: "Motions to require security for costs must be made at the first calling of the docket, unless the affidavit upon which the motion is based shows that



the plaintiff's nonresidence was not known to the defendant or his attorney, and that it is made as soon as the fact of such nonresidence comes to his knowledge." The evidence showed that the cause was called in court on the forenoon of the second day of a term of court, and the defendant was ruled to answer. In the afternoon of the same day the defendant moved for a rule to require the plaintiff to file security for costs, which was overruled by the court. It was held that the motion was properly overruled, as the court rule in question was not repugnant to the laws of the state, and should be enforced.

In *Murphy v. Fairweather* (1913) 72 W. Va. 14, 77 S. E. 321, the defendant did not move to require the plaintiff to give security for costs until all the proof had been taken and the case was ready for submission. It was held that the motion was made at too late a date and was properly overruled. The court said: "Having waived, until that late hour, any right to security for costs he may have had, Hart had no just ground for complaint as to the ruling on his motion. As the statute allows sixty days in which to give security for costs after the motion has been made, to allow it to be made on the hearing, when all costs have been incurred, and delay the decision during the period allowed in which to give security, would be a perversion of the statute to a purpose for which it was never intended."

In *Spencer v. Trafford* (1875) 42 Md. 1, it appeared that during the progress of the trial, and after the plaintiff had closed his testimony, the defendants asked the court to stop the trial until the plaintiff had complied with the act requiring a nonresident plaintiff to give security for costs. The motion was denied, and on appeal it was held that the trial court had ruled correctly, as the defendants had waived their right to insist on the security by pleading to the merits and going to trial. It was said: "The law encourages diligence on the part of suitors in the maintenance of their rights, and laches is discountenanced. The rule did not pertain to the merits

of the case, but was prescribed for the protection of the defendants. It did not give them the power to use it ad libitum. It was the defendants' duty to have insisted more promptly, after the expiration of the time allowed the plaintiff to give security, for the enforcement of the rule. That should have been done before going to the trial of the cause."

In *Harris v. Doyle* (1902) 130 Mich. 470, 90 N. W. 293, the statute provided that in all suits before justices of the peace "plaintiffs who are not residents of the county in which the suit is brought shall give security for costs before process shall issue." At the close of the plaintiff's testimony, the defendant's counsel moved for an order requiring the plaintiff to file security for costs, on the ground that the plaintiff was a nonresident. The court refused to require the security, and the appellate tribunal in affirming the judgment said: "There can be no doubt of the power of a defendant to waive his right to security for costs. In this case the motion was not made until all of plaintiff's testimony was in. It does not appear to have been claimed that defendant's omission to move earlier was due to the belief that the plaintiff or Doyle resided in said county, nor is there any showing that he had been misinformed on the subject and misled. . . . A reversal in this case would annul the proceedings, if it did not prevent any remedy upon the lien. We must presume that the justice found that defendant's motion was unseasonable, and we will not review his action."

In *Conrad v. Cole* (1862) 15 Wis. 547, the defendant answered the complaint of a nonresident plaintiff, and went to trial without requiring security for costs from the plaintiff. It was held that the defendant had waived the right to such security, the court saying: "Security for the costs was evidently a matter for the benefit of the defendant. The object in requiring it in any case is that the defendant may have some responsible party within the jurisdiction of the court to whom he can look for the payment of his costs in the event he suc-

ceeds in the action. If he chooses to appear and go to trial without demanding security for costs, or taking any objection to that which is given, he must be deemed to have waived it. It is certainly a defect or error which he may waive. This is obvious. And ought he not to be held to have waived it, when he appears and goes to trial before the justice, without making any objection that the proper security for costs is not filed? We think he ought. If security for costs had been required before the justice, and the plaintiff had refused or neglected to give it, the justice might have dismissed the suit. But when no objection is taken for the want of security, and the parties appear and go to trial, it must be deemed to have been waived."

In *Wallace v. Collins* (1843) 5 Ark. 41, 39 Am. Dec. 359, the plaintiff was nonresident. After the jury were sworn the defendant moved to require the plaintiff to give security for costs. In holding that the defendant had waived the statutory provision, the court said: "If the motion may properly be made after the jury are sworn, we can see no good reason why such motion may not be made after they have retired from the box, and before they render their verdict. The question is one of practice, left to the sound, but not arbitrary, discretion of the court. We hold the better rule to be to hear the evidence on such motion at any time before the jury are summoned in the case. Such a rule would doubtless be more in conformity with the intention of the legislature. In our opinion, therefore, the circuit court did right in overruling the motion of the defendant below to rule the plaintiff to security for costs."

*h. Application after judgment or decree.*

Where a judgment or decree has been obtained, the defendant has waived his right to demand security for costs. *Lytle v. Fenn* (1844) 3 McLean, 411, Fed. Cas. No. 8,651 (Ohio); *United States ex rel. Shelly v. St. Charles County* (1887) 31 Fed. 442 (Missouri); *Borhs v. Sessions* (1834) 2 Dowl. P. C. (Eng.) 710.

Thus, where a motion was made for security for costs after judgment was obtained and process in the nature of execution was issued, it was held that at that stage of the case the motion should be overruled. *United States ex rel. Shelly v. St. Charles County* (Fed.) *supra*.

*i. Application after judgment opened to permit defendant to plead.*

A motion to require a nonresident plaintiff to give security for costs is properly denied, when made after a judgment has been opened to permit the defendant to plead. Thus, in *Firestone v. Christ* (1886) 2 Pa. Co. Ct. 413, a judgment was entered on a note, and subsequently the judgment was opened and the defendant let in to defend, the defense to be confined to a failure of consideration. It was held that the defendant was not entitled to security for costs at this stage of the proceedings, the court stating that he was in the position of a plaintiff, in a bill asking the court to enjoin the plaintiff from collecting the judgment, and the application was not within the reason or spirit of the rule entitling defendants to ask security for costs.

Likewise, in *Booth v. Lawton* (1869) 13 Lower Can. Jur. 59, the defendant was served and allowed judgment to go against him by default. Subsequently he filed an apposition and plea, and on the same day gave notice to the plaintiff of his intention to move for security for costs, since the plaintiff was a nonresident. The motion was rejected on the ground that the rules of practice provided that a motion for security must be made on the first day of the term following the return, on notice to be given within four days after the return.

So, in *Applegate v. Railroad Co.* (1883) 12 W. N. C. (Pa.) 406, a judgment by default was taken and the defendants subsequently obtained a rule to open the judgment and permit them to defend. It was held to be too late to ask for security for costs.

*J. Application after appeal.*

A motion to require a nonresident plaintiff to furnish security for costs is properly refused after an appeal has been taken. *Ruckman v. Allwood* (1867) 40 Ill. 128; *Hatton v. Weems* (1841) 12 Gill & J. (Md.) 83; *Frantz v. Dehart* (1881) 1 Pa. Co. Ct. 4; *Montpelier Carriage Co. v. Lowenstein* (1887) 4 Kulp (Pa.) 359; *Hebblewhite Mfg. Co. v. White Co.* (1900) 24 Pa. Co. Ct. 82; *Farmers' Nursery Co. v. Harshberger* (1901) 25 Pa. Co. Ct. 456. See also *Kolbe v. People* (1877) 85 Ill. 336, 2 Am. Crim. Rep. 177.

In *Hatton v. Weems* (1841) 12 Gill & J. (Md.) 83, the court held that the defendant had waived the right to demand security for costs by praying an appeal, as the settled doctrine was that any proceeding in a cause recognizing the complainant's right to sue, took away the defendant's right to have security for costs.

So, in *Frantz v. Dehart* (1881) 1 Pa. Co. Ct. 4, it was held that the defendant's delay for a year and a half after the entry of an appeal from a judgment of a justice of the peace was a waiver of his right to ask that security for costs be entered under the rule.

Similarly, in *Montpelier Carriage Co. v. Lowenstein* (1887) 4 Kulp (Pa.) 359, the defendant did not make the motion to require the plaintiff to give security until a considerable time after the cause was at issue, had been arbitrated, and the defendant had appealed from the award. In holding the motion to have been made at too late a date, the court said: "It is a general rule of practice that a nonresident plaintiff may, at the instance of the defendant, be compelled to give security for costs. But it is equally well settled that the defendant may forfeit his right to such an order by his laches. Some courts have held that if he delays his motion until after pleading, or ruling the plaintiff to declare, he waives his right to the order. But we do not think the weight of authority is in favor of the rule that pleading is in itself conclusive against the defendant, and we do not

see why it should be, if the motion does not delay the trial. But where he does not make the motion until a considerable time after the cause is at issue, has been arbitrated, and he has appealed from the award, it seems to us that he is too late. If he had made his motion promptly the plaintiff might have pursued a different course. Under such circumstances the defendant should show some cause for the order, in addition to the mere fact of nonresidence."

Likewise, in *Hebblewhite Mfg. Co. v. White Co.* (1900) 24 Pa. Co. Ct. 82, judgment was taken against the defendants by default. They appealed, and asked that the plaintiffs be required to give security for costs, under a court rule which required such security to be given where the plaintiff resided out of the state. The plaintiffs contended that the defendants had lost by laches the right to invoke the rule. In holding the right to require security to have been waived, the court said: "Why should not an appeal from the judgment of a magistrate be as much of a bar as an appeal from an award of arbitrators? Magistrates were given jurisdiction and provision was made for arbitration for a twofold reason: First, to expedite and cheapen litigation; second, to relieve the burden of courts. If defendants choose to lose sight of, or disregard, the objects intended by magistrates' courts, and fail to appear therein and make defense, it may be their legal right to appeal and throw the case to court, but certainly courts should not put a premium on such practice. Such appeal, without making a defense before the magistrate, is, I think, a waiver of the right to demand security for costs. Had defendants made defense before the magistrate, the case might present a different aspect. A defendant, sued before a magistrate by a nonresident, should at least appear before the magistrate and warn the plaintiff that if the case reaches the courts security for costs will be demanded."

In *Farmers' Nursery Co. v. Harshberger* (1901) 25 Pa. Co. Ct. 456, there was a rule to show cause why the

plaintiff, a nonresident, should not give security for costs under the following rule of the court: "In cases where the plaintiff resides out of the state, the defendant, on motion and affidavit of a just defense against the whole demand, may have a rule that the plaintiff give security for costs within twenty days after service of rule." The record showed that suit was brought before a justice of the peace, and judgment entered in favor of the plaintiff on May 21. The defendant took an appeal on June 4, and the application for security was made and the rule granted on July 5. It was held that the defendant had delayed unreasonably in applying for the security, and the rule should be discharged.

Similarly, in *Ruckman v. Allwood* (1867) 40 Ill. 128, it was held that where a cause had been tried, the verdict of the jury certified back to the appellate court, and other proceedings taken, a motion to require a nonresident plaintiff to furnish security for costs was made too late to be granted.

#### *k. Rule in New York.*

By the New York Code of Civil Procedure (§ 3272), as amended in 1915, it is provided that where security for costs is required to be given the court, on proof "at any time" of the facts, "must" make an order requiring the plaintiff to give security. See *Belch v. Delaware & H. Co.* (1916) 173 App. Div. 867, 160 N. Y. Supp. 74, holding that the right to security was not waived by answering the complaint before moving for security.

Prior to the Code provision referred to, the New York rule was that a cost bond was waived unless application was made before answer or demurrer. *Long v. Majestre* (1814) 1 Johns. Ch. 202; *Johnson v. Metropolitan Street R. Co.* (1900) 56 App. Div. 286, 67 N. Y. Supp. 855. Thus, in each of the following cases it was held that an application after answer was too late. *Goodrich v. Pendleton* (1818) 3 Johns. Ch. 520; *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1883) 3 N. Y. Civ. Proc. Rep. 429, affirmed in (1883) 93 N. Y. 637; *Stevenson v. New York L. E. & W. R. Co.* (1888) 49 Hun, 169,

14 N. Y. Civ. Proc. Rep. 384, 1 N. Y. Supp. 670; *Segal v. Cauldwell* (1897) 22 App. Div. 95, 47 N. Y. Supp. 839; *Schwartz v. Scott* (1895) 25 N. Y. Civ. Proc. Rep. 53, 35 N. Y. Supp. 607; *Willson v. Eveline* (1899) 39 App. Div. 129, 56 N. Y. Supp. 632; *Corbett v. Brantingham* (1901) 65 App. Div. 335, 72 N. Y. Supp. 763, 10 N. Y. Anno. Cas. 297; *Boyd v. United States Mortg. & T. Co.* (1904) 90 App. Div. 32, 85 N. Y. Supp. 589; *Nimkie v. New York Evening Journal Pub. Co.* (1912) 133 N. Y. Supp. 1075; *Smiley v. Finucane* (1911) 134 N. Y. Supp. 59; *Knaggs v. Easton* (1907) 54 Misc. 51, 104 N. Y. Supp. 508; *Denison v. Denison* (1914) 85 Misc. 498, 147 N. Y. Supp. 575; *Tedeschi v. Bacigalupo* (1915) 89 Misc. 153, 151 N. Y. Supp. 649, affirmed without opinion in (1915) 169 App. Div. 960, 153 N. Y. Supp. 1147. See also *Teal v. Yost* (1889) 16 N. Y. Civ. Proc. Rep. 367, 5 N. Y. Supp. 777.

An early Federal case, however, interpreted differently the New York practice. *Huginin v. Thatcher* (1883) 21 Blatchf. 497, 18 Fed. 105. That decision was followed in other Federal cases in the same state. *Stewart v. The Sun* (1888) 36 Fed. 307; *Uhle v. Burnham* (1891) 46 Fed. 500; *O'Brien v. Hearn* (1903) 125 Fed. 95. However, in *Winkley Co. v. Bowen Mfg. Co.* (1910) 180 Fed. 624, a Federal court, sitting in New York, refused to order security eighteen months after issue was joined, citing and following the state decisions.

So, in each of the following cases it was held that a cost bond was waived by failure to apply therefor until after the case was ready for trial: *Robinson v. Sinclair* (1845) 1 Denio, 628; *Swan v. Mathews* (1854) 3 Duer, 613; *Fearn v. Gelpcke* (1862) 13 Abb. Pr. 473; *McDonald v. Peet* (1884) 7 N. Y. Civ. Proc. Rep. 200; *Dunaway v. Terry* (1902) 37 Misc. 510, 75 N. Y. Supp. 974; *Hopkins v. Cohen* (1916) 96 Misc. 657, 161 N. Y. Supp. 1104; *Ampel v. Seifert* (1904) 86 N. Y. Supp. 17. See also *Boyce v. Bates* (1853) 8 How. Pr. 495.

Similarly, it was held that an application for a cost bond could not be made at the trial. *Fitzsimmons v.*

Curley (1884) 6 N. Y. Civ. Proc. Rep. 156.

In like manner an application after judgment was held to be too late. *Abel v. Bradner* (1888) 15 N. Y. Civ. Proc. Rep. 241, 3 N. Y. Supp. 20; *Brackett v. Griswold* (1887) 46 Hun, 442; *Wood v. Blodgett* (1888) 49 Hun, 64, 2 N. Y. Supp. 304; *Turell v. Erie R. Co.* (1899) 46 App. Div. 296, 61 N. Y. Supp. 308; *Nassar v. Elias* (1908) 1 N. Y. Civ. Proc. Rep. N. S. 274, 115 N. Y. Supp. 106.

So too, a motion to require security for costs after the taking of an appeal was held to be out of time. *Flint v. Van Deusen* (1881) 24 Hun, 440.

## II. Waiver of right to dismissal.

### a. Application after continuance.

Where a defendant secures the continuance of a cause, the right to have the cause dismissed for failure of the plaintiff to furnish security for costs is waived. *Lavage v. Burke* (1873) 50 Ala. 61; *Shuttleworth v. Dunlop* (1881) 34 N. J. Eq. 488; *Enos v. Stansbury* (1881) 18 W. Va. 477. See also *Ex parte Jones* (1887) 83 Ala. 587, 3 So. 811. Compare *Burke v. Dillingham* (1885) 42 S. C. L. (8 Rich.) 256.

In *Shuttleworth v. Dunlop* (1881) 34 N. J. Eq. 488, the defendant asked the dismissal of the complainant's bill, because he had failed to obey an order requiring him to give security for costs. The complainant applied for the appointment of a receiver, and on the return day of the order the defendant asked for a continuance, which was granted. Subsequently, the defendant obtained the order requiring the complainant to give security for costs. On appeal, the court held that the defendant, by obtaining a continuance, had taken such steps as to disentitle him to security, saying: "A proper regard for the rights growing out of an enlightened comity requires the courts of this state to treat the citizens of other states or nations, who appeal to them for justice against our own citizens, with considerate liberality. A defendant, in case his adversary is nonresident, has an unquestionable right to security for costs, but inasmuch as it is

a right which may be used to delay or obstruct justice, he should be required to insist upon it promptly, and to adhere to it persistently, or otherwise be held to have lost it."

In *Enos v. Stansbury* (1881) 18 W. Va. 477, the defendants appeared and pleaded, and also moved to require the plaintiff to furnish security for costs, which motion was granted, it being ordered that security for costs should be furnished within sixty days, or the suit dismissed. After the lapse of the required sixty days, no security having been furnished, the defendants moved to continue the case, which motion was granted. The statute (Code 1869, chap. 38, § 2) provided as follows: "No person, who is a nonresident of this state, shall hereafter prosecute any action or suit in any court in this state, until he has (if required by the defendant) filed with the clerk of the court security for the costs in the manner prescribed." In holding the defendants to have waived the statutory requirement, the court said: "It is much clearer under our statute than it was under the Virginia statutes that the suit, after the expiration of the time allowed by the court for giving security for costs, did not stand dismissed, and that it required an order subsequently to dismiss it, if the security was not given. Our law simply provides, not that the case shall be dismissed, but only that it shall not be prosecuted until the security is given. This law is for the benefit of the defendants, and they of course can waive the benefit of it; and this they do when they, without objection, permit the suit to be further prosecuted without the security for costs being given. In the case before us, they actually, after the expiration of the sixty days, asked the court to continue the case, instead of asking it to dismiss the case. This was an express waiver of their right then to have it dismissed. They could, of course, afterwards have withdrawn this waiver, and required the giving of the security for costs; but they never did so."

In the case of *Ex parte Jones* (1887) 83 Ala. 587, 3 So. 811, an application by petition was made to show cause

why a peremptory mandamus should not be issued, requiring the dismissal of the suit for failure of the plaintiffs, who were nonresidents, to give security for costs as prescribed and required by a former order in the cause. The statute provided that actions by a nonresident must be dismissed if security was not given when the suit was commenced, or within such time thereafter as the court might direct. It appeared that the court had made the order allowing the plaintiff until the first day of a subsequent term to give security, and when this day arrived the judge, in effect, extended the time, by continuing the cause, and on the third day of the term the proper security was furnished. It was held that the right to dismiss was discretionary with the trial judge, and as he effectually extended the time for furnishing the security the action could not be dismissed.

Compare *Burke v. Dillingham* (1855) 42 S. C. L. (8 Rich.) 256, wherein, on motion of the defendant, an order was made, requiring the plaintiff to give security for costs on or before the ensuing term. The plaintiff defaulted from this order, but the case was marked continued, and remained on the docket until the fourth term after the order had been entered, when the plaintiff moved for leave to enter security for costs *nunc pro tunc*, alleging that he had never had notice of the application for the order, nor of the order itself. The court held that the defendant had not waived the right to dismissal by having failed to enter a judgment of nonsuit, or by continuing the cause on the calendar, and nonsuit was ordered.

*b. Application after demurrer.*

The right to have a case dismissed for failure of a plaintiff to furnish security for costs is waived by the entry of a demurrer to the complaint. *Muldoon v. Place* (1885) 2 Ariz. 4, 6 Pac. 479; *Clark v. Gibson* (1840) 2 Ark. 109; *Webb v. Jones* (1840) 2 Ark. 330; *Kittlewell v. Scull* (1841) 3 Ark. 474. Compare *Dean v. Cannon* (1892) 37 W. Va. 123, 16 S. E. 444.

In *Webb v. Jones* (1840) 2 Ark. 330,

it was held that the failure or omission of a nonresident plaintiff to file a bond for costs before the instituted suit was waived by the defendant demurring to the petition, although the defendant's motion for dismissal because of such failure had been previously overruled.

So, in *Clark v. Gibson* (1840) 2 Ark. 109, an action for money had and received, the defendant moved to dismiss the declaration because of the failure of the nonresident plaintiff to file a bond for costs. The motion was overruled, whereupon the defendant demurred to the declaration, which demurrer was also overruled, and judgment was entered for the plaintiff. It was held that, by demurring, the defendant waived the failure to furnish the bond for costs. The court said: "If the defendant, instead of availing himself of this defense at the proper time, interposes a defense to the merits of the action, the law regards him as waiving the objection altogether, upon the same principle by which the defendant is precluded by law from insisting upon any other matter of defense in abatement, if he omits to take advantage of it in the established order of pleading, or pleads to the action itself, in bar thereof, either before or after presenting the matter in abatement; and upon this principle the defendant below must be considered as waiving upon the record his motion to dismiss, when he demurred to the declaration, and his adversary joined in the demurrer." See to the same effect, *Kittlewell v. Scull* (1841) 3 Ark. 474.

Similarly, in *Muldoon v. Place* (Ariz.) *supra*, an action to recover possession of a mining claim, a demurrer to the complaint was filed, and about a month subsequently a motion was made to dismiss the case for failure of the plaintiff to give a bond for costs before commencing suit, as required by statute. It was held that the motion was made at too late a date, the court stating that all dilatory pleas or motions must be pleaded in apt time, that is, at the earliest practicable moment, or the right to plead them or make the motion would be waived. The motion to dismiss for

want of security for costs being such a motion, it was held that after filing a demurrer it was then too late to ask for and require the plaintiff to file a bond for costs. A judgment of dismissal was accordingly reversed.

Compare *Dean v. Cannon* (1892) 37 W. Va. 123, 16 S. E. 444, wherein the defendants filed an answer to the complaint of a nonresident plaintiff, and during the same term obtained an order requiring the plaintiff to furnish security for costs. Before the expiration of the time given to furnish security, the defendants demurred to the complaint and the demurrer was overruled. The court held that under the circumstances the defendants had not waived their right to have the case dismissed for failure to furnish security.

*c. Application after answer.*

A defendant, by answering, waives his right to a dismissal of the action for failure of the plaintiff to furnish security for costs.

**Alabama.**—*Heflin v. Rock Mills Mfg. Lumber Co.* (1877) 58 Ala. 613.

**Arkansas.**—*Ormsby v. Kendall* (1840) 2 Ark. 338.

**Colorado.**—Compare *Edgar Gold & S. Min. Co. v. Taylor* (1887) 10 Colo. 110, 14 Pac. 113.

**District of Columbia.**—*Guarantee Sav. Loan & Invest. Co. v. Pendleton* (1894) 14 App. D. C. 384. And see the reported case (*BOSS v. HAGAN*, ante, 1508).

**Idaho.**—Compare *Kissler v. Budge* (1913) 24 Idaho, 246, 133 Pac. 125.

**Illinois.**—*Roberts v. Fahs* (1863) 32 Ill. 474.

**Indiana.**—*Lindley v. Kindall* (1836). 4 Blackf. 189.

**Iowa.**—*Randolph v. Cottage Hospital* (1905) — Iowa, —, 103 N. W. 157.

**Massachusetts.**—*Carpenter v. Aldrich* (1841) 3 Met. 58. Compare *Keown v. Trudo* (1919) 233 Mass. 19, 123 N. E. 99; *Keown v. Hughes* (1919) 233 Mass. 1, 123 N. E. 98.

**Michigan.**—*Lacomb v. Godkin* (1906) 143 Mich. 193, 106 N. W. 702.

**South Carolina.**—*Fonville v. Richey* (1845) 31 S. C. L. (2 Rich.) 10; *Garratt v. Niel* (1897) 49 S. C. 560, 27 S.

E. 512; *Ex parte Hill* (1899) 55 S. C. 446, 33 S. E. 483.

In *Guarantee Sav. Loan & Invest. Co. v. Pendleton* (1894) 14 App. D. C. 384, the plaintiff, a nonresident, brought an action without first giving security for costs, as required by statute. The defendant appeared and moved to dismiss the suit because of the failure of the plaintiff to give the security, but the justice allowed the plaintiff to file a bond and overruled the defendant's motion. Thereupon, the defendant appeared generally, and pleaded to the merits of the case. The court held that the action of the defendant amounted to a waiver of the positive condition that the plaintiff should not commence his suit without first giving security for costs.

Similarly, in *Lindley v. Kindall* (Ind.) supra, on the motion of the defendant, an order was entered for the nonresident plaintiff to show cause why the suit should not be dismissed for want of security for costs. At the following term, however, the defendant pleaded to the merits, without any notice being taken of the rule requiring security for costs. The court held that the defendant had waived the right to security for costs.

In the reported case (*BOSS v. HAGAN*, ante, 1508) the defendant, when served with the complaint, moved to dismiss the suit on the ground that the plaintiff was a nonresident, and had filed no security for costs as required by statute. The motion was overruled, whereupon the defendant entered a general appearance and defended on the merits. The court holds that the statutory requirement was a privilege personal to the defendant, which he waived by pleading to the merits.

The defendant in *Ormsby v. Kendall* (1840) 2 Ark. 338, moved to dismiss the cause because of the failure of the plaintiff, a nonresident, to furnish a bond for costs, and the motion was overruled. It was held that the defendant, by pleading to the merits, had waived the right to have the bond furnished.

In *Heflin v. Rock Mills Mfg. & Lumber Co.* (Ala.) supra, the defendant appeared before a circuit judge and

moved to dismiss the plaintiff's petition on several grounds, none of which raised the question of the want of security for costs. His motion was overruled, and he then applied to the supreme court for a mandamus to compel the lower tribunal to dismiss the petition on the grounds previously set forth. On denial of the motion, the defendant moved to dismiss for want of security for costs. The court held that, by entering on a defense, the defendant had waived the right to have the suit dismissed for failure to give security for costs.

In *Fonville v. Richey* (S. C.) *supra*, an order was entered that the plaintiff should give security for costs. Subsequently the plaintiff filed a declaration without having filed the security as ordered. The defendants filed their plea and issue was joined. When the case came on for trial, defendants moved for a nonsuit, which was denied by the court. It was held that the defendants, by filing their plea, had waived the right to have the suit dismissed by reason of the plaintiff's failure to file the necessary security.

In *Carpenter v. Aldrich* (1841) 3 Met. (Mass.) 58, the defendants moved that the action should be dismissed, because it appeared on the writ that although the plaintiff, when the same was made and served, was an inhabitant of Pennsylvania, yet it was not indorsed by an inhabitant of Massachusetts under the terms of a statute which provided that "all original writs in which the plaintiff is not an inhabitant of the state shall, before the entry thereof, be indorsed." The court held that the manifest intention of the provision was to give security to the defendants, and that they had waived the statutory requirement by pleading to the merits. See to the same effect, *Ripley v. Warner* (1824) 2 Pick. (Mass.) 592.

However, in *Keown v. Hughes* (1919) 233 Mass. 1, 123 N. E. 98, an action on contract, the defendant moved that the plaintiff, not being an inhabitant of the commonwealth, should be nonsuited because his writ had not been indorsed for costs in compliance with the statute. The mo-

tion was not made until a year after the date of the writ, but it was alleged in the motion that the fact that the plaintiff was a nonresident was not disclosed on the face of the pleadings, and that it was a fact which had only recently come to the knowledge of the defendant. The motion was allowed and an order granted requiring the plaintiff to furnish an indorser for costs within ten days. On failure of the plaintiff to furnish the indorser a nonsuit was granted. The court stated that under ordinary circumstances the failure of a nonresident to furnish an indorser for costs is taken to have been waived if the objection is not made at the first term of court, but where the fact that the plaintiff is not an inhabitant is not disclosed on the pleadings, and is known to the defendant, this rule does not apply and the motion is properly allowed. See to the same effect, *Keown v. Trubo* (1919) 233 Mass. 19, 123 N. E. 99.

In *Edgar Gold & S. Min. Co. v. Taylor* (1887) 10 Colo. 110, 14 Pac. 113, it appeared that a nonresident plaintiff commenced an action, but failed to file the necessary cost bond until several weeks had elapsed. The statute provided that such a bond should be filed before the institution of an action by a nonresident plaintiff. On appearing, the defendant moved to dismiss the action, and on denial of the motion he answered the complaint. It was held that the defendant had not waived the statutory requirement by answering after his motion for dismissal had been denied.

So, in *Kissler v. Budge* (1913) 24 Idaho, 246, 133 Pac. 125, the defendant filed an answer and shortly thereafter moved to require the nonresident plaintiff to furnish security for costs. He subsequently moved for a dismissal of the action on the ground that no bond had been given. The court held that although the undertaking could be waived by the defendant, either by failing to demand the same or by proceeding in the action to such an extent as to make it inequitable thereafter to make the demand, the evidence showed conclusively that the defendant had not waived his right to



dismissal for failure to give the security.

*d. Application after case ready for trial.*

Where a case is ready for trial, a motion to dismiss because of the failure of a nonresident plaintiff to furnish security for costs will be denied. Thus, in *Weeks v. Napier* (1859) 33 Ala. 568, the plaintiff, having obtained a judgment, summoned another by process of garnishment, as the debtor of the judgment debtor. The garnishee answered, excepted to the action of the court in several particulars, and at a subsequent term, after having been examined, moved to dismiss the garnishment proceedings, it appearing that the plaintiff was a nonresident and had not given security for the costs. It was held that the garnishee had waived his right to have the case dismissed, the court saying: "He [the garnishee] will not be permitted to deal with the case as one rightly in court, continue, or contribute to the continuation of, the litigation, and after heavy costs have been incurred, or, perhaps, after he makes the discovery that his defense will be unavailing, then for the first time raise the objection that he had been improperly sued, without security for costs; and for this omission have the cause repudiated. Such practice would work the grossest injustice."

In *Cator v. Collins* (1876) 2 Mo. App. 225, the defendant moved on the trial to dismiss the suit for want of security for costs, it appearing that the plaintiff was a nonresident. In holding the refusal of the trial court to grant such motion to be correct, the court said: "Obviously the person who, as attorney, brings a suit in behalf of a nonresident, without filing an undertaking for costs, commits what may be termed an impropriety; but it is one which has been so long acquiesced in that it would be extremely harsh peremptorily to enforce against him the extreme consequences of his irregularity; and if the defendant, who, of course, is aware of the nonresidence of the plaintiff, continues silent until the cause is reached for trial, and then attempts for the first time to exact these extreme con-

sequences, he is guilty of at least as great an impropriety, and will have only himself to blame if his application be treated as the court in this case treated it."

Similarly, in *Wheelin v. Kertley* (1808) Hardin (Ky.) 540, the trial court below dismissed the suit on the motion of the defendant for want of security for costs, the motion not being made until after the jury were sworn. In holding the motion to have been made at too late a date, the court said: "We are also of opinion that the motion to dismiss for want of security came too late, after the jury was sworn, and that it ought not then to have been heard by the court. The plaintiff has the right of contesting the fact of nonresidence, and it would give the defendant a most unreasonable advantage over him if the motion were permitted to be made after the jury was sworn, when, in general, the plaintiff could not have reasonable time or opportunity of making defense to the motion."

The question was raised in *Miami Copper Co. v. Strohl* (1913) 14 Ariz. 410, 130 Pac. 605, whether the right to a dismissal for failure to give security had been waived by delaying the motion until after the first trial of the action, in which the jury disagreed. The court made an order requiring such security, but the plaintiff filed an affidavit alleging his inability to do so. The defendant questioned the sufficiency of the showing made by the plaintiff, and moved to dismiss the suit for failure to comply with the order of the court. The court held that the motion to dismiss was properly denied, as the defendant had unduly delayed in making his application for security. It was said: "Under the view we take of it, the sufficiency of the showing for and against the giving of the security is not necessary to determine. On the proper showing, the defendant may require the security at any time before trial. Ariz. Rev. Stat. 1901, § 1551. The motion for the security was not made until one trial of the cause was had. This, we think, was too late. . . . In view of such an application being

considered a personal privilege, and being looked upon with disfavor as dilatory, it behooves the defendant who requires the security to bring his application clearly within the terms of the statute. The appellant has not done so in this case."

*e. Application after verdict.*

After a verdict has been rendered, it is too late for the defendant to move for a dismissal of the cause because of the plaintiff's failure to furnish security for costs. Thus, in *Furnan v. Harman* (1823) 13 S. C. L. (2 M'Cord) 436, when the case was called for trial, a motion was made for a nonsuit on the ground that security for costs had not been given within the time prescribed by an order of court, previously made for that purpose. The motion was overruled, on the ground that the question had been decided at a former court, but it was said obiter: "But even if the fact were otherwise, it would furnish no ground for setting aside the verdict. There is no law in this state requiring persons residing out of the state to give security for the costs when they bring an action in our courts. It is merely a practice introduced by the court for the security of the defendant; and after a verdict has been obtained, the court will not set it aside, even if no security has been given. The object of it ceases as soon as it is discovered that the plaintiff's case has merits, and a verdict has been obtained."

So, in *Grimball v. Mississippi & A. R. Co.* (1844) 3 Smedes & M. (Miss.) 38, wherein a rule was made against the plaintiff in the lower court, for security for costs, with which there was no compliance. The defendants permitted the case to go to trial and judgment, without objection. The court held that the defendants' want of action below was a waiver of their right to a dismissal of the cause.

In *Davies v. Graham* (1820) 2 A. K. Marsh. (Ky.) 540, an action for breach of contract, the defendants answered the complaint, alleging fraud and deceit, to which the plaintiffs demurred, and issue being joined, judgment was rendered by the court in favor of the plaintiffs. Subsequently the defend-

ants moved to set aside the judgment and dismiss the suit on the ground that the plaintiffs, who were nonresidents, had failed to give security for costs, but the motion was overruled. It was held that the requirement had been waived by neglecting to make the motion in due time, the appellate court saying: "With respect to the court's refusal to set aside the verdict and dismiss the suit, it need only be remarked that the application came too late to authorize the interposition of the court. For whilst the law properly guards the interests of the defendant and that of the officers of the court, by requiring the nonresident plaintiff to give bond and security for cost, it would be a palpable violation of the established rules of practice to permit the defendant, after verdict against him, for the first time to urge the failure to give bond for costs as a cause for overturning the verdict and dismissing the suit."

*f. Application after appeal.*

A motion for the dismissal of an action for failure of a nonresident plaintiff to furnish security for costs will be denied, when it is not made until after an appeal has been taken.

**Alabama.**—*Duncan v. Richardson* (1859) 34 Ala. 117.

**California.**—*Comstock v. Clemens* (1861) 19 Cal. 77.

**Illinois.**—*Ripley v. Morris* (1845) 7 Ill. 381.

**Indiana.**—*Coffey v. Collier* (1859) 12 Ind. 565.

**Kentucky.**—*Shelley v. Newport Sav. Asso.* (1875) 11 Bush, 305.

**Massachusetts.**—*Whiting v. Hollister* (1806) 2 Mass. 102; *Gilbert v. Nantucket Bank* (1809) 5 Mass. 97.

**Michigan.**—*Bay City v. Bay Circuit Judge* (1901) 126 Mich. 50, 85 N. W. 263.

In *Bay City v. Bay Circuit Judge* (Mich.) *supra*, an application was made for an order requiring a circuit judge to vacate an order refusing to grant a dismissal of a case on the defendant's motion, because of the plaintiff's failure to furnish security for costs. The suit was commenced in April of one year and the judgment

was reversed in May of the year following. In August of the same year the motion was made to dismiss the cause because of the plaintiff's failure to furnish security for costs. The court, in denying the application, stated that the motion was made at too late a day, there being no apparent excuse for the delay.

So, in *Duncan v. Richardson* (Ala.) supra, the defendant entered on the trial of the case before a justice of the peace, and succeeded in establishing a defense on the merits. After the case was carried by appeal to an intermediate court, he moved to dismiss the suit because of the failure of the plaintiff to give security for costs. It was held that he had waived his right to make such a motion.

Likewise, in *Coffey v. Collier* (Ind.) supra, an action on a promissory note, the defendants appeared in the lower court and defended the action unsuccessfully. On appeal, a motion was made to dismiss the cause on the ground that the plaintiff had not complied with the statutory requirement that nonresident plaintiffs should furnish security for costs. It was held that the defendant had waived the requirement.

Similarly, in *Whiting v. Hollister* (1806) 2 Mass. 102, the original writ was not indorsed, as required by stat-

ute, and at a subsequent term the plaintiff obtained leave to indorse the writ. On appeal the defendant moved to dismiss the appeal on the ground that the indorsement had not been made at the proper time. In holding that the defendant had waived the right to enforce the statutory requirement, the court said: "This provision [for the indorsement of the writ] was made, for the security of the defendant, which, if he pleased, he might waive; and if, at the term the writ is returned, he does not except to the want of an indorser, either by a plea in abatement, or perhaps by moving the court to nonsuit the plaintiff, he must be considered as having waived the security provided for his benefit." See to the same effect, *Gilbert v. Nantucket Bank* (1809) 5 Mass. 97.

In *Shelley v. Newport Sav. Asso.* (1875) 11 Bush (Ky.) 305, under a statute which gave to a defendant the unqualified right to have an action dismissed if it was begun by a nonresident without giving a bond for costs, it was held that the right, like all similar rights, could be waived, and if the defendant took no steps to enforce it before judgment, the defendant would be held to have waived the right, and could not raise the question for the first time, after an appeal to the court of last resort. E. C. B.

## STELLA WINIFRED HOLMES

v.

FRANK A. HOLMES, Appt.

*Iowa Supreme Court — February 18, 1919.*

(— Iowa, —, 170 N. W. 798.)

### **Divorce — cruel and inhuman treatment — communicating venereal disease.**

1. Communicating a venereal disease to one's wife is within a statute allowing a divorce for cruel and inhuman treatment.

[See note on this question beginning on page 1540.]

— effect of existence of disease.

2. The mere fact that a wife is, after marriage, found to be infected with a venereal disease, is not in itself sufficient to justify granting her a divorce, but her case must be supported by negative testimony that she was not exposed in any manner other than through her husband.

Evidence — communication of disease — sufficiency.

3. That a man communicated venereal disease to his wife may be found from testimony that she was chaste and not affected at time of marriage, that she developed the disease within a few weeks thereafter without other exposure than through her husband, and that he was circumcised just prior to the marriage, although he denies that he had ever been afflicted with the disease.

Divorce — knowingly communicating disease.

4. A man, knowing the possibility of communicating venereal disease to his wife by intercourse with her, will, in case she contracts the disease from him, be held to have communicated the disease to her knowingly so as to entitle her to a divorce, although he hoped, because of precautions taken, to avoid such result from his act.

[See 9 R. C. L. 351.]

Courts — jurisdiction — action for divorce.

5. Plaintiff's residence in the county in which an action for divorce is brought at the time the action is commenced, with the intention then to remain permanently in that county, gives the courts of that county jurisdiction under a statute providing that the court in the county in which either party resides has jurisdiction of the subject-matter of divorce.

[See 9 R. C. L. 400, 403, 545.]

APPEAL by defendant from a decree of the District Court for Fayette County (Hobson, J.) in favor of plaintiff in an action brought to secure a divorce because of alleged cruel and inhuman treatment. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Ainsworth & Antes, E. R. O'Brien, W. W. Woolley, and Bailie & Edson, for appellant:

No court would be justified in finding a defendant guilty of cruel and inhuman treatment based upon the inference of such guilt, to be drawn simply from the fact that the wife was shown to have been infected with a venereal disease after her marriage, even though she had been shown as being of previously chaste character and to have had sexual relations with no other man.

Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150; Foss v. Foss, 12 Allen, 26; 2 Bishop, Marr. Div. & Sep. § 1398; Nelson, Div. & Sep. § 272; N. v. N. 8 Swabey & T. 234, 9 Jur. N. S. 1203, 9 L. T. N. S. 265; Morphett v. Morphett, L. R. 1 Prob. & Div. 702, 38 L. J. Prob. N. S. 23, 19 L. T. N. S. 801, 17 Week. Rep. 471; Mount v. Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276; Collett v. Collett, 35 Beav. 312, 55 Eng. Reprint, 916, 12 Jur. N. S. 180, 14 L. T. N. S. 94, 14 Week. Rep. 446; Summerbell v. Summerbell, 37

N. J. Eq. 617; Mack v. Handy, 39 La. Ann. 491, 2 So. 181.

This charge of cruel and inhuman treatment is not substantiated unless it appears that the communication was knowingly, wilfully, and intentionally accomplished.

Jones v. Jones, Searle & S. 137; Collett v. Collett, 1 Curt. Eccl. Rep. 678; Abramowitz v. Abramowitz, 140 N. Y. Supp. 275; Anonymous, 17 Abb. N. C. 231; Hooe v. Hooe, 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 Ann. Cas. 214; Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Wagner v. Wagner, 80 Or. 256, 156 Pac. 1037; Ryder v. Ryder, 66 Vt. 159, 44 Am. St. Rep. 833, 28 Atl. 1029; Carbajal v. Fernandez, 130 La. 812, 58 So. 581; Leach v. Leach, — Me. —, 8 Atl. 349; Rehart v. Rehart, — Or. —, 25 Pac. 775; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; McMahan v. McMahan, 186 Pa. 485, 41 L.R.A. 802, 40 Atl. 795; Smith v. Smith, 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933.

Messrs. E. H. Estey, W. B. Ingersoll, and J. R. Bane for appellee.

Gaynor, J., delivered the opinion of the court:

Plaintiff and defendant were married in the city of Oelwein, in this state, on the 5th day of October, 1916. At the time of the marriage plaintiff was residing at Minneapolis, Minnesota, and the defendant was a resident of Sioux City, Iowa. During the ten days following their marriage they visited the cities of Cedar Falls and Sioux City, and on October 16th returned to Minneapolis, where plaintiff formerly resided. Six acts of copulation are shown to have taken place during this time. While at Sioux City, one Dr. Lawrence was consulted concerning the condition of the plaintiff. She was then suffering from nausea, a symptom of pregnancy. The evidence shows that nausea may follow as a consequence within that time, but it is of rather unfrequent occurrence. On her return to Minneapolis she immediately consulted one Dr. Ida MacKeen, who gave her electric treatments and manipulation, but made no physical examination of her. On the 23d of October she again consulted this same doctor, and was found having difficulty in urination, attended with scalding and burning. This doctor made an examination of her, and found her private parts inflamed with a serous, sanguineous, purulent, profuse, inflammatory exudate, attended by a discharge of pus from the urethra and from the vagina. The doctor took four slides of the exude and made four smears upon the slides. Two of the slides she examined under a microscope, and found the presence of gonococcus, a gonorrhea-producing germ. On the 29th day of November following she was examined by Dr. Emmons, of Burr Oak, who pronounced her trouble gonorrhea. On the 13th day of December, 1916, she was again examined by Dr. Alford, of Waterloo, who said that he made a thorough

vaginal examination, took smears from the cervix and urethra, and examined them. The examination disclosed that she was suffering from gonorrheal infection of the urethra, also of the cervix, uterus, and both Fallopian tubes, and he treated her for that.

The testimony discloses that before the marriage the plaintiff was a perfectly healthy woman, and her private parts in normal condition; that within less than two weeks after her marriage she was suffering from gonorrhea, which continued to develop until it reached an exaggerated form of the disease. Her contention is that the defendant knowingly communicated it to her. On this she bases her right to a divorce.

The authorities are uniform that an act such as is complained of here, if proven, constitutes cruel and inhuman treatment, under the statute, such as justifies the granting of a divorce. The holding is that the communication by a husband of a venereal disease to his wife, knowingly, is good and sufficient cause for a divorce, and is cruelty of the most flagrant kind.

However, the mere fact that the wife is found infected with this disease after marriage is not in itself sufficient to justify the court in granting a divorce. In *Holthoefer v. Holthoefer*, 47 Mich. 260, 643, 11 N. W. 150, it is said, in substance, that the evidence from the physician and nurses attending disclosed that the complainant was afflicted with a venereal disease. No charge was made and no suspicion suggested against the chastity of the complainant. On the other hand, there is no evidence against the defendant except the single fact that his wife was found to be diseased. If it were impossible that a virtuous wife should contract such

Divorce—  
cruel and  
inhuman  
treatment—com-  
municating  
venereal  
disease.

—effect of  
existence of  
disease.

a disease otherwise than from the husband, perhaps the facts already stated should, under the circumstances, be sufficient proof of his guilt. But it is conceded that the wife may innocently acquire the disease in other ways, and the wife's case must be supported by negative testimony that she was not in any manner exposed.

So we turn our attention to the evidence touching the physical condition of the defendant prior to the marriage.

Dr. Ida MacKeen testified that on the 26th or 27th of October she informed the defendant that his wife was suffering with gonorrhea. The defendant said: "My God, where did she get it?" The doctor replied: "You ought to know." He answered that he had a eugenic examination prior to his marriage to know that he was absolutely clean. The doctor replied that that might be, but probably somewhere in his long life he had contracted a germ that might have remained dormant or quiescent, and on finding virgin soil became rejuvenated and she was affected. He responded by saying that he was infected slightly twenty-two years ago.

Another witness, E. H. Farin, testified that he overheard a conversation between the defendant and one Fisher, in which the defendant told Fisher that he had been in to Chicago with some friends, making the rounds of the sporting houses; told of a number of different stunts that the girls pulled off; heard him tell about a visit to New York city, in which he said that he made the rounds of the sporting houses and had a good time. This conversation occurred about eighteen years ago.

One Davis testified that in August, 1916, about two months before the marriage, he saw the defendant in a roadhouse with women, near Sioux City, but had no conversation with him. The place was considered a

fast place. Defendant was then under the influence of liquor. At another time he heard the defendant tell of having women in his room at a hotel; heard him tell about parties with ladies in the hotel. In 1914 or 1915 the witness testifies that Holmes asked him about a prescription for gonorrhea, and was told that one Hecklin had a recipe that was good for that. The witness further testified that about August or September, 1916, defendant asked him where he could find Hecklin; that he wanted to get that recipe.

Hecklin testified that he met the defendant in Sioux City with Davis. Davis asked him for a certain prescription he had for gonorrhea, and wanted to know if a friend could get a copy. He told him "Yes," and he gave him the prescription. The same witness testified that afterwards, in the Jackson Hotel at Sioux City, sometime in September, 1916, the defendant asked him if he was the man that gave him the prescription through Davis, and was informed that he was, but that he had lost the prescription. He then asked the defendant if the prescription helped him, and he said "Yes," he wanted to get it filled again; that he saw him at the roadhouse at the same time Davis testified to, sometime in July, 1916.

Dr. Lawrence, called for the defendant, testified that on September 3d preceding the marriage, the defendant came to him and told him he had made up his mind to have an operation. "I knew he had a fistula before that. I examined him at that time with reference to the operation for fistula. I advised him to be circumcised. I told him that he would be cleaner. I said nothing about infection, and never thought of infection at that time or anything of that kind. Germs of various kinds may get under the foreskin. I made no examination at that time to deter-

mine whether he had gonorrhea or not, or whether he ever had it. I never made any such an examination of his private parts. I only examined him for the purpose of circumcision. I circumcised him then."

Defendant was asked this question concerning the circumcision:

Didn't you tell your wife you had been examined to see that you were free from disease?

A. I did not. I told her I had a circumcision, that I might come to her a clean, perfect, physical man.

The defendant denies that he ever had any of the symptoms of gonorrhea; denies that he was ever examined or treated for gonorrhea before his wife accused him of communicating it to her; that after her accusation he was examined by several physicians. These physicians testified that they found nothing to indicate that he ever had gonorrhea. Defendant denies practically all the matters testified to by the plaintiff's witnesses touching his admissions and previous conduct. It is true some of the witnesses against him do not come with very clean records, but a summing up of the testimony shows these facts, we think, fairly well established. The plaintiff is a pure, virtuous woman, and never copulated with anyone but her husband, and never was exposed to gonorrheal affection, except as it may be found in these acts of copulation; that immediately after copulation she was afflicted with gonorrhea. The defendant was about forty-two years of age; had traveled a good deal over the country, and visited some of the larger cities; was vigorous physically, and had on several occasions visited sporting houses and consorted with lewd women, and at some time during his life had been afflicted with gonorrhea. The testimony further shows that one may carry the gonococci in a latent form, lying dormant some place in the prostate or in the ure-

thra or some of the sexual organs, and not have any test show it; that he may carry it for several years, and that he may communicate it after it has lain apparently dormant for two years. Circumcision is not a Christian rite. It is unusual for Christian men to be circumcised. Even among those who consider circumcision proper, it is performed in the early life of the child. No doubt circumcision is conducive to cleanliness. Christian men, however, do not ordinarily resort to circumcision to secure cleanliness. Something must have been in the mind of the defendant, or in the mind of his physician, at the time of the circumcision, that indicated that there were unusual conditions requiring cleanliness in this defendant.

The record discloses that the plaintiff and the defendant had been acquainted for a great many years, though the plaintiff knew nothing of the defendant's habits of life. He proposed marriage to her some fifteen years before, and at intervals thereafter, but had been either turned down or laughed down by the plaintiff. At least, she seems not to have taken his proposition seriously until the 12th day of August, 1916, when the engagement to marry was entered into. Immediately he began to clean up. Why clean up? Why did he need cleaning up? Why was it deemed necessary that he be circumcised that he might present himself "a clean, sound man" to his wife on the marriage day? He says he had never been exposed and never had been affected with any venereal disease. Why, then, immediately after he had engaged himself to marry this plaintiff, whose hand he had so long sought and desired, did he begin to clean up? Why this circumcision? The question suggests the answer—he thought he needed cleaning up; that there were conditions that required remedying before the marriage was consum-

mated. This circumstance has great probative force, both on his condition, and his knowledge of his condition, immediately before the marriage. He may have hoped to avoid the effect that usually follows copulation when those conditions exist. It was, however, a reckless and wanton exposure of the woman to consequences most serious to her life and happiness. We think the two

**Evidence—  
communication  
of disease—  
sufficiency.**

propositions are established, to wit:  
That he was affected with gonorrhea

at the time of the marriage, and communicated it to his wife; and, second, that he knowingly, wantonly, and recklessly indulged his passion without due care for her safety. In Boardman v. Boardman, L. R. 1 Prob.

**Divorce—  
knowingly  
communicating  
disease.**

& Div. 233, 14 Week. Rep. 1024 (1866), it was held that, if the husband knew that he was in such a state of health that having connection with his wife would be a reckless act, the communication of the disease would amount to cruelty; and that one who does an act likely to produce injury, and the injury follows, cannot excuse himself by saying that he hoped the probable consequences might, by some peculiar good fortune, not follow. Ordinarily, the state of a man's health is within his own knowledge. Here we have proof that the state of his health prior to the marriage was within his own knowledge.

In Cook v. Cook, 32 N. J. Eq. 475, it was said: "If a husband, knowing that he is in such a state of health that, by having connection with his wife, he will run the risk of communicating venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty, and the presumption is that he knew his own state of health and the probable result of the connection. . . . The proof of the wilfulness of the

act may reasonably be sought in surrounding circumstances, in the condition of the husband, and the probabilities of the case."

See also Carbajal v. Fernandez, 130 La. 812, 58 So. 581; Canfield v. Canfield, 34 Mich. 519.

We find, therefore, that the plaintiff's case was proven by that degree of evidence which the law requires, and she was entitled to the decree which she obtained.

II. It is contended, however, that the court had no jurisdiction of the parties at the time of the commencement of this suit and at the time the decree was entered.

It will be noted from what has been said before that, prior to her marriage, the plaintiff resided in Minneapolis, Minnesota, the defendant in Sioux City, Iowa; that soon after the marriage they moved to Minnesota; that when this trouble arose the plaintiff left Minneapolis, took all her furniture with her, and moved to Oelwein, and took up her residence with her uncle, Judge Bane, intending never to live with defendant again. She came to Oelwein about the 2d of December. The notice of this action was served on the 7th of December, 1916. The showing by her is that on or about the 2d of December, as soon as it became certain that she was afflicted with this disease, she packed up her furniture and belongings and moved to Oelwein, Fayette county, arriving there the same day, with the full intention of residing there and making her residence in that county; that her father and mother resided near Westgate, Fayette county, until her father's death, in 1912; that her mother resided with her in Minneapolis until her death. She said it was her intention to reside in Fayette county, where she could look after her farm in that county near Westgate; that she had no intention to make any other place her home than in Fayette county, and that her



presence there was in good faith. A motion was made to transfer the cause to Woodbury county. This motion was overruled, and this is assigned as error.

Section 3171 of the Code of 1897 provides: "The district court in the county where either party resides has jurisdiction of the subject-matter of" divorce. Now it is certain that no length of time is necessary to fix the residence contemplated by this statute. The very nature of the action shows that the rule of unity of domicil does not apply. The length of time is not controlling. If, at the time the action

is commenced, the plaintiff is living within the county in which the divorce suit is instituted, with the intention

Courts—  
jurisdiction—  
action for  
divorce.

then to permanently remain in the county, the right to maintain the action in that county is complete. This is the showing here. See *Sylvester v. Sylvester*, 109 Iowa, 401, 80 N. W. 547.

Upon the whole record we think the case should be, and is, affirmed.

Ladd, Ch. J., and Preston and Stevens, JJ., concur.

Petition for rehearing denied May 21, 1919.

## ANNOTATION.

### Venereal disease as ground for divorce or annulment of marriage.

This note is designed to supplement that published in 5 A.L.R. at page 1016.

While the reported case (*HOLMES v. HOLMES*, ante, 1534) was decided prior to the writing of the original note, the decision therein was not then final because of the pendency of a motion for a rehearing. It is held in that case that for a man, having reason to believe himself to be afflicted with a venereal disease, to have marital intercourse with his wife and communicate the disease to her, is cruel and inhuman treatment entitling her to a divorce. See in this connection, *Holmes v. Holmes* (1920) — Iowa, —, 176 N. W. 691, wherein the court affirmed a decision sustaining a demurrer to a petition to set aside, for fraud and perjury, the divorce granted in the reported case.

Apparently the only other recent case passing on the right to divorce because of one of the spouses con-

tracting a venereal disease is *Dowling v. Dowling* (1920) — N. J. Eq. —, 110 Atl. 39. In that case it appeared that both spouses had the disease in question, and each claimed to have contracted it from the other. The court held that the evidence was insufficient to show that the wife had contracted the disease in adulterous intercourse, and denied the prayer of the husband for a divorce. With respect to the wife's bill for a divorce for adultery, based on the theory that he first contracted the disease, the court held that relief was barred by a decree against her in a suit wherein she sought a divorce on the claim that the husband, by infecting her with the disease, compelled her to leave him, and was therefore guilty of constructive desertion. The court said by way of dictum: "Of course, if she contracted a venereal disease from him she was justified in leaving him." W. A. S.

EX PARTE G. W. PATTERSON, Appt.

Arkansas Supreme Court — November 10, 1913.

(110 Ark. 94, 161 S. W. 173.)

**Contempt — power of mayor to punish.**

A mayor acting with power and jurisdiction of a justice of the peace cannot punish for contempt not committed in his presence, or in disobedience of process, unless power to do so is expressly conferred by statute.

[See note on this question beginning on page 1543.]

APPEAL by petitioner from a judgment of the Circuit Court for Searcy County (Reed, J.) dismissing his petition for certiorari to review a judgment of the Mayor of the town of Marshall, adjudging him to be in contempt of court for publishing in a newspaper an article criticizing the mayor on account of his rulings in a certain case. *Reversed.*

The facts are stated in the opinion of the court.

Mr. A. Y. Barr for appellant.

Mr. Grover C. Bratton for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant, G. W. Patterson, was by the mayor of the incorporated town of Marshall adjudged to be in contempt of court, for publishing in a newspaper an article criticizing and ridiculing the mayor on account of his rulings in a certain case, which had been pending in his court against one Lindsay, for alleged violation of an ordinance of the town. The case against Lindsay had been disposed of by judgment imposing a fine, which had been paid, and the matter was thus ended. We pass over consideration of the question raised by appellant as to whether or not the article published amounted in fact to contempt, and proceed to the initial question of the jurisdiction of the mayor of an incorporated town to punish for contempt not committed in the presence of the court, or in disobedience of its process. Appellant applied to the circuit court for certiorari to bring up the record, which was done, but the court, on hearing the cause, dismissed the petition, and an appeal to this court has been prosecuted.

There is no statute in this state expressly authorizing the mayor of an incorporated town to punish for

contempt; but by statute that officer is declared to be a conservator of the peace throughout the limits of the corporation, with "all the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the state, to all intents and purposes whatever." Kirby's Dig. § 5586. The power of justices of the peace to punish for contempt is limited by statute to misconduct committed in the presence of the court, or in disobedience of any process issued by the court requiring the attendance of a witness. Kirby's Dig. § 726.

It is seen, therefore, that there is no statutory authority to punish for contemptuous conduct committed other than in the presence of the court, or in disobedience of the court's process. It is contended, however, that a mayor or justice of the peace, as well as all other courts, possesses inherent power to punish for contempt. The case of *State v. Morrill*, 16 Ark. 384, is relied on in support of this contention. This question was not raised in the *Morrill* Case, for it involved the question of contemptuous conduct toward the supreme court.

It seems to be very generally settled at common law, and also in this country, that inferior courts do not possess the power, in the absence of statute expressly conferring it,

of punishing for contempt, except that committed in the presence of the court, or in disobedience of process. That rule is stated in the *Cyclopedia of Law*, vol. 9, p. 28, and numerous authorities cited in support.

The case of *Reg. v. Lefroy*, 8 L. R. Q. B. 134, involved the power of the county court to punish an attorney for contemptuous conduct committed, not in the presence of the court, by publishing a statement derogatory to the judge of the court. Chief Justice Cockburn, delivering his opinion as one of the judges on appeal, said: "I think that the judge of the county court has no authority to punish for contempt not committed in the face of the court. It is perfectly true that it is laid down by authority, and reason shows the correctness of the rule, that all courts of record have power to fine and imprison for any contempt committed in the face of the court, for the power is necessary for the due administration of justice, to prevent the court being interrupted. But it is quite another thing to say that every inferior court of record shall have power to fine or imprison for contempt of court, when that contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge. There are other remedies for such proceedings. The power to commit for contempt is fully gone into by Blackstone and Hawkins; but, though this power is recognized in the superior courts, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court; and there is an obvious distinction between the superior courts and other courts of record. . . . No case is to be found in which such a power has ever been exercised by an inferior court of record, or, at all events, upheld by a decision of the superior courts."

Mr. Rapalje, in his work on Contempt, § 4, says: "The power to punish by commitment for contempt is a power belonging only to judges

of certain courts, and does not arise from the mere exercise of judicial functions. The power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to civil and criminal jurisdictions, but not extending, at the common law, below such as are courts of record recognized by the common law."

The same rule is stated in another textbook on the subject, where it is said that "the jurisdiction of inferior courts of record (such as a court of quarter sessions, the mayor's court, and a county court) is confined to such contempts as are perpetrated in *facie curiæ*, and does not extend to such as are committed out of court, unless by virtue of some statutory enactment." Oswald, *Contempt of Court*, p. 11.

In a well-considered opinion of the New Jersey supreme court we find the law on this subject thoroughly reviewed, and the doctrine is shown to be well established that, in the absence of statute, the power to punish for contempt is not possessed by inferior courts not of record, except for contemptuous conduct committed in the presence of the court, or in disobedience of its process. That case involved the power of the recorder of a municipality to punish for contempt. The learned judge delivering the opinion in that case said: "To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions.

. . . That power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal jurisdictions, but not extending, at the common law, below such as are courts of record recognized in the common law. The general doctrine of the English law is that all courts of record may fine or imprison for contempts in the face of the court.

. . . A power to fine or imprison in such cases, although necessary for the proper discharge of the duties of a court not of an inferior juris-

diction, and for the maintenance of its independence and dignity, should not belong to all persons, bodies, or tribunals who may have a judicial duty to perform. The common law wisely did not recognize it in courts below those of record; and we would be doing violence to the liberty of the citizen to encourage its existence in any of our own courts, except those that, in their very nature, . . . are courts of record, with jurisdictions not beneath the character of those so treated in the common law." *Re Kerrigan*, 33 N. J. L. 344.

It is insisted by counsel for the municipality, while conceding the general doctrine thus stated, that it does not apply to justices of the peace and mayors in this state, because their creation is expressly authorized by the Constitution of the state. We do not see the force of

that distinction, because it is merely a question of the legal existence of the court, whether created by express constitutional authority or merely by legislative authority.

The reason for the rule at all times has been that inferior courts not of record do not possess such power, unless expressly granted to it by the lawmakers. The courts will not construe the law to grant such inherent power to courts of that class.

The mayor being without jurisdiction to punish for the alleged contemptuous conduct specified in the information filed before him, the judgment rendered against appellant was void, and should have been quashed by the circuit court. The judgment of the Circuit Court is, therefore, reversed, and the Mayor's judgment is quashed.

Contempt—  
power of mayor  
to punish.

### Annotation.

#### What courts or officers have power to punish for contempt.

- I. In general, 1544.
- II. Particular courts:
  - a. Federal courts:
    1. In general, 1545.
    2. Circuit and district courts, 1546.
    3. Court of claims, 1547.
    4. Court-martial, 1547.
    5. Courts of District of Columbia:
      - (a) Supreme court, 1547.
      - (b) Juvenile court, 1548.
      - (c) Justice of the peace, 1548.
  - b. State courts:
    1. In general, 1548.
    2. Courts of last resort, 1549.
    3. Intermediate appellate courts, 1550.
    4. Courts of chancery or equity, 1551.
    5. Probate or surrogate courts, 1551.
    6. Circuit courts, 1553.
    7. District courts, 1556.
    8. Superior courts, 1558.
    9. Courts of common pleas, 1560.
    10. County courts, 1561.
    11. Municipal or city courts, 1562.
- II. b—continued.
  12. Police courts, 1564.
  13. Justices of the peace, 1566.
  - c. British courts:
    1. England:
      - (a) High court of justice, 1570.
      - (b) King's bench, 1570.
      - (c) Court of assize, 1570.
      - (d) Court of nisi prius, 1570.
      - (e) Court of general jail delivery, 1570.
      - (f) County court, 1570.
      - (g) Quarter sessions, 1571.
      - (h) Justice of the peace, 1571.
      - (i) Leet, 1571.
    2. Ireland:
      - (a) Court of assize, 1571.
    3. Canada:
      - (a) Supreme court, 1571.
      - (b) Queen's bench, 1571.
      - (c) Superior court, 1571.
      - (d) Division court, 1572.
      - (e) County court, 1572.
      - (f) Justice of the peace, 1572.
      - (g) Police magistrate, 1572.

## II. c—continued.

## 4. Colonies:

(a) Supreme court of civil justice of British Guiana, 1572.

(b) Recorder's court of Sierra Leone, 1572.

## III. Officers and boards:

a. Mayor, 1573.

b. Notary, 1574.

c. Referee:

1. In bankruptcy, 1575.

## III. c—continued.

2. In supplementary proceedings, 1576.

3. Other referees, 1576.

d. Commissioner:

1. United States commissioners, 1577.

2. Other commissioners, 1578.

e. Grand jury, 1579.

f. Boards, 1580.

g. Miscellaneous, 1581.

**Scope.**

This annotation is confined in the main to cases that expressly discuss, or at least decide, the question whether the court or officer had power to punish for contempt, to the exclusion of cases in which the power was assumed and the question was as to whether or not the particular acts or conduct amounted to contempt. The acts or conduct of which the contempt was predicated have been referred to merely as indicating the character or kinds of contempt to which the power of the court or officer extends, and not at all for the purpose of showing what does or does not amount to contempt.

This note does not include cases treating of the power of the legislature, or committees thereof, to punish for contempt; nor the power of one court to punish contempts against another; nor a superior court's power to punish inferior courts, nor the power of a judge in chambers or vacation to punish for contempt. The question as to the punishment, e. g., fine or imprisonment, that may be imposed, is also beyond the scope of the note.

*I. In general.*

Constitutional courts, i. e., courts created by the Constitution, have inherent power, independently of statute, to punish for contempt, of which power they cannot be deprived by the legislature, in the absence of a constitutional provision authorizing it; but the power to punish contempts can be withheld, or taken from statutory courts by the legislature, whose creatures they are. *Wyatt v. People* (1892) 17 Colo. 252, 28 Pac. 961; *People v. Gilbert* (1917) 231 Ill. 619, 118 N. E. 196; *Drady v. District Ct.* (1905)

126 Iowa, 345, 102 N. W. 115; *State ex rel. Coleman v. Rose* (1906) 74 Kan. 260, 85 Pac. 803; *Chicago, B. & Q. R. Co. v. Gildersleeve* (1909) 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; *Ex parte Sullivan* (1914) 10 Okla. Crim. Rep. 465, 138 Pac. 815, Ann. Cas. 1916A, 719; *Carter v. Com.* (1899) 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780, 11 Am. Crim. Rep. 303; *State v. Frew* (1884) 24 W. Va. 416, 49 Am. Rep. 257.

A superior court of general jurisdiction has inherent power to punish contempts. *Burns v. Superior Ct.* (1903) 140 Cal. 1, 73 Pac. 597; *McDougall v. Sheridan* (1913) 23 Idaho, 191, 128 Pac. 954; *Rucker v. State* (1908) 170 Ind. 635, 85 N. E. 356; *Re Ellison* (1914) 256 Mo. 378, 165 S. W. 987; *State v. Markuson* (1895) 5 N. D. 147, 64 N. W. 934; *Re Evans* (1913) 42 Utah, 282, 130 Pac. 217.

But inferior courts of limited jurisdiction have only statutory power, except, perhaps, as to contempts committed in the face of the court. *Re Monroe* (1891) 46 Fed. 52; *Farnham v. Colman* (1905) 19 S. D. 342, 1 L.R.A. (N.S.) 1135, 117 Am. St. Rep. 944, 103 N. W. 161, 9 Ann. Cas. 314.

The power to punish for contempt is inherent in courts of record. *State v. Howell* (1908) 80 Conn. 668, 125 Am. St. Rep. 141, 69 Atl. 1057, 13 Ann. Cas. 501; *Flannagan v. Jepson* (1916) 177 Iowa, 393, L.R.A.1918E, 548, 158 N. W. 641; *Morrison v. McDonald* (1842) 21 Me. 550; *Langdon v. Judge of Wayne Circuit Ct.* (1889) 76 Mich. 358, 43 N. W. 310; *State ex rel. Metcalf v. District Ct.* (1916) 52 Mont. 46, L.R.A. 1916F, 132, 155 Pac. 278, Ann. Cas. 1918A, 985; *Hawes v. State* (1895) 46 Neb. 149, 64 N. W. 699; *Re Merrill* (1917) 88 N. J. Eq. 261, 102 Atl. 400;

*Cress v. State* (1918) 14 Okla. Crim. Rep. 521, 173 Pac. 854; *Re Taber* (1900) 13 S. D. 62, 82 N. W. 398; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* (1909) 55 Wash. 1, 103 Pac. 426, 107 Pac. 196.

Appellate courts have inherent power to punish for contempt. The fact that an appellate court has no jurisdiction to examine witnesses does not take away its power to punish indirect contempts. *State v. Anderson* (1915) 6 Tenn. C. C. A. 1.

Courts of equity have the same power as courts of law to punish contempts. *Kirk v. Milwaukee Dust Collector Mfg. Co.* (1885) 26 Fed. 501; *Howard v. Durand* (1867) 36 Ga. 346, 91 Am. Dec. 767; *Rudd v. Rudd* (1919) 184 Ky. 400, 214 S. W. 791; *Cartwright's Case* (1873) 114 Mass. 230; *Re Merrill* (1917) 88 N. J. Eq. 261, 102 Atl. 400; *Rowley v. Feldman* (1903) 84 App. Div. 400, 82 N. Y. Supp. 679, 13 N. Y. Anno. Cas. 173; *Smith v. Smith* (1918) 81 W. Va. 761, — A.L.R. —, 95 S. E. 199.

Civil courts, though without criminal jurisdiction, have power to punish criminal contempts, since a proceeding for criminal contempt is not a criminal prosecution. *Merchants' Stock & Grain Co. v. Board of Trade* (1912) 120 C. C. A. 582, 201 Fed. 80; *Middlebrook v. State* (1876) 43 Conn. 257, 21 Am. Rep. 650; *State v. Howell* (1908) 80 Conn. 668, 125 Am. St. Rep. 141, 69 Atl. 1057, 13 Ann. Cas. 501; *Smith v. State* (1915) 12 Okla. Crim. Rep. 513, 159 Pac. 941.

## II. Particular courts.

### a. Federal courts.

#### 1. In general.

Under the Judiciary Act of September 4, 1789, chap. 20, § 17, the courts of the United States were given power to punish by fine or imprisonment, at the discretion of the court, all contempts of their authority in any cause or hearing before them. This power was exercised until the passage of the Act of March 2, 1831, which limited this power of the Federal courts, and prescribed the cases in which it might be exercised. This act became § 725

of the United States Revised Statutes, and § 725 was re-enacted without change in § 268 of the Judicial Code, Act of March 3, 1911, chap. 231, 36 Stat. at L. 1163, Comp. Stat. § 1245, 5 Fed. Stat. Anno. 2d ed. p. 1009. Section 268 of the Judicial Code provides as follows: "The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempt of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any other person to any lawful writ, process, order, rule, decree, or command of the said court." *Ex parte Buskirk* (1896) 18 C. C. A. 410, 25 U. S. App. 613, 72 Fed. 14; *Boyd v. Glucklich* (1902) 53 C. C. A. 451, 116 Fed. 131; *Cuyler v. Atlantic & N. C. R. Co.* (1904) 131 Fed. 95.

This statutory provision, in terms, applies to all the Federal courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. *Ex parte Robinson* (1873) 19 Wall. 505, 22 L. ed. 205; *Cuyler v. Atlantic & N. C. R. Co.* supra.

The power of the courts of the United States to punish for contempt and imprison for nonpayment of money judgments is circumscribed and controlled by the laws of the states, and where, by the laws of a state, proceedings cannot be had as for a contempt for the nonpayment of money ordered by the court to be paid, when the payment can be enforced by execution, an

order of a Federal court, made in the progress of a cause, of the character, in substance, of a judgment or decree for the payment of money, cannot be enforced upon the theory that disobedience is a contempt. *Mallory Mfg. Co. v. Fox* (1884) 20 Fed. 409.

## 2. Circuit and district courts.

The circuit court had power to punish for contempt the following acts or omissions:

- refusal of clerk of court to pay over money due from him in his official capacity, *Re Pitman* (1852) 1 Curt. C. C. 186, Fed. Cas. No. 11,184;

- neglect to attend court as witness after having been duly subpoenaed, *Re Ellerbe* (1882) 4 McCrary, 449, 13 Fed. 530;

- forcible resistance in presence of court to lawful order, *Ex parte Terry* (1888) 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77;

- violation of injunction, *Merchants' Stock & Grain Co. v. Board of Trade* (1912) 120 C. C. A. 582, 201 Fed. 30;

- perjury on the witness stand, *Re Ulmer* (1913) 208 Fed. 461.

But it was held in *Ex parte Poulson* (1835) Fed. Cas. No. 11,350, that the Act of March 2, 1831, took away from the circuit court the power to punish for contempt the publishing of articles relating to a pending suit, or to the suitors therein.

In *United States v. Holmes* (1842) 1 Wall. Jr. 1, Fed. Cas. No. 15,383, the judge, on taking his seat, refused to allow reporters to enter the court room, except on condition of suspending all publication until after the conclusion of the trial, stating that the court had power to regulate the admission of persons to the court room, although it no longer had the power to punish for contempt the publication of testimony pending the trial, since the enactment of the Act of March 2, 1831.

The circuit court had no power to punish as for contempt the violation of a stipulation made by the attorneys of the parties in open court, or the disobedience, before its entry, of an order nunc pro tunc. *Ex parte Buskirk* (1896) 18 C. C. A. 410, 25 U. S. App. 613, 72 Fed. 14.

The power of the circuit court at common law to punish as for a contempt a misstatement of its own decision was taken away by § 725 of the United States Revised Statutes Comp. Stat. § 1245, because it is within none of the exceptions contained in the proviso. *Asbestos Shingle Slate & Sheathing Co. v. H. W. Johns-Manville Co.* (1911) 189 Fed. 610.

The circuit court was abolished and its powers transferred to the district court, by the Judicial Code, enacted March 3, 1911, §§ 289, 291, 36 Stat. at L. 1087, chap. 231, Comp. Stat. §§ 1266, 1268, 5 Fed. Stat. Anno. 2d ed. pp. 1082, 1083.

The district court has power to punish for contempt the following acts:

- disobedience of habeas corpus commanding one to produce bodies of colored persons claimed as slaves, *Williamson's Case* (1855) 26 Pa. 9, 67 Am. Dec. 374;

- contempt by offer of money to witness, while in witness room or hallway of court room, to deter him from testifying, *Re Sabin* (1889) 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699;

- assault upon court officer while yet in office, induced by his performance of duty in a past case, *Ex parte McLeod* (1903) 120 Fed. 130;

- attempt to corrupt jurors expected to be called upon criminal prosecution, *Kirk v. United States* (1911) 112 C. C. A. 531, 192 Fed. 278;

- statement by attorney in address to jury that he does not expect them to render a verdict in his client's favor, even if the evidence warrants it, *Re Maury* (1913) 123 C. C. A. 642, 205 Fed. 626;

- publication of newspaper articles in reference to pending action, tending and intended to provoke public resistance to an injunctive order, if one should be made, and constituting an attempt to intimidate, or at least unduly influence, the district judge in making his decision, *Toledo Newspaper Co. v. United States* (1916) 150 C. C. A. 636, 237 Fed. 986;

- publication in newspaper of article pending criminal prosecution,

containing statements prejudicial to defendant, *Re Independent Pub. Co.* (1917) L.R.A.1917E, 703; 153 C. C. A. 585, 240 Fed. 849, Ann. Cas. 1917C, 1084.

But it is held in *Cuyler v. Atlantic & N. C. R. Co.* (1904) 131 Fed. 95, that the district court has no power to punish for contempt an editor of a daily newspaper, who published an editorial criticizing the conduct of the court in appointing a receiver in a pending action, and reflecting on the official integrity of the court, because the misbehavior of the editor was not in the presence of the court, or so near thereto as to obstruct the administration of justice.

The district court has no power to punish for contempt a grand juror who discloses the evidence upon which an indictment was founded, after the grand jury has been finally discharged. *Atwell v. United States* (1908) 17 L.R.A.(N.S.) 1049, 89 C. C. A. 97, 162 Fed. 97, 15 Ann. Cas. 253.

As a court of bankruptcy, the district court has power to punish for contempt a bankrupt who fails to turn over to his trustee, when ordered, property in his possession belonging to the bankrupt estate. *Re Purvine* (1899) 37 C. C. A. 446, 96 Fed. 192; *Ripon Knitting Works v. Schreiber* (1900) 2 N. B. N. Rep. 899, 101 Fed. 810.

And in *Boyd v. Glucklich* (1902) 53 C. C. A. 451, 116 Fed. 131, holding that a court of bankruptcy cannot punish for contempt the failure of a bankrupt to comply with an order to deliver property to his trustee, when such property is not in the bankrupt's possession or under his control, it is said by the court that § 41 of the Bankruptcy Act does not invest courts of bankruptcy with broader and larger powers to punish for contempt than are possessed by other United States courts; that this section does not, in express terms, confer on the court of bankruptcy the power to punish for contempt; that the reference to the power to punish for contempt in § 41 was not to confer the power on the court of bankruptcy, but was to make it plain that the power was

not conferred on referees in bankruptcy, and to confer the power on the judge of the court of bankruptcy, who could not exercise the power in the absence of the statute expressly conferring it; that no new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court; and that any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy, and any act, matter, or thing which cannot be punished as a contempt by other United States courts cannot be punished as such by a court of bankruptcy.

### 3. Court of claims.

It appears from the case of *Elting v. United States* (1892) 27 Ct. Cl. 158, that the United States court of claims has power to punish for contempt.

### 4. Court-martial.

A court-martial has no power to punish for contempt a civilian for refusing to testify (U. S. Rev. Stat. § 1342, 86th Article of War, Comp. Stat. § 2308a), its authority over him in that regard being limited to a certification of the facts to the United States district attorney (Act of Congress, March 2, 1901, chap. 809, 31 Stat. at L. 950, 951, Comp. Stat. § 2308a). *United States v. Praeger* (1907) 149 Fed. 474.

### 5. Courts of District of Columbia.

#### (a) Supreme court.

The supreme court of the District of Columbia is a court of the United States within the meaning of § 725 of the Revised Statutes of the United States, Comp. Stat. § 1245, which provides that the courts of the United States shall have power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority, provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers



of said court in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command, of the said court (attempt to influence jury in murder case, by addressing them as they pass along the street in charge of an officer of the court). *Moss v. United States* (1904) 23 App. D. C. 475.

(b) *Juvenile court.*

The juvenile court of the District of Columbia has power to punish for contempt, under the Act of Congress of March 19, 1906, 34 Stat. at L. 73, chap. 960, creating such court, which confers power upon that court to punish for contempt, and this power is not limited to contempts committed in the presence of the court, but extends to those which tend to obstruct the administration of justice therein. *United States ex rel. Alward v. Latimer* (1915) 44 App. D. C. 81 (advice and aid by attorney to client, to absent himself from jurisdiction of court, and thus evade process and orders of court). *Juvenile Ct. v. Hughlett* (1915) 44 App. D. C. 59.

(c) *Justice of the peace.*

A justice of the peace has power, under the common law, to punish contempts committed in his presence, but he has no power to punish other contempts, unless such power is expressly conferred by statute. Section 725 of the United States Revised Statutes, Comp. Stat. § 1245, does not apply to justices' courts in the District of Columbia, and the only statute upon this subject is § 1005 of the Revised Statutes, relating to the District of Columbia, which provides that a justice of the peace in the District has power to compel the attendance of witnesses by attachment, and to punish them for contempt for refusing to obey a summons to appear. As the power of a justice to punish contempts committed out of his presence depends upon statute, and the statute confines this power to disobedience of summons to appear as witness, he has no power to punish for contempt an ef-

fort to prevent the execution of a writ of fieri facias issued by him. *Re Carson* (1898) 26 Wash. L. Rep. 152.

But it appears from the cases of *Washington v. Dawson* (1846) 1 Hayw. & H. 236, Fed. Cas. No. 17,227, and *Ex parte Gorman* (1835) 4 Cranch (C. C.) 572, Fed. Cas. No. 5,628, that a justice of the peace in the District of Columbia had no power to punish for contempt a witness who refused to obey a summons issued by him, under the Act of Maryland 1791, chap. 68, § 8, which provided that, where witnesses do not attend according to summons, the justice before whom such witnesses ought to have attended shall enforce obedience to his process by attachment of contempt, to be returnable before the justices of the next county court, who shall take cognizance thereof, and shall at their discretion fine the offender.

b. *State courts.*

1. *In general.*

While the name of a court is not always an accurate index of its essential characteristics and rank in the judicial scheme, and courts of the same name in different states are sometimes found to vary considerably in these respects, it has been thought that in general the name of the court is sufficiently suggestive to form the basis of the classification of the cases from the different states for the purposes of the question under annotation. An exception, however, has been made as to courts which are in effect probate or surrogate courts, and which, though variously designated as "orphans' courts," "courts of ordinary," "prerogative courts," etc., have been grouped under the heading "probate or surrogate courts." So courts of last resort and intermediate appellate courts have been grouped, respectively, under those headings, irrespective of the particular names by which they are known.

So far as it has been possible to determine the point from the cases, an attempt has been made to refer the decisions to the inherent power of the court, or to its statutory powers, as the case may be; and, in the latter

event, to indicate the scope and terms of the statute. This, however, has been found to be impossible in many instances, because of the meagerness of the reports.

*2. Courts of last resort.*

The highest courts of the several states are possessed of inherent power to punish contempts of every kind or character.

**Arkansas.**—*State v. Morrill* (1855) 16 Ark. 384.

**Colorado.**—*People ex rel. Atty. Gen. v. News-Times Pub. Co.* (1906) 35 Colo. 253, 84 Pac. 912.

**Florida.**—*Re Hayes* (1916) — Fla. —, L.R.A.1917D, 192, 73 So. 362, Ann. Cas. 1918B, 936.

**Idaho.**—*McDougall v. Sheridan* (1913) 23 Idaho, 191, 128 Pac. 954.

**Illinois.**—*People v. Wilson* (1872) 64 Ill. 195, 16 Am. Rep. 528, 1 Am. Crim. Rep. 107.

**Kansas.**—*State ex rel. Coleman v. Rose* (1906) 74 Kan. 260, 85 Pac. 803.

**Massachusetts.**—*Cartwright's Case* (1873) 114 Mass. 230.

**Missouri.**—*State ex rel. Crow v. Shepherd* (1903) 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79.

**Nebraska.** — *Kregel v. Bartling* (1888) 23 Neb. 848, 37 N. W. 668; *Re Dunn* (1909) 85 Neb. 606, 124 N. W. 120.

**North Carolina.**—*Re Moore* (1869) 63 N. C. 397.

**Ohio.**—*Randall v. Pryor* (1831) 4 Ohio, 424.

**Oklahoma.** — *Ex parte Sullivan* (1914) 10 Okla. Crim. Rep. 465, 138 Pac. 815, Ann. Cas. 1916A, 719; *State ex rel. Tucker v. Davis* (1913) 9 Okla. Crim. Rep. 94, 44 L.R.A.(N.S.) 1083, 130 Pac. 962.

**West Virginia.** — *State v. Frew* (1884) 24 W. Va. 416, 49 Am. Rep. 257.

The Arkansas supreme court, being created by the Constitution, is not limited in its power to punish for contempt by the statute on the subject of contempts, which declares that every court of record shall have power to punish as for criminal contempt persons guilty of the following acts and no other: First, disorderly, contemptuous, and insolent behavior, committed during its sitting, in its

immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise, or disturbance, directly tending to interrupt its proceedings; third, wilful disobedience of any process or order lawfully issued or made by it; fourth, resistance wilfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, and, when so sworn, the like refusal to answer any legal and proper interrogatory. The Constitution contains no provision relating to the power of the court to punish for contempt, but the power to punish contempt of its authority is impliedly given to it as a necessary incident to the exercise of its expressed powers (publication of newspaper article intimating that court was induced by bribery to make the decision in case previously decided). *State v. Morrill* (Ark.) *supra*.

The supreme court of Colorado has inherent power to punish for contempt (publication of criticism of court). *People ex rel. Atty. Gen. v. News-Times Pub. Co.* (Colo.) *supra*.

The Florida supreme court has, independently of statutory authority, inherent power to punish for contempt of court (publication in newspaper, during pendency of cause, of article reflecting upon efficiency and integrity of court). *Re Hayes* (Fla.) *supra*.

The power to punish contempt is inherent in the supreme court of Idaho (newspaper criticism). *McDougall v. Sheridan* (Idaho) *supra*.

As the supreme court of Illinois has power to punish all contempts, a statute providing that it shall have power to punish contempts offered by any person to it while sitting does not restrict the exercise of such power to contempts in the presence of the court (newspaper article reflecting upon action of court in pending case, impeaching its integrity, and seeking to intimidate it in respect to its action in such case by threat of popular clamor). *People v. Wilson* (Ill.) *supra*.

The supreme court of Kansas is a constitutional tribunal with inherent power to punish for contempt (violation of judgment of ouster from office). *State ex rel. Coleman v. Rose* (Kan.) *supra*.

The Massachusetts supreme court has inherent power to punish for contempt (failure of receiver, when ordered, to turn over property to coreceiver). *Cartwright's Case* (1873) 114 Mass. 230.

The supreme court of Missouri has inherent power to punish contempts, both civil and criminal, direct and constructive (newspaper article charging court with having stultified itself in decision, and designating it as a venal court, and as having been bought by a railroad company). *State ex rel. Crow v. Shepherd* (1903) 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79.

The supreme court of the territory of Montana has power to punish as for a contempt the making of a wager upon the decision of a pending suit, and the publication that such person had made such wager that, owing to the influence of certain claimants, the supreme court would reverse their former decision, under a statute limiting the common-law jurisdiction to punish for a contempt of such supreme court to specified acts, including disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings, which provision is held to embrace the contempt in question. *Territory v. Murray* (1887) 7 Mont. 251, 15 Pac. 145.

The Nebraska supreme court possesses inherent power to punish for contempt. *Kregel v. Bartling* (1888) 23 Neb. 848, 37 N. W. 668 (violation of injunction); *Re Dunn* (1909) 85 Neb. 606, 124 N. W. 120 (language insulting to court in petition for rehearing).

The power of the supreme court of North Carolina to punish as for contempt a publication signed by members of the bar, tending to impair the respect due to the court, is not taken away by a statute defining all matters of contempt, which does not embrace

the contempt in question. *Re Moore* (1869) 63 N. C. 397.

The Ohio supreme court has inherent power to punish contempts (neglect and refusal to comply with decree). *Randall v. Pryor* (1831) 4 Ohio, 424.

The supreme court of Oklahoma has inherent power to punish for contempt (scandalous, and scurrilous recitals in exhibit filed in support of motion). *Ex parte Sullivan* (1914) 10 Okla. Crim. Rep. 465, 138 Pac. 815, Ann. Cas. 1916A, 719.

And the criminal court of appeals of the same state, independently of authority granted by statute, has inherent power to enforce obedience to its orders by contempt proceedings (refusal of sheriff to obey order directing him to permit prisoner to consult privately with his attorney). *State ex rel. Tucker v. Davis* (1913) 9 Okla. Crim. Rep. 94, 44 L.R.A.(N.S.) 1083, 130 Pac. 962.

The supreme court of appeals of West Virginia has constitutional power summarily to punish both direct and constructive contempts (newspaper editorial charging political motives in decision of case). *State v. Frew* (1884) 24 W. Va. 416, 49 Am. Rep. 257.

### 3. *Intermediate appellate courts.*

The intermediate appellate courts of the several states generally have the same powers as to contempt as the ultimate appellate courts. *Re Fite* (1912) 11 Ga. App. 665, 76 S. E. 397; *State v. Anderson* (1915) 6 Tenn. C. C. A. 1.

The Georgia court of appeals, a constitutional court having the same powers as to contempt as the supreme court, has inherent power to punish contempts, not only those committed in the presence of the court, or criticisms relating to pending cases, but also criticisms of cases no longer pending (criticism by trial judge of reversal of his decision by court of appeals, in newspaper article reflecting upon their honesty and judicial integrity). *Re Fite* (Ga.) *supra*.

The court of civil appeals of Tennessee has inherent power to punish

for contempt (violation of injunction). *State v. Anderson* (Tenn.) *supra*.

#### 4. Courts of chancery or equity.

While the powers as to contempt of the courts of chancery or equity of the several states are to some extent inherent, they are to a great extent statutory. *Ex parte Walker* (1854) 25 Ala. 81; *Ex parte Hamilton* (1874) 51 Ala. 66; *Callan v. McDaniel* (1882) 72 Ala. 96; *Ex parte Dickens* (1909) 162 Ala. 272, 50 So. 218; *Rudd v. Rudd* (1919) 184 Ky. 400, 214 S. W. 791; *Graham v. Williamson* (1913) 128 Tenn. 720, 164 S. W. 781; *McCormick v. Phillips* (1918) 140 Tenn. 268, L.R.A.1918F, 791, 204 S. W. 636; *Sanders v. Metcalf* (1873) 1 Tenn. Ch. 419.

The chancery court of Alabama is given power by the Code to punish for contempt, among other things, disobedience of any person to any lawful writ, process, order, rule, decree, or command of the court. *Ex parte Walker* (Ala.) *supra* (refusal to pay over money to receiver); *Ex parte Hamilton* (1874) 51 Ala. 66 (violation of injunction); *Callan v. McDaniel* (1882) 72 Ala. 96 (violation of injunction); *Ex parte Dickens* (1909) 162 Ala. 272, 50 So. 218 (failure to deliver property to receiver).

The circuit court of Kentucky, when exercising equity jurisdiction, has power to punish for contempt disobedience of its orders or decrees, where the party ordered occupies a fiduciary position, or has dealt with the court as an officer of the court in an action and becomes debtor to the court, and in cases in which it is authorized by statute (disobedience by executor de son tort of order to pay money into court). *Rudd v. Rudd* (1919) 184 Ky. 400, 214 S. W. 791.

The special term of the New York supreme court has inherent power to punish for contempt, and is given such power by statute (failure to pay alimony pursuant to order). *Brinkley v. Brinkley* (1871) 47 N. Y. 40; *Hayes v. Hayes* (1912) 160 App. Div. 842, 135 N. Y. Supp. 225, affirmed in (1913) 208 N. Y. 600, 102 N. E. 1104.

Such special term has power to punish for contempt the disobedience of

its order, which prejudices the rights of a party, under a statute conferring the power upon courts of record to punish a violation of duty, or other misconduct, by which a right or remedy of a party to a civil action may be defeated, impaired, impeded, or prejudiced. *People ex rel. Platt v. Rice* (1894) 144 N. Y. 249, 39 N. E. 88.

A county chancery court of Tennessee has inherent power to punish for contempt a violation of an injunction granted by it. *Graham v. Williamson* (1913) 128 Tenn. 720, 164 S. W. 781.

The same appears from *McCormick v. Phillips* (1918) 140 Tenn. 268, L.R.A.1918F, 791, 204 S. W. 636, where it was held that the court had lost this power by an appeal from the decree granting the injunction.

A special judge of such court has power, both inherent and statutory, to punish for contempt the disobedience by an officer of the court of an order made by it. *Sanders v. Metcalf* (1873) 1 Tenn. Ch. 419 (refusal by clerk of court to obey order to appear before the court, and bring his books and papers).

#### 5. Probate or surrogate courts.

The probate or surrogate courts of the several states generally have broad powers as to contempt, partly inherent, and partly derived from statutes.

**Arkansas.**—*Welsh v. Lloyd* (1848) 5 Ark. 367.

**Georgia.**—*State v. White* (1807) T. U. P. Charlt. 123.

**Idaho.**—*Re Niday* (1908) 15 Idaho, 559, 98 Pac. 845.

**Kansas.**—*Re Hanson* (1909) 80 Kan. 783, 105 Pac. 694; *Re Moran* (1910) 83 Kan. 615, 112 Pac. 94.

**Maine.**—*Bradley v. Veazie* (1860) 47 Me. 85.

**Mississippi.**—*Moore v. Judge of Probate* (1828) Walk. 310; *Watson v. Williams* (1858) 36 Miss. 331.

**New Jersey.**—*Re Merrill* (1917) 88 N. J. Eq. 261, 102 Atl. 400.

**Ohio.**—*Ex parte Lilliland* (1879) 7 Ohio Dec. Reprint, 659, 4 Ohio L. J. 733.

**Oklahoma.**—*Re Abbott* (1898) 7 Okla. 78, 54 Pac. 319.

**Pennsylvania.**—*Donaldson v. Miller* (1899) 23 Pa. Co. Ct. 393, 9 Pa. Dist.

R. 282; *Gilchrist's Estate* (1877) 6 *Luzerne Leg. Reg.* 57.

The probate court of Arkansas was held in *Welsh v. Lloyd* (Ark.) *supra*, to have power to compel, by attachment and imprisonment, a person to appear before the court, and disclose whether he had property in his possession belonging to the estate of a decedent, a section of the Administration Law giving the probate court authority to issue process, and compel the attendance of persons, by attachment and imprisonment.

A court of ordinary of Georgia, being a court of record established by the Constitution, has the power to punish for contempt (refusal of dismissed clerk of court to deliver up to his successor records, documents, and papers in his custody). *State v. White* (Ga.) *supra*.

The probate court of Idaho has power to punish for contempt a witness who refuses to answer interrogatories before a commissioner, when ordered to do so by the court. *Re Niday* (Idaho) *supra*.

Every probate court in Kansas is a court of record, and has inherent power to punish summarily for contempt persons who, in open court, refuse to comply with its lawful orders, or in any manner impede or embarrass the orderly transaction of its business; and this power exists independently of any statute (refusal of witness to answer pertinent question). *Re Hanson* (Kan.) *supra*.

Such a court has power to punish for contempt a person refusing to comply with its order to return to the administrator property embezzled or concealed by such person, belonging to the estate. *Re Moran* (Kan.) *supra*.

A probate judge is given by statute, in Maine, power to punish for contempt one who, appearing before him in proceedings to disclose property belonging to a decedent's estate, refuses to answer any lawful interrogatory. *Bradley v. Veazie* (Me.) *supra*.

The probate court is expressly given by statute, in Mississippi, power to punish for contempt disobedience of its orders and decrees. *Moore v. Judge of Probate* (Miss.) *supra* (non-

compliance by administrator with order of distribution of estate); *Watson v. Williams* (Miss.) *supra* (failure or refusal of guardian, when ordered, to make account of his guardianship).

The prerogative court of New Jersey, a probate court, though not a court of record, as the inheritor of the jurisdiction of its prototype, the English ecclesiastical court, has power to punish contempts, both direct and consequential, and it is given power to enforce its decrees by a statute providing that, if any person shall neglect or refuse to obey any sentence or decree of the judge of the probate court, it shall be lawful to cause such person to be taken and imprisoned until he shall obey and perform such sentence or decree (letter by party to ordinary to influence his decision in pending case). *Re Merrill* (N. J.) *supra*.

By the New York Code of Civil Procedure, the surrogate's court is made a court of record, and is given power to punish for contempt as follows: To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner. In any of the following cases, a decree of a surrogate's court directing the payment of money, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court: Where it cannot be enforced by execution, as prescribed in the last section; where part of it cannot be so enforced by execution, in which case, the part or parts which cannot be so enforced may be enforced as prescribed in this section; where an execution issued as prescribed in the last section to the sheriff of the surrogate's county has been returned by him wholly or partly unsatisfied; where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree re-

lates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper. New York Code Civ. Proc. § 2490, subd. 7, and § 2554.

The surrogate has no power under the Code to enforce the payment of costs by contempt proceedings. *Re Humfreville* (1897) 154 N. Y. 115, 47 N. E. 1086 (failure of removed executor to pay costs awarded to petitioners); *Re Grant* (1909) 130 App. Div. 706, 115 N. Y. Supp. 288 (failure of temporary administrator to pay costs awarded to special guardian and to objectors to account).

There was a conflict in the cases as to the power of the court, before the passage of the Code, to enforce its decrees by contempt proceedings. It was held to have the power in the following cases: *Dunford v. Weaver* (1881) 84 N. Y. 445 (failure of administrator to pay over money of estate to person entitled); *Seaman v. Dur-yea* (1854) 11 N. Y. 324 (failure of guardian to turn over ward's property to succeeding guardian); *Re Hahlin* (1877) 53 How. Pr. (N. Y.) 501 (failure of executor to pay money as directed on accounting); *People v. Marshall* (1877) 7 Abb. N. C. (N. Y.) 380 (refusal of executor to pay over fund in his possession); *Re Watson* (1872) 5 Lans. (N. Y.) 466 (failure of executor to pay over money as directed); *Saltus v. Saltus* (1870) 2 Lans. (N. Y.) 9 (neglect of executor to pay money as directed on accounting); *Doran v. Dempsey* (1851) 1 Bradf. (N. Y.) 490 (refusal of executor to pay over money).

But in the following cases it was held that it did not have the power: *Watson v. Nelson* (1877) 69 N. Y. 536 (failure of executor to comply with order directing payment of money generally); *Seaman v. Whitehead* (1879) 18 Hun (N. Y.) 64, reversed on another point in (1879) 78 N. Y. 306 (failure of executor to pay money as required); *Re Seaman* (1849) 7 N. Y. Leg. Obs. 70 (refusal of guardian to pay over to ward amount found due on final accounting).

8 A.L.R.—98.

The probate court of Ohio has power to punish for contempt the refusal of a defendant in proceedings in aid of execution, to turn over to the sheriff, as ordered by the court, property in his possession, under the statute relating to proceedings in aid of execution, providing that if a person, party or witness, disobey an order of the judge or referee, he may be punished as for contempt. *Ex parte Lilliland* (1879) 7 Ohio Dec. Reprint, 659, 4 Ohio L. J. 733.

A judge of probate is given power by statute in Oklahoma to punish a witness for contempt, who, having been duly subpoenaed before him for that purpose, refuses to be sworn, or to give his deposition. *Re Abbott* (1898) 7 Okla. 78, 54 Pac. 319.

The orphans' court of Pennsylvania has both inherent and statutory power to punish for contempt the failure of a guardian to pay over, as directed, a certain sum on his accounting to his ward's estate. *Donaldson v. Miller* (1899) 23 Pa. Co. Ct. 393, 9 Pa. Dist. R. 282.

Such court also has power to punish for contempt the failure of an administrator to pay over money of the estate, as ordered by the court. *Gilchrist's Estate* (1877) 6 Luzerne Leg. Reg. (Pa.) 57.

The probate court of Vermont has power to punish for contempt, but it has no power to imprison an executor until he complies with and pays a final order for the payment of money, since that is an imprisonment for debt, which has been abolished by the statute. *Re Leach* (1878) 51 Vt. 630.

#### 6. Circuit courts.

The circuit courts of the several states generally possess inherent power to punish contempt, but their power appears to be limited in some instances by statute.

**Alabama.**—*Powell v. State* (1872) 48 Ala. 154.

**Arkansas.**—*Turk v. State* (1916) 123 Ark. 341, 185 S. W. 472.

**Illinois.**—*Schmidt v. Cooper* (1916) 274 Ill. 243, 113 N. E. 641; *O'Neil v. People* (1904) 113 Ill. App. 195.

**Indiana.**—*Taylor v. Moffatt* (1830) 2 Blackf. 805; *Ex parte Smith* (1867)

28 Ind. 47; *Holman v. State* (1886) 105 Ind. 513, 5 N. E. 556; *Hawkins v. State* (1890) 125 Ind. 570, 25 N. E. 818; *Rucker v. State* (1908) 170 Ind. 635, 85 N. E. 356.

**Kentucky.**—*Arnold v. Com.* (1882) 80 Ky. 300, 44 Am. Rep. 480.

**Michigan.**—*Langdon v. Judges of Wayne Circuit Ct.* (1889) 76 Mich. 358, 43 N. W. 310; *Re Dingley* (1914) 182 Mich. 44, 148 N. W. 218.

**Mississippi.**—*Ex parte Adams* (1853) 25 Miss. 883, 59 Am. Dec. 234.

**Missouri.**—*State ex rel. Chicago, B. & Q. R. Co. v. Bland* (1905) 189 Mo. 197, 88 S. W. 28, 3 Ann. Cas. 1044; *Chicago, B. & Q. R. Co. v. Gildersleeve* (1909) 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; *Re Ellison* (1914) 256 Mo. 378, 165 S. W. 987; *State ex rel. Caldwell v. Cockrell* (1919) — Mo. —, 217 S. W. 524; *State ex rel. Thatcher v. Horner* (1884) 16 Mo. App. 191; *Fiedler v. Bambrick Bros. Constr. Co.* (1912) 162 Mo. App. 528, 142 S. W. 111.

**Oregon.**—*State v. Bourne* (1891) 21 Or. 218, 27 Pac. 1048.

**Virginia.**—*Wells v. Com.* (1871) 21 Gratt. 500; *Carter v. Com.* (1899) 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780, 11 Am. Crim. Rep. 308.

**West Virginia.**—*State v. McClaugherty* (1889) 33 W. Va. 250, 10 S. E. 407.

**Wisconsin.**—*Re Milburn* (1883) 59 Wis. 24, 17 N. W. 965; *Re Rosenberg* (1895) 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

In *Powell v. State* (Ala.) *supra*, where the action of the circuit court in causing another juror to be selected in the place of one who had been accepted, and who, without being excused by the court, left the court room, was held to be reversible error, the court said that the power to punish for contempt was inherent in the circuit court, but that in Alabama the exercise of this power was limited to certain specified cases, seven being enumerated in the Revised Code, the first of which was defined in the following words, namely, disrespectful, contemptuous, or insolvent behaviour in court, tending in any wise to diminish or impair the respect due to judi-

cial tribunals, or to interrupt the due course of the trial; and that the circuit court, therefore, had power to punish such juror for contempt.

The Arkansas Constitution provides that the general assembly shall have power to regulate by law the punishment of contempt not committed in the presence or hearing of the court, or in disobedience of process. It would appear, then, that contempt in the presence of the court cannot be regulated by statute, so that the power to punish such a contempt is inherent in the courts. The circuit court was held empowered to punish for contempt the action of the defendant in a pending suit, who accosted the plaintiff on his way to the courthouse on the day the case was set for trial, and by threats induced him not to appear in court and prosecute the action. *Turk v. State* (Ark.) *supra*.

The power to punish for contempt is inherent in the circuit court of Illinois, independent of statutory provisions. *Schmidt v. Cooper* (1916) (Ill.) *supra* (refusal of witness to obey order requiring him to testify before master in chancery); *O'Neil v. People* (Ill.) *supra* (solicitation of bribe by juror).

The Indiana circuit court has inherent power to punish for contempt, and is vested by statute with power to punish all contempts of its authority and process in any matter before it, or by which the proceedings of the court, or the due course of justice, are interrupted. *Taylor v. Moffatt* (Ind.) *supra* (disobedience of injunction); *Ex parte Smith* (1867) 28 Ind. 47 (statements by attorney in entry on docket for purpose of dismissing action, reflecting upon integrity of court); *Whittem v. State* (1871) 36 Ind. 196 (assistance by defendant to plaintiff to get away and not testify against him held not contempt, but that abduction of plaintiff by defendant for such purpose would be contempt); *Holman v. State* (1886) 105 Ind. 513, 5 N. E. 556 (insulting language and defiant manner by attorney to judge in open court); *Cheadle v. State* (1887) 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426 (newspaper com-

ment on trial held not contempt, because case had terminated); *Hawkins v. State* (1890) 125 Ind. 570, 25 N. E. 818 (resistance to officers in execution of process); *Rucker v. State* (1908) 170 Ind. 635, 85 N. E. 356 (newspaper articles concerning action of judge in appointing prosecuting attorney, and in instructing grand jury).

A special judge of such court has power to punish the violation of an injunction. *Mowrer v. State* (1886) 107 Ind. 539, 8 N. E. 561. But he has no power, after the case has been ended by the rendition by him of a decree awarding a permanent injunction, to subsequently punish for contempt a violation of such injunction, since such special judge, when he rendered the final decree, had exercised the jurisdiction he was called upon to entertain, and if jurisdiction was again to be put into exercise it must be done by the court through the regularly acting judge. *Kissel v. Lewis* (1901) 27 Ind. App. 302, 61 N. E. 209.

The judge of a circuit court in Kansas has power to punish as for contempt disobedience of a lawful order duly made by such court (refusal of defendant to turn over to plaintiff property of latter in possession of defendant, when ordered to do so by court). *Re Wolf* (1893) 52 Kan. 866, 34 Pac. 1048.

A circuit court of Kentucky has power to punish as for a contempt an assault in open court upon the attorney for the commonwealth, while engaged in the prosecution of a trial. *Arnold v. Com.* (1882) 80 Ky. 300, 44 Am. Rep. 480.

The circuit court is given power by statute in Michigan, and has inherent power, independent of the statute, to punish criminal contempts. *Langdon v. Judges of Wayne Circuit Ct.* (1889) 76 Mich. 358, 43 N. W. 310 (attempt by bribing juror to bring about disagreement of jury); *Re Dingley* (1914) 182 Mich. 44, 148 N. W. 218 (newspaper article charging circuit judge with using grand jury as a club to attack prosecuting attorney).

The circuit court of Mississippi has power to punish contempts. It is

given such power by a statute providing that circuit courts shall have power to fine and imprison any person guilty of a contempt while either in the presence or hearing of the court, and it also has inherent right to punish for contempt, independent of the statute (refusal of witness to answer questions asked him by the grand jury). *Ex parte Adams* (1853) 25 Miss. 883, 59 Am. Dec. 234.

The circuit court of Missouri, being a constitutional court of record of general jurisdiction, has inherent power to punish contempts, and is given by statute power to punish as for criminal contempt persons guilty: First, of disorderly, contemptuous, or insolent behavior committed during its session in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority; second, any breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings; third, wilful disobedience of any process or order lawfully issued or made by it; fourth, resistance wilfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, to refuse to answer any legal and proper interrogatory. *State ex rel. Chicago, B. & Q. R. Co. v. Bland* (1905) 189 Mo. 197, 88 S. W. 28, 3 Ann. Cas. 1044 (violation of injunction); *Chicago, B. & Q. R. Co. v. Gildersleeve* (1909) 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749 (violation of injunction); *Re Ellison* (1914) 256 Mo. 378, 165 S. W. 987 (attempt to influence juror); *State ex rel. Caldwell v. Cockrell* (1919 — Mo. —, 217 S. W. 524 (refusal of clerk to make entries on court records, as directed by court); *State ex rel. Thatcher v. Horner* (1884) 16 Mo. App. 191 (refusal of officers of corporation to obey order to make transfer of stock); *Fiedler v. Bamdrick Bros. Constr. Co.* (1912) 162 Mo. App. 528, 142 S. W. 111 (violation of injunction).

An Ohio county circuit court has power to punish for contempt disobedience of its orders (held, that circuit



court, on appeal, directing receiver to pay over money in his hands, could punish him, although it was not the court that appointed him receiver). *Eichert v. Eichert* (1908) 30 Ohio C. C. 825, 11 Ohio C. C. N. S. 525.

The circuit court of Oregon has inherent power to punish for contempt disobedience or resistance to its process and orders (disobedience of subpoena issued by court to witness, to attend before commissioner appointed by court of another state to take testimony to be used in that state). *State v. Bourne* (1891) 21 Or. 218, 27 Pac. 1048.

The circuit court of Virginia has inherent power to punish for contempt. *Wells v. Com.* (1871) 21 Gratt. (Va.) 500 (advising and aiding client to prevent execution of decree); *Carter v. Com.* (1899) 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780, 11 Am. Crim. Rep. 303 (false telegram of illness by party to obtain continuance).

The power of the circuit court to punish contempts is limited by statute, in West Virginia, to direct contempts (publication in newspaper of false and libelous charge against judge in respect to his official conduct held a constructive contempt, and therefore not punishable by the court). *State v. McClaugherty* (1889) 33 W. Va. 250, 10 S. E. 407.

The circuit court of Wisconsin has power, partly inherent and partly derived from the common law and from statutes, to punish for contempt. *Re Milburn* (1883) 59 Wis. 24, 17 N. W. 965 (disobedience of order in supplementary proceedings, requiring payment of money or delivery of property by judgment debtor); *Re Rosenberg* (1895) 90 Wis. 581, 68 N. W. 1065, 64 N. W. 299 (refusal of witness, when ordered, to produce books and papers).

It appears from *State ex rel. Atty. Gen. v. Circuit Ct.* (1897) 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193, that such court has no power to punish for contempt the publication in a newspaper of articles charging corruption in the trial of cases, where the cases have terminated; but would have the power if the cases were pending.

#### 7. District courts.

The district courts of the several states have, in general, extensive inherent power as to contempt, though in some cases the power to punish contempt rests on statute.

**California.**—*People ex rel. Lamby v. Dwinelle* (1866) 29 Cal. 632.

**Colorado.**—*Cooper v. People* (1889) 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790.

**Iowa.**—*Brady v. District Ct.* (1905) 126 Iowa, 345, 102 N. W. 116; *Flannagan v. Jepson* (1916) 177 Iowa, 393, L.R.A.1918E, 548, 158 N. W. 641.

**Kansas.**—*Re Millington* (1880) 24 Kan. 214.

**Louisiana.**—*State ex rel. Barthet v. Houston* (1885) 37 La. Ann. 852; *State ex rel. Phelps v. Judge of Civil Dist. Ct.* (1898) 45 La. Ann. 1250, 40 Am. St. Rep. 282, 14 So. 310.

**Montana.**—*State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Clancy* (1904) 30 Mont. 193, 76 Pac. 10.

**Nebraska.**—*Hawes v. State* (1895) 46 Neb. 149, 64 N. W. 699; *Back v. State* (1906) 75 Neb. 603, 106 N. W. 787.

**Nevada.**—*Phillips v. Welch* (1877) 12 Nev. 158.

**North Dakota.**—*State v. Markuson* (1896) 5 N. D. 147, 64 N. W. 934.

**Oklahoma.**—*Burke v. Territory* (1894) 2 Okla. 499, 37 Pac. 829; *Smith v. State* (1916) 12 Okla. Crim. Rep. 518, 159 Pac. 941.

**Texas.**—*Taylor v. Goodrich* (1897) 25 Tex. Civ. App. 109, 40 S. W. 515; *Ex parte Morgan* (1906) 48 Tex. Crim. Rep. 108, 86 S. W. 755.

**Wyoming.**—*Mau v. Stoner* (1904) 12 Wyo. 478, 76 Pac. 584.

The district court of the territory of Arizona had power to punish for contempt (publication of newspaper editorial relating to pending proceedings, and tending to influence such proceedings, and to obstruct justice). The power of the court to punish contempts is not taken away by a Code provision that, after its adoption, no act is punishable, except as authorized by statute or ordinance, where another section provides that the Code shall not affect any power conferred by law upon any tribunal to punish

for contempt. *Hughes v. Territory* (1906) 10 Ariz. 119, 6 L.R.A. (N.S.) 572, 85 Pac. 1058.

It is stated in *People ex rel. Field v. Turner* (1850) 1 Cal. 152, that by the common law every court has the power to punish for contempt, and that the 13th section of the act organizing the district court of California is merely declaratory of the common law, and provides that such court shall have power to punish in a summary manner, by fine and imprisonment, or either, for contempt offered to it while in session, or to any process, writ, rule, or order of said court, issued and made, or for disobeying any writ, process, or order thereof, or for obstructing or preventing the execution of the same.

It is stated also in *Re Cohen* (1855) 5 Cal. 494, that it cannot be doubted that such court has power to punish for contempt of their process.

Such court has power to punish for contempt one who re-enters upon a tract of land, after having been dispossessed therefrom under an execution issued on a judgment of such court, under an act for the punishment of contempt and trespasses, which provides that every person who shall have been or who shall be hereafter dispossessed or ejected from any parcel of land by the judgment or process of any court of competent jurisdiction, and who, not having legal right so to do, shall re-enter into or upon such land, shall be deemed guilty of a contempt of the court by which such judgment or decree was rendered, or from which such process issued. *People ex rel. Lamby v. Dwinelle* (Cal.) *supra*.

The district court of Colorado has inherent power to punish for contempt those responsible for articles published in a newspaper in reference to a pending cause, when such articles are calculated to interfere with the due administration of justice in such case. *Cooper v. People* (Col.) *supra*.

The Iowa district court, as a constitutional court of record, has inherent power to punish for contempts. *Drady v. District Ct.* (1905) 126 Iowa, 345, 102 N. W. 116 (attempt to improp-

erly influence juror; punishable also by statute); *Flannagan v. Jepson* (1916) 177 Iowa, 393, L.R.A. 1918E, 543, 153 N. W. 641 (violation of injunction).

The district court of Kansas, as a court of record, has inherent power to punish for disorderly conduct in the court room, resistance of its process, or any other interference with its proceedings, which amounts to actual contempt (newspaper article criticizing action of judge in pending case). *Re Millington* (1880) 24 Kan. 214.

A district court of Louisiana has power to punish contempts (violation of injunction). *State ex rel. Barthet v. Houston* (1885) 37 La. Ann. 852.

The civil district court for the parish of Orleans, created by the Constitution, is a court of record having original general jurisdiction, and is not an inferior court in the technical sense of that term, and has power to punish contempts, both direct and constructive. The court said that if a direct legislative grant from the legislature were necessary to confer upon it such powers as have been usually held to be inherent in all such courts, it would be found in the statute which declares that all judges possess the powers necessary for exercise of their respective jurisdictions, though the same be not expressly given by law, and in the statute providing that all the judges of the supreme, district, and parish courts have the power to punish all contempts of their authority (newspaper criticism of pending case). *State ex rel. Phelps v. Judge of Civil Dist. Ct.* (1893) 45 La. Ann. 1250, 40 Am. St. Rep. 282, 14 So. 310.

The district court of the territory of Montana is given by statute all the chancery powers which properly belong to the chancery courts in England, and therefore has power to punish contempts (disobedience of order to pay alimony). *Zimmerman v. Zimmerman* (1887) 7 Mont. 114, 14 Pac. 665.

And the power to punish for contempt is inherent in the district court of the state of Montana. *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Clancy* (1904) 30 Mont. 193, 78

Pac. 10 (violation of injunction); *State ex rel. Metcalf v. District Ct.* (1916) 52 Mont. 46, L.R.A.1916F, 132, 155 Pac. 278, Ann. Cas. 1918A, 985 (newspaper criticism of case, vilifying judge, held not contempt because case had terminated).

The district court of Nebraska has inherent power to punish contempts (violation of injunction). *Back v. State* (1906) 75 Neb. 603, 106 N. W. 787.

And it is also given by statute power to punish as for criminal contempt persons guilty of disorderly or insolent behavior towards the court or any of its officers, in its presence. *Hawes v. State* (1895) 46 Neb. 149, 64 N. W. 699.

A district court of Nevada has power to punish for contempt a violation of an injunction granted by it. *Phillips v. Welch* (1877) 12 Nev. 158.

The North Dakota district court had inherent power to punish for contempt (violation of injunction). *State v. Markuson* (1895) 5 N. D. 147, 64 N. W. 934.

The district court of Oklahoma has inherent power to punish contempts. *Burke v. Territory* (1894) 2 Okla. 499, 37 Pac. 829 (newspaper publication in reference to pending matter reflecting upon integrity of court); *Smith v. State* (1916) 12 Okla. Crim. Rep. 513, 159 Pac. 941 (violation of injunction).

A district court is given by statute, in Texas, power to punish contempts. *Taylor v. Goodrich* (1897) 25 Tex. Civ. App. 109, 40 S. W. 515 (county attorney inciting publication of newspaper article criticizing court for discharging alleged murderers); *Ex parte Morgan* (1905) 48 Tex. Crim. Rep. 108, 86 S. W. 755 (violation of injunction).

The district court of the territory of Utah, while exercising the powers of a district court of the United States, has the power to punish for contempt, given to the United States courts by § 725 of the United States Revised Statutes, Comp. Stat. § 1245 (inducing witness, duly subpoenaed to appear before the grand jury, to leave the territory so as not to testify). *Re Whetstone* (1893) 9 Utah, 156, 36 Pac. 633.

The district court of Wyoming has inherent power to punish for contempt disobedience of its orders. *Man v. Stoner* (1904) 12 Wyo. 478, 76 Pac. 584.

#### *S. Superior courts.*

The superior courts of the several states generally have inherent power to punish contempt, and their power in some cases is derived from the Constitution.

**California.**—*Burns v. Superior Ct.* (1903) 140 Cal. 1, 73 Pac. 597; *Crocker v. Conrey* (1903) 140 Cal. 213, 73 Pac. 1006; *Ex parte Creely* (1908) 8 Cal. App. 713, 97 Pac. 766; *Drew v. Superior Ct.* (1919) — Cal. App. —, 185 Pac. 680.

**Connecticut.** — *State v. Howell* (1908) 80 Conn. 668, 125 Am. St. Rep. 141, 69 Atl. 1057, 13 Ann. Cas. 501.

**Georgia.**—*Howard v. Durand* (1867) 36 Ga. 346, 91 Am. Dec. 767; *Obear v. Little* (1887) 79 Ga. 384, 4 S. E. 914; *Swafford v. Berrong* (1889) 84 Ga. 65, 10 S. E. 593; *Bradley v. State* (1900) 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630; *Crawford v. Manning* (1912) 12 Ga. App. 54, 76 S. E. 771.

**Massachusetts.**—*Hurley v. Com.* (1905) 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757.

**North Carolina.**—*Re Brown* (1915) 168 N. C. 417, 84 S. E. 690.

**Ohio.**—*Ironmoulders' Union v. I. & E. Greenwald Co.* (1906) 4 Ohio N. P. N. S. 161.

**South Carolina.**—*State v. Williams* (1843) 29 S. C. L. (2 Speers) 26.

**Washington.**—*State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* (1909) 55 Wash. 1, 103 Pac. 426, 107 Pac. 196; *State ex rel. Sargent v. Superior Ct.* (1913) 71 Wash. 495, 128 Pac. 1077; *Re Anderson* (1917) 97 Wash. 683, 167 Pac. 70.

The source of the power of the superior court of California to punish for contempt is not statutory, but is derived from the Constitution which created the court, and thereby invested it with all the powers incidental to courts of common law and courts of equity, of which it is the successor. *Burns v. Superior Ct. (Cal.) supra.*

Such court has power to punish for

contempt one who in passing the jury, after they had retired to deliberate upon their verdict in a criminal action, calls out to them not to convict the defendant. *Ex parte Creely* (Cal.) *supra*.

And a judge of such court has power to punish for contempt a witness who disobeys a subpoena issued by him to appear before him to give his deposition. *Crocker v. Conrey* (1903) 140 Cal. 213, 73 Pac. 1006.

But such court has no power to punish for contempt one who refuses to turn over to a receiver in insolvency property held by him adversely to the insolvent debtor, where he is neither an officer of the court nor a party to the proceedings in insolvency. *Ex parte Hollis* (1881) 59 Cal. 405.

And it was held in *Re Shortridge* (1893) 99 Cal. 526, 21 L.R.A. 755, 37 Am. St. Rep. 78, 34 Pac. 227, that such court had no power to punish for contempt the editor and publisher of a newspaper article containing a true report of the testimony of the witnesses in a divorce case, upon the commencement of which the court had made an order that during the trial all persons be excluded from the court room except the officers of the court, the parties, and their counsel, and that no public report or publication of any character of the testimony in the case be made. A recent act of the legislature had provided that no speech or publication reflecting upon or concerning any court or any officer thereof should be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session, and in such manner as actually to interfere with the proceedings. The court said: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties," but it was held that the article in question did not tend to impair, impede, or obstruct the administration of justice.

The power to punish for contempt is inherent in the superior court of Connecticut (newspaper article assuming to state evidence to be produced by witnesses upon trial, with improper comment thereon, and reflecting upon parties to action, and improperly expressing opinion as to right of controversy, with purpose of discouraging defendant's defense and intimidating his witnesses. *State v. Howell* (Conn.) *supra*).

The superior court of Georgia is a constitutional court of record with inherent power to punish for contempt, and is also given power by statutes to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings, and to inflict summary punishment for contempt upon any party to a case who disobeys or resists any lawful process, order, or command. *Swafford v. Berrong* (1889) 84 Ga. 65, 10 S. E. 593 (assault by defendant upon witness during trial, in presence of court, and insulting and abusive language to court); *Bradley v. State* (1900) 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630 (approaching, during adjournment, attorney engaged in trial, and offering illegally to influence juror to obtain favorable verdict or mistrial); *Howard v. Durand* (1867) 36 Ga. 346, 91 Am. Dec. 767 (violation of injunction); *Obear v. Little* (1887) 79 Ga. 384, 4 S. E. 914 (failure of trustee to pay over money for support of cestui que trust); *Crawford v. Manning* (1912) 12 Ga. App. 54, 76 S. E. 771 (refusal of grandparents to whom custody of minor child is awarded, to comply with order to surrender child to father at stated intervals).

The superior court of Massachusetts has inherent power to punish contempts (attempt to influence and corrupt jury, and to induce attorney engaged in trial to corrupt jury). *Hurley v. Com.* (1905) 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757.

The superior court of North Carolina has inherent power to punish contempts (publication in newspaper defaming judge, because made after

adjournment of court, and after all matters referred to concerning the official conduct of the judge have terminated, held not contempt). *Re Brown* (1915) 168 N. C. 417, 84 S. E. 690.

The superior court of Ohio has inherent power to punish for contempt the violation of an injunction. *Iron-moulders' Union v. I. & E. Greenwald Co.* (1906) 4 Ohio N. P. N. S. 161.

The South Carolina superior court has power to punish for contempt (held, that statute making habitual drunkenness of constable indictable did not take away power of court to punish constable for contempt for same cause). *State v. Williams* (1843) 29 S. C. L. (2 Speers) 26.

A county superior court of Washington has power, partly inherent and partly statutory, to punish for contempt. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* (1909) 55 Wash. 1, 103 Pac. 426, 107 Pac. 196 (violation of judgment); *State ex rel. Sargent v. Superior Ct.* (1913) 71 Wash. 495, 128 Pac. 1077 (refusal of party to comply with judgment); *Re Anderson* (1917) 97 Wash. 683, 167 Pac. 70 (failure of guardian to pay over, as ordered, money to ward).

#### *9. Courts of common pleas.*

The courts of common pleas of the several states have power, in some instances inherent, and in other instances statutory, to punish for contempt. *Middlebrook v. State* (1876) 43 Conn. 257, 21 Am. Rep. 650; *People ex rel. Mitchell v. New York County* (1859) 29 Barb. (N. Y.) 622; *Kahn's Case* (1860) 11 Abb. Pr. (N. Y.) 147; *Hale v. State* (1896) 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; *Steube v. State* (1888) 3 Ohio C. C. 383, 2 Ohio C. D. 216, affirming (1886) 10 Ohio Dec. Reprint, 199, 19 Ohio L. J. 181; *Jack v. Twyford* (1899) 10 Pa. Super. Ct. 475; *Greason v. Cumberland R. Co.* (1913) 54 Pa. Super. Ct. 595.

The court of common pleas of Connecticut has inherent power, and is empowered by statute, to punish direct contempts. The statute provides that every person who shall, in the presence of the court, either by word or

action, behave contemptuously or disorderly, may be punished by the court (assault by party upon attorney during trial). *Middlebrook v. State* (1876) 43 Conn. 257, 21 Am. Rep. 650.

The court of common pleas of New York had power to punish for contempt the refusal of a witness to answer a question which he was directed by the court to answer on a trial. *People ex rel. Mitchell v. New York* (1859) 29 Barb. (N. Y.) 622.

It also had power to punish as for contempt failure to pay a personal property tax, under the statute providing that the neglect or refusal to pay such a tax shall be held and deemed to be a neglect or violation of duty, or misconduct, within the meaning of the provision that every court of record shall have power to punish any neglect or violation of duty, or misconduct, by which the rights or remedies of a party in a cause or matter pending in such court may be defeated, impaired, or prejudiced. *Kahn's Case* (1860) 11 Abb. Pr. (N. Y.) 147.

An Ohio county common pleas court has inherent power to punish contempts, both direct and constructive. *Hale v. State* (1896) 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199 (removal of witness from county of residence to prevent his appearing on day of trial); *Steube v. State* (1888) 3 Ohio C. C. 383, 2 Ohio C. D. 216, affirming (1886) 10 Ohio Dec. Reprint, 199, 19 Ohio L. J. 181; *Ex parte Morris* (1906) 28 Ohio C. C. 611 (held, that court could not punish summarily refusal of assistant prosecuting attorney, when ordered, to prepare and present nolle prosequi, as statute required notice).

The court of common pleas of Pennsylvania has power to punish for contempt one refusing to obey a final decree of such court in a proceeding in equity (refusal of party ordered to restore to former position frame building wrongfully removed from another's property). *Jack v. Twyford* (1899) 10 Pa. Super. Ct. 475.

Such court also has power to punish for a constructive contempt, an attempt to influence a juror in a pending

case. *Greason v. Cumberland R. Co.* (1913) 54 Pa. Super. Ct. 595.

#### 10. County courts.

The county courts of the several states, generally, have inherent and statutory powers as to contempt.

**Colorado.**—*Hughes v. People* (1880) 5 Colo. 436; *Wyatt v. People* (1892) 17 Colo. 252, 28 Pac. 961.

**Illinois.**—*Ex parte Thatcher* (1845) 7 Ill. 167; *People v. Gilbert* (1917) 281 Ill. 619, 118 N. E. 196.

**Indiana.**—*Little v. State* (1883) 90 Ind. 338, 46 Am. Rep. 224; *Ray v. State* (1917) 186 Ind. 396, 114 N. E. 866.

**Missouri.**—*Ex parte Stone* (1916) — Mo. —, 183 S. W. 1058.

**New Jersey.**—*Re Cheeseman* (1886) 49 N. J. L. 115, 60 Am. Rep. 596, 6 Atl. 513; *Croasdale v. Court of Quarter Sessions* (1916) 88 N. J. L. 506, 97 Atl. 285, affirmed on opinion below in (1916) 89 N. J. L. 711, 99 Atl. 1070; *Re Verdon* (1916) 89 N. J. L. 16, 97 Atl. 783, reversed on another point in (1917) 90 N. J. L. 494, 102 Atl. 66, 157, and (1918) 91 N. J. L. 494, 104 Atl. 317.

**Oklahoma.**—*Waugh v. Dibbens* (1916) — Okla. —, L.R.A.1917B, 360, 160 Pac. 589; *Cress v. State* (1918) 14 Okla. Crim. Rep. 521, 173 Pac. 854.

**South Dakota.**—*Re Taber* (1900) 18 S. D. 62, 82 N. W. 398.

The county court of Colorado has power to punish for contempt a party to an action who fails to appear personally, as required by a citation; and who, in his answer, makes statements untrue, scandalous, impertinent, and disrespectful to the judge, and, in an affidavit for a change of venue, makes grossly scandalous, untrue, and impertinent allegations, and outrageously insulting imputations against the judge. The Civil Code provides that the following acts or omissions shall be deemed contempt: First. Disorderly, contemptuous, or insolent behavior toward the judge while holding court or engaged in his judicial duties and at chambers, or toward referees or arbitrators, while sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference, arbitration, or other judi-

cial proceedings; second, a breach of the peace, boisterous conduct, or insolent disturbance in the presence of the court, or in its immediate vicinity, tending to interrupt the due course of a trial or judicial proceeding; third, disobedience or resistance to any lawful writ, order, rule, or process, issued by the court or judge at chambers; fourth, disobedience of a subpoena duly served, or refusing to be sworn, or answer as a witness; fifth, rescuing any person or property in the custody of an officer by virtue of any order or process of such court or judge at chambers. The court stated that such a statutory enumeration, when applied to the ever-varying facts and circumstances out of which questions of contempt arise, cannot be taken as the arbitrary measure and limit of the inherent power of the court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law. *Hughes v. People* (Colo.) *supra*.

And the criminal court of a county has inherent power to punish for contempt. *Wyatt v. People* (Colo.) *supra*.

The county court of Illinois is a constitutional court, and though a court of limited jurisdiction, has inherent power to punish contempts, not only those committed in its presence, but also one consisting in the publication of a newspaper article concerning a pending case, which reflects upon the judicial integrity of the court. *People v. Gilbert* (Ill.) *supra*.

And the county commissioner's court has power to punish for contempt the refusal of its clerk to enter up its order, where the statute provides that it shall have power to enforce its orders, decrees, and judgments by attachment or other process, and shall have all the power necessary to the right exercise of the jurisdiction which is, or may be, vested in it according to law. *Ex parte Thatcher* (Ill.) *supra*.

The power to punish for contempt is inherent in a county criminal court of Indiana. *Little v. State* (1883) 90 Ind. 338, 46 Am. Rep. 224 (soliciting money from father of accused to bribe

jurors or prosecuting attorney); *Ray v. State* (1917) 186 Ind. 396, 114 N. E. 866 (newspaper editorial charging judge with political motives as basis of his action).

A parish judge of Louisiana has authority to punish contempts, under the statute giving judges express power to punish all contempts of their authority, and even without this statutory authority he has inherent power to repress disorder and punish infractions of his discipline (disobedience of administrator of order to file account). *State ex rel. Farmer v. Judge of Parish Ct.* (1879) 31 La. Ann. 116.

It is held in *Ex parte Stone* (1916) — Mo. —, 183 S. W. 1058, that while the county court of Missouri, being a court of record, has power to punish as for a criminal contempt persons guilty of wilful disobedience of any process or order lawfully issued or made by it, and of the contumacious and unlawful refusal of any person to be sworn as a witness, the authority of a county court to commit for contempt must be explicitly given by statute, or necessarily implied from some power expressly conferred to the exercise of which its authority is an essential incident, and therefore it has no power to punish for contempt a person refusing to be sworn as a witness, where it appears that no subpoena has been issued and served upon him.

The county court of quarter sessions of New Jersey has power to punish contempts committed either in or out of its presence (publication in newspaper of editorial criticizing action of county prosecutor at a quarter session, in criminal matter). *Croasdale v. Court of Quarter Sessions* (1916) 88 N. J. L. 506, 97 Atl. 285, affirmed on opinion below in (1916) 89 N. J. L. 711, 99 Atl. 1070.

The power of such court to punish contempts is derived wholly from the common law, which has been neither altered nor enlarged by statute in this state (newspaper publication). *Re Verdon* (1916) 89 N. J. L. 16, 97 Atl. 783, reversed on another point in (1918) 91 N. J. L. 494, 104 Atl. 817.

Since the superior courts of New

Jersey, which are modeled after the English superior courts of common law, have power to punish for contempt for any words uttered by speech, by writing, or by printing, outside of the regular course of litigation, which are designed to bring contempt on the courts in the exercise of their judicial functions, or to pervert, in a pending cause, the due administration of justice, a county oyer and terminer court has power to punish as for contempt the publication in a newspaper of an article intended to cast discredit upon the members of the grand jury that had indicted the publisher, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial. *Re Cheeseman* (1886) 49 N. J. L. 115, 60 Am. Rep. 596, 6 Atl. 513.

A judge of the county court, while taking a deposition, is given power by statute, in Oklahoma, to commit a witness for contempt for refusing to answer a material question. *Wagh v. Dibbens* (1916) — Okla. —, L.R.A. 1917B, 360, 160 Pac. 589.

And a county court has power to punish for contempt an attorney who instructs a witness not to be sworn, and to refuse to give testimony in a pending action when ordered by the judge to do so. It was held in this case that there was no contempt, because the county judge was sitting as an examining magistrate, and that he lost jurisdiction on the filing of an affidavit for a change of venue, and that all proceedings by him thereafter were void. *Cress v. State* (1918) 14 Okla. Crim. Rep. 521, 173 Pac. 354.

The county court of South Dakota, being a court of general jurisdiction in respect to all probate matters, and being created by the Constitution, has inherent power to punish all criminal contempts (refusal of special administrator to obey order of court directing him to turn over to the administrator all papers, effects, and assets in his hands, belonging to the estate). *Re Taber* (1900) 13 S. D. 62, 82 N. W. 398.

#### 11. Municipal or city courts.

In general, a municipal or city court, unless a court of record, is dependent on statute for power to punish con-

tempt, and its power is limited by the statute.

**Connecticut.**—*McCarthy v. Hugo* (1909) 82 Conn. 262, 135 Am. St. Rep. 270, 73 Atl. 778, 17 Ann. Cas. 219; *Goodhart v. State* (1911) 84 Conn. 60, 78 Atl. 858, Ann. Cas. 1912B, 1297.

**Georgia.**—*Hewitt v. State* (1913) 12 Ga. App. 168, 76 S. E. 1054.

**Illinois.**—*People v. Seymour* (1916) 272 Ill. 295, 111 N. E. 1008; *People v. Samuel* (1916) 199 Ill. App. 294.

**Maine.**—*Morrison v. McDonald* (1842) 21 Me. 550.

**Michigan.**—*Nichols v. Judge of Superior Ct.* (1902) 130 Mich. 187, 89 N. W. 691.

**Minnesota.**—*State ex rel. Bullard v. McDonough* (1912) 117 Minn. 173, 134 N. W. 509.

**New York.**—*Buchsbaum v. Laue* (1909) 63 Misc. 374, 118 N. Y. Supp. 419.

**Porto Rico.**—*People v. Freyre* (1908) 14 P. R. R. 799; *Ex parte Pesquera* (1911) 17 P. R. R. 706.

**Texas.**—*Ex parte Hubbard* (1911) 63 Tex. Crim. Rep. 516, 140 S. W. 451.

**Vermont.**—*Rudd v. Darling* (1892) 64 Vt. 456, 25 Atl. 479.

**Wisconsin.**—*State ex rel. Long v. Keyes* (1889) 75 Wis. 238, 44 N. W. 13.

A town court of Connecticut has the power to punish for contempt by a sentence and imprisonment, which a justice of the peace is authorized to inflict, by § 506, Gen. Stat., providing that any court may punish by fine and imprisonment any person who shall in his presence behave contemptuously or in a disorderly manner (substituting bottle of ginger ale for bottle of whisky in presence of court, on prosecution for selling liquor in violation of law). *McCarthy v. Hugo* (Conn.) supra.

The city court of New Haven is a court of record, and has the inherent right to punish contempts committed in its presence (untruthful statements by counsel for defense in criminal case to secure admission of certain evidence). *Goodhart v. State* (Conn.) supra.

The city court of La Grange is a statutory court without inherent power to punish for contempt, and its

power to punish contempts is limited to those specified in § 4643 of the Civil Code of 1910. *Hewitt v. State* (Ga.) supra.

The municipal court of Chicago has inherent power to punish contempts committed in its presence (making of motion for change of venue on ground of prejudice, based on untrue affidavits). *People v. Samuel* (Ill.) supra.

Such court, in the absence of statutory authority, has power to punish any interference with its orders in the administration of justice (advice by attorney to client, after dispossession, to repossess herself of premises by force, and to withhold possession from plaintiff and bailiff, acted upon by client). *People v. Seymour* (Ill.) supra.

The municipal court of the city of Bangor, being a court of record, has the power to punish contempts which is incident to all courts of record (refusal of recorder, when ordered by judge, to desist from exercising duties of office, after having been duly removed therefrom). *Morrison v. McDonald* (Me.) supra.

The municipal court of Grand Rapids, being given by statute the same power in that respect as is possessed by the circuit courts, has power to punish contempts (subornation of perjury in a criminal case by attorney). *Nichols v. Judge of Superior Ct.* (Mich.) supra.

A judge of a municipal court of Minnesota has power to punish for contempts committed in open court (attempt by justice of peace appointed by mayor, to take chair of duly elected, qualified judge of municipal court). *State ex rel. Bullard v. McDonough* (1912) 117 Minn. 173, 134 N. W. 509.

The city court of New York is given by statute power to punish as for contempt the disobedience by the judgment debtor of the injunction prohibiting the transfer of his property, in an order by the city judge for the examination of said debtor supplementary to execution. *Buchsbaum v. Laue* (1909) 63 Misc. 374, 118 N. Y. Supp. 419.

A municipal court is given by statute, in Porto Rico, power to punish



contempts committed in its presence. *People v. Freyre* (1908) 14 P. R. R. 799; *Ex parte Pesquera* (1911) 17 P. R. R. 706 (objection by attorney to judge questioning witness).

A city corporation court is given by statute, in Texas, power to punish for contempt one who keeps witnesses from attending the court. *Ex parte Hubbard* (1911) 63 Tex. Crim. Rep. 516, 140 S. W. 451.

The municipal court of Bennington is declared to be a court of record by the statute creating it, and has inherent power to punish for contempt the refusal of a witness to answer proper questions. *Rudd v. Darling* (1892) 64 Vt. 456, 25 Atl. 479.

A judge of a municipal court in Wisconsin, acting as a committing magistrate, has power, given by statute, to punish for contempt the refusal of the witness to be sworn. *State ex rel. Long v. Keyes* (1889) 75 Wis. 288, 44 N. W. 13.

#### 12. Police courts.

A police court is generally given power by statute to punish contempts, and the statute further prescribes in what cases such power may be exercised.

United States.—*Re Monroe* (1891) 46 Fed. 52.

Georgia.—*Faircloth v. Macon* (1905) 122 Ga. 795, 50 S. E. 915.

Illinois.—*Newton v. Locklin* (1875) 77 Ill. 103.

Kansas.—*Re Palmeter* (1897) 58 Kan. 809, 51 Pac. 288.

New Jersey.—*Re Mindes* (1915) 88 N. J. L. 117, 95 Atl. 743.

New York.—*People v. Hicks* (1853) 15 Barb. 153.

Ohio.—*Meek v. McGorray* (1908) 16 Ohio C. C. N. S. 9.

South Carolina.—*State v. Barnett* (1914) 98 S. C. 422, 82 S. E. 795.

Tennessee.—*State v. Galloway* (1868) 5 Coldw. 326, 98 Am. Dec. 404.

A police judge has power to punish for contempt a police officer who refuses to execute a process of commitment issued by the judge, where the police court is made by statute a court of record, and another statute provides that every court of record shall have power to punish as for criminal

contempt persons guilty of the following acts: First, disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority; second, any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings; third, wilful disobedience of any process or order lawfully issued or made by him. *Re Monroe* (Fed.) *supra*.

The recorder of a city, given by its charter the same power to punish for contempt as a judge of the superior court, has power to punish contempts without reference to whether he is sitting for the trial of offenses against the municipal ordinances, or as a court of inquiry for the investigation of offenses committed against the state within the limits of the city (attempt by one, brought before recorder charged with gaming, to procure, while case was pending, prosecutor to leave city). *Faircloth v. Macon* (Ga.) *supra*.

A police magistrate and justice of the peace has power to punish for contempt one using abusive and insolent language, under a statute providing that every person who shall appear before a justice of the peace when acting as such, or who shall be present at any legal proceeding before a justice, shall behave himself in a decent, orderly, and respectful manner, and for failure to do so such person shall be fined by the said justice for contempt. *Newton v. Locklin* (Ill.) *supra*.

The power of a police judge to imprison for contempt cannot rest on mere implication or inference, but must be clearly expressed in the statute. The general welfare clause, which authorizes a city council to enact such ordinances as may be deemed expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce, does not authorize the city council to confer power upon the police judge to adjudge a person guilty of contempt, and to imprison him

therefor. *Re Palmeter (Kan.) supra.*

A police judge of a city of the third class, in Kansas, has no power to punish indirect contempts (refusal of witness to obey subpoena). *Re Rich (1900) 10 Kan. App. 280, 62 Pac. 715.*

A judge of the criminal court of Newark has power to punish for contempt threatening language by an attorney to the judge in open court. *Re Mindes (1915) 88 N. J. L. 117, 95 Atl. 743.*

The recorder of a city has no power to punish for contempt the use of insulting language to him while sitting at the trial of persons who have violated a city ordinance, where his powers are derived from the city charter, which provides that he shall have all powers in criminal matters that justices of the peace for the several counties of the state have, and like powers with the mayor, to cause to be arrested and committed without process any person guilty, or that he may have reason to believe guilty, of any crime or misdemeanor or breach of the peace, and to try all causes and complaints arising from the violation of any city ordinance, and also power to inflict such fines on such persons as shall be brought before him charged with vagrancy, disorderly conduct, or breach of the peace, or, in his discretion, to order the person committed to the county jail. The court said: "It will thus be seen that the recorder has certain ministerial powers in criminal matters, the same as a justice of the peace, and certain powers of a judicial nature as to violations of city ordinances, and vagrancy, and other light offenses. He has no power to hold a court for the trial of small causes, and although some of his proceedings are to be conducted in analogy to those in that court, yet he is not empowered to hold a court of even that limited jurisdiction. To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions. . . . That power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal

jurisdiction, but not extending at the common law, below such as are courts of record recognized in the common law." *Re Kerrigan (1869) 33 N. J. L. 344.*

A city recorder, authorized by the city charter to punish for contempt the refusal of a witness to be sworn, or to answer proper questions, has no power to punish a witness who refuses to produce books and papers. *People ex rel. Webster v. Van Tassell (1892) 64 Hun, 444, 19 N. Y. Supp. 643, affirmed on opinion below in (1892) 135 N. Y. 638, 82 N. E. 646.*

The recorder of the city of New York has power to punish as for a criminal contempt the refusal of a witness to be sworn and testify upon a criminal complaint before the recorder, the statute respecting criminal proceedings giving express power to any magistrate to punish for contempt in like cases, and in like manner as is permitted to justices of the peace in civil cases, and as to such justices it is provided that where a witness attending before any justice shall refuse to be sworn, and the party at whose instance he attended shall make oath that the testimony of such witness is so far material that without it he cannot safely proceed in the trial of such cause, such justice may, by warrant, commit such witness to the county jail. *People v. Hicks (1853) 15 Barb. (N. Y.) 153.*

A police justice is given by statute, in Ohio, power to punish for contempt committed in his presence, and the court stated that without the statute he would have inherent power to do so. *Meek v. McGorray (1908) 16 Ohio C. C. N. S. 9.*

A magistrate's court is given by statute, in South Carolina, power to punish for contempt (statements, in affidavit for change of venue, that magistrate directed his constable to influence a juror, and that he was instigated by malice and improper motives in his rulings). *State v. Barnett (1914) 98 S. C. 422, 82 S. E. 795.*

The criminal court of Memphis has no power to punish as a contempt any other act than those specified in the Code, which are as follows: First,

the wilful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice. Second, the wilful misbehavior of any of the officers of the court in their official transactions. Third, the wilful disobedience or resistance of any officer of the court, party, juror, witness, or any other person to the lawful writ, process, order, rule, decree, or command of the court. Fourth, the abuse of, or unlawful interference with, a process or proceeding of the court. Fifth, wilfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them. Sixth, any other act or omission declared a contempt by law. It is held in this case that the publication of an editorial article purporting to give the particulars, and denouncing the judge of the court as guilty of official corruption in discharging upon bail a prisoner under indictment in the court for a felony, does not come within any of the foregoing subdivisions of the statute, and is, therefore, not punishable by such court. *State v. Galloway* (1868) 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

### 13. *Justices of the peace.*

The power of a justice of the peace to punish contempt is generally a matter of statute, though in a few states he has some inherent power.

**Alabama.**—*Early v. Fitzpatrick* (1909) 161 Ala. 171, 185 Am. St. Rep. 123, 49 So. 686.

**California.**—*Ex parte Latimer* (1873) 47 Cal. 131.

**Connecticut.**—*Holcomb v. Cornish* (1831) 8 Conn. 375; *Church v. Pearne* (1903) 75 Conn. 350, 53 Atl. 955.

**Georgia.**—*Ormond v. Ball* (1904) 120 Ga. 916, 48 S. E. 383.

**Illinois.**—*Clark v. People* (1830) *Breese*, 266, 12 Am. Dec. 177.

**Indiana.**—*Murphy v. Wilson* (1874) 46 Ind. 537; *State v. Newton* (1878) 62 Ind. 517.

**Iowa.**—*Robb v. McDonald* (1870) 29 Iowa, 330, 4 Am. Rep. 211.

**Kentucky.**—*McBurnie v. Sullivan* (1913) 152 Ky. 686, 44 L.R.A. (N.S.)

186, 153 S. W. 945; *Marksberry v. Beasley* (1886) 8 Ky. L. Rep. 534.

**Massachusetts.**—*Clarke's Case* (1853) 12 Cush. 320.

**Nebraska.**—*Re Button* (1908) 83 Neb. 636, 23 L.R.A. (N.S.) 1173, 120 N. W. 203.

**New Hampshire.**—*Burnham v. Stevens* (1856) 33 N. H. 247; *State ex rel. Welsh v. Towle* (1861) 42 N. H. 540; *Robertson v. Hale* (1896) 68 N. H. 538, 44 Atl. 695.

**New York.**—*Onderdonk v. Ranlett* (1842) 3 Hill, 323; *People ex rel. Deal v. Williams* (1900) 51 App. Div. 102, 64 N. Y. Supp. 457; *People ex rel. Mallory v. Benjamin* (1853) 9 How. Pr. 419; *Bowen v. Hunter* (1873) 45 How. Pr. 193; *Rutherford v. Holmes* (1876) 66 N. Y. 368; *People v. Webster* (1857) 8 Park. Crim. Rep. 503.

**Ohio.**—*Rehburg v. Hirstius* (1910) 17 Ohio C. C. N. S. 199.

**Philippine.**—*Narcida v. Bowen* (1912) 22 Philippine, 365.

**South Carolina.**—*Lining v. Bentham* (1796) 2 S. C. L. (2 Bay) 1; *State v. Johnson* (1802) 2 S. C. L. (2 Bay) 385, 3 S. C. L. (1 Brev.) 155.

**Texas.**—*Ex parte Robertson* (1889) 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669.

**Vermont.**—*Re Cooper* (1858) 32 Vt. 253.

It is held in *Early v. Fitzpatrick* (Ala.) *supra*, that it is too well settled in Alabama to need extended argument, that a justice of the peace has power to punish for contempt.

A justice of the peace, in California, has power to punish for contempt one who, in proceedings supplementary to execution, refuses to obey an order to deliver to an officer of the court property liable to execution. The Code of Civil Procedure, defining what shall constitute contempt of courts of justice, enumerates, among others, the "disobedience of a lawful judgment, order, or process of the court." Another provision of the same Code makes applicable to justices' courts those provisions of the Code which are in their nature applicable to the organization, powers, and force of proceedings in justices' courts, and the court held that, under this section,

the provisions of the Code as to contempt were applicable to justices' courts, and stated that if there was any doubt on the point it would be removed by reference to the 4th subdivision of § 128 of the same Code, which provides that every court shall have power to compel obedience to its judgments, orders, and processes, and to the orders of a judge out of court in an action or proceeding pending therein. *Ex parte Latimer* (Cal.) *supra*.

But he has no power to punish for contempt one who disobeys a subpoena issued by the justice to appear before him to give his deposition, the power to punish for such contempt being in the superior court in which the proceeding was pending, of which the taking of the deposition was a part. *Gay v. Thorpe* (1905) 1 Cal. App. 312, 82 Pac. 221.

A justice of the peace has power to arrest and fine, and commit until the fine is paid, without previous complaint or warrant, one who curses him in his hearing and presence, under a statute providing that a justice of the peace who shall have plain view or personal knowledge of any person being guilty, among other things, of profane swearing, may make up a judgment against such person. *Holcomb v. Cornish* (1831) 8 Conn. 375.

The Connecticut statute, Gen. Stat. 1902, § 506, providing that any court may punish by fine and imprisonment any person who shall in its presence behave contemptuously, or in a disorderly manner, relates only to acts of contempt committed in the presence of the court, and leaves all others to be dealt with according to the course of the common law. The court said: "It necessarily implies that a justice of the peace has power to deal with such acts committed in his presence while holding court, but we do not decide whether he has power to punish for acts not committed in his presence" (refusal and neglect of selectman having charge of town hall to have said town hall unlocked and open for purpose of continuing trial). *Church v. Pearne* (1903) 75 Conn. 350, 53 Atl. 955.

In Georgia, a justice of the peace is both a civil and a criminal magistrate. His civil jurisdiction is derived from the Constitution, while his criminal jurisdiction is derived from statute. When presiding over the constitutional court, or over the statutory court called the court of inquiry, he may, although neither court is a court of record, punish contempts, but he cannot punish as for a contempt of court the refusal to surrender to an arresting officer, upon a warrant lawfully issued by the justice, one accused of crime, because the court of inquiry does not, under the statute, come into existence until the accused has been legally arrested and brought before the justice, and a court has been organized for the purpose of examining into the accusations. *Ormond v. Ball* (1904) 120 Ga. 916, 48 S. E. 383.

A justice of the peace has power to punish contempts committed in his presence, under an act providing that every person who shall appear before a justice of the peace when acting as such, or who shall be present at any legal proceeding before a justice, shall demean himself in a decent, orderly, and respectful manner, and for failing to do so, such person shall be fined by the justice for contempt. *Clark v. People* (1830) Breese (Ill.) 266, 12 Am. Dec. 177.

A justice of the peace, in Indiana, has power to punish for contempt jurors who, without his permission, leave before arriving at a verdict. *Murphy v. Wilson* (1874) 46 Ind. 537.

He has also power to punish for contempt a witness who refuses to obey a subpoena in a criminal case, under the statute providing that justices shall have power to subpoena witnesses and enforce their attendance by attachment and fine, and to enforce order when judicial proceedings are in progress before them, as this statute applies both to criminal and civil cases. *State v. Newton* (1878) 62 Ind. 517.

A justice of the peace, in Iowa, has power, upon the application of a person desirous of obtaining the affidavit of another, to punish for contempt the refusal of the latter to obey a subpoena

of the justice, or to answer when brought before him. *Robb v. McDonald* (1870) 29 Iowa, 330, 4 Am. Rep. 211.

Justices' courts in Kentucky are courts of record, and have the same power as such courts to punish for contempts (insulting language by witness to justice). *McBurnie v. Sullivan* (1913) 152 Ky. 686, 44 L.R.A. (N.S.) 186, 153 S. W. 945.

And a justice of the peace in that state has power to punish disobedience of his orders. *Marksberry v. Beasley* (1886) 8 Ky. L. Rep. 534.

A justice of the peace is given by statute, in Massachusetts, the same power to punish for contempt as courts of record have, and they have the power to punish for contempt a witness, who, when duly subpoenaed, refuses to attend, but the justice of the peace has no power to punish a witness for failure to attend after the case has been terminated by final judgment. *Clarke's Case* (1853) 12 Cush. (Mass.) 320.

And he has no power to punish for contempt, when taking the deposition of a witness, the refusal of the latter to answer questions put to him. *Lawson v. Rowley* (1904) 185 Mass. 171, 69 N. E. 1082.

A justice of the peace, in Michigan, holding an examination to determine whether one charged with crime shall be committed for trial or held to bail, has no power to commit a witness for refusing to testify on such examination, no power to do so being expressly conferred by statute. *Re Farnham* (1860) 8 Mich. 89.

A justice of the peace in Nebraska has power to punish for contempt the refusal of a witness to be sworn and to testify, when duly subpoenaed to give his deposition, the power to take depositions and commit for refusal to testify being expressly conferred by statute. *Re Button* (1908) 83 Neb. 636, 23 L.R.A. (N.S.) 1173, 120 N. W. 203.

A justice of the peace has power to punish for contempt the failure of a witness to obey a summons to appear and give a deposition, under a statute providing that every justice before

whom any witness has been summoned to appear and testify, or to give a deposition, may bring any witness refusing or neglecting to appear and testify, or give a deposition, by attachment before him, and if on examination he has no reasonable excuse, may punish him by a fine. *Burnham v. Stevens* (1856) 33 N. H. 247.

And he has power under the same statute, to punish for contempt the refusal of a witness duly summoned to give a deposition, to answer proper questions. *State ex rel. Welsh v. Towle* (1861) 42 N. H. 540.

The same statute confers upon a justice power to punish for contempt a witness who, after giving his deposition, fails to appear at an adjourned day to sign it. *Robertson v. Hale* (1896) 68 N. H. 538, 44 Atl. 695.

A justice of the peace in New Jersey, sitting in the course of a trial of small causes, has no power to commit for a contempt committed in the presence of the court, while engaged in the trial of a civil cause (commanding a witness under examination to leave the court room, and calling the justice names). The justice's court is a statutory court, and its powers are limited to those expressly conferred by statute, and a statute making the justice's court a court of record, and giving it all the powers that are usual in courts of record, does not confer upon it power to punish contempts, since, although under the common law all courts of record possess the power to punish for contempts, only the courts of New Jersey which are modeled after the courts which possess such power at common law have the power to punish contempts, and courts created by an act of the legislature with limited and special statutory jurisdiction do not have such power, unless specially conferred by statute. *Rhinehart v. Lance* (1881) 43 N. J. L. 311, 39 Am. Rep. 592.

A justice of the peace in New York state has no power to punish for contempt, save in a case stated in the statute law. *Rutherford v. Holmes* (1876) 66 N. Y. 368.

He is given by statute power to punish as for a criminal contempt,

the following acts, and no others: First, disorderly, contemptuous, or insolent behavior toward the justice while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceeding, which shall tend to interrupt such proceedings, or to impair the respect due to his authority. Second, any breach of the peace, noise, or other disturbance, tending to interrupt the official proceedings of the justice. Third, resistance wilfully offered by a person, in the presence of the justice, to the execution of any lawful order or process made or issued by him. Another statute provides as follows: "When a witness attending before a justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent and proper question, and the party at whose instance he attended shall make oath that the testimony of such witness is so far material that without it he cannot safely proceed in the trial of such cause, such justice may by warrant commit such witness to the jail of the county." *Onderdonk v. Ranlett* (1842) 3 Hill (N. Y.) 323 (boisterous conduct and insulting language by party during trial); *People ex rel. Deal v. Williams* (1900) 51 App. Div. 102, 64 N. Y. Supp. 457 (creation of disturbance tending to interrupt proceeding); *People ex rel. Mallory v. Benjamin* (1853) 9 How. Pr. (N. Y.) 419 (refusal of attorney to produce papers held not contempt under third subdivision of statute); *Rutherford v. Holmes* (1876) 66 N. Y. 368 (refusal of witness to answer proper questions); *People v. Webster* (1857) 3 Park. Crim. Rep. (N. Y.) 503 (refusal of witness to be sworn in special proceeding under prohibitory act, to ascertain violators of act, held not punishable, because second statute not applicable to such proceeding).

But it is held in *Bowen v. Hunter* (1873) 45 How. Pr. (N. Y.) 193, that a justice of the peace holding a court of special sessions has power, under the common law, to punish as for a criminal contempt, a witness duly sub-

pœnaed, who wilfully and contemptuously refuses to be sworn.

In Ohio, a justice of the peace has power to punish for contempt the refusal of a witness to answer a proper question in a civil action before the justice. *Rehburg v. Hirstius* (1910) 17 Ohio C. C. N. S. 199.

In Pennsylvania, justices of the peace derive all their judicial powers from legislation, and they exercise no common-law powers, and no statute gives them the power to punish contempts (insulting and contemptuous language to justice during proceeding before him held not so permissible). *Albright v. Lapp* (1856) 26 Pa. 99, 67 Am. Dec. 402.

A justice of the peace is given power by statute, in the Philippine Islands, to punish direct contempts only, and has no power to punish as for contempt the disobedience of a subpoena. *Narcida v. Bowen* (1912) 22 Philippine, 365.

In South Carolina, a justice of the peace has inherent power to punish contempts in his presence (insulting, abusive, and disrespectful language to justice to his face). *Lining v. Bentham* (1796) 2 S. C. L. (2 Bay) 1; *State v. Johnson* (1802) 2 S. C. L. (2 Bay) 385, 3 S. C. L. (1 Brev.) 155.

But he has no inherent power, nor is power given to him by statute, to commit for contempts committed out of court (held, that he could not commit constable for contempt in not returning execution and paying money collected thereon). *State v. Applegate* (1822) 13 S. C. L. (2 M'Cord) 110.

In South Dakota, a justice of the peace, sitting as a committing magistrate, has no power to punish for contempt a witness who refused to obey a subpoena duces tecum, as the statute giving such magistrate power to punish a witness for refusing to testify does not authorize him to punish for failure to obey such a subpoena. *Farnham v. Colman* (1905) 19 S. D. 342, 1 L.R.A. (N.S.) 1185, 117 Am. St. Rep. 944, 108 N. W. 161, 9 Ann. Cas. 314.

A justice of the peace, in Texas, has statutory power to punish for contempt

the refusal of a constable to execute a writ for sequestration issued by the justice. *Ex parte Robertson* (1889) 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669.

In Vermont, justices of the peace are courts of record, and have inherent power to punish for contempt (insulting language by attorney to justice). *Re Cooper* (1858) 32 Vt. 253.

*o. British courts.*

*1. England.*

*(a) High court of justice.*

The high court of justice has power to punish for contempt the publication in a newspaper of matter tending to interfere with the fair trial of one charged with an offense, although at the time of the publication the person charged had not yet been committed for trial. *Rex v. Parke* [1903] 2 K. B. 432, 72 L. J. K. B. N. S. 839, 67 J. P. 421, 52 Week. Rep. 215, 89 L. T. N. S. 439, 19 Times L. R. 627.

*(b) King's bench.*

The King's bench has power to punish for contempt an interference with the administration of justice, or acts tending to prejudice the fair trial of one accused of an offense. *Re Johnson* (1887) L. R. 20 Q. B. Div. 68, 52 J. P. 280, 57 L. J. Q. B. N. S. 1, 58 L. T. N. S. 160, 86 Week. Rep. 51 (use by solicitor of grossly abusive expressions and threatening gestures to opposing solicitor, on their way from the judge's chambers to entrance gate of building); *Reg. v. Castro* (1878) L. R. 9 Q. B. 219, 28 L. T. N. S. 222, 12 Cox, C. C. 371 (making of speeches at public meetings during pendency of criminal case to effect that defendant is not guilty, and that there is a conspiracy to prevent his having a fair trial); *Rex v. Clarke* [1910] 103 L. T. N. S. 686, 27 Times L. R. 82 (publication in newspaper of facts concerning trial which tend to prejudice fair trial of accused); *Rex v. Davies* [1906] 1 K. B. 32, 75 L. J. K. B. N. S. 104, 93 L. T. N. S. 772, 54 Week. Rep. 107, 22 Times L. R. 97 (publication of newspaper articles tending to interfere with fair trial of accused, although he may never be tried before King's bench).

*(c) Court of assize.*

A court of assize, being a superior court, has power to punish for contempt the refusal of a witness to answer questions. *Ex parte Fernandez* (1861) 10 C. B. N. S. 3, 142 Eng. Reprint, 349, 7 Jur. N. S. 571, 4 L. T. N. S. 324, 9 Week. Rep. 832, 15 Eng. Rul. Cas. 1.

*(d) Court of nisi prius.*

A court of nisi prius has power to punish as for contempt the indecorum of the defendant in addressing the jury on his trial under an indictment for publication of blasphemous libel, with statements, irrelevant to the issue, concerning the Christian religion and derogatory to the character of judges and barristers. *Rex v. Davison* (1821) 4 Barn. & Ald. 329, 106 Eng. Reprint, 958, 23 Revised Rep. 295.

*(e) Court of general jail delivery.*

A court of general jail delivery has power to punish for contempt the publication in a newspaper of the proceedings of a trial, in violation of an order of the court prohibiting the publication of such proceedings pending the trials of several persons charged by the same indictment. *Rex v. Clement* (1821) 4 Barn. & Ald. 218, 106 Eng. Reprint, 918, 23 Revised Rep. 260, 25 Revised Rep. 710.

*(f) County court.*

A county court, being an inferior court of record, had no power to punish for a contempt committed out of court, and its power was limited by statute to contempts committed in the face of the court (writing of letter published in newspaper, reflecting on conduct of court not within its power to punish). *Reg. v. Lefroy* (1873) L. R. 8 Q. B. 134, 42 L. J. Q. B. N. S. 121, 28 L. T. N. S. 132, 21 Week. Rep. 332.

But it was given power by a later statute to enforce obedience to its orders by commitment to prison. *Richards v. Cullerne* (1881) L. R. 7 Q. B. Div. 623 (disobedience on order of reference by consent, of directions to attend on certain date, and to produce books and papers); *Ex parte Martin* (1879) L. R. 4 Q. B. Div. 212 (disobedience of injunction); *Martin v.*

Bannister (1879) L. R. 4 Q. B. Div. 491, 48 L. J. Q. B. N. S. 76, 28 Week. Rep. 143 (disobedience of injunction).

(g) *Quarter sessions.*

A quarter sessions, being a court of record, has inherent power to punish for contempt an insult to a juror by a barrister. *Ex parte Pater* (1864) 5 Best & S. 299, 122 Eng. Reprint, 842, 33 L. J. Mag. Cas. N. S. 142, 10 Jur. N. S. 972, 10 L. T. N. S. 376, 12 Week. Rep. 823, 9 Cox, C. C. 544, 15 Eng. Rul. Cas. 141.

(h) *Justice of the peace.*

A justice of the peace may punish for contempt one who, in his presence, says that he is a rogue and liar. *Rex v. Revel* (1760) 1 Strange, 420, 93 Eng. Reprint, 609.

And he also has power to commit to prison one who was a material witness upon a charge of felony brought before him, but refuses to appear at the sessions to give evidence, or to enter into a recognizance for his appearance, since such power is inferred from the statute giving the justices authority to bind witnesses by recognizance to appear at the trial to give evidence against the party indicted. *Bennet v. Watson* (1814) 3 Maule & S. 1, 105 Eng. Reprint, 512, 15 Revised Rep. 373.

But he has no power to punish for contempt the refusal of a witness to give evidence concerning a breach of the public peace, where there is no information upon oath, or any person charged with the offense, so as to render necessary the examination of witnesses. *Cropper v. Horton* (1826) 8 Dowl. & R. 166.

(i) *Leet.*

A leet is a court of record, and the steward is a judge thereof, and therefore has power to punish for contempt committed in the face of the court (refusal of one chosen at leet to be constable of a manor, being present in court, to take the oath of office, and his departure in contempt of court). *Griesley's Case* (1588) 8 Coke, 38a, 77 Eng. Reprint, 530.

2. *Ireland.*

(a) *Court of assize.*

A court of assize, sitting under a commission of oyer and terminer for the purpose of a general jail delivery, is a superior court, and has power to punish for contempt the publication in a newspaper of articles reflecting upon the trial of a case in such court. *Re M'Alcece* (1873) Ir. Rep. 7 C. L. 146.

3. *Canada.*

(a) *Supreme court.*

It is assumed in *Meriden Britannia Co. v. Walters* (1915) 24 Can. Crim. Cas. 864, 34 Ont. L. Rep. 518, 9 Ont. Week. N. 87, 25 D. L. R. 167, that the Ontario supreme court has power to punish contempts, it being stated, on a motion on behalf of a plaintiff in a pending case for an order for the punishment for contempt of a newspaper editor for writing an article commenting on the case, that the disciplinary power of the court to punish for contempt should be sparingly and carefully exercised, and that it should be exercised to punish one publishing an article commenting upon a pending case, only when such article is likely to prejudice the proper conduct of the case.

And in *Reg. v. Ellis* (1889) 28 N. B. 497, it is assumed that the supreme court of New Brunswick has power to punish for contempt, the case holding that a newspaper publication, charging that a judge of such court was actuated by dishonest and corrupt motives in granting an order, constituted a contempt punishable by the court. Appeal dismissed in *Ellis v. Baird* (1888) 16 Can. S. C. 147.

(b) *Queen's bench.*

The court of Queen's bench has power to punish for contempt the writer of a letter published in a newspaper, reflecting on one of the judges of the court, and tending to prejudice the defense in a pending prosecution. *Re Houston* (1877) 41 U. C. Q. B. 42.

(c) *Superior court.*

The superior court has inherent power to punish contempts, and there-



fore has power to punish for contempt the publication of newspaper articles scandalizing the court, though the cases in regard to which they were written are not pending, but have been finally determined. *Fournier v. Atty. Gen.* (1910) *Rap. Jud. Quebec* 19 B. R. 431, 17 *Can. Crim. Cas.* 108.

(d) *Division court.*

The power of punishing contempts by a fine is given by statute to the judge of a division court (insult by barrister to judge on a motion). *Re Recorder & Judge of Division Ct.* (1864) 23 *U. C. Q. B.* 376.

Such court also has power to punish for contempt the disobedience of its judgment ordering a street railway company to furnish a city annual statements. *Toronto v. Toronto R. Co.* (1917) 12 *Ont. Week. N.* 111.

(e) *County court.*

A county court has power to punish for contempt insulting words by a barrister to the court. *Ex parte Lees* (1874) 24 *U. C. C. P.* 214.

But a judge of a county court, in removing an assignee for creditors under the authority of 48 *Vict. chap.* 26, § 6(O), is not exercising the powers of the county court, but an independent statutory authority conferred upon it, and therefore has no power to punish for contempt the refusal of the assignee to comply with an order directing him to turn over to his successor the insolvent's property. *Re Pacquette* (1886) 11 *Ont. Pr. Rep.* 463.

(f) *Justice of the peace.*

A justice of the peace, while sitting in discharge of his duties, examining parties upon a criminal charge, has power to protect himself from insult, and to repress disorderly conduct, by committing for contempt a person who shall violently or indirectly interrupt his proceeding, or conduct himself insultingly towards him (insulting language to justice by spectator at trial). *Re Clarke* (1849) 7 *U. C. Q. B.* 223.

And a justice, acting judicially in a proceeding in which he has power to convict, fine, and imprison, is a judge of record, and has power to punish

for contempts in the face of the court (insulting expressions by accused to justice). *Armstrong v. McCaffrey* (1869) 12 *N. B.* 525.

But a justice of the peace, acting as such under the provisions of the *Summary Convictions Act*, has not the power summarily to punish contempts in *facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt (action of attorney before a justice on a trial in continually, after being told by the justice not to do so, objecting to improper questions by the justice to his client, held not a contempt, but that if it amounted to a contempt, the justice could punish him therefor only by issuing his warrant). *Young v. Saylor* (1892) 23 *Ont. Rep.* 513, affirmed without opinion in (1893) 20 *Ont. App. Rep.* 645.

(g) *Police magistrate.*

A police magistrate has power to punish for contempt the refusal of a witness to answer a material question on a preliminary investigation, under a section of the *Criminal Code* providing that where a witness refuses to answer such questions as are put to him, without offering any just excuse for his refusal, the justice may commit the witness so refusing to jail. *Re Ayotte* (1905) 15 *Manitoba L. R.* 156, 9 *Can. Crim. Cas.* 133.

4. *Colonies.*

(a) *Supreme court of civil justice of British Guiana.*

The supreme court of civil justice of British Guiana is a court of record, and as a court of record has power to punish for contempt the publication of an article in a newspaper containing matters scandalously reflecting upon a judge of the court, therein tending to defame and obstruct the administration of justice. *McDermott v. Beaumont* (1868) *L. R.* 2 *P. C.* 341, 38 *L. J. C. P. N. S.* 1, 20 *L. T. N. S.* 74, 5 *Moore, P. C. C. N. S.* 466, 16 *Eng. Reprint*, 590, 17 *Week. Rep.* 352.

(b) *Recorder's court of Sierra Leone.*

The recorder's court of Sierra Leone is a court of record, and hence has power to punish for contempt (inso-

lent and disrespectful conduct by an advocate to court). *Rainy v. Sierra Leone* (1852) 8 Moore, P. C. C. 47, 14 Eng. Reprint, 19.

### III. Officers and boards.

Officers or boards, not being or holding courts in the true sense of that term, do not possess inherent power to punish contempt, and, though frequently power is conferred upon them by statute to punish contempt, they often are required to resort to the courts to secure the punishment of those guilty of contemptuous acts or conduct.

**United States.** — *Interstate Commerce Commission v. Brimson* (1893) 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Ex parte Perkins* (1887) 29 Fed. 900; *Re Mason* (1890) 43 Fed. 510; *Elting v. United States* (1892) 27 Ct. Cl. 158; *Re Purvine* (1899) 37 C. C. A. 446, 96 Fed. 192; *Johnson v. Southern Bldg. & L. Asso.* (1899) 99 Fed. 646; *Re Perkins* (1900) 100 Fed. 950; *Ripon Knitting Works v. Schreiber* (1900) 2 N. B. N. Rep. 899, 101 Fed. 810; *United States v. Beavers* (1903) 125 Fed. 778; *Re Romine* (1905) 138 Fed. 837; *Bank of Ravenswood v. Johnson* (1906) 74 C. C. A. 597, 143 Fed. 463; *United States v. Tom Wah* (1908) 160 Fed. 207, affirmed without discussion of this point in (1908) 90 C. C. A. 178, 163 Fed. 1088; *Re Magen* (1910) 179 Fed. 572, reversed on another point in (1911) 108 C. C. A. 531, 186 Fed. 675; *Re Haring* (1912) 193 Fed. 168, affirmed without discussing this point under the name *Re Holden* (1913) 121 C. C. A. 435, 203 Fed. 229.

**Alaska.**—*United States v. Pratt* (1907) 3 Alaska, 400.

**California.**—*Re Gannon* (1886) 69 Cal. 541, 11 Pac. 240.

**Colorado.**—*Wyatt v. People* (1892) 17 Colo. 252, 28 Pac. 961.

**Connecticut.**—*Re Clark* (1894) 65 Conn. 17, 28 L.R.A. 242, 31 Atl. 522.

**Idaho.**—*Re Niday* (1908) 15 Idaho, 559, 98 Pac. 845.

**Indiana.**—*Burt v. Pyle* (1883) 89 Ind. 398; *Langenberg v. Decker* (1892) 131 Ind. 471, 16 L.R.A. 108, 31 N. E. 190.

**Iowa.**—*Brown v. Davidson* (1882) 59 Iowa, 461, 13 N. W. 442.

**Kansas.**—*Re Sims* (1894) 54 Kan. 1, 25 L.R.A. 110, 45 Am. St. Rep. 261, 37 Pac. 135; *Re Huron* (1897) 58 Kan. 152, 36 L.R.A. 822, 62 Am. St. Rep. 614, 48 Pac. 574.

**Kentucky.** — *Roberts v. Hackney* (1900) 109 Ky. 265, 58 S. W. 810, modified on rehearing without affecting this question in (1900) 109 Ky. 269, 59 S. W. 328.

**Missouri.**—*State ex rel. Haughey v. Ryan* (1904) 182 Mo. 349, 81 S. W. 435.

**New York.**—*People ex rel. Phelps v. Fancher* (1874) 2 Hun, 226, 4 Thomp. & C. 467.

**Pennsylvania.** — *Llewellyn's Case* (1893) 13 Pa. Co. Ct. 126, 2 Pa. Dist. R. 631.

**Texas.**—*Johnson v. State* (1908) 54 Tex. Crim. Rep. 113, 111 S. W. 743.

**Utah.**—*Re Harris* (1884) 4 Utah, 5, 5 Pac. 129.

### a. Mayor.

A mayor of a town or city, while holding a quasi court, does not generally have power to punish contempt, unless conferred upon him by statute. *EX PARTE PATTERSON* (reported herewith ante, 1541; *Roberts v. Hackney* (1900) 109 Ky. 265, 58 S. W. 810, modified on rehearing without affecting this question in (1900) 109 Ky. 269, 59 S. W. 328.

The mayor of a town, acting with power and jurisdiction of a justice of the peace, cannot punish for contempt not committed in his presence, or in disobedience of process, unless power to do so is expressly conferred by statute. No statute giving it, he has no power to punish for contempt the publisher of a newspaper article, criticizing and ridiculing him on account of his rulings in a case previously decided by him. *EX PARTE PATTERSON* (reported herewith) 1541.

The mayor of a city cannot punish contempts, where the Constitution vests the judicial power of the state in certain specified courts, which do not include the mayor's court (refusal to testify). *Roberts v. Hackney* (1900) 109 Ky. 265, 58 S. W. 810, modified on rehearing without affecting

this question in (1900) 109 Ky. 269, 59 S. W. 328.

But, in North Carolina, a mayor's court is given by statute power to punish for contempt the publication of a grossly inaccurate account of the proceedings of the court. *Re Deaton* (1890) 105 N. C. 59, 11 S. E. 244.

And has inherent, as well as statutory power to punish for contempt the disobedience of a subpoena by a witness. *State v. Aiken* (1893) 113 N. C. 651, 18 S. E. 690.

*b. Notary.*

A notary is commonly given power by statute to punish contempts committed in connection with the taking of depositions by him. *Coleman v. Roberts* (1896) 113 Ala. 323, 36 L.R.A. 84, 59 Am. St. Rep. 111, 21 So. 449; *Ex parte McKee* (1853) 18 Mo. 599; *Ex parte Krieger* (1879) 7 Mo. App. 367; *Re Nitsche* (1883) 14 Mo. App. 213; *Dogge v. State* (1887) 21 Neb. 272, 31 N. W. 929; *De Camp v. Archibald* (1893) 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056; *Ex parte Schoepf* (1906) 74 Ohio St. 1, 6 L.R.A. (N.S.) 325, 77 N. E. 276; *Re Sims* (1879) 4 Ohio L. J. 457; *Burnside v. Dewstoe* (1886) 9 Ohio Dec. Reprint, 589, 15 Ohio L. J. 197; *Ex parte Langford* (1886) 15 Ohio L. J. 267; *Ex parte Woodworth* (1893) 6 Ohio S. & C. P. Dec. 19, 29 Ohio L. J. 315.

In Alabama, a notary public, exercising the jurisdiction of a justice of the peace, has power to punish a bystander or spectator for conduct constituting contempt. *Coleman v. Roberts* (Ala.) *supra*.

But a notary public sitting as an examiner, and taking a deposition of a witness in Alaska, is not a court, and has no power to punish a witness who disobeys a subpoena to appear and give testimony, but should report such disobedience to the court wherein the action, suit, or proceeding is pending. *United States v. Pratt* (1907) 3 Alaska, 400.

So, in Indiana, a notary public in taking a deposition has no power to punish for contempt a witness who refuses to testify, or answer proper questions. *Burt v. Pyle* (1883) 89 Ind. 398.

In *Re Abeles* (1874) 12 Kan. 451, however, it was held that a notary public may punish for contempt the refusal of a witness to testify when attending before him, after being duly subpoenaed to testify in a cause by giving his deposition.

And it was held in *Re Merkle* (1888) 40 Kan. 27, 19 Pac. 401, that a notary public has power to punish for contempt the refusal of a witness to answer certain questions, for no other reason than that he was instructed by counsel not to do so, on his examination before the notary after having been duly subpoenaed to testify in a cause by giving his deposition.

But it is held in *Re Huron* (1897) 58 Kan. 152, 36 L.R.A. 822, 62 Am. St. Rep. 614, 48 Pac. 574, that a notary public has no power to commit for contempt a witness, who, having been duly subpoenaed before him for that purpose, refuses to be sworn, or to give his deposition, and that a statute purporting to confer such power upon him is invalid. The reason given for this holding is that the notary public is not a judicial officer, nor a court, and that the power to punish for contempt cannot be conferred upon an executive officer. The court said: "It is true that in *Re Abeles* (Kan.) *supra*, it was stated that a notary might commit a recusant witness for contempt, but it does not appear that the constitutional phase of the question received much consideration, and the decision is not deemed to be controlling. It has since been accepted without serious dispute, and has been followed in other cases without much discussion. It is, therefore, the view of the court that the question has not before been authoritatively settled."

In Missouri, a notary public taking a deposition has power to punish for contempt a witness refusing to answer proper questions. By statute notaries are given power to take depositions, and the same powers for that purpose are given to them as are conferred on a justice of the peace, and justices of the peace are given power to issue subpoenas to witnesses to appear and testify, and to compel their attendance in the same manner and under

like penalties as any court of record, and a further statute provides that a person summoned as a witness and attending, who shall refuse to give evidence which may lawfully be required, may be committed to prison by the court or other person authorized to take his deposition or testimony. *Ex parte McKee* (1853) 18 Mo. 599; *Ex parte Krieger* (1879) 7 Mo. App. 367.

In *Re Nitsche* (1883) 14 Mo. App. 213, it appears that a notary public has power to punish for contempt a witness who refuses to testify when duly summoned to give his deposition, under the statute which provides that every officer required to take depositions or examinations of witnesses in pursuance of the statute, or by virtue of a commission issuing out of any court of record in the state, or any other government, shall have power to issue subpoenas for witnesses, and to compel their attendance in the same manner and under like penalties as any court of record of the state. In this case the notary was held not to have power to punish the refusal of a witness to testify in a case pending in another state, before the notary received the commission from such other state.

But a notary public in taking a deposition has no power to punish for contempt the refusal of a witness to produce books and papers under a subpoena duces tecum, since the power of notaries in taking depositions is strictly statutory, and there is no power given to an officer taking depositions to commit a witness for refusing to produce books. *Ex parte Mallinkrodt* (1855) 20 Mo. 493.

In Nebraska, a notary public has power to commit for contempt a witness who refuses to give his deposition in a proper case. *Dogge v. State* (1887) 21 Neb. 272, 31 N. W. 929.

But a notary public has no power to punish as for a contempt one who, while he is taking a deposition, repeatedly indulges in vulgar and profane language in the presence of the notary, since the power of the notary to punish contempts is strictly limited to that given by the statute, which provides that a notary is empowered

to issue summonses, and command the presence before him of witnesses, and to punish witnesses for neglect or refusal to obey such summons, or for refusal to testify when present, by commitment to the jail of the county for contempt. *Courtney v. Knox* (1891) 31 Neb. 652, 48 N. W. 763.

In Ohio, a notary public, taking a deposition, is given power by statute to punish for contempt the refusal of a witness, duly subpoenaed, to appear, or to testify, or to answer proper questions. *De Camp v. Archibald* (1893) 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056; *Ex parte Schoepf* (1906) 74 Ohio St. 1, 6 L.R.A. (N.S.) 325, 77 N. E. 276; *Re Sims* (1879) 4 Ohio L. J. 457; *Burnside v. Dewstoe* (1886) 9 Ohio Dec. Reprint, 589, 15 Ohio L. J. 197; *Ex parte Langford* (1886) 15 Ohio L. J. 267; *Ex parte Woodworth* (1893) 6 Ohio S. & C. P. Dec. 19, 29 Ohio L. J. 315.

It was held in *Re Sims* (1879) 4 Ohio L. J. 457, that, under the statute then in force, a notary public taking a deposition had no power to punish for contempt the refusal of a witness to obey a subpoena duces tecum.

But it appears from *Ex parte Schoepf* (1906) 74 Ohio St. 1, 6 L.R.A. (N.S.) 325, 77 N. E. 276, that a notary public before whom a deposition is being taken is empowered by a later statute to punish as for contempt any person who refuses to obey an order to produce a document.

In Texas, a notary public taking a deposition has no power to punish for contempt the refusal of a witness to answer interrogatories. *Johnson v. State* (1908) 54 Tex. Crim. Rep. 113, 111 S. W. 743.

#### *c. Referees.*

##### *1. In bankruptcy.*

It appears from the following cases that a referee in bankruptcy has no power to punish for contempt, but that he is required by § 41 of the Bankruptcy Act to certify the facts to the district court, which will punish the contempt as though it had originally arisen therein. *Re Purvine* (1899) 37 C. C. A. 446, 96 Fed. 192; *Ripon Knitting Works v. Schreiber* (1900) 101

Fed. 810; *Re Romaine* (1905) 138 Fed. 837; *Bank of Ravenswood v. Johnson* (1906) 74 C. C. A. 597, 143 Fed. 463; *Re Magen* (1910) 179 Fed. 572, reversed on another point in (1911) 108 C. C. A. 531, 186 Fed. 675; *Re Haring* (1912) 193 Fed. 168, affirmed without discussing this point under the name *Re Holden* (1918) 121 C. C. A. 435, 203 Fed. 229.

### 2. In supplementary proceedings.

A referee appointed to conduct the examination of a judgment debtor concerning his means and ability to pay the judgment has power to punish such debtor for contempt, upon his refusal to answer proper questions, since the referee is a referee appointed in pursuance of "an order of reference," upon whom power to commit for contempt is conferred by statute. *State ex rel. Ames v. Barclay* (1885) 86 Mo. 55.

But it appears from the case of *Re Backus* (1904) 91 App. Div. 266, 86 N. Y. Supp. 638, affirmed on opinion below in (1904) 179 N. Y. 571, 72 N. E. 1139, that a referee in proceedings supplementary to execution has no power to punish as for a contempt a judgment debtor who appears before him but refuses to answer questions and to obey directions of the referee, under a statute providing that a person who refuses to obey an oral direction given directly to him by a judge or referee in the course of the special proceeding may be punished by the judge or by the court out of which the execution was issued as for a contempt.

And in North Carolina a referee in proceedings supplementary to execution has no power to punish as for a contempt the refusal of a witness to answer questions, since such examination is not a trial within the meaning of the statute providing that a referee has power to enforce obedience to his rulings on a trial of the issues before him, just as a court would have upon a trial before it. *La Fontaine v. Southern Underwriters Assn.* (1880) 83 N. C. 132.

### 3. Other referees.

A referee appointed to report testi-

mony and his opinion thereon, in an incidental issue, has power to punish for contempt the refusal of a witness to answer proper questions, under § 2272 of the New York Code of Civil Procedure, which provides that an order to show cause may be made, or a warrant may be issued, by a referee appointed by the court, where the offense is committed upon the trial of the issue referred to him, or consists of a witness's nonattendance, or refusal to be sworn or to testify before him, and that the order or warrant may, in the discretion of the referee, be made returnable before him, or before the court, and that, where it is made returnable before the referee, he has all the power and authority of the court, with respect to the motion or special proceeding instituted thereby. *People ex rel. Baldwin v. Miller* (1894) 9 Misc. 1, 29 N. Y. Supp. 305.

In *Milton v. Richardson* (1897) 21 Misc. 380, 47 N. Y. Supp. 735, the court stated that a referee directed to take and state an account had power to punish as for a contempt a disobedience of his order to file an account.

A referee appointed for the examination of persons claimed by an administrator or executor to be withholding property of the estate from him appears, from the case of *Re Husted* (1902) 37 Misc. 237, 75 N. Y. Supp. 252, to have power to punish for contempt a witness who refuses to answer proper questions, under the statute providing that a refusal to attend, or be sworn, or to answer a question which the surrogate determines to be proper is punishable in the same manner as a like refusal by a witness subpoenaed to attend a hearing before the surrogate.

In *Re Seeley* (1858) 6 Abb. Pr. (N. Y.) 217, note, where the contemptuous act consisted in an assault during the trial before a referee, and the referee reported the matter to the court, it was held that the court had power to punish the contempt committed before the referee, although the offense was one that, by statute, the referee had power to punish.

And on an appeal, in an action by

one partner against his copartner for an accounting, from an order made at a special term, denying the plaintiff's motion to punish the defendant for a contempt in refusing to obey the order and direction of the referee to whom the whole issues in the action were referred, which order of the referee required the defendant to make and file an account, the denial of which motion was made upon the ground that the referee should determine whether defendant had been guilty of a contempt or not, since he had the power to punish for alleged contempt under the statute providing that a referee, upon the trial of an issue of fact or an issue of law, exercises the same power as the court to preserve order and punish the violation thereof, and that, upon the trial of an issue of fact, the referee exercises also the same powers of the court to compel the attendance of witnesses by attachment, to punish a witness as for a contempt of court, for non-attendance, or refusal to be sworn, or to testify, it was held in *Naylor v. Naylor* (1884) 32 Hun (N. Y.) 228, reversing the order denying the motion, that, assuming that the statute under which the proceedings to punish for contempt were instituted conferred upon the referee power for that purpose, it gave concurrent jurisdiction to the court, and that it was the duty of the court to have considered and passed upon the alleged contempt.

A referee, appointed by the court to hear the evidence and determine the matters considered, has power to punish for contempt the refusal of a witness, when directed, to produce books, and the interruption of the proceeding by the attorney for the witness by instructing the witness not to answer questions. *Heerdt v. Wetmore* (1864) 2 Robt. (N. Y.) 697.

But it was held in *Bonesteel v. Lynde* (1853) 8 How. Pr. (N. Y.) 226, affirmed on opinion below in (1853) 8 How. Pr. 352, that a referee to whom an action was referred, to hear and decide the same, had no power to punish as for a contempt the failure of a witness, served with a subpoena duces tecum, to produce books and papers.

#### *d. Commissioner.*

##### *1. United States commissioners.*

A United States commissioner has no power to punish for contempt. Such power is nowhere expressly conferred on such commissioners. They are not, and do not hold, a court, in the proper sense of that term, but are officers of, and a part of, the court appointing them, and they have to resort to such court for the punishment of contempts against their process or authority. *Ex parte Perkins* (1887) 29 Fed. 900; *Re Mason* (1890) 43 Fed. 510; *Re Perkins* (1900) 100 Fed. 950; *United States v. Beavers* (1903) 125 Fed. 778; *United States v. Tom Wah* (1908) 160 Fed. 207, affirmed without discussion of this point in (1908) 90 C. C. A. 178, 163 Fed. 1008.

It was contended in *Ex parte Perkins* (1887) 29 Fed. 900, and in *Re Mason* (1890) 43 Fed. 510, that the provision of § 1014 of the Revised Statutes of the United States, Comp. Stat. § 1674, that offenders against the United States may be arrested, imprisoned, or bailed by the officers therein named (among whom are commissioners), agreeably to the usual mode of process against offenders in the state where they are found, confers on commissioners the power to punish for contempt possessed by state officers, but the court said in both cases that it is not essential to the due exercise of the power given by § 1014 that commissioners should have authority to punish for contempt, for they can refer the contumacy of witnesses to the court, as they do in taking depositions, and as masters in chancery and registers in bankruptcy are required to do, and that it was the intention of Congress to assimilate the proceedings before commissioners and other officers mentioned in § 1014, for holding accused persons to answer before the courts of the United States, to the proceedings for similar purposes in the states where such proceedings are had, but that it was a stretch of language to say that the punishment of a witness for contempt by a commissioner was a necessary part of the "usual mode of process against offenders," or essential to the

exercise of any power that is expressly conferred on him by the Federal law. *Ex parte Perkins* (1887) 29 Fed. 900 (refusal to be sworn as a witness).

In *Ex parte Doll* (1870) 7 Phila. 595, Fed. Cas. No. 3,968, discharging the relator in habeas corpus proceedings because of the irregularity of the proceedings before the commissioner appointed by the circuit court of the United States, who ordered the relator's commitment, where it appeared that an assessor summoned the relator to appear and bring certain books and papers and, on the disregard of such summons, made complaint to the commissioner, who ordered the relator to appear on a certain day or be committed for contempt, and on the relator's failure to appear committed him, the district court stated that he very much doubted the power of Congress to invest a commissioner with the authority, in a proceeding regularly instituted before him, summarily to commit a citizen for an alleged contempt, and that this was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which the commissioners were appointed and held their offices.

A master commissioner, appointed by the district court of the United States to take an account of the assets of an insolvent corporation, has no power to determine that a party to the cause, or other person, is in contempt of the order of the court whose decree the master is executing, and on that ground refuse to allow such party, or person, to appear before him by counsel; but such power is conferred on the court alone by § 725 of United States Revised Statutes, Comp. Stat. § 1245. *Johnson v. Southern Bldg. & L. Asso.* (1899) 99 Fed. 646.

It is stated in the case of *Elting v. United States* (1892) 27 Ct. Cl. (Fed.) 158, that a commissioner of the court of claims has no power to punish for contempt.

#### 2. Other commissioners.

It appears from the case of *Re Niday* (1908) 15 Idaho, 559, 98 Pac.

845, that a commissioner taking a deposition has no power to punish for contempt a witness who refuses to attend or testify, since the statute provides that in such case the commissioner shall report such fact to the probate or district court of the county, and that such court shall order the witness to attend and testify, and on his failure to do so such witness shall be dealt with as for a contempt.

A commissioner appointed by a court of another state to examine witnesses in Ohio has no power to punish for contempt a witness who, appearing, refuses to be sworn. *Re Goodman* (1900) 1 Ohio S. & C. P. Dec. 360.

A commissioner or examiner to take a deposition is given by statute power to punish for contempt the disobedience of a subpoena by a witness. *Com. v. Newton* (1857) 1 Grant, Cas. (Pa.) 453.

And a city alderman, appointed commissioner to take a deposition by a court of record, is given by statute power to punish for contempt the refusal of a witness to be sworn. *Com. ex rel. Rathvon v. Roberts* (1841) 2 Clark (Pa.) 340.

In *Peabody v. Harmon* (1854) 3 Gray (Mass.) 113, the court said, in effect, that a commissioner of insolvency had no power to punish for contempt a creditor who refused to answer questions concerning his claim against the estate of an insolvent debtor.

A commissioner in chancery has no power to punish for contempt a witness who refuses to testify before him. The commissioners of chancery appointed by the chancellor derive their powers solely from the statute under which they are appointed; they are officers of the court for a particular purpose, and, their powers being prescribed by the statute under which they are appointed, they cannot transcend those powers. *Marsh v. Williams* (1834) 1 How. (Miss.) 132.

In *Bradley Fertilizer Co. v. Taylor* (1893) 112 N. C. 141, 17 S. E. 69, where a commissioner appointed by the court for the examination of a party before trial, on the refusal of

the witness to answer proper questions, certified such matter to the court, it was held that, if the power to punish for contempt a witness refusing to answer was given by the statute to the commissioner, it was not given exclusively to him, but that he might invoke the aid of the judge appointing him. The statute provided that commissioners appointed by the court to take depositions, arbitrators, referees, and all persons acting under commission issuing from any court of record, are hereby empowered to issue subpoenas, and to administer oaths to witnesses to the end that they may give their testimony, and any witness appearing before any of the said persons, and refusing to give his testimony on oath upon matters concerning which it may be lawfully required of him, shall be committed, by warrant of the person before whom he shall so refuse, to the county jail until he may be willing to give his evidence.

A commissioner of the supreme court of a territory has no power to punish for contempt the publication and circulation of newspaper articles, criticizing the commissioner's court. *People ex rel. Pierce v. Carrington* (1888) 5 Utah, 531, 17 Pac. 735.

A court commissioner of Wisconsin has no power to punish for contempt, except in those cases where such power is expressly conferred by statute. *Haight v. Lucia* (1874) 36 Wis. 355.

He was not originally authorized by statute to take jurisdiction of supplementary proceedings, or to make an order for the payment of money and the appointment of a receiver, or to punish for a contempt a person who disobeyed those orders. *Re Remington* (1858) 7 Wis. 643.

But it is stated in *Haight v. Lucia* (1874) 36 Wis. 355, that subsequently the legislature conferred upon court commissioners the powers there denied them.

A court commissioner, upon the examination of a party before trial, has no power to punish for contempt his refusal to answer questions, since such power is not specially conferred

by statute. *Stuart v. Allen* (1878) 45 Wis. 158.

He has no power, it not being given by statute, to punish for contempt the refusal of a witness to answer questions propounded to him, when giving his deposition as a witness before the commissioner in an action pending in court. *State ex rel. Lanning v. Lonsdale* (1879) 48 Wis. 348, 4 N. W. 390.

And it is held in *Haight v. Lucia* (Wis.) *supra*, that he has no power to punish the violation of an injunction granted by him.

It appears from *Nieuwankamp v. Ullman* (1879) 47 Wis. 168, 2 N. W. 131, that, under the statute increasing his powers in supplementary proceedings, a court commissioner has power to punish for contempt the violation of an injunction granted by him in such proceedings, the case holding that his jurisdiction was not exclusive of that of the circuit court, which had power, on report of the proceedings to it, to punish for such contempt.

While a district court commissioner is given by statute power to punish for contempts committed during hearings before him, the statute provides that he has power to punish constructive or indirect contempts only where the district judge at chambers is invested by law with such power; and therefore he has no power to punish for contempt an interference with the discharge of the duties of a water distributor appointed by him. *Mau v. Stoner* (1904) 12 Wyo. 478, 76 Pac. 584.

Commissioners of oyer and terminer have power to punish contempts offered to them in open court. *Dawe v. Broom* (1823) *Newfoundl. Sel. Cas.* 438.

#### *e. Grand jury.*

A grand jury has no power to punish contempts, as it is merely an adjunct or appendage to the court. The usual mode of procedure, where witnesses refuse to testify, or legitimate action of the body is obstructed, is, unless otherwise provided by statute, to report the matter to the court, which will punish the contempt. *Re Gannon* (1886) 69 Cal. 541, 11 Pac. 240; *Wyatt v. People* (1892) 17 Colo.



252, 28 Pac. 961; *Re Clark* (1894) 65 Conn. 17, 28 L.R.A. 242, 31 Atl. 522; *People ex rel. Phelps v. Fancher* (1874) 2 Hun (N. Y.) 226, 4 Thomp. & C. 467; *Re Harris* (1884) 4 Utah, 5, 5 Pac. 129.

*f. Boards.*

A board of police commissioners, created under an act giving them, among other powers, power to discharge or suspend officers and summon witnesses, is, when sitting for the trial of charges preferred against a police officer, a court within the meaning of a statutory provision empowering every court to punish for contempt committed in its immediate presence, or so near thereto as to interrupt, disturb, or hinder its proceedings, to compel obedience to its judgments, orders, and process, and to control the conduct of its officers and all other persons connected with a judicial proceeding before it. *Plunkett v. Hamilton* (1911) 136 Ga. 72, 35 L.R.A. (N.S.) 583, 70 S. E. 781, Ann. Cas. 1912B, 1259.

A board of county commissioners has power to punish contempts consisting of the refusal to obey orders lawfully made by them, under a statutory provision that they shall have power to preserve order when sitting as a court, to punish contempts, and to enforce obedience to all orders made by them by attachment, or other compulsory process (refusal of attorney to return to county auditor report of reviewers to the board of county commissioners). *Garrigus v. State* (1883) 93 Ind. 239.

A county board of equalization has power to commit for contempt a witness who, after being duly subpoenaed, refuses to testify or to produce the books and papers called for by the subpoena, in relation to the property of a taxpayer. In this case, where it was conceded that there was no statute conferring upon the board, in express terms, the power to commit for contempt, it was held that such power was conferred upon the board by implication, for the following reasons: First, because of statutory provisions imposing upon the board the duty to hear and investigate the truthfulness

of all matters brought before it regarding the assessment and equalization of taxes, and empowering it to send for books and papers after subpoenaing witnesses; second, because of the great importance of proper assessment of property and equalization of values for the purpose of taxation, to both the state and her citizens; and, third, because of the rule of statutory construction that, when a power is given by statute, everything necessary to make it effectual or requisite to attain the end is necessarily implied. *Re Sandford* (1911) 236 Mo. 665, 139 S. W. 376.

A canal investigating commission, given by statute authority to issue subpoenas, compel the attendance of witnesses and the production of books and papers before it, and, on failure of any witness to obey its mandates, power to issue attachments, with the like penalties as courts of record, has power to punish for contempt a witness, duly subpoenaed to appear before such commission and to produce certain books, who appears and brings such books, but refuses to produce them, without giving any reason or making any excuse. *People v. Learned* (1875) 5 Hun (N. Y.) 626.

But, in *Interstate Commerce Commission v. Brimson* (1893) 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, upholding a statute authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books and papers, it is stated that the question of punishing the defendants for contempt could not arise before the Commission, for in a judicial sense there is no such thing as contempt of a subordinate administrative body, that no question of contempt could arise until the issue of law in the circuit court was determined adversely to the defendants, and they refused to obey, not the order of the Commission, but the final order of the court.

The power to punish contempts is essentially a judicial one, and an attempt to confer it on a state board of tax commissioners, which has power to

take testimony, is in violation of a constitutional provision that no person charged with official duties under either the legislative, executive, or judicial department of the government shall exercise any of the functions of another department, since such board belongs to the executive or administrative department. *Langenberg v. Decker* (1892) 131 Ind. 471, 16 L.R.A. 108, 31 N. E. 190.

A visiting committee of insane asylums, provided for by a section of the Code which empowers them to send for persons and papers, and to examine witnesses on oath, to ascertain whether any of the inmates are improperly detained in the asylums, or unjustly placed there, and whether the inmates are humanely treated, with full power to correct any abuses found to exist, have no power to punish for contempt a refusal to be sworn or to testify, where there is no statute specifically granting such power, and while such committee exercises quasi judicial powers, they are not a court, nor judicial officers acting in the discharge of an official duty, within the meaning of a section of the Code conferring general authority upon the courts of the state and upon any judicial officer acting in the discharge of an official duty, to punish for contempts. *Brown v. Davidson* (1882) 59 Iowa, 461, 13 N. W. 442.

The chairman of a board of trustees of a town has no power to punish for contempt the refusal to testify, of one summoned before him for examination, as to names of persons selling intoxicating liquors in the town contrary to law, since the Constitution vests the judicial power of the state in certain specified courts, and the statute vesting the power to punish for contempt in the chairman of the board of trustees of a town, is in conflict with this constitutional provision, and therefore void. *Roberts v. Hackney* (1900) 109 Ky. 265, 58 S. W. 810, modified on rehearing without affecting this question in (1900) 109 Ky. 269, 59 S. W. 328.

A board of mediation and arbitration, which is not a court, nor possessed of judicial powers, cannot be

clothed by the general assembly with the power to punish contempts, since all the judicial power in the state is, by the Constitution, vested in certain courts therein named, and the general assembly has no authority to create any other tribunal and vest it with judicial power (refusal of witness, duly subpoenaed, to attend and testify before the board). *State ex rel. Haughey v. Ryan* (1904) 182 Mo. 349, 81 S. W. 435.

#### *g. Miscellaneous.*

It appears from *Kuhlman v. Superior Ct.* (1898) 122 Cal. 636, 55 Pac. 589, that, by statute, power is conferred on a coroner to punish for contempt a witness who refuses to testify at an inquest held by him.

A statute making it the duty of a county attorney, when notified of any violation of the prohibitory law, to issue his subpoena commanding witnesses to appear before him, to swear such witnesses, examine them, reduce their testimony to writing, and cause it to be subscribed by such witnesses, and expressly authorizing him to punish for contempt any witnesses disobeying his process, or refusing to answer questions, is unconstitutional and void, so far as it attempts to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or to testify, since the legislature has no power to confer on an executive officer, charged with the duty of searching out violations of the law, inquiring into the facts, and instituting and carrying on prosecutions for violations of the criminal laws of the state, the power at the same time, and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. *Re Sims* (1894) 54 Kan. 1, 25 L.R.A. 110, 45 Am. St. Rep. 261, 37 Pac. 135.

Borough auditors have no power to punish for contempt a witness who refuses to answer a question in relation to the misconduct of certain borough officers. *Llewellyn's Case* (1898) 13 Pa. Co. Ct. 126, 2 Pa. Dist. R. 631.  
G. V. I.

STATE OF MINNESOTA EX REL. ROBERT PEERS, Appt.,  
v.  
WILLIAM FITZGERALD, Court Officer of the City of Virginia, Respt.

*Minnesota Supreme Court—November 12, 1915.*

(131 Minn. 116, 154 N. W. 750.)

**Municipal corporation — power to punish for contempt.**

1. The constitutional and legislative provisions relative to home rule charters of villages and cities do not authorize a city to grant its city council the right to punish a witness called before it for contempt. Such power is not to be inferred, but must be clearly granted either by the Constitution or by statute.

[See note on this question beginning on page 1586.]

**Contempt — failure to produce immaterial evidence.**

2. Even had the city possessed such power, it clearly appears in this case that the invoices called for, and which

the witness refused to produce, were not pertinent to a legitimate subject of investigation before the city council.

Headnotes by HOLT, J.

**APPEAL** by relator from an order of the District Court for St. Louis County (Hughes, J.) discharging a writ of habeas corpus to secure his release from custody to which he had been committed for contempt, for refusing to produce and submit to the city council for inspection his invoices, showing the purchase of products used in the meat business carried on by him. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George F. Shea, for appellant:

Neither house of the state legislature may punish anyone not a member, for contempt, for his refusal to give testimony or produce documents in any inquiry in aid of legislation.

*Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Re McDonald*, 66 How. Pr. 487; *People ex rel. Sabold v. Webb*, 23 N. Y. S. R. 324, 5 N. Y. Supp. 855.

The state legislature cannot delegate or grant to any city council, or other person or body, the power to punish for contempt.

*Ibid.*

The city council of Virginia has no inherent or statutory power to punish for contempt.

*Re McDonald*, 66 How. Pr. 487.

Messrs. Montague & Montague, for respondent:

Legislatures have the power to punish witnesses for contempt for failure to testify in an investigation properly undertaken for the aid of intended legislation.

*Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *People ex rel. McDonald v. Keeler*, 99 N. Y. 475, 52 Am. Rep. 53, 2 N. E. 615; *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124; *State v. Matthews*, 37 N. H. 453; *Lowe v. Summers*, 69 Mo. App. 649; *Ex parte Nugent*, Brunner, Col. Cas. 296, Fed. Cas. No. 10,375; *Ex parte McCarthy*, 29 Cal. 405; *Re Davis*, 58 Kan. 379, 49 Pac. 163; *Ex parte Dalton*, 44 Ohio St. 150, 58 Am. Rep. 801, 5 N. E. 138; *Burnham v. Morrissey*, 14 Gray, 225, 74 Am. Dec. 676; *Ex parte Parker*, 74 S. C. 470, 114 Am. St. Rep. 1011, 55 S. E. 124, 7 Ann. Cas. 874; *Re Falvey*, 7 Wis. 630; *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124.

But even assuming the dicta of *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377, to be correct, the power of state legislatures to punish for contempt is based on different grounds than the power of Congress.

*People ex rel. McDonald v. Keeler*, 99 N. Y. 475, 52 Am. Rep. 53, 2 N. E. 620.

The power to punish for contempt may be conferred on a city charter.

Ibid.; *Briggs v. Mackellar*, 2 Abb. Pr. 30; *Re Dunn*, 9 Mo. App. 255.

Holt, J., delivered the opinion of the court:

Relator was, by the city council of the city of Virginia, found guilty of contempt for refusing to produce and submit to the council for inspection his invoices, showing the purchase of products used in the meat business carried on by him in the city. Failing to pay the fine imposed, he was placed in respondent's custody. He sought liberty through a writ of habeas corpus. From the order discharging the writ, and remanding him, he appeals.

The city of Virginia is under a home rule charter which contains these provisions:

"Section 87. . . . The city council, and any of its committees authorized by it so to do, shall have the power to compel the attendance of witnesses and the production of books, papers and other evidence at any of its meetings, or before such committee, and for that purpose may issue subpoenas or attachments in any case of inquiry or investigation, to be signed by its president, or the chairman of such committee as the case may be, which shall be served and executed by any officer or person authorized by law to serve subpoenas and other processes.

"Section 88. . . . If any witness shall refuse to testify to the facts within his knowledge, or to produce any books or papers in his possession, or under his control, the city council shall have the power to fine or commit him for contempt."

The council is empowered to license and regulate butcher shops and slaughterhouses, to provide for inspection and prevent the offering for sale of unwholesome meats and fish, and to establish and regulate the location of markets and market houses. A resolution was duly adopted by the city council to investigate matters pertaining to the purchase, sale, and handling of

meats, fowl, and fish, with a view to determine whether conditions were such as to require the city to establish a municipal slaughterhouse, whether meat dealers should be licensed, whether any pool or illegal combination had been formed to control the prices on meats and fish in the city, who were in such combination, if it existed, and what effect it had on prices, and the qualities of meats, and how the prices on these products compared with the prices in other cities. Under subpoena duces tecum relator came before the council, pursuant to the resolution, was sworn, and gave testimony. However, while announcing a willingness to answer any proper question, he refused to produce his invoices showing the wholesale prices paid by his firm for meats during a certain month, being the documents called for by the subpoena. For this refusal he was adjudged guilty of contempt by the council, and a fine of \$20 imposed.

The relator claims that municipal corporations have not been granted the power to incorporate such a provision, as the above set out, in a home rule charter. It is conceded that the legislature has the power to require witnesses to attend and give pertinent testimony upon a subject legitimately before that body for investigation, and in case of contumacy to punish as for contempt. *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615; *Re Davis*, 58 Kan. 379, 49 Pac. 160; *Ex parte Dalton*, 44 Ohio St. 142, 58 Am. Rep. 800, 5 N. E. 136; *Ex parte Parker*, 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 Ann. Cas. 874. But the courts, upon habeas corpus or other proper proceeding, will examine into the matter and determine whether the conviction was lawful. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. St. Rep. 49, 2 N. E.

615; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

It is argued by the respondent that, since the legislature possesses this power, a city has the right, under the Constitution, to adopt a home rule charter giving its city council the same power, its possession being as necessary to efficient performance of the functions of its legislative body as to that of the state's; and, further, it is claimed that the legislature, pursuant to § 36, art. 4, of the Constitution, by § 1345, Gen. Stat. 1913, has given to cities and villages full power to adopt "any scheme of municipal government not inconsistent with the Constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption" of the constitutional amendment forbidding special legislation, and that this confers the power to coerce obedience by the use of contempt proceedings the same as is employed by courts of record.

Under the common law in England, a municipal corporation had no authority to punish for contempts, unless Parliament had expressly granted the same. The well-considered opinion in *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, holds that the Bill of Rights in the Constitution of that commonwealth, essentially the same as ours, precludes the legislature from granting a city council the power to punish as for contempt. It is therein said: "The legislature may also provide for the punishment, upon indictment and trial in the courts of justice, of any person who, being duly summoned, refuses to appear and testify before any board or tribunal upon a matter which it is authorized by law to investigate or decide. But the legislature cannot delegate to or confer upon municipal boards or officers that are not courts of justice, and whose proceedings are

not an exercise of judicial power, the authority to imprison and punish, without right of appeal or trial by jury."

On the other hand, the courts in Missouri have held that the power to punish a contumacious witness as for contempt is a necessary incident to the authority to call witnesses, and is lodged with every legislative body, administrative board, or officer clothed directly or indirectly with power to investigate or decide matters upon testimony. *Re Dunn*, 9 Mo. App. 255; *Re Sanford*, 236 Mo. 665, 139 S. W. 376.

Without determining which of these opposing views ought to be adopted, we may concede, for the purpose of this case, that by law administrative boards and officers, including the governing board or council of municipal corporations, may be invested with authority to punish a contumacious witness who refuses to respond to proper inquiries concerning a subject which such board, council, or officer is required to act upon. But we do hold, in view of our constitutional guaranties and the trend of legislation, that such power is not to be implied or inferred. That the citizen shall not be deprived of his liberty without due process of law has always been a cherished idea of framers of constitutions and laws in this country. The legislature of this state has carefully defined what constitutes contempt of its own authority and limited the punishment it may inflict (Gen. Stat. 1913, §§ 38 and 39), and also undertaken to define what shall constitute contempt of court, prescribe the procedure to be followed by the courts in adjudications upon contempts, and limit the punishment. When the legislature has been so careful by explicit statutory provisions to guard the liberties and rights of the citizen as against its own power and that of the courts in matters relating to contempt, we cannot conclude that villages and cities were in-

tended to have free hand to vest the great coercive power to punish for contempt, so readily converted into an instrument of oppression, in its councils, or administrative boards, or officers, ordinarily composed of or being persons of limited legal knowledge and experience.

We also find statutes wherein the legislature has conferred the power to call witnesses and punish for contumacy, thus showing that this right to punish is not left to inference. See § 5136, Gen. Stat. 1913, in case of state fire marshal. It would almost seem that the legislature here had some doubt concerning the power, for in the next section it is provided that the marshal, instead of himself meting out punishment upon a witness, may apply to the court to have it done. And in § 3236, Gen. Stat. 1913, the public examiner is given the powers possessed by the courts in the matter of securing testimony, thus conferring judicial authority to be exercised in the manner prescribed for courts. By §§ 2293, 4020, 4184, Gen. Stat. 1913, the attorney general, the board of control, and the Railroad and Warehouse Commission are given express authority to subpoena and examine witnesses; nevertheless contumacy may not be passed upon or punished by the attorney general or the two chief administrative boards of the state, but must be referred to the courts. And we take it that the enforcement of the authority to obtain testimony conferred by such sections as 3942, 3907, 3911, and 9288, Gen. Stat. 1913, must go to the district court, if there be contumacy.

We are also of the opinion that no necessity exists for an inference of a power in municipal corporations to determine and punish as for contempt the refusal of a person to testify or produce private documents in investigations relating to municipal affairs. Where any body, board, or officer of a village or city has the right to hear testimony, the

right may be enforced under §§ 8370 and 8373, Gen. Stat. 1918. *Minneapolis v. Wilkin*, 80 Minn. 140, 14 N. W. 581; *Wolf v. State Medical Examiners*, 109 Minn. 360, 123 N. W. 1074. Grant that a city council may have express or implied authority to examine witnesses and inspect documents, the enforcement thereof through the aid of courts under the last-cited sections will safeguard the rights of the citizen against unlawful inquisitions, and at the same time give the municipality all legitimate aid in the performance of its proper governmental and administrative functions. Authority to punish for contempt should not be left to inference, but must be expressly granted. *Noyes v. Byxbee*, 45 Conn. 382; *Brown v. Davidson*, 59 Iowa, 461, 13 N. W. 442; *Re Davis*, 58 Kan. 379, 49 Pac. 160.

But, even could the correctness of the conclusion we have reached be questioned, it is entirely clear that the city council had no lawful right to demand that relator produce the invoices called for. It is not the function of city councils to procure evidence for the attorney general for prosecution

Contempt—  
failure to  
produce  
immaterial  
evidence.

of illegal combinations. Grant that municipal corporations have the power to license butchers, employ inspectors to prevent the sale of unwholesome meats, and regulate market places, we fail to see the connection between any of these matters and the price at which relator in the past had bought his wares. A city or village surely has no right to fix prices, or limit the profits of merchants engaged in lawful business. If the city of Virginia is to embark in the meat business, it must do so as any private concern in like business. No private person, desirous of engaging in the meat or slaughter business, can by lawful means compel those already in the business to disclose the price at which their merchandise is bought or sold. Under such deci-

sions as *People ex rel. McDonald v. Keeler and Kilbourn v. Thompson*, supra, and *Ex parte Conrades*, 185 Mo. 411, 85 S. W. 160, the invoices of relator were not pertinent to any

investigation which the city council could legitimately pursue.

Relator is unlawfully deprived of his liberty.

Order reversed.

### ANNOTATION.

#### Power of municipal councils to punish for contempt.

Municipal councils have no inherent power to punish for contempts, and their power to punish contempts must be derived from either constitutional or statutory provisions. There is apparently no doubt but that such power can be conferred upon them by the Constitution, but there appears to be a conflict in the cases as to whether the legislature can give them such power. The weight of authority, however, seems to sustain the grant of such power by statute.

It is stated in *Whitcomb's Case* (1876) 120 Mass. 118, 21 Am. Rep. 502, that it is universally admitted that by the law of England a town or city council had no power, without express act of Parliament, to commit for contempt of its authority.

It was held in *Whitcomb's Case*, that the common council of the city of Boston had no power to commit and punish for contempt one who refused to answer a certain question before a special committee of the council, appointed with full power to investigate and report upon a specified subject; and that a statute undertaking to confer the power to punish for contempt upon either branch of a city council, or upon the selectmen of a town, is inoperative and void, because it is a violation of the Constitution of the commonwealth, and contrary to the law of the land. The provision held to be violated was the twelfth article of the Declaration of Rights prefixed to the Constitution, which states that no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

The court, in *Whitcomb's Case*, said:

"The legislature may also provide for the punishment, upon indictment and trial in the courts of justice, of any person who, being duly summoned, refuses to appear and testify before any board or tribunal upon a matter which it is authorized by law to investigate or decide. But the legislature cannot delegate to or confer upon municipal boards or officers that are not courts of justice, and whose proceedings are not an exercise of judicial power, the authority to imprison and punish, without right of appeal or trial by jury." "The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge, and subject to the paramount control of the legislature. Neither branch of the city council is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen."

In *Re Yard* (1891) 48 Phila. Leg. Int. (Pa.) 288, affirmed in (1892) 148 Pa. 509, 24 Atl. 63, upholding a statute giving a certain court power to compel witnesses to be sworn and testify before an investigating committee of a city council, where it appeared that the clerk of the common council of Philadelphia, pursuant to the statute, reported to the court the refusal of a witness to testify before a subcommittee of the finance committee of the council, neither the council nor its committee asserting that they had the

power to punish such witness for contempt, it was stated that the exercise of a power to punish for disobedience belongs to the judicial department of the government, and that unless there is authority given by the Constitution to some other department or tribunal to punish for this cause, such punishment cannot be imposed.

On a similar report by the clerk of the councils of the city of Philadelphia, under the same statute, it was held in *Simon's Case* (1895) 16 Pa. Co. Ct. 353, that a witness before an investigating committee of such councils could not be compelled by process for contempt to answer an irrelevant question. It was stated in this case that before the passage of such statute, investigations by committees of councils were futile, because witnesses could not be compelled to answer; and that to remedy this evil the act was passed.

But it was held in *Re Dunn* (1880) 9 Mo. App. 255, that the house of delegates of the municipal assembly of St. Louis had power to punish for contempt a witness who appeared before a committee of such house, but refused to produce a book called for by a subpoena duces tecum, under a charter providing that the assembly or either house shall have power to compel the attendance of witnesses and the production of papers relating to any subject under consideration, and under an ordinance passed in pursuance of such charter provision, authorizing either house of the municipal assembly to punish for contempt any person who, when duly subpoenaed, fails to appear before a committee or refuses or fails to answer any question propounded to him by the committee, or fails to produce any book or paper required by them. It was further held in this case that such charter provision was, as required by the Constitution, in harmony with the Constitution and laws of the state, and that it did no violence either to the declared law, or to the policy or manifest governmental purposes of the state, as shown in her Constitution and statutory amendments, and that such charter and ordinance provisions

did not violate the constitutional guaranties against unreasonable searches and seizures, against depriving any person of life, liberty, or property without due process of law, and in favor of a trial by jury, since such guaranties have no application to commitment for contempt by any tribunal lawfully acting in its quasi judicial capacity.

It is stated in the *Dunn Case* that the legislature cannot possibly perform its whole duty to the public without sometimes doing acts of a judicial nature, that it must investigate and decide upon facts, that it cannot do this with effect without the power to examine witnesses and to compel their attendance, and that in all such matters a municipal legislature differs in nothing from any other, except in so far as its powers are defined by the charter of its creation.

When municipal councils are invested by the legislature with power to punish for contempt, such power must be expressly granted, and should not be left to inference. The reported case (*STATE EX REL. PEERS v. FITZGERALD*, ante, 1582); *Re Palmeter* (1897) 58 Kan. 809, 51 Pac. 288.

Statutes conferring such power are strictly construed, and any fair reasonable doubt as to the existence of such power is resolved against the council. *Re Cole* (1896) 16 Misc. 134, 38 N. Y. Supp. 955.

And the power cannot be extended beyond the limit imposed by the law. *People ex rel. Webster v. Van Tassell* (1892) 64 Hun, 444, 19 N. Y. Supp. 643, affirmed on opinion below in (1892) 135 N. Y. 638, 32 N. E. 646.

It is stated in *Re Sanford* (1911) 236 Mo. 665, 139 S. W. 376, that in many of the states the power to punish for contempt has been conferred upon city councils.

It was held in *Re Holman* (1917) 197 Mo. App. 70, 191 S. W. 1109, that the board of aldermen of St. Louis had power to issue a warrant for the commitment of a witness who refused to testify before a committee of the board, after being duly subpoenaed to attend an investigation to secure information for legislation within their



jurisdiction. The city charter contained the provision that the board of aldermen should have power, and may delegate it to any committee, to subpoena witnesses and order the production of books and papers relating to any subject within its jurisdiction, and to arrest and punish by fine or imprisonment, or both, any person refusing to obey such subpoena or order. The opinion in this case was adopted by the supreme court on a petition in the latter court for a writ of habeas corpus. (1917) 270 Mo. 696, 195 S. W. 711.

And it was held in *Re Conrades* (1904) 112 Mo. App. 21, 85 S. W. 150, that the house of delegates, a branch of the municipal assembly of the city of St. Louis, had power to punish for contempt a witness who refused to produce books required by a subpoena duces tecum before a committee of such house, appointed in pursuance of resolutions of such house to investigate tax dodging, which directed the committee to investigate the books, records, and accounts in the several city departments wherein returns were made of taxes, and empowered them to subpoena witnesses and to send for persons and papers. The city charter provided that the assembly, or either house, should have power to compel the attendance of witnesses, and the production of papers relating to any subject under consideration in which the interests of the city were involved, and an ordinance, enacted by virtue of such provision, provided that whenever either of the houses of the municipal assembly shall by resolution authorize a committee to make an investigation of any question or matter on which such house may lawfully take action, and shall empower such committee to send for persons and papers, the committee shall thereupon have authority to issue subpoenas and subpoenas duces tecum, and that such house shall, upon the report by the committee of the refusal of a witness to testify or to produce books or papers, issue a warrant for the arrest of the accused witness, and shall have him before the house to answer for contempt. One of the judges dis-

sented, mainly upon the ground that the resolution did not authorize the committee to compel the production of the books in question, and asked that the cause be certified to the supreme court. The supreme court in (1904) 185 Mo. 411, 85 S. W. 160, without passing upon the question whether or not the house of delegates had the power to punish for contempt, held that the action of the committee in requiring the production of the books in question was beyond the scope of its authority under the resolution of its creation, and ordered the witness discharged from custody.

A town council, made by its charter a court for the trial of violations of its ordinances, has power to punish for contempt committed in its presence, under provisions of the Code declaring that every court has power to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings; and that the judicial power of the state is vested in such tribunals as are created by the Constitution and such other inferior courts as are or may be established by law, and such persons as are or may be specially invested with powers of a judicial nature. *Swafford v. Ber-rong* (1889) 84 Ga. 65, 10 S. E. 593.

But it is held in the reported case (*STATE EX REL. PEERS v. FITZGERALD*, ante, 1582) that a statute, passed pursuant to a provision of the Constitution relative to home rule charters of villages and cities, giving full power to adopt any scheme of municipal government not inconsistent with the Constitution, and to provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, does not authorize a city to grant its city council power to punish a witness called before it for contempt.

So, a general welfare clause, which authorizes a city council to enact such ordinances as may be deemed expedient for maintaining the peace, good government, and welfare of the city and its trade and commerce, does not

authorize the city council to confer power upon the police judge to adjudge a person guilty of contempt and to imprison him therefor. *Re Palmer* (1897) 58 Kan. 809, 51 Pac. 288. The court said: "Where the power to imprison for contempt rests upon statute, as in this case, it is generally held that it is not to be inferred, but must be clearly expressed. There is certainly room to doubt whether the legislature can delegate to a city council the power to create a tribunal and vest it with judicial power of this character, but however that may be, it is clear to us that no such power is delegated by the general welfare clause above referred to."

A city charter provision, authorizing the imprisonment of a witness before the common council, who refuses to be sworn or to answer proper questions, does not authorize the punishment of a witness for contempt who refuses to produce books and papers before an investigating committee of the council. *People ex rel. Webster v. Van Tassell* (1892) 17 N. Y. Supp. 938, affirmed in (1892) 64 Hun, 444, 19 N. Y. Supp. 643, which is affirmed on the opinion below in (1892) 135 N. Y. 638, 32 N. E. 646.

A committee of inquiry and investigation, appointed by a municipal corporation of Quebec, in issuing a rule declaring in contempt of such committee one who failed to appear and give testimony, was held to have exceeded its powers, and to have assumed to act as a court, and to have exercised judicial functions. *Lussier v. Maisonneuve* (1898) *Rap. Jud. Quebec* 15 C. S. 45.

In *Briggs v. Mackellar* (1855) 2 Abb. Pr. (N. Y.) 30, under a statute providing that the clerk of either board of the common council may issue subpoenas to compel the attendance of witnesses before any committee of such board, that a witness so subpoenaed may be required to testify in respect to any matters pending before the committee, and that on his refusal to answer any proper questions, a justice of the supreme court, or the judge of the common pleas, shall, on application, issue an order

requiring him to show cause why an attachment should not issue against him, and shall compel him to testify, and punish disobedience as if the matter were legally pending in court, an application for an attachment was granted against persons subpoenaed as witnesses before a committee of the board of aldermen of New York city, for their refusal to answer questions on an inquiry into the state and condition of the police department, and the court stated that the common council, independent of the statute, as a municipal corporation clothed with legislative powers, had the right inherent in either board, of investigating municipal matters in the ordinary legislative mode, together with the power not only of summoning witnesses to appear and testify, but also the power of enacting ordinances imposing pecuniary penalties upon witnesses neglecting to attend, or refusing to testify, and that whether the provisions in *Magna Charta*, incorporated in our Bill of Rights, that no one shall be imprisoned except by due process of law, would, as has been held repeatedly in respect to municipal corporations, deprive either board of the common council of the power of imprisoning a disobedient witness, it was not necessary in this case to inquire, since the statute had provided a mode by which the disobedience of the witness might be punished by imprisonment, if necessary.

It appears from the case of *People ex rel. Steitz v. Rice* (1890) 57 Hun, 62, 32 N. Y. S. R. 7, 10 N. Y. Supp. 270, that a committee of a county board of supervisors has no power to punish as for contempt refusal of a witness, duly subpoenaed, to testify before it, such committee having power by resolution to investigate certain matters, with full power to employ counsel and examine witnesses concerning such matters, since such committee in this case reported the refusal to answer to the court under a provision of the statute that whenever a person duly subpoenaed shall refuse to answer any question before the board of supervisors, which a majority thereof shall decide to be proper and pertinent, he

shall be deemed guilty of contempt, and it shall be the duty of the chairman of the board, or of the committee, to report these facts to a specified judge or court, who shall thereupon issue an attachment.

It likewise appears from the case of *Re Westchester County* (1896) 6 App. Div. 144, 39 N. Y. Supp. 878, that a committee of a board of supervisors has no power to punish for contempt the disobedience of a subpoena issued by such committee. The court said that under the Code of Civil Procedure

as first enacted, §§ 855 and 856 empowered the body issuing a subpoena to issue its warrant to the sheriff, commanding him to arrest the defaulting witness, and bring him before it, or, in case of a refusal to testify, it might commit such defaulting witness to jail until he submitted to testify, or was discharged according to law; but that such sections have been so amended as to take from the body issuing the subpoenas the power to issue a warrant, and that can now be done only by a judge. G. V. L.

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WILLIAM F. O'NEIL, Deputy Chief of Police,  
v.  
PROVIDENCE AMUSEMENT COMPANY.

*Rhode Island Supreme Court — January 29, 1920.*

(— R. I. —, 108 Atl. 887.)

**Constitutional law — due process — requiring employee at fixed salary.**

1. Compelling a theater proprietor to employ one to guard audiences from fire danger at a salary fixed by the statute deprives such proprietor of his property without due process of law.

[See note on this question beginning on page 1628.]

**Theater — character of business.**

2. The carrying on of a theater or place of amusement is a private business.

[See 26 R. C. L. 710.]

**— right to conduct.**

3. The amusement business, being private, may be exercised under the police power of the state, which is subject to the limitations and provisions of the Constitution.

[See 26 R. C. L. 696.]

**Court — assumption as to exercise of legislative power.**

4. The court cannot, in passing upon the constitutionality of a law imposing upon theaters the duty of employing an approved person at a specified salary to guard against fires, assume that the legislative power has been properly exercised.

[See 6 R. C. L. 241.]

**Constitutional law — fixing salary of theater employee — validity.**

5. Provisions in a statute for the protection of theater patrons, fixing the wages of an employee whom the theater is compelled to employ for fire protection, forbidding his discharge without approval of the fire commissioners, and forbidding any reduction in his salary, are unconstitutional as depriving the proprietor of the theater of his liberty of contract.

[See 6 R. C. L. 271.]

**Statute — unconstitutional in part — effect.**

6. A statute for the protection of theater employees is not rendered void by the invalidity of provisions requiring the employment of one to protect audiences against danger from fire, at a fixed salary which cannot be reduced without permission of the fire commissioners, who must also consent to his discharge.

[See 6 R. C. L. 121 et seq.]

(Rathbun and Sweetland, JJ., dissent.)

**CERTIFICATION** by the District Court for the Sixth Judicial District for determination by the Supreme Court of questions arising upon motion by defendant to dismiss a complaint charging him with violation of an act regulating the salary to be paid to one employed to guard theaters against danger from fire, which resulted in a denial of the motion and finding him guilty. *Questions answered and case sent back.*

The facts are stated in the opinion of the court.

Messrs. Elmer S. Chace, Henry C. Crain, and Ellis L. Yatman, for complainant:

Defendant was not deprived of its property without due process of law, as all property is held subject to the valid exercise of the police power.

*Brown v. Keener*, 74 N. C. 714; *Pool v. Trexler*, 76 N. C. 297; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Dill. Mun. Corp.* 5th ed. § 801; *Re Ten-Hour Law*, 24 R. I. 608, 62 L.R.A. 612, 54 Atl. 602.

Acting under this power, the state has the right to regulate the operation of theaters.

*Tannenbaum v. Rehm*, 152 Ala. 494, 11 L.R.A. (N.S.) 700, 126 Am. St. Rep. 52, 44 So. 532; *Waters v. Leech*, 3 Ark. 110; *Hartford v. Parsons*, 87 Conn. 412, 87 Atl. 736, Ann. Cas. 1916A, 1182.

The act in question is a proper regulation of the operation of theaters.

*East Shore Land Co. v. Peckham*, 33 R. I. 541, 82 Atl. 487; *State v. Kofines*, 33 R. I. 211, 80 Atl. 432, Ann. Cas. 1913C, 1120; *Cleveland v. Tripp*, 13 R. I. 50.

The reasonable cost of special service in the regulation of theaters may be imposed upon the owners or licensees thereof.

*Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 287, 6 Sup. Ct. Rep. 1114; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 18; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *New Orleans v. Hop Lee*, 104 La. 601, 29 So. 214; *Harrison v. Baltimore*, 1 Gill, 264; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Tannenbaum v. Rehm*, 152 Ala. 494, 11 L.R.A. (N.S.) 700, 126 Am. St. Rep. 52, 44 So. 532; *Hartford v. Parsons*, 87 Conn. 412, 87 Atl. 736, Ann. Cas. 1916A, 1182.

Unjust discrimination is not shown against the defendant.

*Barbier v. Connolly*, 113 U. S. 27, 28

L. ed. 923, 5 Sup. Ct. Rep. 357; *Lindsley v. Carbonic Acid Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Finley v. California*, 222 U. S. 28, 56 L. ed. 75, 32 Sup. Ct. Rep. 13; *Selover, B. & Co. v. Walsh*, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.

Chapter 1780 of the Public Laws 1919 does not impair the obligation of contracts.

*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 388; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Austin v. Tennessee*, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132.

Messrs. Alexander L. Churchill, Philip C. Joslin, and John E. Bolan, for defendant:

That portion of the act in question which compels the payment of \$3 a day to the person employed to guard against danger by fire is unconstitutional, in that it deprives the defendant of liberty of contract, and deprives it of its property without due process of law.

*Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 31; *Buenzle v. Newport Amusement Asso.* 29 R. I. 23, 14 L.R.A. (N.S.) 1242, 68 Atl. 721; *Horney v. Nixon*, 213 Pa. 20, 1 L.R.A. (N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; *Collister v. Hay-*

man, 183 N. Y. 250, 1 L.R.A.(N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 5 Ann. Cas. 344; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298; *Smith v. Texas*, 233 U. S. 632, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The provision of the act in question is unconstitutional and void, because thereunder the defendant is deprived of the equal protection of the laws, contrary to § 1 of the 14th Amendment.

*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Wisconsin Asso. v. Weigle*, 167 Wis. 569, 168 N. W. 883; *Re Van Horne*, 74 N. J. Eq. 600, 70 Atl. 986; *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *Opinion of Justices*, 220 Mass. 627, L.R.A.1917B, 1119, 108 N. E. 807.

The provision of the act forbidding discharge or reduction of salary by the proprietor of a theater in the city

of Providence, without the consent of the board of fire commissioners, is unconstitutional and void, in that it deprives the defendant of liberty in violation of § 1 of the 14th Amendment of the Constitution of the United States.

*Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Opinion of Justices*, 220 Mass. 627, L.R.A.1917B, 1119, 108 N. E. 807.

*Vincent, J.*, delivered the opinion of the court:

This case comes before us upon the constitutionality of § 5 of chapter 131 of the General Laws of 1909, as amended by chapter 1780 of the Public Laws of 1919, approved April 24, 1919. The act is entitled, "Of Diminishing Danger to Life in Case of Fire." The portion of the act which we are called upon to examine in the consideration of the questions presented to us is as follows: "The board of fire commissioners, or, in case there is no such board, the chief of the fire department of every city shall station in every theater during the time any audience is present therein a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars, except in the city of Newport, where such person or persons holding the license shall pay such city for the attendance of such fireman the sum of three dollars, for every day during which any performance, show or exhibition shall be given therein: Provided, however, that in the city of Providence in lieu thereof the person or persons holding the license pertaining to such theater shall employ at a salary of not less than three dollars per day a suitable person, approved by the board of fire commissioners thereof, who shall be stationed in such theater during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said board to guard against fire, and to protect life and property in case of fire therein, and who shall

not have any other duties and in case said board at any time shall withdraw its approval of any such person, another person approved by said board shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment nor his salary reduced except with the prior approval of said board; and said board from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said board from time to time may assign any officers or members of the fire department thereof to inspect such theaters and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theaters in said city; and provided further, that in the cities of Woonsocket and Central Falls in lieu thereof the person or persons holding the license pertaining to such theaters shall employ a suitable person approved by the chief of the fire department thereof, who shall be stationed in such theater during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said chief of the fire department to guard against fire, and to protect life and property in case of fire therein, and in case said chief of the fire department at any time shall withdraw his approval of any such person, another person approved by said chief of the fire department shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment except with the prior approval of said chief; and said chief from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said chief from time to time may

assign any officers or members of the fire department thereof to inspect such theaters and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theaters in said cities."

A complaint issued by the district court of the sixth judicial district charged the defendant; holding a theatrical license in the city of Providence, with failure to pay \$3 a day, pursuant to said § 5, to one Robert S. Gallagher employed by said defendant to guard against danger from fire in its theater located in said city. The defendant pleaded not guilty.

At the hearing in the district court, it appeared that the defendant had not paid the sum of \$3 a day to the said Gallagher; that he had been employed for some two years, and still was employed, at \$2 a day; that he was approved as competent for such employment by the board of fire commissioners of the city of Providence; and that such approval was in force at the date of the complaint. The defendant offered testimony as to the character of the contract of hiring, the seating capacity of the theater in question, and the seating capacity of the theaters in the various cities of the state, and then filed its motion to dismiss the complaint and to discharge the defendant on the ground that said act was unconstitutional. The defendant was found guilty, sentence was stayed, and the constitutional questions raised by the motion to dismiss were certified to this court for determination.

The act in question appeared originally as chapter 181 of the General Laws of 1909, and by § 5 of the said original act it was provided as follows: "Sec. 5. The board of fire commissioners, or, in case there is no such board, the chief of the fire department of every city shall cause to be installed and maintained in every theater therein a fire alarm

box, and shall station in every theater, during the time any audience is present therein, a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars for every day during which any performance, show, or exhibition shall be given therein. The board of police commissioners, or in case there is no such board, the chief of police, of every city shall cause to be installed and maintained in every theater therein a police call box.

Before noting the changes in this section brought about by the later amendatory acts, it may be well to bear in mind that the original act provided that a member of the fire department of each city in the state should be stationed by the fire commissioners or chief of the fire department in every theater, and that each theater in which a fireman was so stationed should pay to the city the sum of \$2 per day for his attendance. At the January session of the general assembly, 1916, § 5 was amended by chapter 1366 of the Public Laws in respect to the theaters in Providence; the amendment providing that the licensee of the theater should employ a suitable person, to be approved by the board of fire commissioners, who should perform the duties which had previously devolved upon the fireman stationed therein, and that such person so employed could not be discharged by his employer without the consent of such board.

At the January session of the general assembly, 1919, the act was again amended by chapter 1718 of the Public Laws in respect to the theaters in the city of Newport, the amendment providing that the theaters in that city should pay the sum of \$3 per day for the services of the fireman stationed therein. Later, at the same session, the act was further amended by chapter 1780 of the Public Laws. It is upon the act as finally amended that the questions now submitted to us arise. Under the provisions of the act as

it now stands, in the cities of Newport, Pawtucket, and Cranston firemen must be stationed in theaters by the respective municipal authorities for which services the city of Newport is required to pay \$3 per day, and the cities of Pawtucket and Cranston \$2 per day. In the cities of Providence, Central Falls, and Woonsocket a person approved by the board of fire commissioners, or other municipal authority, must be employed by the person holding a theatrical license to guard against danger by fire, and cannot be discharged by his employer without the consent of the proper municipal authority. In the city of Providence such employee must be paid not less than \$3 a day, while in Woonsocket and Central Falls no compulsory payment of any amount whatsoever is made necessary, and further, in Providence, the salary of such person cannot be reduced without the previous approval of the board of fire commissioners, while no such provision is in force as regards Woonsocket and Central Falls.

The defendant claims that § 5 of chapter 131, General Laws 1909, as thus amended, is unconstitutional, and raises the following questions:

(1) Does the provision compelling the holder of a theatrical license in the city of Providence to pay \$3 a day to a person employed by him and stationed in the theater to guard against fire deprive the defendant of liberty and property without due process of law?

(2) Does such provision deny the defendant the equal protection of the law?

(3) Does the provision that the salary of the person employed to guard against fire shall not be reduced, except by consent of the board of fire commissioners, deprive the defendant of its liberty and property without due process of law?

(4) Does such provision deny the defendant the equal protection of the law?

(5) Does the provision that such employee cannot be discharged with-

out the prior approval of the board of fire commissioners deprive the defendant of liberty and property without due process of law?

(6) Does the provision requiring the payment of \$3 a day violate the obligation of any contract between this defendant and Robert S. Gallagher, mentioned in the complaint and warrant?

(7) Does the provision requiring the payment of \$3 a day violate article 1, § 2, of the Constitution of Rhode Island, in that it does not distribute the burdens of the state fairly among its citizens?

The defendant advises the court in its brief and argument that it does not object to the provisions of § 5 of chapter 131, as amended by chapter 1780 of the Public Laws, in so far as they compel every person holding a theatrical license to employ a competent person to guard against fire in the theater to which such license pertains, nor to the provision requiring such employee to be approved by the board of fire commissioners, nor to those portions of § 5, as amended, which give power to officers of the fire department to inspect theaters and ascertain whether such employee is properly performing his duty, and therefore all discussion of those matters may be eliminated.

It may be further noted here that under § 8 of said chapter 131 of the General Laws of 1909 it is also provided that the license of any owner or lessee of any theater who shall neglect or refuse to comply with any obligations imposed by said chapter may be suspended or revoked by the authority having the power to grant the same, thus preventing such owner or licensee from giving any performance or entertainment therein.

The defendant claims, first, that the portion of the act which compels the payment of \$3 a day to the person employed is unconstitutional, in that it deprives the defendant of liberty of contract, and deprives it of its property without due process of law, and is therefore in

conflict with the 14th Amendment of the Constitution of the United States.

That the carrying on of a theater or place of amusement is a private business has been

Theater—  
character of  
business.

clearly stated by this court in the case of *Buenzle v. Newport Amusement Asso.* 29 R. I. 23, 14 L.R.A. (N.S.) 1242, 68 Atl. 721, in which the following language of the court in *Horney v. Nixon*, 213 Pa. 20, 1 L.R.A. (N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496, was adopted and made a part of its opinion: "The proprietor of a theater is a private individual, engaged in a strictly private business, which though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public. When he sells a ticket, he creates contractual relations with the holder of it, and whatever duties on his part grow out of these relations he is bound to perform, or respond in damages for the breach of his contract."

And the opinion further holds that no analogy can be drawn between a place of entertainment and a corporation affected with a public duty. Such, therefore, is the law of this state, and it would be useless to pursue further the discussion of this particular point in the case. Reference, however, may be made to *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240, which sustain the proposition that, while the duties of the person so employed may have to do with the public safety, his employment remains a private rela-



tionship in its legal and constitutional aspects. Under the very terms of the act he is employed by the licensee of the theater, and from such licensee he receives his wages. He has no claim against anyone else for compensation for his services. The power of the board to pass upon his competency, prescribe his duties, and scrutinize their performance are only matters of supervision in the interest of public safety.

The sole purpose of the act in question, as its title indicates, is to diminish the danger from fire to those who may assemble in places of amusement, a danger which not only arises from fire itself, but also from the panic which is apt to seize upon an assemblage of people whose individual freedom of movement is more or less restricted. The act provides that every person holding a theater license shall employ a suitable person approved by the board of fire commissioners, who shall be stationed in the theater during the time any audience is present therein; that such person shall perform such duties as may be prescribed by said board to guard against fire; that such person shall have no other duties; that said board may at any time withdraw its approval of any such person, when another person approved by said board shall be employed in his stead; and that said board may assign any officer or member of the fire department to inspect the theaters for the purpose of ascertaining whether the persons employed are properly discharging their duties. These provisions fully meet all the purposes and requirements of the act, which are to protect the audience from the dangers of fire, and to such provisions the defendant offers no objection. The act, however, goes further, and provides that the licensee of the theater employing such a person shall pay him a wage of not less than \$3 per day, and that no such employee shall be discharged by such licensee from his employment, nor his salary reduced, except with the prior approval of the board.

In the case at bar it appears that one Robert S. Gallagher had been for a long period an employee of the defendant at its theater in Providence, charged with the duty of protecting the premises from the dangers of fire, his employment in that capacity had been approved by the board of fire commissioners, and such approval had never been withdrawn, and that the defendant paid to the said Gallagher for his services the sum of \$2 per day. This arrangement between the defendant and Gallagher continued without interruption from the time when the latter was employed by the defendant down to April 24, 1919, when chapter 1780 of the Public Laws was approved. Thereafter, upon the neglect or refusal of the defendant to raise the pay of its said employee to \$3 per day, the complaint was instituted under which the constitutional questions now before us have arisen. The defendant contends that these provisions, compelling the payment of \$3 per day, forbidding the discharge of the employee without the approval of the board of fire commissioners, and forbidding any reduction in the salary of such employee, are unconstitutional, being in violation of the 14th Amendment of the Constitution of the United States.

These provisions seem to us to be unrelated to the purposes of the act. The safety of the public is amply provided for without them. If these provisions are eliminated, the act would still effectively provide for the safety of the people who may compose the audience, and the degree of safety is neither increased nor diminished by the amount of wages paid to the employee, nor does it depend upon depriving the employer of the right to discharge his employee or to reduce his wages. Whatever may be the amount of the wages paid to the employee, and whoever may be empowered to reduce his salary or bring about his discharge, the fact remains that all the elements of the act bearing upon the safety of the public still re-

main in full force and effect. A man whose competency is approved by the board of fire commissioners must be on duty whenever an audience is present, and at all times under the supervision of said board, which may prescribe his duties and, through inspection, see that he discharges them properly, and which may in its discretion withdraw its approval, thus compelling the licensee to employ another person in his stead, who likewise can only act with the approval of said board. Any failure on the part of the licensee to have an approved man on duty would bring about the cancellation of his license, without which he could not continue his business.

As the amusement business is a private business, and not a business affected with a public interest, it

may be exercised under the police power of the state.

But the police power of the state is subject to the limitations and provisions of the Federal Constitution, as the Supreme Court of the United States has held in several cases. In *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, the court said: "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to

pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

See also *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, L.R.A. 1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201.

The 14th Amendment to the Constitution of the United States provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of this provision has been interpreted and defined by the Supreme Court of the United States in a number of cases. In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, the court said: "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

And in *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240, the word

—right to  
conduct.

"liberty," as used in the 14th Amendment, is defined as follows: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

And to the same effect are the cases of *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420.

In the case of *Adair v. United States*, supra, the court said: "While, as already suggested, the rights of liberty and property, guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business, and against his will, to accept or retain the personal services of another or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."

The case of *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024, is referred to in the brief of the complainant, and also in the brief of the defendant. It involves the constitutionality of an act of Congress popularly known as the Adamson Act (U. S. Comp.

Stat. §§ 8680a-8680d, Fed. Stat. Anno. Supp. 1918, pp. 754-756). We do not deem it necessary to discuss that case at great length. The act provided, among other things, that pending, the report of a commission to investigate and deal with the wages of trainmen on interstate railroads, the then-existing rate of compensation should "not be reduced below the present standard day's wage." It differs materially from the case at bar, in that it was a temporary expedient, resorted to in the face of an emergency. It did not undertake to fix a permanent wage, but to retain the already existing wage for a limited period of thirty days, until, through an investigation then progressing, certain rights might be determined, "leaving employers and employees free as to the subject of wages, to govern their relations by their own agreements after the specified time." The act was intended as an exercise of governmental power over a matter of interstate commerce or a business affected with a public interest. The act was passed to meet an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike was threatened, which would bring about commercial paralysis and grave loss and suffering; the parties concerned being unable to agree. It was designed to bridge over a limited period within which the parties might reach an agreement. The question in that case, as stated by the court in its opinion, was: "Did Congress have power under the circumstances stated,—that is, in dealing with the dispute between the employers and employees as to wages, . . . to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power, in order to prevent the interruption of inter-

state commerce, to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees, and to make its will on that subject controlling for the limited period provided for?"

The difference between the Adamson Law and the act which we are considering, which fixes a permanent wage in the absence of any emergency, is so apparent that it need not be specifically pointed out. That the court recognizes a distinction between employment in a private business and an employment in a business charged with a public interest, and that its decision is not intended to apply to the former, is fully evidenced in the opinion itself, wherein it is stated: "Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest."

And it may be fairly said that the court confined itself solely to dealing with an employment charged with a public interest, for the opinion states: "It is also equally true that, as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority."

And, further, that "there is no question here of purely private right, since the law is concerned only with those who are engaged in a business charged with a public interest."

In *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420, the court, in passing upon a statute forbidding the employment of any person as a passen-

ger conductor, unless such person had had two years' experience as a brakeman or conductor of a freight train, declared that "the liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent, and arbitrarily exclude others who are equally competent, to labor on terms mutually satisfactory to employer and employee."

In *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, the court said: "While good faith and a knowledge of existing conditions on the part of a legislature are to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

We have already pointed out that it is obligatory upon the licensee, under the provisions of the act, to employ a person who shall attend at the theater during the time when an audience is present, for the purpose of guarding against fire; that such person must be approved by the board of fire commissioners; that such approval may be withdrawn, compelling the licensee to employ another man; that said board may prescribe the duties to be performed; that the said board may direct some member of the fire department, whose duty it shall be to make an inspection for the purpose of determining whether the person so employed is properly discharging his duties; and that these provisions of the act are not objected to by the defendant.

The act goes further, and dictates a minimum wage, and seeks to take away from the employer the right to discharge or reduce the wages of the employee whom he has em-

played in the conduct of his private business. Neither of these last-named provisions are essential, or have any relation to the protecting features of the act, which are its sole object and purpose.

We cannot assume that the legislative power has been properly exercised. It does not follow that, because the general assembly has enacted a law, it must have had some good and sufficient reason for so doing, although such reason may not be apparent. The court of appeals of New York (*Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636), in a carefully considered and well-reasoned opinion, has satisfactorily disposed of that question, holding that, while generally it is for the legislature to determine what laws are required to protect and secure the public health, comfort, and safety, under the guise of police regulations, it may not arbitrarily infringe upon personal or property rights; and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts, and that when the legislature passes an act ostensibly for the public health, but which does not relate to the purpose sought to be carried out, and which destroys the property or interferes with the rights of the citizens, it is within the province of the court to determine that fact and to declare the act unconstitutional.

Other portions of the opinion in the *Jacobs Case* seem to have a substantial bearing upon the questions now before us. The court in stating the facts says: "The relator at the time of his arrest lived with his wife and two children in a tenement house in the city of New York, in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family, living independently of the others, and doing their cooking in one of the rooms so occupied.

The relator at the time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house, except the room where he was thus engaged. These facts showed a violation of the provisions of the act."

The court then proceeded to quote the provisions of the act; the first section thereof being as follows: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein." N. Y. Laws 1884, chap. 272.

The title of the act was: "An Act to Improve the Public Health by Prohibiting the Manufacture of Cigars and Preparation of Tobacco in Any Form in Tenement Houses in Certain Cases, and Regulating the Use of Tenement Houses in Certain Cases."

This law, by its title and otherwise, purports to be designed to promote the public health, and the court says, in respect to that: "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must therefore pronounce it unconstitutional and void."

The court further says: "This law was not intended to protect the health of those engaged in cigar making, as they are allowed to manufacture cigars everywhere, except in the forbidden tenement houses. It cannot be perceived how the cigar maker is to be im-

proved in his health or his morals by forcing him from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere." "It is . . . plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house, who is a cigar maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty."

The opinion also quotes with approval from the cases of *Austin v. Murray*, 16 Pick. 121, 126, and *Watertown v. Mayo*, 109 Mass. 315, 319, 12 Am. Rep. 694. In the first-mentioned case the court said: "The law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."

And in the last-mentioned case the court said: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."

So, in the case at bar, as we have already demonstrated, the purpose of the act is to protect the public from the dangers of fire, and that the degree of protection for which the act provides can be neither increased nor diminished by fixing the wages of the person employed in carrying out its provisions. The defendant argues that, if the lawmaking power can fix the wages of such employee, it could with equal propriety fix the wages of motormen, telegraph operators, and of those engaged in a variety of other employments. We think there is much logic in that argument. In the *Jacobs Case*, *supra*, the court said: "Such

legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, . . . we will not be far away in practical statesmanship from those ages when governmental prefects . . . regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs, long since in all civilized lands regarded as outside of governmental functions."

In *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 987, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, it was held that a statute of New York, providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such is in conflict with, and void under, the Federal Constitution.

*People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, is another case decided by the court of appeals of New York. A contractor having performed his contract for grading a public street, and having received from the proper authorities a certificate that the contract price had been earned, it was held that he may compel the city to pay the amount due by mandamus, although he has failed to comply with the Labor Statute regulating the amount of wages to be paid his employees, on the ground that such Labor Law, in such respect, invades rights of liberty and property in that it denies to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compels them to pay an arbitrary and uniform rate, and, further, that in effect it imposes a penalty upon the exercise by the city or by the contractor of the right to agree with

their employees upon the terms and conditions of the employment.

And it was held in the case of *Tannenbaum v. Rehm*, 152 Ala. 494, 11 L.R.A.(N.S.) 700, 126 Am. St. Rep. 52, 44 So. 532, that a fireman assigned to duty at a theater under an ordinance requiring the assignment, and providing that the manager of the theater shall pay for such attendance, may bring his action against such manager for compensation for his services. The main contention in that case, however, was that the actual cost of the services could be collected—a point not involved here. It cannot be reasoned from this case that a property owner may be compelled to pay an amount in excess of cost, and we need not consider the cases which deal with the right to reimbursement for the services of a fireman appointed to duty at a theater from the regular force of the city.

In *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, the court held that a state statute which requires locomotive engineers and other persons, employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect by a tribunal established for the purpose, and which exacts a fee from the company for the service of examination, does not deprive the company of its property without due process of law. In that case such provisions were not only closely related to the purposes of the act, but were absolutely essential if the act was to be effective. As the court said in its opinion: "Color blindness is a defect of a vital character in railway employees.

Ready and accurate perception by them of colors . . . is essential to safety of the trains, and, of course, of the passengers and property they carry."

And the court further held that "requiring railroad companies to pay the fees allowed for the examination of parties who are to

serve on their railroads . . . is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law."

The difference between that case and the case at bar is too apparent to require elucidation.

In *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, the question presented was as to the validity of an act precluding the railroad company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its relief department. The defendant in error, while acting as a brakeman in the service of the railroad company, had received injuries for which he had recovered judgment. The railroad company claimed that, the defendant in error having received the benefits to which he was entitled from the relief fund, the payment and acceptance thereof subsequent to the injury constituted a full satisfaction of his claim. The statute involved in that case is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including the employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees; when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall

acceptance of any such relief, benefit or indemnity by an injured, his widow, heirs or representatives after the death of such corporation, person or persons, shall not constitute any bar or defense to any cause of action arising under the provisions of this act. No provision contained hereafter shall be construed to prevent or delay the settlement for damages between the parties subsequent to the injuries received."

Code Supp. Iowa 1913, § 2071.

The railroad company contended that the statute attempts to prohibit the making of a contract for settlement "by acts done after the liability had become fixed." The court, however, rejected that view, holding that, while the acceptance of benefits was, of course, an act done after the injury, the legal consequences sought to be attached to that act were derived from the provision in the contract of membership, and that the stipulation which the statute nullifies is one, made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction. The full import of the case is that it is within the power of the legislature to provide that contracts entered into prior to the injury, and designed to exempt the employer from liability, shall not be legal or binding, and that the statute cannot be abrogated by such a contract. The opinion itself excludes its application to the case at bar when it says, quoting from the case of *Frisbie v. United States*, 157 U. S. 165, 166, 39 L. ed. 658, 659, 15 Sup. Ct. Rep. 636, 588: "The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

The weight of authority is well stated in 6 R. C. L. § 258, as follows: "Since an employee cannot be compelled to work against his will, it is generally recognized that he is at

liberty to refuse to continue to serve his employer. In this respect the rights of the employer and the employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping one in his service whom, for any reason, he does not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property."

It may be here observed that the act before us seeks to deprive the licensee of the free exercise of his right to discharge his employee, but does not attempt to place a similar restriction upon the right of the employee to leave the service of his employer.

We think that the provisions compelling the payment of \$3 per day, forbidding the discharge of the employee without the prior approval of the board of fire commissioners, and forbidding the reduction of his salary take away that freedom and liberty of contract to which the defendant is entitled under the 14th Amendment to the Constitution of the United States, and are, therefore, unconstitutional and void.

We do not think, however, that the elimination of these provisions tends to nullify the act as a whole, but that the other requirements thereof remain in full force and effect.

Under the provisions of the act, if the defendant fails to pay \$3 per day, its license will be refused or taken away by the board of police commissioners, and the defendant's business, otherwise lawful, will forthwith cease. It appears in the case at bar that the defendant, prior to the objectionable enactment, employed a person approved by said board, at \$2 per day, down to the time that the act fixing the wage at \$3 was passed. Such fixing of the price is made without regard to the

Constitutional law—fixing salary of theater employees—invalidity.

Statute—unconstitutional in part—effect.



market price of such services, or whether employer and employee fix a lower rate. It seems to us that this is depriving the defendant of his property without due process of law, and is, therefore, unconstitutional and void under the 14th Amendment to the Constitution of the United States.

As the city of Providence does not furnish any of its employees to guard against fire in any of its theaters, we need not discuss a number of cases cited in the briefs bearing upon the question as to whether the city could legally claim reimbursement for such services.

The defendant further claims that the act deprives it of equal protection of the laws, contrary to § 1 of the 14th Amendment of the Constitution of the United States; in other words, that the law which is applicable to all cities in the state imposes upon the owners or lessees of theaters in Providence a greater burden than is imposed upon others carrying on a similar business in other portions of the state, and the defendant points out that in the cities of Pawtucket and Cranston the act provides that firemen from the city force must be stationed in each theater, to be paid \$2 per day for their services, and that in Providence the person employed by the owner or lessee of a theater shall receive for his services not less than \$3 per day, while in Woonsocket and Central Falls the act does not fix any wage to be paid to the person employed, but leaves owners and lessees in the two cities last named to contract for such service in their discretion.

We do not think it necessary for us to discuss this question, in view of the conclusions which we have already reached regarding the fixing of wages. With that portion of the act eliminated which seeks to fix the wages of such employees, the question of equal protection under the law disappears and becomes purely academic. With such elimi-

nation, all parties will stand upon an equal footing, and be left to contract for such required service upon such terms as may be in accordance with their own judgment and wishes. If the employer and employee have a right to agree upon the terms of the employment, it naturally follows that such employment may be terminated by either party, without the interference or dictation of the board of fire commissioners, and such right is well settled by authority. *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240.

Our decision is that General Laws 1909, chapter 131, § 5, as amended by Public Laws, January Session, 1919, chapter 1780, is in violation of the 14th Amendment of the Constitution of the United States, in so far as it undertakes (1) to fix the wages which a person holding a theatrical license shall pay to a person employed by him to guard against danger by fire; (2) to forbid the discharge of such person so employed without the consent of the board of fire commissioners; and (3) to forbid a reduction in the wages of such employee without the consent of the board of fire commissioners.

The papers in the case are sent back to the District Court of the Sixth Judicial District, with the decision of this court certified thereon, for further proceedings.

**Rathbun, J., dissenting:**

I am obliged to dissent from the opinion of the majority, and have, as I deem it my duty to do, without attempting to analyze said opinion in detail, here set out at length my opinion as to the legal principles involved in the constitutional question before us. I do this for the reason that the majority opinion appears to me to completely disregard the essential facts involved in the case, fails to make application of very elementary principles of the common law of contracts, and particularly because said opinion adopts a

novel and surprising position, opposed to the uniform decisions of this court, and, so far as I can ascertain, to the decisions of all courts, as to the relative powers of the legislative and judicial departments of government.

The above-entitled proceeding is a criminal complaint, preferred against said respondent corporation in the district court of the sixth judicial district. The matter is before us upon the certification of a constitutional question. Said complaint charges that the respondent, "being the person and corporation holding the license pertaining to the Bijou Theater, unlawfully did neglect and refuse to pay to Robert S. Gallagher, a suitable person approved by the board of fire commissioners of said Providence, and employed by the said Providence Amusement Company, a corporation, and stationed in the said Bijou Theater pursuant to the provisions of § 5 of chapter 131 of the General Laws of 1909, as the same was amended by chapter 1780 of the Public Laws of 1919, the sum of \$3 per day while employed as aforesaid, against the statute and the peace and dignity of the state."

To this complaint the respondent pleaded not guilty, and at the trial in said district court questioned the constitutionality of said § 5, chapter 131, General Laws 1909, as amended by chapter 1780 of the Public Laws, January Session, 1919. The respondent was adjudged guilty, sentence was deferred, and said constitutional question has been certified to this court for decision.

Said § 5, as amended, so far as the same relates to the question now before us, is as follows: "The board of fire commissioners, or in case there is no such board, the chief of the fire department of every city shall station in every theater during the time any audience is present therein a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars, except in the city

of Newport, where such person or persons holding the license shall pay such city for the attendance of such fireman the sum of three dollars, for every day during which any performance, show or exhibition shall be given therein: Provided, however, that in the city of Providence in lieu thereof the person or persons holding the license pertaining to such theater shall employ at a salary of not less than three dollars per day a suitable person, approved by the board of fire commissioners thereof, who shall be stationed in such theater during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said board to guard against fire, and to protect life and property in case of fire therein, and who shall not have any other duties and in case said board at any time shall withdraw its approval of any such person, another person approved by said board shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment, nor his salary reduced except with the prior approval of said board; and said board from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said board from time to time may assign any officers or members of the fire department thereof to inspect such theaters and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theaters in said city; and provided further, that in the cities of Woonsocket and Central Falls in lieu thereof the person or persons holding the license pertaining to such theaters shall employ a suitable person approved by the chief of the fire department thereof, who shall be stationed in such theater during the time any audience is present

therein, and who shall perform such duties as from time to time may be prescribed by said chief of the fire department to guard against fire, and to protect life and property in case of fire therein, and in case said chief of the fire department at any time shall withdraw his approval of any such person, another person approved by said chief of the fire department shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment except with the prior approval of said chief; and said chief from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said chief from time to time may assign any officers or members of the fire department thereof to inspect such theaters and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theaters in said cities."

The respondent's various claims as to the unconstitutionality of said section are substantially as follows:

(1) That said section compelling the holder of a license pertaining to a theater in the city of Providence to pay \$3 per day to the person employed to guard against fire and to protect life in case of fire in such theater, and in providing that the salary of the person so employed to guard against fire and to protect life in such theater shall not be reduced, except with the prior approval of the board of fire commissioners of the city of Providence, deprives the defendant of its liberty and property without due process of law, in violation of § 1 of the 14th Amendment of the Constitution of the United States.

(2) That said section, by imposing an unequal burden on the defendant as against the burdens imposed on other persons holding theatrical licenses in other cities in the

state of Rhode Island, and in providing that the salary of the person employed to guard against fire and to protect life in a theater in the city of Providence shall not be reduced, except with the prior approval of the board of fire commissioners of the city of Providence, denies to the defendant the equal protection of the laws, in violation of § 1 of the 14th Amendment of the Constitution of the United States.

(3) That the provision of said section compelling the holder of a license pertaining to a theater in the city of Providence to pay \$3 per day to the person employed by such holder to guard against fire does not distribute the burdens of the state fairly among its citizens, and is in violation of article 1, § 2, of the Constitution of the state of Rhode Island.

(4) That the provision of said section compelling the holder of a license pertaining to a theater in the city of Providence to pay \$3 per day to the person employed by such holder to guard against fire and to protect life in such theater deprives the defendant of its liberty and property without the judgment of its peers, and is in violation of article 1, § 10, of the Constitution of the state of Rhode Island.

(5) That the provision of said section fixing the salary of the person employed to guard against fire in a theater in the city of Providence impairs the obligation of a contract existing between the defendant and Robert S. Gallagher, and is in violation of article 1, § 10, of the Constitution of the United States.

The section in question is plainly an attempt on the part of the general assembly, in the exercise of its police power, to legislate for the safety and welfare of the people. As was stated by this court in *Re Ten Hour Law*, 24 R. I. 608, 605, 61 L.R.A. 612, 54 Atl. 603: "There is also a common assent that the legislature has the right of control in all matters affecting public safety, health, and welfare, on the ground that these are within the indefinable,

but unquestioned, purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise, and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people."

In *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 929, 5 Sup. Ct. Rep. 357, the court said: "But neither the amendment [the 14th Amendment], broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

It is beside the mark for the respondent to claim that it is beyond the power of the general assembly to provide these regulations for the conduct of the theatrical business in this state, because the operation of a theater is a private business. The purpose of the statute is not, primarily to regulate the business of the holders of theater licenses, but to guard the safety of those who attend theatrical entertainments. In the city of Providence, upon every secular day, the audiences in the many theaters number thousands, a large proportion of whom are women and children. Experience has forcibly demonstrated the great hazard to which such audiences are subjected, in the absence of safeguards for their protection and constant vigilance that such safeguards are maintained. It has been shown in many instances that the maintenance of such regulations for the safety of audiences cannot prudently be left to the initiative or to the control of the theater managers or their employees. Although the operation of theaters may in law be regarded as a form of private business, the care for the safety of theatrical audiences clearly presents a field for the exercise of the police power of the state for the public welfare. *Tannenbaum v. Rehm*, 152 Ala. 494;

11 L.R.A. (N.S.) 700, 126 Am. St. Rep. 52, 44 So. 532; *Hartford v. Parsons*, 87 Conn. 412, 87 Atl. 736, Ann. Cas. 1916A, 1182.

The respondent contends that said section, in requiring that it, as the operator of a theater in the city of Providence, should employ a fire guard or inspector at a salary of not less than \$8 per day, and that said guard should not be discharged; nor his salary reduced, except with the approval of the board of fire commissioners, interferes with the respondent's right to freely contract with its servant, and thus deprives it of its liberty without due process of law. It has been held that the right to make contracts is embraced in the conception of liberty guaranteed by the 14th Amendment. This was pointed out by the court in *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240.

It may be noted in passing that the respondent and the majority opinion place great reliance upon the authority of the cases just cited, but the legislation under review in those cases had no reference to health, safety, morals, or the public welfare; and it is in the regulation of those matters alone that the legitimate field is presented for the exercise of the police power. In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, the court was considering the application of a statute of Louisiana, regulating insurance upon property in said state, to a contract of insurance made in New York. In *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, a statute of New York regulating the hours of labor of bakers was declared to have no relation to public health, and not an exercise of the police power. In *Adair v. United*

States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, an act of Congress making it an offense for a public carrier to discharge an employee because he was a member of a labor organization was held not to be within the power of Congress in the regulation of interstate commerce. In *Coppage v. Kansas*, the court was considering a statute of Kansas making it a misdemeanor for an employer to require an employee to agree not to become or remain a member of a labor organization during the time of the employment. Those cases, therefore, are not in point upon the question now before us. They all admit that, when the police power may properly be exercised for the preservation of public health and safety, as Mr. Justice Pitney says in *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240, "such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts."

Mr. Justice Hughes, in commenting upon these cases in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, at page 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259, 262, says: "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right;" and further, that the right to make contracts "is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction."

Said justice then cites, at page 568 of 219 U. S., a list of cases in the United States Reports which support the doctrine which he has enunciated.

In *Chicago, B. & Q. R. Co. v. McGuire*, *supra*, the court held that the "state has power to prohibit contracts limiting liability for injuries made in advance of the injury received, and to provide that the

subsequent acceptance of benefits under such contract shall not constitute satisfaction of the claim for injuries received after the contract," and that "such a statute does not impair the liberty of contract guaranteed by the 14th Amendment."

In *State v. Read*, 12 R. I. 137, the defendant had been convicted on a complaint charging him with "keeping and exposing for sale certain drinks, food, and merchandise" in violation of the following statute: "Section 1. Whenever any religious society shall hold any camp, tent, grove, or other outdoor meeting, for any purpose connected with the object for which such religious society was organized, no person, without the consent of such religious society or of its proper officers, shall keep in any shop, tent, booth, wagon or carriage, or other place for sale, or expose for sale any spirituous or intoxicating liquors, or other drinks, or food, or merchandise of any kind, or hawk or peddle any such liquors, or merchandise within one mile of the place of such meeting: . . .

Provided, however, that nothing herein contained shall be construed to prevent innkeepers, grocers, or other persons from pursuing their ordinary business at their usual place of doing business, nor to prevent any person from selling victuals in his usual place of abode." Laws R. I. 1877, chap. 629.

The defendant had leased land for the purpose of selling food, but the statute prohibited his enjoying the privileges provided for in his contract. He, as well as all landowners, except "innkeepers, grocers or other persons," "pursuing their ordinary business at their usual place of doing business," and a person "selling victuals in his usual place of abode," within 1 mile of the meeting, was by the act denied the liberty of acquiring property by making contracts for the sale of food and other merchandise. But this court held that the statute was constitutional as a valid police regulation.

In the case of *Re Williams*, 79 Kan. 212, 98 Pac. 777, the court up-

held a statute which interfered with the petitioner's liberty of making contracts for the sale or delivery of black powder. The act provided as follows: "It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal mine or mines in the state of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed," etc. Kan. Laws 1907, chap. 250.

The statute applied to no explosive except black powder, and was limited to coal mines; but the court held that the act was a valid police regulation, and did not violate the state Constitution or the 14th Amendment.

In *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970, the court upheld a statute which interfered with the obligation of contract, existing between employer and employee, that the employee should receive a certain portion of his wages in orders on the employer's store. The act provided: "That all persons using store orders to pay their employees shall, if demanded, redeem the same in the hands of the employee or a bona fide holder, in money." Tenn. Laws 1899, chap. 11, § 1.

The court held that the statute was a valid police regulation, and did not violate the state Constitution or the 14th Amendment.

And in *Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492, where the statute required as a safety appliance that mines be propped up, and gave a right of action to employees for any injury occasioned by failure to comply with the provisions of the statute, the employee not only knew the risk, but had by contract with the mine owner waived the right provided by statute to have the mine roof propped up for his safety. The court held that the contract was unenforceable, and that the employee could recover for the injuries received by reason of the owner's fail-

ure to do that which the employee had agreed for a good consideration that the owner need not do. The court held that the act was a proper police measure, and not unconstitutional.

See *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820. The city of New York had by contract given the electrical company the right to use the city streets. The statute requiring electrical conductors to be placed underground imposed a heavy financial burden upon the electrical company as a condition precedent to its enjoying the benefits to be derived from its contract. The New York court held that the act was a valid police measure, and was not unconstitutional as in violation of the contract wherein the electrical company obtained from the city the right to use the streets. On appeal the act was upheld by the United States Supreme Court. See *New York ex rel. New York Elec. Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880.

In *Brick Presby. Church v. New York*, 5 Cow. 540, an ordinance was held valid which prohibited the use for burial purposes of land which the city had previously conveyed to the plaintiff for church and cemetery purposes, by deed containing full covenants of warranty. The court held the ordinance to be a valid police measure.

In *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10, an act prohibiting the purchase, sale, or possession of game during the closed season, even when the game was lawfully killed in a foreign country, was held to be a proper police regulation, and not in violation of the state Constitution or the 14th Amendment. In *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, an act was held valid as a police measure which prohibited the sale and shipment out of the state of game lawfully killed. To the same effect, see *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2

Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, and *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

In the following cases statutes limiting the right to contract have been held constitutional, as valid police measures: In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 388, an act limiting labor in mines to eight hours a day; in *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, an act prohibiting work in laundries from 10 P. M. to 6 A. M., and to the same effect see *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 928, 5 Sup. Ct. Rep. 357; in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, an act fixing the maximum charge for storing grain and prohibiting contracts for a larger amount, and in *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, an act of Congress prohibiting attorneys from contracting for a larger fee than \$10 for prosecuting pension claims.

In Opinion of Justices (Re House Bill No. 1230) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713, the court held constitutional an act requiring all corporations, copartnerships, or individuals engaged in any manufacturing business and employing more than twenty-five employees to pay wages weekly, thus interfering with the right freely to contract.

In *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 638, 635, the court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and the personal rights of the citizen are

unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

We have at this length considered the respondent's claim that under the 14th Amendment there has been secured to the theater manager the absolute and unqualified right to contract as to the service and the compensation of the fireguard or inspector stationed at its theater, and that said § 5, in violation of the 14th Amendment, has undertaken to control the contract between it as a master and said inspector as a servant. In making this contention the respondent and the majority opinion completely lose sight of the fundamental principles underlying the relation of master and servant. These principles are too elementary to require statement, save for the fact they have been entirely disregarded by said argument and majority opinion. The relation of master and servant exists only when "the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done." 26 Cyc. 966.

"He is to be deemed a master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in the details." 26 Cyc. 965.

An examination of said § 5 unmistakably indicates that the relation there established between a theater operator and a fire inspector is entirely lacking in the elements essential to the relation of master and servant. Disregarding for the time those provisions the validity of which the respondent questions, viz., fixing a minimum salary and providing that the fireguard may not be discharged, or his salary reduced, "except with the prior approval of

said board," it appears that in the city of Providence the licensee of a theater shall employ a suitable person, approved by the board of fire commissioners, who shall be stationed in such theater during the time any audience is present therein, who shall perform the duties prescribed by the board to guard against fire, and to protect life and property in case of fire in such theater, who shall not have any other duty, and in case said board at any time shall withdraw its approval of such person, another person, approved by said board, shall be employed in his stead. The theater licensee has neither the unrestricted choice, control, nor direction of the inspector. Such licensee can only employ an inspector approved by the board of fire commissioners. The period during which his services are to be performed is fixed by law. The licensee cannot prescribe his duty, such direction being vested in the fire commission; the licensee may not require or receive services from the inspector beyond the duties prescribed by said board. If said board is not satisfied with the manner in which the inspector performs his duties, he must be replaced by another inspector approved by the board; and the power is given to the board, and not to the licensee, to prescribe the uniform and the badge to be worn by such inspector.

Said section does use the word "employ" with reference to the appointment of such inspector. The respondent seizes upon said word as indicative of the nature of the inspector's service, and appears to assume that, since masters "employ" their servants, the employment of the inspector by the licensee makes said inspector the servant of the licensee. Such reasoning magnifies the use of a somewhat indefinite word into an indication of legislative intent contrary to and inconsistent with all the other provisions of said section. It is plain that the limit of the intention of the general assembly in the use of the word "employ" was to permit the theater licensee in

Providence to nominate for the approval of the fire commissioners, or to select for their approval, the person who should act as fire inspector in the theater of such licensee; but the person so nominated, when approved by the board, did not become in the slightest particular the servant of such licensee, but became the person charged with the performance of a public duty under the direction of the board of fire commissioners. For the court to give the conclusive force to the word "employ" which the respondent urges would be to question the deliberate action of a co-ordinate branch of the government upon a mere verbal quibble, and to magnify what is clearly circumstantial into something essential and intrinsic.

Under the statute the nature of the duties to be performed by the theater fireguards in each of the cities of the state is the same, whether said fireguard be a member of the fire department of such city or a person selected by the theater licensee and approved by the board of fire commissioners or the chief of the fire department of such city, save that in the city of Providence it is specially provided that the duties of the fireguard shall be restricted to the public duty of guarding against fire, and protecting life and property in case of fire, and that he shall have no other duty. This provision would completely exclude the performance by the inspector of any service for the theater licensee in the ordinary conduct of its business as the operator of a theater. It is clear to us that the fireguard stationed in a theater is not the servant of the theater licensee, but a person charged with the performance of a public duty, and all the respondent's criticism of said § 5 as an attempt to interfere with its right to contract freely with its servant is without point or pertinency.

One of the tests which the respondent suggests, to establish that the fire inspector is his servant, is that the respondent would be responsible for the result of the in-



spector's negligence. A master may be compelled to respond in damages for the negligent act of his servant, but the theater manager would not be liable for the negligent act of the fireguard in the performance of his duties, because the manager cannot direct or control the acts of the fireguard. The board of fire commissioners has certified to the competency of the fireguard. The fireguard cannot be discharged by the manager without permission from the board of fire commissioners. The manager is not the master and the fireguard is not a servant. See *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237, which was an action of negligence for injury to a coal miner, brought against the mine owner. The statute provided that no person "shall be permitted to act as mine foreman" until after examination by an examining board created by the state, and a certification as to qualification by the mine inspector appointed by the governor. The statute required all mine owners and operators to "employ" a certified mine foreman under penalty of a fine of \$25 per day. The duties of the mine foreman are prescribed by the act, and the owners or operators of the mines cannot interfere with his duties. The act provides that "for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any . . . mine foreman a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby." Act Pa. June 2, 1891 (P. L. 207) art. 17, § 8.

The court, holding that the mine owner was not liable in spite of the statute making him liable for the negligence of the certified mine foreman, said: "This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner: 'You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own

employees. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employees. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for. If, notwithstanding out certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence.'"

The statute was held to be unconstitutional, so far as it purported to make the mine owner liable for the negligence of the certified foreman.

The respondent contends that, if the provisions of § 5 are held to be valid, such determination will require us to approve the constitutional soundness of all legislation which may assume to fix by statute the wages of private employees, when the performance of their duties has any relation to public safety, as, for example, the wages of locomotive engineers, motormen, chauffeurs, and the like, and, finally, that we must approve legislative regulation of the wages of any class of workmen with which the general assembly may see fit to deal. Such argument is clearly specious. All such private employees and workmen are servants of a private master, performing such master's business in accordance with the master's direction. That the safety of the public frequently depends upon the proper performance of their duties is merely an incident of their occupation. A fire inspector stationed in a theater is not engaged in the service of a private master. He is performing the duties prescribed by law under the direction of a public board. His duty is to the public. The public is the master, and it is for the public, as represented by the lawmaking power of the state, to fix his compensation and to regulate the

terms of his employment. No principle is better settled than that compensation for the performance of public duties may be fixed by law, whether such compensation is paid from the public treasury or charged against the business in relation to which it is to be performed.

The burden upon the theater manager consists in being obliged to pay the compensation of the fireman or fireguard stationed in his theater; it is a matter of no consequence to him, and it has no bearing upon the reasonableness of the charge or the constitutionality of the act whether he be required to pay said compensation to the city, and the city pay the fireman or inspector, or that the manager be directed to pay the fireman or inspector directly. The manner of payment is a matter of detail; the vital consideration is whether such manager should be compelled to pay the charge at all. There is a long line of decisions holding that, whenever any business or line of business affects the public health, safety, morals, or welfare, thereby becoming a proper subject for police regulation, the fees and charges for inspection, or otherwise for protecting the public against the dangers incident to such business, may be imposed upon the business itself, regardless of whether any special franchise or privilege had been conferred upon such business, or that it was one affected with a public interest, or was one merely of private interest.

In *Willis v. Standard Oil Co.* 50 Minn. 290, 52 N. W. 652, it was held that a statute requiring illuminating oil which was held for sale to be first inspected, and fixing the fees for inspection, was a valid exercise of the police power, and the court said: "On its face the act is a bona fide police regulation, a proper inspection law, and not a law levying a tax. What is a reasonable fee for inspection under such laws must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case; and, unless

it is manifestly unreasonable, in view of the purpose of the law, as a police regulation, the court will not adjudge it a tax."

In *Consolidated Coal Co. v. People*, 186 Ill. 134, 56 L.R.A. 266, 57 N. E. 880, the court held "that under the police power the legislature has the right to provide for the inspection of mines, and that it also has the right to place the burden of the expense of such inspections upon the mine owners," and that a law was not in violation of the 14th Amendment of the Constitution of the United States, as one denying equal protection of the laws or taking property without due process of law, because it did not lay down proper rules for its impartial execution in fixing fees to be charged upon a basis of the number of men employed, size of the mine, or "some definite circumstance or condition," and fixing a reasonable number of inspections to be made annually, by which the exercise of an arbitrary discretion might be avoided. The inspection fee was fixed at not less than \$6 nor more than \$10 a visit. By statute, it became the inspector's duty to inspect "as often as he may deem necessary and proper," and "at least four times a year."

In *New Orleans v. Kee*, 107 La. 762, 31 So. 1014, the court held an ordinance constitutional which provided for inspection of laundries and required the laundry to pay the inspection fee. In *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, a statute was held to be valid which required steamship vessels to submit to inspection and pay a fee therefor.

In *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 7 L.R.A. 266, 5 So. 311, an act made it a misdemeanor for any railroad to have in its employ any engineer, fireman, brakeman, conductor, gateman, signalman, etc., who did not "possess a certificate of fitness therefor in so far as color blindness and visual powers are concerned," issued by a medical examiner provided for by

the act. The railroad company was obliged to pay the examination fee, fixed by the act at \$3. The plaintiff brought suit to recover from the railroad his fees for examining, in his capacity as medical examiner, employees of the defendant. The court held that the act was not in violation of the 14th Amendment.

In *People v. Harper*, 91 Ill. 357, the court held an act constitutional which created a board with powers to fix the fees for inspecting grain. In *Louisiana State Bd. of Health v. Standard Oil Co.* 107 La. 713, 31 So. 1015, the court held that the act which required the plaintiff board to inspect coal oil throughout the state by reasonable implication conferred upon the board authority to exact an inspection fee from the dealer in oil. In *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 852, 2 Inters. Com. Rep. 288, 9 Sup. Ct. Rep. 28, the court considered the provision of a statute requiring a railroad to pay a fee fixed at \$3 for the examination of certain of its employees as to color blindness and visual powers, and held the same to be constitutional, as not depriving such railroad of property without due process of law. In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, the plaintiff in error, a locomotive engineer, had been convicted of operating a locomotive without a license prescribed in a statute which required all engineers to be examined by a state board of examiners as to their fitness to operate locomotives, and forbade the operation of a locomotive by an engineer, not possessing such license, on the main line for the purpose of hauling passengers or freight. The examination fee was fixed at \$3, which was required to be paid by the engineer. The court held that the act did not contravene the Constitution of the United States, and that the statute was valid under the police power of the state. Upon the point now under consideration, see *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386,

35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Daniels v. Hilgard*, 77 Ill. 640, 15 Mor. Min. Rep. 280; *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; *State v. Murlin*, 137 Mo. 297, 38 S. W. 923; *Com. ex rel. Williams v. Bonnell*, 8 Phila. 534, 15 Mor. Min. Rep. 14; *Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492.

A somewhat novel case of a law aiming to protect the public against the dangers incident to a business is considered in *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765. An act making it an offense to sell spirituous liquors without having a special license (in addition to all other licenses), for which a fee of \$10 must be paid, "to establish a fund for the foundation and maintenance of an asylum for inebriates," was held to be a valid exercise of the police power. In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, the court considered a statute of Oklahoma which provided for a levy upon all banks existing under the laws of the state of an assessment of a percentage of each bank's average deposits to pay the loss arising to depositors in banks which might become insolvent. The court sustained the constitutionality of this statute, and held that, when the legislature of Oklahoma declared that said regulation was a necessary safeguard to banking, the court cannot say that it is wrong. Upon petition for rehearing the court said (219 U. S. at page 580): "We fully understand the practical importance of the question, and the very powerful argument that can be made against the wisdom of the legislation; but on that point we have nothing to say, as it is not our concern."

It is no just criticism of the amount of compensation fixed by law for public office, or public serv-

fee, that perhaps some person may be found in the community who will undertake to perform it for less. The provisions of § 5, wherein the general assembly in its legislative discretion has fixed \$3 per day as the compensation of a fireguard cannot be regarded as unconstitutional because the respondent, before the passage of the act, was able to make an arrangement with Mr. Gallagher to act for \$2 per day. Such a principle, if adopted by this court, would lead to a declaration of the unconstitutionality of a great number of acts of the general assembly in which a fee is fixed or compensation provided for the performance of some public act.

We have in this state many statutes providing for inspection and inspection fees. See the following chapters of General Laws 1909: Chapter 220 requires the insurance commissioner to examine insurance companies, and the insurance company to pay the commissioner the expense of such examination. Chapter 157 provides for the inspection and branding of beef and pork, and fixes the fees which are to be paid by the dealer and retained by the inspector, and imposes penalties in certain cases for sale without inspection. Said chapter 157 and § 6 of chapter 30 were amended by chapter 1026 of the Public Laws of 1914, by fixing a salary for the state inspector, and providing that the inspection fees should be turned over to the general treasurer; but the cities and towns may still elect inspectors of beef and pork and "provide for their compensation by salary or fees." Chapter 158 provides for the inspection of hides and leather, and fixes the inspector's fees, which are to be paid by the owner and retained by the inspector. Chapter 159 provides for the inspection of lime, fixes the inspection fees, to be paid by the burner of the lime and retained by the inspector, and imposes a penalty for selling or exporting lime not branded by the inspector. Chapter 160 provides for the inspection of fish, fixes the in-

spection fees to be paid by the owner and retained by the inspector, and imposes a penalty for selling fish not inspected and branded. Chapter 161 provides for the inspection and survey of lumber shipped into this state, fixes the fees, to be paid by the owner and retained by the inspector, and imposes a penalty for dealing in such lumber which has not been inspected and surveyed. Chapter 162 provides for the inspection of hoops, fixes the fees to be paid by the owner and retained by the inspector, and imposes a penalty for shipping hoops which have not been inspected. Chapter 163 provides for the inspection of scythe stones, fixes the fees, to be paid by the owner and retained by the inspector, and imposes a penalty for selling or exporting scythe stones which have not been inspected. Chapter 164 provides for the inspection of saleratus, soda, and cream of tartar, fixing a fee for inspection and certificate of analysis, which is to be paid by the dealer and retained by the inspector, and imposes a penalty for selling such articles when impure. Chapter 165 provides for the measure and sale of grain, meal, and salt, fixes the fees, to be paid by the owner and retained by the official measurer, and imposes a penalty for the sale of such articles from a vessel or railroad car in quantities greater than 25 bushels, without having the same duly measured and duly certified by the official measurer. Chapter 166 provides that "all cotton sold in this state, unless specially agreed, shall be weighed" by the official weigher. Said chapter fixes the fees, which are to be paid by the owner and retained by the weigher. Chapter 170 provides for the inspection, sale, and keeping of inflammable and explosive fluids, fixes the fees, to be paid by the dealer and retained by the inspector, and imposes penalties for keeping or selling certain petroleum oils and products thereof which have not been inspected. Chapter 171 provides for weighing of neat cattle, fixes the fees for weighing, one half

of which shall be paid by the seller and one half by the buyer, to be retained by the town weigher, and imposes a penalty on persons "slaughtering or weighing any neat cattle, and being obliged to account for the same to the owner or seller thereof as aforesaid, who shall not weigh and account" for all "parts of such cattle denominated weighable as aforesaid." Chapter 194 provides for sealing of weights and measures, fixes the fees, which are to be paid by the owner and retained by the official sealer, and imposes a penalty for using weights or measures which have not been sealed. Chapter 195 provides for gauging, fixes the fees, to be paid by the owner and retained by the gauger, and imposes a penalty for selling commodities by gauge or gauge marks not made by an official gauger.

Perhaps the market man, like the theater manager, would prefer to have his business inspected and regulated by his own servant. We have no doubt that the market man could save a considerable expense by having his large number of weights and measures sealed by one of his employees possessing the requisite skill. It is probable that such market man could arrange with his employee to do the work for a compensation much less than the statutory fee of the public sealer. That fact, however, has no bearing upon the question of the constitutionality of the statute relating to the sealing of weights and measures. It is the policy of the law to surround a public official with a degree of independence, the better to enable him faithfully to perform his duties to the public.

My conclusion that § 5 provides for the performance by the fire inspector of a public duty, and not of a private service for the theater manager, is really determinative of the questions before us, because, as I have already said, it is undoubtedly within the power of the general assembly to fix the compensation and regulate the employment of this public inspector. I will, however,

consider at length the contention of the respondent that the provisions fixing the compensation of this public servant at \$3 per day, providing that his salary shall not be reduced by the theater manager, and that he may not be discharged by the theater manager, are entirely arbitrary, and have no reasonable relation to the protection of audiences in theaters in the city of Providence.

For the proper understanding of the cases in which a party has questioned the constitutionality of legislation purporting to be enacted under the police power, the distinction between the question of legislative power and the matter of legislative policy must always be borne in mind. Mr. Justice Hughes, in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. at page 569, 55 L. ed. 339, 31 Sup. Ct. Rep. 263, says: "The principle involved in these decisions is that, where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

In *McLean v. Arkansas*, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 208, the court said: "The legislature, being familiar with local conditions, is, primarily, the judge of

the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Courts, as evidenced by their opinions in many cases, have scrutinized very carefully the claims that legislation in question before them was within the scope of the police power. When, however, it has been determined that the matter as to which regulation has been provided did have such a relation to the public health, safety, morals, and welfare as to present a proper occasion for the exercise of the police power, then it has been recognized that a very wide discretion rests in the legislature in determining the policy or the methods to be employed in its exercise. In *Holden v. Hardy*, 169 U. S. 366, at page 397, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 388, 390, the court said: "Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government."

In speaking of the limits of judicial discretion, the court in *Wilson v. New*, 243 U. S. 332, at page 359, 61 L. ed. 755, 778, L.R.A. 1917E, 988, 87 Sup. Ct. Rep. 298, 306, Ann. Cas. 1918A, 1024, said: "While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will, and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion, or to control judgment."

This principle has been adopted by this court without a contrary opinion, down to the present time. In *East Shore Land Co. v. Peckham*, 33 R. I. 541, at page 548, 82 Atl. 491, this court said: "All statutes are presumed to be valid and constitutional, and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt."

In *State v. Kofines*, 38 R. I. 211, at page 218, 80 Atl. 435, Ann. Cas. 1918C, 1120, the court said: "'A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained. *Cooley*, Const. Lim. p. 252, and cases cited. 'Before an act is declared to be unconstitutional, it should clearly appear that it cannot be supported by any reasonable intendment or allowable presumption.' *People ex rel. Burrows v. Orange County*, 17 N. Y. 235, 241.' . . . Therefore it is incumbent upon the respondents to satisfy this court beyond all reasonable doubt that the act in question is unconstitutional in the particulars complained of."

The opinion of this court in *Cleveland v. Tripp*, 13 R. I. 50, at page 65, was as follows: "Our conclusion is that the complainants are not entitled to relief. We have reached this conclusion, not without much hesitation, but in obedience to the rule that a statute duly enacted, however questionable it may be in point of constitutionality, is not to be pronounced void for unconstitutionality until the court is clearly convinced of it."

In *Re Ten Hour Law*, 24 R. I. 603, 606, 61 L.R.A. 612, 54 Atl. 603, this court said: "Both this court in *State v. Peckham*, 3 R. I. 289, and the Supreme Court of the United States in *Munn v. People*, 94 U. S. 113, 24 L. ed. 77, have declared that the legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which

would justify legislation, it is to be presumed that it did exist."

We will now consider the policy or the method adopted by the general assembly in § 5, for the purpose of guarding the safety of audiences in theaters in the city of Providence. It would tend to a better understanding of this policy of the general assembly if we should note the historical development in this state of legislation of this character. By § 5, chap. 131, Gen. Laws 1909, it was provided that the board of fire commissioners, or, in case there was no such board, the chief of the fire department, in every city, should station in every theater during the time any audience was present therein a fireman, and the licensee of the theater should pay such city for the attendance of said fireman \$2 for every day during which a performance should be given in such theater. By reason of the great increase in the number of theaters in the city of Providence, the demands upon the fire department by reason of the assignment of firemen for service in the theaters became so great that by chapter 1366, Pub. Laws 1916, it was provided that, instead of a fireman being stationed by the board of fire commissioners in each theater in the city of Providence, the licensee of such theater should "employ" a suitable person, approved by said board, who should be stationed in such theater, who should there perform the duties prescribed by said board, and who should have no other duties, whose continuance in service depended upon the continued approval of the board, and who should not be discharged by said licensee, except with the prior approval of said board. The next change came in the January session, 1919, when by chapter 1718 of the Public Laws it was provided that the proprietor of a theater in Newport should pay \$3 per day, instead of \$2 per day, to the city, for the services of a fireman stationed in a theater. By the provisions of chapter 1780, Public Laws 1919, § 5 was

again amended to the form in which it now stands, the essential parts of which have been quoted above.

It cannot be questioned that by the original provisions of § 5 a city fireman stationed in a theater was not the servant of the theater manager, but was a person performing a public function, and for that public service it was within the power of the legislature to compel the theater manager to pay the city. This is in accord with the cases cited above. For the reasons that we have named, the city was relieved of the duty of assigning members of the fire department for service in theaters, and the theater manager was permitted to select a person who should act as a fireguard in his theater, but with great particularity the duties of the fireguard or inspector so selected are designated and his relations to the fire board are defined. It is clear that the legislature intended that in every respect, save in the method of selection, the fireguard should exactly take the place of the city fireman. Everything that the city fireman had formerly done the fireguard must do; and the exclusive oversight and control which the board of fire commissioners had over its fireman was continued in it over the fireguard selected by the theater manager. If, instead of permitting the theater manager to select a person for the approval of the board, the statute had provided that the theater manager should choose for service in his theater one from a body of theater fire inspectors first selected and established by the board of fire commissioners, would the situation have been different? In either case the manner of selection would be an immaterial circumstance.

The essential matter in determining the legal status of the fireguard in his relations to the theater manager is the nature of his service. It was unmistakably public service formerly performed by the public fireman. The inspector is exercising a public function and discharg-

ing a public duty. There can be no question that for that public duty the legislature might fix the compensation. At first in its discretion the legislature did not fix the compensation, but left it to such arrangement as should be made between the theater manager and the inspector. Later in its discretion the legislature saw fit to name the minimum amount of compensation which the fire inspector should receive for his public service, and further provided that the same should not be reduced without the prior approval of the board of fire commissioners. This court should not assume that these later provisions were enacted from any desire on the part of the legislature, either to benefit the person who might act as fire inspector, or to oppress the theater manager; but we should assume that such provisions, in the judgment of the general assembly, had a direct bearing upon the efficiency of the fire inspectors, and hence upon the safety of theater audiences in Providence. In accordance with the universally accepted doctrine, all presumptions must be in favor of the validity of legislative action, and if upon any view such action would be justified, it should be permitted to stand. That has always been the position of this court. It was said in *Re Ten Hour Law*, 24 R. I. 608, 61 L.R.A. 612, 54 Atl. 603: "If a state of facts could exist which would justify legislation, it is to be presumed that it did exist."

The determination as to the reasonableness of the provisions as to compensation, and whether they have a fair connection with the efficiency of fire inspectors, depends upon a knowledge of the facts regarding the situation, and what experience has shown to the public authorities in the city of Providence. This knowledge can be gained only by investigation. The legislature can make such investigation; this court cannot. *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *Horton*

*v. Old Colony Bill Posting Co.* 36 R. I. 507, 90 Atl. 822, Ann. Cas. 1916A, 911. After the general assembly has made its investigation, and determined upon the regulations which in its judgment are desirable and tend to promote the public safety, this court should not oppose to that judgment of the legislature, based upon such investigation, the court's conclusions founded entirely upon conjecture as to the situation. It was stated to us in argument that, at the hearing before the committee of the general assembly, it appeared that a certain theater manager in Providence desired to be relieved of the presence of an inspector, who appeared to said manager to be too zealous in insisting upon an observance of the directions which the fire board had made for the public safety, but whose conduct and service had the full approval of said board. The manager was unable to discharge the inspector directly, but accomplished the same indirectly by reducing his compensation to such a low figure that the inspector was forced to resign. Upon this the legislature, in its discretion, in order that the personal interests of an inspector should not make him seek the favor of a theater manager rather than zealously observe the directions of the fire board, fixed upon \$3 per day as a fair and reasonable minimum compensation for such inspector in Providence, and provided that such compensation should not be reduced, save with the approval of the board of fire commissioners. Now we will not accept that statement made by counsel before us, although not contradicted, as being an exact statement of the facts, nor as representing the reason that caused the legislature to adopt said provisions, but we will receive it as part of an argument by the state, setting forth a possible situation which might confront the public authorities in Providence, and might appeal to the discretion of the general assembly. It is surely a state of facts which could exist, and, as we have said in



*Re Ten Hour Law*, *supra*, "if a state of facts could exist which would justify legislation, it is to be presumed that it did exist."

It has been suggested that the provisions as to salary, particularly the provision that the salary should not be reduced without the approval of the fire board, are entirely unnecessary provisions; that the object of the legislation, which is to protect the safety of audiences, would be as adequately secured if these provisions were omitted. It has been urged that, if an inspector appears to the board of fire commissioners to be unfaithful, it may require his removal and the selection of another man, and that to give to said board rather than to the theater licensee control over his salary is entirely unnecessary. The value of this method of protecting a theater audience depends upon the efficiency of the inspection. It requires no argument to establish the proposition that it will tend to that efficiency if the inspector is in every way dependent upon the board, and all his interests compel him to a faithful and painstaking observance of their directions, rather than that, as to his personal interest, he should look to the theater manager, whose notions of necessary regulation may not be in accordance with that of the fire board. If in that divided loyalty his desire to obtain the favor of his paymaster leads him to be lax in his duty to the public, it is not enough to say that for that laxity he may be removed, for before the inefficiency may be discovered by the board a serious tragedy may have occurred. The suggestion of a lack of necessity for any of these regulations is entirely irrelevant to the consideration of the constitutionality of the section in question. Whether or not a given regulation shall appear to a court to be necessary or unnecessary is not the criterion of constitutionality. The regulations which should be prescribed to effect a given purpose are matters addressed to the wide powers of discretion and judgment pos-

sessed by the general assembly, and it is no valid objection to a regulation that its necessity should not be apparent to some mind which is not fully informed as to the situation and the particular purpose which is behind the regulation. If it was for the members of a court to prescribe the policy and method of regulation, they might adopt an entirely different scheme. They might be of the opinion that the plan of the legislature is practically faulty and ill-advised; that it will quite likely fail of its purpose, or that some of its details are unnecessary; but for any or all of these reasons the legislation in question should not be declared unconstitutional unless the provisions are without doubt unrelated to the matter under consideration, and so clearly unreasonable and arbitrary as to be oppressive. Our fundamental test must be applied. If a state of facts could exist which would justify the regulation, it is to be presumed that it did exist.

In the case dealing with billboard advertising in the city of Providence, *Horton v. Old Colony Bill Posting Co.* *supra*, the ordinance under consideration was passed in accordance with the authority given by statute to the city council of Providence to regulate such outdoor advertising "in order to preserve the health, safety, morals, and comfort of the inhabitants of this state." This was a delegation to said city council of a part of the police power of the state. An examination of said ordinance discloses a number of regulations which are not apparently necessary for the preservation of the health, safety, morals, and comfort of the inhabitants of the state. As to a number of the provisions this court was not free from doubt, even as to their reasonableness; yet they were approved. The court held that in view of the fact that the lawmaking body has far more opportunity to ascertain and meet the public need than the court can have, and "in view of the wide latitude permitted the legislative branch in determin-

ing the public needs and the appropriate remedies, the court should uphold the limitations on size" of billboards, imposed by this section, which in our opinion are not clearly unreasonable, and the court quoted with approval the language of the opinion in *Re Wilshire* (C. C.) 103 Fed. 620, as follows: "I entertain a good deal of doubt in respect to the reasonableness of the maximum limitation placed upon the structures in question by the municipal authorities of the city of Los Angeles, but the fact that this doubt exists is sufficient reason for the court to decline to adjudge the ordinance invalid. It is only in clear cases that such a judgment should be given."

In the foregoing part of the opinion I have dealt with the respondent's various contentions that said § 5 deprives the respondent of its liberty and property without due process of law. We find no validity in any of them. They are all based upon its misconception that the relation of the theater licensee to the fire inspector is that of master and servant; whereas in fact and law the fire inspector is a public servant, performing public duties, which it was clearly within the power of the state to regulate, and for which it might fix a compensation, and charge the payment of the same upon the theater manager whose business was the subject of the regulations.

The respondent's contention is that, inasmuch as said § 5 does not operate uniformly upon all the theaters in the state, the act is therefore in violation of article 1, § 2, of the Constitution of Rhode Island, which declares that "the burdens of the state ought to be fairly distributed among its citizens," and is in violation of the 14th Amendment to the Constitution of the United States, which requires that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The respondent contends that said § 5 imposes an unequal burden on him in the conduct of his business—in other words, imposes a heavier burden upon his theater and all other theaters situated in the city of Providence than it imposes on the same business in other cities. It is not suggested that the act is invalid because it operates only as to cities, and does not apply to the towns, and yet some of our towns have thickly populated and congested centers in which theaters are conducted. In Providence, the largest city in the state, we have special provisions for supplying fireguards or fire inspectors for the theaters. No fireguard is required for theaters situated in towns. In the cities of Pawtucket and Cranston theaters must pay the city \$2 per day for a regular fireman stationed in the theater; theaters in Newport pay the city \$3 per day for a regular fireman; theaters in Providence and Newport pay the same amount. In Providence, Woonsocket, and Central Falls theater licensees must "employ" a suitable person, approved in Providence by the board of fire commissioners, and in Woonsocket and Central Falls by the chief of the fire department. In Providence, the theater must pay whatever price may be necessary, which shall not be less than \$3 per day, to secure a competent person approved by the board of fire commissioners.

The statute makes three classes of theaters and imposes a slightly different burden on each class; Providence and Newport in one class, Pawtucket and Cranston in another class, and those in Woonsocket and Central Falls in a third class. The Providence class differs from the Woonsocket and Central Falls class, in that the Providence theater must pay the fireguard at least \$3 per day and such fireguard is not permitted to have any other duties; whereas in the Woonsocket and Central Falls class no minimum fee is fixed and the fireguard is not forbidden to have other duties. It is to be noted that the act applies

equally to all theaters in the city of Providence.

Said § 5 is not in conflict with the Constitution of Rhode Island (art. 1, § 2), which reads as follows: "All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens."

In the case of *Re Dorrance Street*, 4 R. I. at page 249, Ames, Ch. J., in discussing the last clause of the foregoing section, said: "We will not stop to notice the very general language and declaratory form of this clause, setting forth principles of legislation rather than rules of constitutional law—addressed rather to the general assembly, by way of advice and direction, than to the courts, by way of enforcing restraint upon the lawmaking power. We do not mean to say that a law, purporting to impose a tax or burden of some sort upon the citizen, may not be in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness as not to come so far within the purview of this general clause as to enable the court to save the citizen from oppression by declaring it to be void. But evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was intended to be reposed in the general assembly by the will of the people, as signified in this clause of the Constitution. The form is 'ought to be,' the word is 'fairly' distributed, not 'equally' even—unless equality be fair, which it is not always in any sense, and never is in some senses; and especially the words are not 'equally upon property,' or words to that effect, as in the Constitution of Louisiana. . . . All taxation is more or less unfair, and in any proper sense even unequal. Perfect fairness would be to make all those who are benefited by the burdens of the state to bear them, and to extend the burden in due proportion

to every person according to this benefit."

Of course it is not only impracticable, but impossible, to frame and enforce laws which do exact justice to all. Our statute requiring motor vehicles to be registered and licensed is a good example. In order to maintain and improve our state highway system, a tax is imposed on motor vehicles; no similar tax is imposed on horse-drawn vehicles using and impairing the highways. And again the annual tax itself is graduated according to the horse power of the motor vehicle, without any reference whatever to the time or distance which motor vehicles travel on the highways; motor trucks, particularly those transporting heavy loads, probably do far greater damage to the highways than do pleasure motor vehicles, which are required to pay a registration fee (dependent upon horse power) ranging from \$5 to \$25, while commercial motor vehicles, and motor trucks, regardless of the horse power thereof, pay a fee of \$7. But such legislation has been held to be not unconstitutional. *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30.

While the 14th Amendment to the Federal Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of its laws, this provision has been uniformly held to be entirely consistent with the power of a state legislature to make classification as to the subjects of legislation, provided all members of a class are treated equally. The following language was quoted with approval by this court in *Sayles v. Foley*, 38 R. I. 491, 96 Atl. 840, 12 N. C. C. A. 949: "In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 576, 59 L. ed. 368, 35 Sup. Ct. Rep. 169, 7 N. C. C. A. 570, it is stated: 'This court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment, in the equal protection clause, to take from the

states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare 'it beyond the legislative authority.' In *Kidd v. Alabama*, 188 U. S. 730, 738, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401, the court says: 'We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis'—citing cases.

See also *Horton v. Old Colony Bill Posting Co.* 36 R. I. 507, 90 Atl. 822, Ann. Cas. 1916A, 911; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 682, 35 Sup. Ct. Rep. 345; *Singer Sewing Mach. Co. v. Brickell*, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; *St. John v. New York*, 201 U. S. 633, 637, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909.

Mr. Justice Van Devanter, in discussing the power of the legislature to make classification, said in *Lindley v. Natural Carbonic Gas Co.* 220 U. S. at page 78, 55 L. ed. 377, 31 Sup. Ct. Rep. 840, Ann. Cas. 1912C, 160: "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: (1) The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a

law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary"—citing *Bachtel v. Wilson*, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. ed. 77, 86; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

As was said in *Heath & M. Mfg. Co. v. Worst*, 207 U. S. at page 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 119: "A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal, and oppressive legislation.' "

In *State v. Read*, supra, 12 R. I. 137, this court held valid a statute making a very novel classification in reference to the use of land within 1 mile of an outdoor meeting held by any religious society. The statute prohibited all persons other than the religious society, except "innkeepers, grocers, or other persons, from pursuing their ordinary business at their usual place of doing business," and persons selling victuals in their usual place of abode from selling food or other merchandise within 1 mile of such meeting. The act was unnecessary to prevent the sale of intoxicating liquors, as at the time of its passage statutes were in force, with penalties more severe, prohibiting the sale of intoxicating liquors. To sell food on one's property (except "in his usual place of abode") within 1 mile of an outdoor meeting held by any religious society is made a misdemeanor by the statute, unless the

sale be made with the consent of the society. Had the society consented to the acts complained of, the defendant would have been guilty of no offense. Giving the society the right to consent to such sales might be regarded as tantamount to creating a monopoly in the sale of food, etc., and hence creating a favored class. The statute prohibited all persons other than the society, within 1 mile radius of the meeting, from using their property in a particular manner without consent of the society. The statute imposed an unequal burden upon one class of landowners. It says in substance: "Whenever a religious society shall spread its tent in a community and hold its meetings, or holds its meetings out of doors in such community, that all landowners within 1 mile of such meeting lose the right, while such meeting is being so held, to use their property in the same manner as they may lawfully use it before the meeting commenced and after it ended."

Shore resorts, county fairs, and even the same religious societies, when holding their meetings in a church edifice, are not similarly protected from encroachment. But as the act applied to all religious societies, it was upheld as a valid exercise of the police power of the state.

In *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, it was held that "a state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax 'planters and farmers grinding and refining their own sugar and molasses,' deny sugar refiners the equal protection of the laws within the 14th Amendment."

In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, an act limiting labor, in mines only, to eight hours a day, was held a valid exercise of the police power, and not in violation of the 14th Amendment.

In *McLeen v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, the court refused to hold a legislative act, requiring coal to be measured for payment of miners' wages before screening, to be an unreasonable police regulation, and held that the act was not unconstitutional under the due process or the equal protection clause of the 14th Amendment, and held that it was not an unreasonable classification to divide coal mines into those where less than ten miners are employed, and those where more than that number are employed, and that a state police regulation is not unconstitutional under the equal protection clause of the 14th Amendment because applicable only to mines where more than ten miners are employed.

In *Louisiana State Bd. of Health v. Standard Oil Co.* 107 La. 713, 31 So. 1015, the court considered an act which required the inspection of coal oil "in every city and town of not less than 2,000 inhabitants, except the city of New Orleans." Inspection in the latter city had been provided for by a special act. The court assumed that there was no question as to the constitutionality of the act under consideration.

In *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207, a statute providing that if live stock strayed upon railroad tracks, by reason of there being no fence where the railroad had the right to fence, and were injured or killed, the railroad should be liable for the damage, and if such corporation neglects to pay the value of damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, "such owner shall be entitled to recover double the value of the stock killed or damages caused thereto,"—was held not to be in violation of the equal protection clause of the 14th Amendment. And in *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 468, 6 Sup. Ct. Rep. 110, a similar statute was held to be a valid police

regulation, as it provided against accident to life and property.

In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927, the Washington Workmen's Compensation Act (Laws 1911; p. 345) provided for the creation of a state fund for compensation of workmen injured, and dependents of workmen killed, in employments classed as hazardous, and abolished (except in certain cases) the action at law by employees against employers for damage due to negligence. The different hazardous industries were classified. The scheme was to tax each employer engaged in a given class, in proportion to his pay roll, to meet the loss in such class. Held, that the act did not violate the 14th Amendment. To the same effect, see *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340, 12 N. C. C. A. 949.

In *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943, the New York Workmen's Compensation Act (Consol. Laws, chap. 67), requiring the employer to secure the compensation required by the act to injured employees and their dependents, by insurance or by deposit of securities with the state commissioner, was held valid as not denying the equal protection of the laws.

In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, the court sustained an Oklahoma statute which levied upon all banks existing under the laws of the state an assessment of a percentage of the bank's average deposits, to pay the loss of the depositors in insolvent banks.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 598, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625, an act provided that, in actions of negligence for personal injuries against railroads, the negligence of a fellow servant was no defense. Held, not in violation of the 14th Amendment, and not class legisla-

tion. To the same effect, see *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 6 Sup. Ct. Rep. 1161.

In *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, a statute prohibiting the sale of milk without a permit from the state board of health was held not in violation of the 14th Amendment as depriving persons in that business of their property without due process of law, or denying them the equal protection of the laws.

In *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, the court, in an opinion by Mr. Justice Hughes, considered the validity of a statute limiting the rights of railroads and their employees to contract. The act applied to railroad corporations only. It was held that the "state has power to prohibit contracts limiting liability for injuries, made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract," and that such a statute does not impair the liberty of contract, take property without due process of law, or deny equal protection of the law, in violation of the 14th Amendment.

In *New York ex rel. New York Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880 (107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820), it was held that an Electrical Commission Act, to regulate electric light, power, etc., companies, violated no contractual rights of the corporation and was not in violation of the 14th Amendment that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The board of commissioners was authorized to assess the several corporations affected by the act, to pay the expenses and salaries of the board. The act was held to be not un-

constitutional, notwithstanding the fact that it applied only to cities with a population of more than 500,000.

In the case of *Re Williams*, 79 Kan. 212, 98 Pac. 777, the petitioner was convicted of selling powder in violation of a statute which provided: "It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal mine or mines in the state of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed," etc. Kan. Laws 1907, chap. 250.

The act applied to no explosive except black powder and was limited to coal mines; but the court held that the statute did not violate the state Constitution or the equal protection clause of the 14th Amendment. The court quoted with approval from *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207, 208, as follows: "But the clause [of the 14th Amendment] does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity; and to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease, and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society."

See, also, *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1061, 12 Sup. Ct. Rep. 255; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; *State v. Marlin*, 137 Mo. 297, 38 S. W. 928; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20

Sup. Ct. Rep. 633; *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; *Daniels v. Hilgard*, 77 Ill. 640; *W. W. Cargil Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *People v. Smith*, 108 Mich. 527, 82 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *Opinion of Justices*, 34 R. I. 191, 83 Atl. 3.

Suppose the legislature, instead of passing the act in question, classifying the theaters of the state according to cities, had passed a general enabling act authorizing the various cities to adopt ordinances for the protection of audiences in theaters against fire. Each city, pursuant to such authority, might adopt an ordinance to meet the needs of the particular city, different from that adopted for every other city, and yet each ordinance would be valid, provided it was fair and reasonable. It is axiomatic that the legislature can do that which it can delegate others to do. Each city would be permitted a wide latitude in determining its peculiar needs and appropriate remedy. Had each of our several cities passed an ordinance identical with the provisions of said § 5 as applicable to such city, could it be said that any one of such ordinances was clearly unfair and unreasonable?

Pub. Laws, chap. 542, passed at the January session, 1910, was "An Act Authorizing Cities and Towns to Regulate Certain Outdoor Advertising." Pursuant to this act, the city of Providence passed chapter 443 of the ordinances of the city of Providence, which ordinance provided with great detail for the regulation of billboards and outdoor advertising. Said ordinance did not affect all classes equally. It prohibited the advertising of intoxicating liquors within 200 feet of a schoolhouse or church. It required billboards on roofs of buildings to be constructed, in one section of the city, of incombustible materials, and contained no such requirement for

other sections of the city. The enabling act, and the ordinance passed pursuant thereof, each defines the term "outdoor advertising," and provides that the term "shall not include advertising located upon private property and relating exclusively to the business conducted on such property, or the sale or rental thereof, or advertising in or upon the cars and stations of any common carrier." If it is unnecessary to regulate outdoor advertising relating to the business conducted on the property where the advertisement is located, it is not entirely clear why it should be necessary to regulate such advertising when it does not relate to the business conducted on such property; but the act affected equally all persons similarly situated, and in *Horton v. Old Colony Bill Posting Co.* 36 R. I. 507, 90 Atl. 822, Ann. Cas. 1916A, 911, this court held that the Enabling Act and ordinances were each valid, and were not obnoxious to either the Constitution of Rhode Island (art. 1, § 10) or the Constitution of the United States (art. 14 of Amendments, § 1), as depriving a person of his property without due process of law, nor as denying to a defendant the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

Said § 5 operates alike upon all theaters in the city of Providence, and it can by no means be said to be clearly unfair or unreasonable in its provisions applying to theaters in the city of Providence. Indeed, with the present high price of wages, it would seem that the respondent is fortunate if he can obtain for \$3 a qualified and duly approved fireguard to be in attendance on his theater throughout the day and evening performance.

The respondent's other claims of unconstitutionality in § 5 have been sufficiently answered in the foregoing. We may add that as to article 1, § 10, of the Constitution of Rhode

Island, it has been held in numerous cases that it is a provision guarding the rights of persons accused of crime, and that the rights of property of other persons are guarded by other clauses of the Constitution of this state, or by the provisions of the Federal Constitution. *State v. Keeran*, 5 R. I. 497; *State v. Armento*, 29 R. I. 431, 72 Atl. 216; *State ex rel. Grant v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824; *State v. Hand Brewing Co.* 32 R. I. 56, 78 Atl. 499; *East Shore Land Co. v. Peckham*, 33 R. I. 541, 82 Atl. 487. In *Reynolds v. Randall*, 12 R. I. 522, the court said that "grammatically, the provisions there seem to apply only in favor of persons accused of crime," yet in that case the court appears to give it a somewhat broader application.

In my opinion, said § 5 is not invalid for any of the reasons urged against it by the respondent.

**Sweetland, J., dissenting:**

I have examined the opinion of Mr. Justice Vincent and that of Mr. Justice Rathbun. From such examination it appears to me that the opinion of Mr. Justice Vincent fails to appreciate the legal nature of the relation between a theater licensee and a fire inspector which has been created by the statutory provision in question. Particularly is it to be regretted that in a vital matter, involving public safety, the majority should disregard the principles heretofore prevailing in this state, by which the constitutional validity of statutory enactments ought to be tested. The recognition and application of those principles appear to me to be essential to the preservation of the proper balance between the respective powers and functions of those co-ordinate departments of our government, the general assembly and the supreme court.

I unreservedly concur in the comprehensive opinion of Mr. Justice Rathbun.



## ANNOTATION.

**Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense.**

The validity of a statute requiring the owners or managers of theaters to furnish, at their own expense, fire or police protection during performances, has apparently received consideration in no case other than the reported case (*O'NEIL v. PROVIDENCE AMUSEMENT Co.* ante, 1590). In that case such an act is held to be valid in so far as it merely requires every person holding a theatrical license to employ a competent person to guard against fire in the theater to which such license pertains, but is held to be unconstitutional in so far as it undertakes (1) to fix the wages which a person holding a theatrical license shall pay to a person employed by him to guard against danger by fire; (2) to forbid the discharge of such person so employed without the consent of the board of fire commissioners; and (3) to forbid a reduction in the wages of such employee without the consent of the board of fire commissioners.

In a few cases, however, ordinances of a similar character have been before the courts, with the result that judicial opinion is apparently evenly divided as to their validity.

Thus, in *Tannenbaum v. Rehm* (1907) 152 Ala. 494, 11 L.R.A. (N.S.) 700, 126 Am. St. Rep. 52, 44 So. 532, the question was raised as to the authority of a municipality to enact and enforce an ordinance providing as follows: "It shall be the duty of the chief of the fire department to assign one fireman to all performances in any theater, said fireman to be stationed at the fire plugs located on the stage, who shall be paid by the manager, and whose duty shall be to have charge of the fire hose, and in case of fire to use every effort to extinguish the same. It shall also be the duty of said fireman to see that all fire apparatus is on hand, and in working order, prior to each performance; and the said fireman is hereby clothed with police authority to enforce all theater ordinances. Any violation of the fore-

going clauses shall be punished by a fine of not more than \$50, or less than \$5." It was held that the city had authority to pass the ordinance by virtue of the power given it by the act under which it was incorporated, which provided that the general council should "have and exercise full police powers within the limits of the city of Mobile," and, in enumerating the duties of the general council, that it should also be their duty "to prevent crime and arrest offenders, to protect the rights of persons or property, to guard the public health, to preserve order." In reaching this conclusion the court said: "The ordinance cannot be said to be unreasonable, in that the city assumes to designate the man to perform the particular service, or imposes the cost of such service upon the manager. The duty of protecting the person or citizen from dangers of fire in the exercise of the police power would seem to carry with it the right to employ the most effective means to that end, and this would include the right of designating competent agents or servants for the performance of such duty. The doctrine as to the right of the municipality to impose the cost of the performance of such services by the fireman on the manager of the theater, as was done in the case at bar, was upheld in the case of *New Orleans v. Hop Lee* (1901) 104 La. 601, 29 So. 214, and in the case of *Harrison v. Baltimore* (1843) 1 Gill (Md.) 264. Of course such cost or expense must be fair and reasonable. We are of opinion that the ordinance in question was clearly within the police power of the municipality, and that it is not unreasonable. The ordinance expressly provides that the manager shall pay the fireman for the services rendered. The suit was, therefore, properly brought in the name of the party performing the service. The evidence was without dispute that the services were rendered, and that the compensation claimed was reasonable."

So, in *Hartford v. Parsons* (1913) 87 Conn. 412, 87 Atl. 736, Ann. Cas. 1916A, 1192, wherein a similar ordinance was considered, although it was held that the proprietor or owner of the particular theater in question was not liable for the wages of a fireman stationed at the theater, for the reason that the ordinance did not expressly impose the cost of such service on the owners or managers of theaters, yet the court expressly recognized the right of a municipality to enact an ordinance requiring the attendance of a policeman or fireman at theaters or other places of amusement, at the expense of the owner or management thereof. The court said: "The ordinance is on its face a proper and reasonable exercise of the police power of the city. It is, however, strictly a police regulation. The owner or manager of a theater is given no option as to whether he will or will not comply with it. It is a regulation imposed for the benefit of the public, and failure to comply with it is declared by the ordinance to be an offense. We have no doubt that the city of Hartford has authority, under its police power, to exact from the owner or manager of a theater, for every performance at which a fireman or policeman is required to be in attendance, a fee equivalent to his pay, and to make the payment of such fees a condition of the right to maintain a place of amusement, and to punish as an offense the giving of public performances without compliance with such provision. But exactions of this kind, however just and reasonable, are in the nature of an involuntary payment imposed upon the citizen. The intent to impose such a burden should be clearly expressed by the legislative department, which alone has power to impose it; and such intent should not first be discovered by a process of judicial construction. In this case the ordinance does not impose the cost of the service on the owners or managers of theaters. The duty to be performed by the city employees is the duty of seeing to the enforcement of the city ordinances regarding exits and fire escapes, and of

reporting to the chief of the fire department. Whether such a service should be paid for by the city or by the owner of the theater is a matter upon which reasonable differences of opinion might exist; but, in the absence of any contractual obligation, the expense must rest upon the city until its common council, by express legislation, imposes it on the theater owner."

But in *Chicago v. Weber* (1910) 246 Ill. 304, 34 L.R.A. (N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359, it was held that a city ordinance which required every proprietor of a theater to furnish at its own expense a fireman detailed from the city fire department, whose duty it should be to attend every performance and guard against fire, was an unreasonable exercise of the city's police power, and therefore invalid. The court said: "In every building in the city where large numbers of people are employed, or where the public go in crowds, the safety of those in the building would be promoted by having a member of the fire department there, and if the cost of discharging the duty to the public who attend the theaters may be charged to the owner, the same requirement may be made of the owner of every other building where the public are invited or attend in numbers. The city has power to establish a fire department, to erect engine houses and provide fire engines and other implements for the prevention and extinguishment of fires, but that duty is a duty to the public. If there is power to charge the expenses of performing that public duty to the owner of a theater, there is also power to do the same thing with respect to other owners, and the members of the fire department could be parceled out and stationed in private buildings, so that practically the whole expense of the fire department would be paid by individuals or corporations. If the city has authority to do that, it could accomplish the same result with policemen, who are in the direct exercise of the police power, and they might be stationed in every building where disorder or violation of the law might occur, and the expense be charged to

the owner; That the city cannot perform its duties to the public in that way is manifest."

Likewise, in *Waters v. Leech* (1840) 3 Ark. 110, the 4th section of the amendatory act under which the city of Little Rock was incorporated provided as follows: "The said mayor and aldermen, or a majority of them, shall have full power and authority from time to time, and at all times thereafter, to hold a common council in said city at such places as they may designate, and to make such by-laws, ordinances, and regulations in writing, not repugnant to the Constitution and laws of this state, and the same to enforce, revoke, or alter, as to them may appear necessary for the good order and government of the city and the inhabitants thereof; and to make, limit, and impose reasonable fines and amercements for all misdemeanors, disorders, neglects, and nuisances committed within the limits of said city, upon persons committing them therein, and for which the laws of the state have not provided an ample remedy." The 3d section of the same act made various provisions, all referring especially to "the better preservation of order and the enforcement of the laws of said city." The common council of the city passed an ordinance which provided that it should be the duty of the city constable "to attend every theater, menagerie, circus, exhibition, and show kept, opened, or exhibited in this city, on every night of such exhibition or performance, and to enforce order and suppress riot and tumult, for which services he shall be entitled to receive of the owner or exhibitor, for each night of his attendance, the sum of \$2.50." Another ordinance provided for the payment of a license fee of \$20 per month by every show, theater, etc. It was held that the city possessed such legislative powers, only, as were prescribed by its charter, and that the ordinance regarding the payment of the constable's salary by the proprietors of the theater was not within such powers. The court said: "That under the charter the corporation had power to make proper and reasonable by-laws, or-

dinances, and regulations for the preservation of the order and government of the city and its inhabitants cannot be doubted. But we are at a loss to determine by what name the imposition of the \$2.50 to be paid to the city constable shall be called or known. The exhibition or performance mentioned certainly cannot be considered as either a misdemeanor or disorder, a neglect or nuisance; for by the payment of \$20 per month the corporation had rendered it legal, and could therefore impose no fine or amercement unless there had been an actual violation of some known and established law of the land. It cannot be considered as a tax, because this power is limited to taxable property situate within the city, to a poll tax upon trading boats vending produce and merchandise at the landing of said city, and to licensing dram shops or drinking establishments. We have seen that the object of the charter is the preservation of good order within the city, but that the power by which this is to be effected is not only limited, but the means by which the funds are to be raised to meet the expense of so doing are expressly defined and pointed out; and that the exercise of these powers must not only be confined to such objects and purposes as are specially defined in the charter, but that they must be reasonably exercised. As previously remarked, no objection is raised to the \$20 imposed by the first ordinance. But we are at a loss to know by what power, after authorizing the exhibition at the theater, and thereby rendering it lawful, an additional imposition of \$2.50 for each performance should be ordered to be paid to the city constable by the owner or exhibitor, who is no party to the contract, and who did not require the services of the constable. Is it reasonable? The tax of \$20 per month is \$240 per annum, and if the performance should continue during the year it would add to the emoluments of the defendant in error \$732.50, for which the other would derive no benefit or consideration. Suppose the corporation was to pass an ordinance that the

city constable should attend every day upon each and every dram shop, or other drinking establishments, and that the owner or keeper thereof should pay such constable \$2.50 per day therefor, would such an ordinance be considered within the proper and legitimate authority of the charter? Would this be a reasonable exercise of power? If the principle is admitted that under the general power of providing by ordinances and by-laws for the preservation of good order within the limits of the city, the corporation can do this, where, we would inquire,

is the limit to their authority? They may, with the same propriety, make his duty extend to standing guard over dram shops and drinking establishments, and at the stores of the citizens, thereby rendering those laws and ordinances oppressive and injurious, under the specious pretense of suppressing riot or tumult which might or might not take place. It cannot be considered as a fee to the city constable for services performed, but an indirect tax levied upon the plaintiff in error, in contravention of the powers of the charter." W. F. F.

RE ESTATE OF OWEN J. EVANS, Deceased.

TAMAZINE M. EVANS, Appt.,

v.

MINNEAPOLIS TRUST COMPANY et al., Respts.

MARK M. EVANS et al., Appts.,

v.

TAMAZINE M. EVANS et al., Respts.

Minnesota Supreme Court—March 19, 1920,

(— Minn. —, 177 N. W. 126.)

Will — effect of subsequent long-term lease.

1. The testator, after making his will, whereby he devised the greater portion of his property in trust, made an enforceable contract to lease for one hundred years a portion of the property devised in trust, with an option in the lessee to purchase within ten years. It is held that this contract did not revoke the will by implication of law; and that the trusts can be carried out in substantially the manner directed by the will.

[See note on this question beginning on page 1638.]

Election — by widow — rights under will and statute.

2. The widow was not put to a statutory election by Gen. Stat. 1913, § 7239, which refers to the will of a parent, for the testator was not a parent; but if the devise in trust was not intended to be additional to the statutory one third, she was required to elect. Under the statute a gift to the wife is not treated as additional to the statutory right unless it clearly appears from the will that such was the testator's intent. It did not so appear and the widow was put to an election.

— devise of income.

3. The statute (Gen. Stat. 1913, § 7239) provides that "no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor, . . . unless it clearly appears from the contents of the will that such was the testator's intent." A devise to a trustee, for the benefit of the surviving spouse, out of which a substantial income was to be paid, not intended by the testator to be additional to the statutory right, puts the spouse to an election as if the devise had been direct.

**APPEALS** by the widow and residuary devisees of **Owen J. Evans**, deceased, from a decree of the District Court for Hennepin County (Fish, J.), construing the will of deceased. *Affirmed on appeal of widow. Reversed on appeal of the devisees.*

The facts are stated in the opinion of the court.

Mr. Francis B. Hart, for appellant  
T. M. Evans:

The fourth subdivision of the will, devising the Anglesey property to the Minneapolis Trust Company, was revoked by the subsequent contract granting lease, with option to purchase, to the Paust Investment Company.

*Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Re McLarney*, 153 N. Y. 416, 60 Am. St. Rep. 664, 47 N. E. 817; *Brown v. Clark*, 77 N. Y. 369; *Booth's Will*, 40 Or. 154, 61 Pac. 1135, 66 Pac. 710; *Fransen's Will*, 26 Pa. 202; *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 81; *Donaldson v. Hall*, 106 Minn. 502, 20 L.R.A. (N.S.) 1073, 130 Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541.

At common law any alteration in the estate inconsistent with the dispositions made thereof in the will was a revocation.

4 Kent, Com. 528; *Bosley v. Wyatt*, 14 How. 390, 14 L. ed. 468; *Newport Waterworks Co. v. Sisson*, 18 R. I. 411, 28 Atl. 336; *Sparrow v. Hardcastle*, 3 Atk. 799, 26 Eng. Reprint, 1256; *Re Dowd*, 58 How. Pr. 107; *Woerner, Administration*, p. 88; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Tebbutt v. Voules*, 6 Sim. 40, 58 Eng. Reprint, 510; *Cogdell v. Widow*, 3 S. C. Eq. (3 Dessaus.) 346; *Dieter v. Dieter*, 3 Lev. 108, 83 Eng. Reprint, 601; *Bullin v. Fletcher*, 1 Keen, 369, 48 Eng. Reprint, 348; *Ballard v. Carter*, 5 Pick. 112, 16 Am. Dec. 377; *Bennett v. Tankerville*, 19 Ves. Jr. 178, 34 Eng. Reprint, 484; *Brydges v. Chandos*, 2 Ves. Jr. 434, 30 Eng. Reprint, 710; *Williams v. Owens*, 2 Ves. Jr. 595, 30 Eng. Reprint, 794; *Donaldson v. Hall*, 106 Minn. 502, 20 L.R.A. (N.S.) 1073, 130 Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541; *Graham v. Burch*, 28 Am. St. Rep. 357, and note, 47 Minn. 171, 49 N. W. 697; *Sprague v. Moore*, 125 Mich. 357, 84 N. W. 293; *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336.

The devise of the Anglesey property to the Minneapolis Trust Company was necessarily a specific devise, subject to ademption.

*May v. Sherrard*, 115 Va. 617, 79 S. E. 1026, Ann. Cas. 1915B, 1131; *Plant v. Donaldson*, 39 App. D. C. 162; *Kaiser v. Brandenburg*, 16 App. D. C. 310; *King v. Shesby*, 8 Leigh, 614; *Boston Safe Deposit & T. Co. v. Plummer*, 142 Mass. 257, 8 N. E. 51; *Georgia Infirmary v. Jones*, 37 Fed. 750, 39 Eng. Reprint, 260; *Newbold v. Roadknight*, 1 Russ. & M. 677, 39 Eng. Reprint, 260; *Tamlyn*, 492, 48 Eng. Reprint, 196; *Page v. Leapingwell*, 18 Ves. Jr. 463, 34 Eng. Reprint, 392, 11 Revised Rep. 234; 40 Cyc. 1914; *Williams v. Owens*, 2 Ves. Jr. 601, 30 Eng. Reprint, 797; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Coulson v. Holmes*, 5 Sawy. 279, Fed. Cas. No. 8,274.

The specific devise of the Anglesey building being revoked, and the option to purchase not having been exercised during the life of the testator, it descends to the widow and heir as intestate property.

*Kerr v. Day*, 14 Fa. 114, 53 Am. Dec. 526; *Melin v. Woolley*, 103 Minn. 498, 22 L.R.A. (N.S.) 595, 115 N. W. 654, 946; *Johnson v. Holifield*, 82 Ala. 123, 2 So. 758; 2 *Woerner, Administration*, § 437; *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159; *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, L.R.A. 1916F, 352, 97 N. E. 48, Ann. Cas. 1913B, 62; *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46.

The provision for Mrs. Evans in the fourth clause of the will is a bounty, and not in lieu of dower.

40 Cyc. 1971; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404; 4 Kent, Com. p. 54; *Re Gotzian*, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; 1 *Jarman, Wills*, 5th ed. p. 458; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868; *Wood v. Wood*, 5 Paige, 596, 23 Am. Dec. 451; *Re Smith*, 1 Misc. 269, 22 N. Y. Supp. 1067; 2 *Story, Eq. Jur.* § 1038; *French v. Davies*, 2 Ves. Jr. 575, 30 Eng. Reprint, 783; *Sherman v. Lewis*, 44 Minn. 108, 46 N. W. 318; *Nester v. Nester*, 68 Misc. 207, 118 N. Y. Supp. 1009, 124 N. Y. Supp. 974; *Bentley v. Bentley*, 112 Iowa, 625, 84 N. W. 676; *Kinsey v. Woodward*, 8 Harr. (Del.)

(— Minn. —, 177 N. W. 126.)

459; *Sanford v. Jackson*, 10 Paige, 266; *Fuller v. Yates*, 8 Paige, 325; *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498.

Messrs. Lancaster & Simpson, for respondent Trust Company:

The execution of the contract for lease and option to purchase does not work a revocation.

1 Jarman, Wills, 6th ed. 162; 40 Cyc. 1208; *Donaldson v. Hall*, 106 Minn. 502, 20 L.R.A. (N.S.) 1073, 130 Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *Lefebvre's Estate*, 100 Wis. 192, 75 N. W. 971; 2 Underhill, Wills, 971; *Wagstaff v. Marcy*, 25 Misc. 121, 54 N. Y. Supp. 1021; *Hall v. Bray*, 1 N. J. L. 212; *Benson's Estate*, 209 Pa. 108, 58 Atl. 135; *Templeton v. Butler*, 117 Wis. 455, 94 N. W. 306; *Ostrander v. Davis*, 111 C. C. A. 636, 191 Fed. 156; *Watson v. McLench*, 57 Or. 446, 110 Pac. 482, 112 Pac. 416; *Page, Wills*, § 279; *Slaughter v. Stephens*, 81 Ala. 418, 2 So. 145; *Re Kelleher*, 140 Minn. 409, 168 N. W. 586.

Mr. L. F. Lammers, for appellants and respondents Mark M. Evans et al.:

The construction of the will that the intent of the testator was to bequeath to his surviving spouse the \$200 per month bounty, in addition to her right or interest secured by statute, was error.

*Connelly v. McMahon*, 122 Minn. 113, 142 N. W. 16; *Howe Lumber Co. v. Parker*, 105 Minn. 312, 117 N. W. 519; *White v. White*, 16 N. J. L. 202, 31 Am. Dec. 232; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404; *Brokaw v. Brokaw*, 41 N. J. Eq. 304, 7 Atl. 414, 40 Cyc. 1959, 1963; *Farmington Sav. Bank v. Curran*, 72 Conn. 342, 44 Atl. 473; *Damuth v. Lee*, 163 N. Y. 478, 57 N. E. 743; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Story, Eq. Jur.* § 1075; *Sullivan v. McCann*, 18 N. Y. S. R. 891, 2 N. Y. Supp. 198; *Ashelford v. Chapman*, 81 Kan. 312, 105 N. E. 534; *Geiger v. Bitzer*, 80 Ohio St. 65, 22 L.R.A. (N.S.) 285, 88 N. E. 134, 17 Ann. Cas. 151; *Cunningham's Estate*, 137 Pa. 621, 21 Am. St. Rep. 901, 20 Atl. 714.

No part of testator's will was revoked on account of the giving of the contract for a lease and an option to purchase the Anglesey property, which contract was given after the will was made.

40 Cyc. 1208; *Donaldson v. Hall*, 106 Minn. 502, 20 L.R.A. (N.S.) 1073, 130 8 A.L.R.—103.

Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; 1 Schouler, Wills, § 427; *Re Lefebvre's Estate*, 100 Wis. 192, 75 N. W. 971; *Barney v. May*, 135 Minn. 299, 160 N. W. 790.

Dibell, J., delivered the opinion of the court:

By his will Dr. Owen J. Evans, of Minneapolis, after making a number of unimportant bequests, devised all of his property to the Minneapolis Trust Company, in trust, to pay from the rents and profits \$200 per month to his wife during her life; and upon her death, with unimportant exceptions, the property remaining was to be sold and the proceeds distributed among his collateral blood relatives. After making his will, he made a contract for a lease of certain property in Minneapolis, which was the principal portion of the property devised in trust, for one hundred years, and in this contract, which was binding upon both parties, gave the lessee the option to purchase at any time within ten years at a stated price. The probate court held that the making of this contract did not revoke the will; that the gift of \$200 per month to Mrs. Evans was not additional to her statutory right; and that she was put to an election. On her appeal to the district court it was held that the making of the contract did not revoke the will; that the gift of \$200 per month during her life was additional to her statutory one third, and she was not put to an election; and that the gift of \$200 per month was a charge upon the remaining two thirds. Mrs. Evans appeals from the decree, and the residuary devisees appeal. The arguments of counsel group themselves about these three questions:

(1) Whether the contract for a lease, with the option to the lessee to purchase, revoked the will by implication of law.

(2) If it did not, whether Mrs. Evans was put to an election; and this depends upon whether the gift

of \$200 per month was additional to the statutory one third given her by statute.

(3) Involved in the preceding question is the question whether the statute (Gen. Stat. 1913, § 7239), which provides that a devise to the wife shall not be deemed additional to her statutory interest unless it clearly appears from the will that such was the intent of the testator, applies when the devise is to a trustee for the wife's benefit, and not directly to her.

1. Dr. Evans died on October 17, 1916. His will was dated November 11, 1914. He then owned a property in Minneapolis known as the Anglesey Building, subject to a mortgage of \$36,500. This property was worth something like \$100,000, and was the principal part in value of his estate. He owned a quarter section in Cass county and some lands in other states, found by the court to be, all together, of the value of \$14,000. The value of his personal estate was small. He bequeathed to various of his relatives articles of personal property of no considerable value, and not in controversy here. He devised the residue of his property to the Minneapolis Trust Company, in trust. It was directed to sell the property devised, except the Anglesey, and apply the proceeds in reduction of the \$36,500 mortgage; to lease the Anglesey, and, after the payment of insurance, taxes, and interest, to pay \$200 per month to Mrs. Evans during life, and apply the rest in reduction of the encumbrance; and, after the payment of the encumbrance, to invest and reinvest and hold as a part of the trust fund. Upon the death of Mrs. Evans the Anglesey was to be sold and the proceeds divided among the testator's nephews and nieces and grand-nephews and grandnieces. We omit mention of some of the provisions of the will, not material here, and refer to them in the connection in which they are important.

On September 16, 1916, Dr. Evans made a contract with the Benjamin A. Paust Company whereby he

agreed to lease the Anglesey for one hundred years at an annual rental of \$6,600, the lessee to pay taxes, insurance, and repairs. The lessee was to erect an additional building on the property, to cost not less than \$4,000, within three years, and to further improve the property within ten years at an additional cost of not less than \$8,000. The option was given the lessee to purchase within ten years for \$110,000. If the purchase was made, enough cash was to be paid to discharge the \$36,500 mortgage; and the balance was to be secured by a 6 per cent mortgage, running for twenty-five years, with the option to pay at any time after the death of Dr. Evans and his wife.

After the death of Dr. Evans, his executor executed a lease in conformity with the contract, in which Mrs. Evans joined, and it was approved by the probate court.

The claim of Mrs. Evans in this court, as in the court below, is that the making of this contract revoked the will, and that she took the whole estate as sole heir. The probate court, and the district court on appeal, found against her.

It was the common-law doctrine that land not owned by the testator at the time of his will, and continuously owned by him thereafter until his death, did not pass by a devise of it. "The law requires that the same interest which the testator had when he made the will should continue to be the same interest, and remain unaltered to his death. The least alteration in that interest is a revocation." 4 Kent, Com. 529. By consequence a conveyance of the land devised operated as a revocation of the will. It was said in such a case that there was a revocation by implication of law because of the alteration of the estate. The strict rule that the least alteration in the estate of the testator revoked the will, founded in part on the common-law conception of seisin, on which English real property law was bottomed, and the necessity of livery to a conveyance,

led to bewildering refinements and confusing distinctions, often bringing absurd and harsh results of which the English judges complained; but the rule persisted. 1 Jarman, Wills, 161; Page, Wills, §§ 278, 279; 1 Redf. Wills, 331-342; 1 Woerner, Administration, 103; 1 Schouler, Wills, § 427; 4 Kent, Com. 528; Gardner, Wills, 246; Rood, Wills, §§ 366 et seq.; 30 Am. & Eng. Enc. Law, 652; 40 Cyc. 1205; Lang v. Vaughn, 137 Ga. 671, 40 L.R.A. (N.S.) 553, 74 S. E. 270, Ann. Cas. 1913B, 56; American Trust & Bkg. Co. v. Balfour, 138 Tenn. 385, L.R.A. 1918D, 538, 198 S. W. 70.

By statute, 1 Vict. chap. 26 (1837), the doctrine of implied revocation was abolished. Section 19 provided "that no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances." Section 23 provided that no conveyance made after the execution of a will should prevent its operation with respect of the estate or interest the testator should have power to dispose of by will at the time of his death. Section 24 provided that every will should be construed with reference to the property mentioned in it to speak and take effect as if executed immediately prior to the testator's death, unless a contrary intention appeared. Some of the states have statutes similar to those mentioned. Some others, as may be noted from the authorities cited above, reach much the same result without the aid of a specific statute.

We have no statute following § 19 or § 23 of the English statute. We have a statute which provides that every devise of land shall convey all the estate of the testator unless it appears by the will that he intended a lesser estate. Gen. Stat. 1913, § 7263. This statute is easily referable to the quality of the estate transferred, so that, for instance, a fee may pass though heirs or assigns or others than the devisee are not mentioned, and so to refer to the construction of the will, rather than to bear on the question of implied

revocation. See *Re Oertle*, 34 Minn. 173, 178, 57 Am. Rep. 48, 24 N. W. 924; *Gleason v. Fayerweather*, 4 Gray, 348; *Burlingham v. Belding*, 21 Wend. 463. But in *Lefebvre's Estate*, 100 Wis. 192, 75 N. W. 971, such a statute was considered to bear on implied revocation. Another statute, resembling § 24, provides that property acquired by the testator after the making of his will shall pass as if possessed by him when he made it, unless a different intention manifestly and clearly appears from the will. Gen. Stat. 1913, § 7264. This statute is not in harmony with the theory upon which the common-law revocation by alteration of estate was based.

The statute which defines the different methods of express revocation provides that "nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator." Gen. Stat. 1913, § 7256. This has been construed to adopt the common-law doctrine of implied revocation, whether by change of status or by alteration of estate. *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31; *Donaldson v. Hall*, 106 Minn. 502, 20 L.R.A. (N.S.) 1073, 130 Am. St. Rep. 621, 119 N. W. 219, 16 Ann. Cas. 541. In the latter case it is said that "the tendency of the reported cases has been to restrict, rather than enlarge, its scope."

The rule is general that a conveyance of property devised revokes the will wholly or pro tanto, in the sense that the will cannot operate upon property conveyed after its execution. This is but the statement of a truism.

There is ample authority for holding under the common-law rule that a contract for the conveyance of real property, whereby the vendee takes the equitable title, and the vendor retains the legal title as security for the unpaid purchase money, operates as an implied revocation. *Bennett v. Tankerville*, 19 Ves. Jr. 170, 34



Eng. Reprint, 482; *Gale v. Gale*, 21 Beav. 349, 52 Eng. Reprint, 894; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Donohoo v. Lea*, 1 Swan, 119, 55 Am. Dec. 725; *Re Bernhard*, 134 Iowa, 603, 12 L.R.A. (N.S.) 1029, 112 N. W. 86. It does not seem that a mere lease necessarily had such effect. *Hodgkinson v. Wood*, Cro. Car. 23, 79 Eng. Reprint, 625; *Lamb v. Parker*, 2 Vern. 495, 23 Eng. Reprint, 917; *Brady v. Brady*, 78 Md. 461, 28 Atl. 515.

Counsel relies upon *Bosley v. Wyatt*, 14 How. 390, 14 L. ed. 468, as holding that a lease coupled with an option in the lessee to purchase is a revocation. There the testator and his lessee agreed upon a purchase price, and a portion was paid in cash. A lease was given for ninety-nine years, renewable forever, at a ground rent equivalent to interest on the unpaid price, and with the right in the lessee to extinguish it by the payment of the unpaid portion of the purchase price. This was said to be a common form of contract in Maryland, from which the case comes, and nearly to have superseded the old form of contract for a conveyance or a bond for deed. The lease and option were held the equivalent of a contract of sale, and therefore to effect a revocation. We do not minimize the force of the argument based on this case, nor the force of the decision in *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336, which is cited in connection with it.

The lease and option given by Dr. Evans did not take his legal title. The lessee acquired a chattel real, the lease, and an option to purchase the reversion, for which there was a consideration; but it took no equitable estate in fee, as in the case of a contract of sale. There was no conversion of real property into personalty. The other real property, which was a part of the trust, and found to be worth \$14,000, and which was to be used in protecting the Anglesey, was not disturbed. The trust can be carried out in substance as the will directs. All the

purposes which Dr. Evans had in view, and all the provision he chose to make for Mrs. Evans, and all the benefits which he wished to give his collateral blood relatives, can be given effect. See *Forney's Appeal*, 161 Pa. 209, 28 Atl. 1086; *Connecticut Trust & S. D. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171. Under the circumstances recited the law should not imply a revocation. That Dr. Evans, when he gave the lease and option, had in mind revoking his will, or changing the provisions of the trust, is not to be thought. The law should not give that effect through the doctrine of implied revocation. By considering the land as passing in trust, subject to the benefits and burdens which attach because of the lease and the option, the will is easily given the substantial effect which Dr. Evans wished.

It may be noted that some cases refuse to apply the doctrine of an implied revocation by a subsequent contract of sale when thereby the apparent intention of the testator is thwarted. *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *Kirsher v. Todd*, 195 Mich. 297, 162 N. W. 129; *Lefebvre's Estate*, 100 Wis. 192, 75 N. W. 971. And so in case of a deed subsequent to the will. *Bills v. Putnam*, 64 N. H. 554, 15 Atl. 138; *Forney's Appeal*, 161 Pa. 209, 28 Atl. 1086; *Connecticut Trust & S. D. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171. And see *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025. We do not discuss these cases, nor need we decide what the holding should be if there had been a contract of sale vesting the equitable title. We limit our decision to a holding that the execution of the lease containing the option of purchase did not revoke the will nor prevent the carrying out of its trusts.

2. Failing in her claim that the will was revoked by implication of law, Mrs. Evans contends that the trust devise is additional to her statutory one third; that she is not put to an election between the will and

Will—effect of subsequent long-term lease.

the provision of the statute; and that she takes her statutory one third with the \$2,400 annuity charged on the remaining two thirds. The district court held with her.

Mrs. Evans is not put to an election within six months by Gen. Stat. 1913, § 7239, which refers to a case where "the will of a deceased parent makes provision for a surviving

**Election—by  
widow—rights  
under will and  
statute.**

spouse in lieu of the rights in his estate secured by statute,"

for Dr. Evans was not a parent. *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111; *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635; *Mechling v. McAllister*, 135 Minn. 357, L.R.A.1917C, 504, 160 N. W. 1016. But unless that given by the will was intended as additional to that given by statute, she must elect. *Re Gotzian*, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920.

The earlier statute was that when any lands were devised to a woman, or other provision made for her in the will of her husband, she must make her election whether she would take the lands devised or the provisions made in the will; but she could not have both unless it plainly appeared by the will to have been so intended by the testator. Gen. Stat. 1866, chap. 48, § 18. This provision was repealed by Laws 1875, chap. 40, which abolished dower, and provided an estate of inheritance in lieu thereof. This left applicable the common-law rule, which was that the widow was entitled to both dower and the provision made in the will unless it plainly appeared from the will not to have been so intended. *Re Gotzian*, supra; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251. It so continued until Laws 1893, chap. 116, § 5, when there was added a provision, now appearing in Gen. Stat. 1913, § 7239, in the following language: "And no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor by statute unless it clearly appears

from the contents of the will that such was the testator's intent."

It does not appear from the contents of the will that the trust devise was intended to be additional to the statutory one third. The contrary appears. The trust devise included all of the testator's property except some minor articles of personal property, largely personal belongings of no great value, bequeathed to relatives, apparently more as keepsakes than because of their value. He intended his wife to have \$200 per month during her life, and had in mind that the Anglesey was the property which would secure it. To this end he put all of his property in trust, with directions that all except the Anglesey, which was revenue-producing, should be sold, and the proceeds used to protect it against the mortgage, and that the Anglesey should be charged with the payment of the income. He provided for burial for himself and his wife, and for the care of their cemetery lot. If his wife chose to give by her will \$200 per year to her sisters for life, each of them was to have it; and the trust fund was to be preserved to insure its payment. There was then a bequest of \$1,000 to a church fund; and the residue was to be distributed among his collateral blood relatives. It was not in his mind that his wife should have one third of all his estate, and that the remaining two thirds should be charged with the \$2,400 annuity. The conclusion is irresistible that Dr. Evans intended his wife to have the specified income for life and the further provisions mentioned, and nothing more; and that when his estate had satisfied this charge, the residue should go to his collateral blood relatives. This was his will.

We hold that Mrs. Evans was not entitled to the annuity in addition to a statutory one third, and that she was put to an election.

3. The statute quoted refers to a "devise and bequest to a surviving spouse." Gen. Stat. 1913, § 7239. It is the contention of Mrs. Evans

that since the devise was to the Minneapolis Trust Company, as trustee, and not directly to her, she is not within the provision of the statute that a devise shall not be deemed additional to the statutory interests unless it clearly appears that such was the testator's intention. In *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404, one or more of the judges held to that effect, though the decision was rested upon another ground. At common law to bar the wife's right of dower by a jointure, the settlement must have been to the wife herself, and not to another, in trust for her. 4 Kent, Com. 5; 2 Bl. Com. 137-139; 1 Washb. Real Prop. § 490; Tiedeman, Real Prop. § 117; 1 Tiffany, Real Prop. 459; 2 Scribner, Dower, 391, 399. The effect of the Statute of Uses, 27 Hen. VIII. chap. 10, which transferred the use into a legal estate, was to make the wife dowable in estates of her husband executed by the statute, though before she was not dowable in estates held in trust for him. So the statute provided that when a jointure was made, the wife should not claim dower in other of her husband's lands. The statute, as it was construed, only had in mind such jointures as were settled upon the wife and, by force of the statute, barred dower; and a grant to a trustee for her was therefore not a legal jointure so as to bar her dower. It was upon this notion of a common-law jointure barring dower that the holding noted in the New Jersey case rests. We are far from common-law dower. There is nothing in the history or reason of the technical common-law rule, though it was entirely reasonable when ap-

plied to dower as it then was, which prompts us to apply it to the statute which determines when a devise shall be in addition to the statutory interest. Our statute gives dower in equitable estates.

Until dower was abolished in 1875 the statute referred to a case where lands were "devised to a woman, or other provisions made for her in the will of her husband;" and in such a case she was required to elect. Gen. Stat. 1866, chap. 48, § 18. From 1875 to 1893, when the present provision was adopted, there was nothing in the statute raising a presumption that a devise to the wife was or was not additional to the statutory right. When the legislature put the statute in its present form, dropping the words, "or other provisions made for her in the will of her husband," it was not its intention to make a rule in harmony with the rule when jointures barred dower, and so to make a provision for the <sup>devise of</sup> ~~income.~~ wife ineffectual to put her to an election unless there was a devise directly to her. The devise to the trust company gave the wife an equitable right or estate. She was a beneficiary of the trust. We hold that it was as effectual to put her to an election as if there had been a devise directly to her.

Upon the appeal of Mrs. Evans the judgment is affirmed, and on the appeal of the residuary devisees it is reversed; and the case is remanded for proceedings not inconsistent with this opinion.

Judgment affirmed in part and reversed in part.

Petition for rehearing denied May 14, 1920.

## ANNOTATION.

### Lease of property as ademption or revocation of devise.

In the absence of controlling statutes to the contrary it seems that a lease for a definite term of years revokes pro tanto only a previous devise of the leased lands. It has been so

held in the American cases of *Herrington v. Budd* (1848) 5 Denio (N. Y.) 321, and *Skerrett v. Burd* (1836) 1 Whart. (Pa.) 246. So it has been held that a lease of lands for life op-

erates as a revocation of a prior devise of the lands quoad the term. *Graves v. Sheldon* (1824) 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653.

And that the granting of a license to occupy devised lands on the payment of a periodical rental operates only as a revocation pro tanto of the devise, see *Re Fuller* (1898) 71 Vt. 73, 42 Atl. 981. In the Maryland case of *Brady v. Brady* (1894) 78 Md. 461, 28 Atl. 515, without reference to any statutory provision it was held that a specific devise of certain real estate was not adeemed by a subsequent lease thereof by the testator for ninety-nine years, renewable forever, with reversion in the lessor. This was upon the ground that the lease merely wrought a change in the tenure of the estate.

And in England it has been held that a lease of devised lands to a stranger for years, to commence after the testator's death, does not constitute a total revocation of the devise, but only quoad the term. *Coke v. Bullock* (1604) Cro. Jac. 49, 79 Eng. Reprint, 41 (dictum); *Hodgkinson v. Wood* (1625) 4 Cro. Car. 23, 79 Eng. Reprint, 625; *Lamb v. Parker* (1705) 2 Vern. 495, 23 Eng. Reprint, 917, affirmed in (1706) 3 Bro. Ch. 12, 1 Eng. Reprint, 1145. And see *Perkins v. Walker* (1682) 1 Vern. Ch. 97, 23 Eng. Reprint, 389.

On the other hand, an early English authority is to the effect that if the lease of the devised lands is to the devisee, to begin at death, the whole devise is revoked. *Coke v. Bullock* (1604) Cro. Jac. 49, 79 Eng. Reprint, 41. The court said that both of the estates could not stand in the devisee, and that since they were to begin at the same time, the testator's intent appears to have been altered so as to give the lessee a lesser estate. However, where the term of the lease is not postponed until after death, it has been held that at law a lease for a term of years to the same person to whom the grantor has previously devised the fee does not work a revocation of the devise, it having been said that in such a case the lease is merged in the inheritance. *Villiers v. Villiers* (1740) 2 Atk. 71, 26 Eng. Reprint, 444.

But applying the rule that if a lease is such as to alter the estate held by the testator, or his interest therein, or modify it by converting it into a different estate from the one held by him at the time of the devise, the devise is revoked or adeemed, it has been held that a change, such as granting a lease in fee, reserving a rent, with a clause of re-entry for condition broken, revokes a prior devise of the lands made by the grantor. *Harrington v. Budd* (1848) 5 Denio (N. Y.) 321; *Skerrett v. Burd* (1836) 1 Whart. (Pa.) 246; *Mullock v. Souder* (1842) 5 Watts & S. (Pa.) 198. So in England it has been held that a lease and release of a previously devised estate worked a revocation of the will. *Pollen v. Husband* (1712) 1 Eq. Abr. 412, 21 Eng. Reprint, 1142; *Cave v. Holford* (1798) 3 Ves. Jr. 650, 30 Eng. Reprint, 1203, affirmed in (1799) 7 Bro. Ch. 593, 3 Eng. Reprint, 384.

And in *Bosley v. Wyatt* (1852) 14 How. (U. S.) 390, 14 L. ed. 468, where a testator specifically devised certain real estate, and subsequently leased the same for the term of ninety-nine years, renewable forever, reserving a ground rent, payable partly in cash, and wholly extinguishable at any time by payment of a certain sum, it was held that the transaction so altered the condition of the property that it amounted to a revocation of the devise. But, as is pointed out in the reported case (*RE EVANS*, ante, 1631), this was upon the theory that the lease and option were the equivalent of a contract of sale. In fact, Mr. Justice Taney, in delivering the opinion of the court, expressly distinguished the case from those where the lessor retains the reversion without obligating himself to convey it to the lessee, pursuant to contract. Among other things he said: "In the case before us, the interest which the testator had in this land at the time of making his will was converted into money by his contract with *Armstrong*. It was a sale and an agreement to convey his whole interest in the land. It is therefore unlike the case of a lease for years, or of ninety-nine years, renewable forever, in which the lessor re-

tains the reversion and does not bind himself to convey it on any terms to the lessee. The form of the contract adopted in this instance, between the testator and Armstrong, is in familiar use in the sale of lots in the city of Baltimore and the adjacent country. It has nearly, if not altogether, superseded the old forms of contract where the vendor conveyed the lands and took a mortgage to secure the payment of the purchase money, or gave his bond for the conveyance, and retained the legal title in himself until the purchase money was paid. And it has taken the place of these forms of contract because it is far more convenient, both to the seller and the purchaser, for it enables the vendee to postpone the payment of a large portion of the purchase money until he finds it entirely convenient to pay it; and at the same time it is more advantageous to the vendor, as it gives him a better security for the punctual payment of the interest; and while an extended credit is given to the vendee, it is to the vendor a sale for cash. For if his ground rent is well secured, he can at any time sell it in the market, for the balance of the purchase money left in the hands of the vendee. It will be observed that the rent reserved is precisely the interest on the amount of the purchase money remaining unpaid. And when it must be admitted that a sale in which a bond of conveyance is given, and the title retained by the vendor, to secure the payment of the purchase money, is in equity a revocation, there would seem to be no good reason for holding otherwise in the case before us, where the vendor is equally bound to convey when the whole purchase money is paid. A distinction between the cases would rest on a difference in form rather than of substance and principle. It would, moreover, make the revocation depend upon the will of a stranger, and not upon that of the testator. For if Armstrong had paid to him, in his lifetime, the whole amount of the purchase money, as he had a right to do under the contract, it is very clear that the devise would then have been revoked. And if the purchaser's omis-

sion to pay prevents the contract from being a revocation, the validity of the devise is made to depend, not upon the will or the act of a testator, but that of a stranger, over which the testator has no control. We think a distinction leading to that result cannot be maintained, and that the devise in question was revoked by the contract with Armstrong." And see *Re Pyle* [1895] 1 Ch. (Eng.) 724, 64 L. J. Ch. N. S. 477, 13 Reports, 896, 72 L. T. N. S. 327, 43 Week. Rep. 420, wherein the court seems to have been of the opinion that a lease with an option to purchase revoked a prior devise of the premises.

On the other hand, in the reported case (*RE EVANS*, ante, 1631), the court refused to adopt the general rule that the giving of a lease with an option to the lessee to purchase revoked a prior devise of the leased property, and this notwithstanding the court admitted that the Minnesota statutes had repeatedly been construed as adopting the common-law doctrine of implied revocation by alteration of estate. It will be remembered that this was upon the theory that the purposes of the testator could still be carried out, and that since it was clear that the testator had not intended to revoke the will, the law should not give that effect through the doctrine of implied revocation. In this connection it is of interest that intent is generally regarded as a necessary element of revocation, but that it is not essential to an ademption, all of which would seem to make it important to use the terms "ademption" and "revocation" advisedly. Of course, the generally accepted common-law rule was that the term "ademption" applied only to specific bequests of personalty, and had no application to devisees of real estate; but it has also been maintained that the question under consideration technically is one of ademption. At any rate, it seems safe to say that some of the apparent confusion is probably due to the indiscriminate use of these terms, some courts having used one term, some having used the other, and still others having employed both to

express the same thing. However, the writer has seen no case wherein the court has expressly referred to the necessity or advisability of using one term in preference to the other when referring to transactions of the class under consideration herein.

In *Joynes v. Hamilton* (1904) 98 Md. 665, 57 Atl. 25, where certain land was specifically devised and subsequently leased for ninety-nine years, subject to an annual ground rent, but with an option in the lessee to redeem for a certain sum, which lease was fol-

lowed by a codicil to the will which devised the ground rent to the devisee, and in effect revoked the original devise, and the lessee afterwards, but during the life of the testator, redeemed the rent and received a deed, it was held that the devise of the ground rent and its subsequent redemption by the lessee did not work an ademption of the devise. The reason assigned was that such was the clear intention of the testator, and that such intention must be carried out. G. J. C.

MARY S. WHITE, Admr., etc., of Gassaway H. White, Appt.,  
v.  
SAMUEL G. THOMPSON.

*Kentucky Court of Appeals—March 16, 1920.*

(— Ky. —, 219 S. W. 434.)

#### **Fence — right to remove hedge.**

1. One upon whose property is located a hedge which forms a division fence between himself and his neighbor may remove it and put another fence in its place, against the protest of the neighbor.

[See note on this question beginning on page 1644.]

#### **Pleading — effect of reply to change allegation in petition.**

2. The implied admission in a complaint for destroying a division fence that it was "on or near the line" is not affected by a denial in the reply that it was on defendant's property.

#### **Estoppel — to complain of removal of hedge.**

3. A property owner who remains silent after receiving notice from his neighbor of intention to remove a

hedge from the division line between the two properties is estopped to claim damages for its removal.

#### **Trespass — right to remove railing attached to house.**

4. The right to remove a hedge on the division line between adjoining properties carries with it the right to take down a supporting railing, although it is attached to the neighbor's house.

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for alleged wrongful and unlawful destruction of a hedge fence on the boundary of plaintiff's property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Moorman & Woodward and Hardin H. Herr, for appellant:

It is proper to join the real and personal representatives of a decedent in an action for damages to real property.

*Prescott v. Grimes*, 143 Ky. 191, 33

L.R.A. (N.S.) 669, 136 S. W. 206; *Chicago, M. & G. R. Co. v. Dodds*, 167 Ky. 624, 181 S. W. 666.

There can be no estoppel by mere silence when it is not the duty of the party to speak.

16 Cyc. 681-761; *Fitzpatrick v.*

Baker, 155 Ky. 175, 159 S. W. 675; Ewart, Estoppel, 90; Johnson v. Elkhorn Gas Coal Min. Co. 176 Ky. 676, 197 S. W. 409.

Equity will not enjoin a trespass if adequate damages can be recovered.

Pom. Eq. Jur. 3d ed. § 221, p. 307.

There is no rule of law requiring the rightful owner of the premises to enter into an agreement with a wilful trespasser to save his rights. The owner of the premises can rely upon the law of the land.

Watson v. Dilts, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, second appeal in 124 Iowa, 344, 100 N. W. 50; Strickler v. Midland R. Co. 125 Ind. 412, 25 N. E. 455; Woll v. Voigt, 105 Minn. 371, 23 L.R.A. (N.S.) 270, 117 N. W. 608; Leber v. Minnesota & N. W. R. Co. 29 Minn. 256, 13 N. W. 31.

Although a petition may allege an improper measure of damages, it is not a reason for sustaining a demurrer thereto.

Pulaski Stove Co. v. Miller's Creek Lumber Co. 138 Ky. 391, 128 S. W. 96.

Where the pleadings show that a plaintiff is entitled to any relief whatsoever, a lower court commits an error when he dismisses an action on the pleadings, and without having a trial of the cause.

Hazelden v. Thompson, 21 Ky. L. Rep. 303, 51 S. W. 1129; Magee v. Frazier, 20 Ky. L. Rep. 1467, 49 S. W. 452; 13 Cyc. 178.

Mr. D. Moxley, for appellee:

The letter written by defendant to White gave him full opportunity to make any protest which he wished, and, having made none, he is estopped.

Trimble v. King, 131 Ky. 4, 22 L.R.A. (N.S.) 880, 114 S. W. 317.

Carroll, Ch. J., delivered the opinion of the court:

In this suit by the administratrix of Gassaway H. White to recover damages in the sum of \$500, it was alleged in the petition that he died the owner of a lot 30 feet wide and 150 feet deep in the city of Louisville, that adjoined a lot owned by the appellee, Samuel G. Thompson; that Thompson in September, 1916, "without right or authority, and against the will of the said Gassaway H. White and this plaintiff, entered upon the aforesaid property, and wilfully, wrongfully, and unlaw-

fully tore down and destroyed a hedge fence that was on or near the western boundary line of said property of the plaintiffs, and further wilfully, wrongfully, and unlawfully tore off a wooden support and railing which was attached to the house of the plaintiff located on the above-described lot."

For an answer to the petition, Thompson, after denying the material averments, affirmatively set up by way of estoppel that, on or about the time referred to by the plaintiff in his petition, "there was a hedge fence on the property of this defendant, separating the property of this defendant from the property of the plaintiff, and this defendant says that he did take the said fence down, and erected an iron railing fence in its place on his own property, and in within about 3 inches of the property line of the plaintiff, and defendant says that, a few days before the hedge fence referred to in the petition was taken down and the iron railing fence erected near the property line of the plaintiff's property, this defendant wrote a letter to the plaintiff, Gassaway White, and notified and informed the said plaintiff in said letter that the said fence was on his property, and was a division fence between the property of the plaintiff and the defendant, and that it was in bad condition and ought to be taken down, and that he would proceed to take said fence down and erect a new fence on his own property, which would be a division fence between his property and the property of the plaintiff, and in said letter defendant notified the said plaintiff, if he had any objection to the removal of said fence, to state said objection. Defendant says that the said letter was received by the said Gassaway White, and that, after receiving said letter, said White saw defendant removing the said hedge fence and erecting said iron fence, and made no protest or objection or complaint of any kind or description, and defendant says that the said plaintiff is barred and estopped from claiming any damages because of

the removal of said fence, by his action in not objecting thereto, and defendant pleads and relies on said facts as an estoppel against the claims of the plaintiff herein."

To this answer a reply was filed, denying that the hedge fence was on the property of Thompson, and that Thompson "took down any fence other than the hedge fence on the property that decedent, White, owned."

There was no denial of the allegation in the answer that Thompson wrote, or that White received, the letter set up in the answer of Thompson.

The lower court sustained a demurrer to the reply, and, the plaintiff declining to plead further, the petition was dismissed.

On the pleadings it will be seen that the lower court was of the opinion that the undenied plea of estoppel set up by Thompson in his answer was a bar to the recovery sought in the petition, and the sufficiency of this defense is the only substantial question in the case.

It will be observed that the petition alleged that the hedge fence torn down by Thompson "was on or near the western boundary line" of the property of the plaintiff, William White, while in the answer of Thompson the allegation was that the fence was on his property, and that the iron fence put in its place was also located on his property.

It will be noticed that the reply denies that the hedge fence was on the property of Thompson, but this denial in the reply cannot change the effect of the affirmative admission and averment in the petition that the hedge fence was "on or

**Pleading—  
effect of reply to  
change allegation  
in petition.**

near" the property line of White; and, construing the petition most strongly

against the pleader, we must take it for confessed that the hedge fence, while on the line, was yet located on the property of Thompson.

If this hedge fence had been located on the property of the Whites

they could easily have so averred, and the fact that they did not is virtually conclusive of the issue that it was not on their property, and especially are we authorized to so conclude by the failure to deny the allegation of the answer that the iron fence put up to take its place was located on the property of Thompson.

Taking this view of the case, Thompson had the right to take down the hedge fence on his own property and put in the place of it, on his own property, the iron fence.

**Fence—right to  
remove hedge.**

But if it should be admitted that the hedge fence was immediately on the line between the two lots, and partly on each, we think the Whites were estopped by their conduct from bringing this action to recover damages for its removal. The confessed allegations of the answer make it a

**Estoppel—to  
complain of  
removal of  
hedge.**

clear case of estoppel, under the authority of Trimble v. King, 131 Ky. 4, 22 L.R.A. (N.S.) 880, 114 S. W. 317; Johnson v. Elkhorn Gas Coal Min. Co. 176 Ky. 676, 197 S. W. 409.

If the letter written by Thompson to White does not, under the pleadings, constitute an estoppel, it would be difficult to find a state of facts that would. Here we have a short division fence that is either immediately on the line or on the property of an owner who wants to remove it and replace it by another and better fence. This owner writes a letter to the adjoining owner, saying to him that the fence was in bad repair, and he wanted to take it down and put in its place, on his own property, but on the line, a good fence at his own expense; also telling him that if he had any objection he wanted him to make it known. The adjoining owner gets the letter, but makes no objection or protest of any kind; he stands by and sees his neighbor tear down the old, and put up a new, fence at his own expense, and then sues him for damages.

It is further said for appellant



that, even if he is estopped by the letter from seeking to recover damages on account of the fence, he should have a right to recover for the alleged wrongful act of Thompson in tearing off "a wooden support and railing which was attached to the house of plaintiff." This act on the face of it appears to be a very unsubstantial ground for damages, but, aside from its trivial nature, it

is plain that this piece of wood was in some way a part of or attached to the hedge fence, and that in tearing down the fence it was also pulled down or removed.

This railing should go with the fence; the right to remove the fence carried with it the right to remove the railing.

The judgment is affirmed.

*Trespass—right to remove railing attached to house.*

## ANNOTATION.

### Right to remove or rebuild fence separating one's land from his neighbor's land.

I. In general, 1644.

II. Removal, 1644.

III. Reconstruction, 1646.

#### Scope.

This annotation is confined to cases involving fences which separate adjoining lands, but are not what are technically known as division or partition fences, since the rights and liabilities of adjoining landowners as to such latter fences are generally regulated by statute. Cases relating to fences along highways or along a railroad right of way, and spite fences, are also excluded from this note.

#### I. In general.

As a general rule, one has the right, in the absence of a statute to the contrary, to remove at his pleasure a fence separating his land from that of his neighbor, when such fence is located wholly upon his own land. The reported case (*WHITE v. THOMPSON*, ante, 1641); *Jones v. Henry* (1877) *Man. Unrep. Cas. (La.)* 65; *Jeffries v. Burgin*, (1874) 57 *Mo.* 327; *Sims v. Field* (1881) 74 *Mo.* 139; *McAninch v. Smith* (1885) 19 *Mo. App.* 240; *Wright v. Brown* (1912) 163 *Mo. App.* 117, 145 *S. W.* 518; *Jones v. Derosset* (1916) — *Mo. App.* —, 185 *S. W.* 239; *Thayer v. Wright* (1847) 4 *Denio (N. Y.)* 180; *Ciowers v. Sawyers* (1858) 1 *Head (Tenn.)* 156; *Kimball v. Adams* (1881) 52 *Wis.* 554, 9 *N. W.* 170; *Scholl v. Kinitzer* (1892) 83 *Wis.* 307, 53 *N. W.* 451; *Bragg v. Rogers* (1875) 25 *U. C. C. P.* 156.

And he may also rebuild such a fence. *WHITE v. THOMPSON* (reported herewith) ante, 1641; *Thayer v. Wright* (1847) 4 *Denio (N. Y.)* 180; *Bragg v. Rogers (U. C.) supra*.

#### II. Removal.

The general rule that a landowner has the right to remove a division fence located wholly upon his own property applies, whether such fence was erected by himself, as in *Jeffries v. Burgin* (1874) 57 *Mo.* 327, and in *Bragg v. Rogers* (1875) 25 *U. C. C. P.* 156, or by his predecessor in title, as in *Sims v. Field* (1881) 74 *Mo.* 139; *McAninch v. Smith* (1885) 19 *Mo. App.* 240, and *Jones v. Derosset* (1916) — *Mo. App.* —, 185 *S. W.* 239; or by the adjoining landowner, without any agreement between the parties as to a right of removal, as in *Wright v. Brown* (1912) 163 *Mo. App.* 117, 145 *S. W.* 518, *Kimball v. Adams* (1881) 52 *Wis.* 554, 9 *N. W.* 170, and *Scholl v. Kinitzer* (1892) 83 *Wis.* 307, 53 *S. W.* 451.

Where one incloses a farm by fences, which he deems to be on his line, whether the true line or not, and claims the fences and the land up to such line for nearly thirty years, and during such time has repaired and maintained such fences, another, who has subsequently improved an adjoining tract, cannot bring an action of trespass for the taking away of the rails by the former. *McAninch v. Smith* (1885) 19 *Mo. App.* 240.

And where one has planted a hedge fence with the intention of locating it near the dividing line, but wholly on his own land, and has done so according to an older fence supposed to be on his land, and for a number of years cares for it until it becomes a substantial fence, during such time claiming the fence as entirely his own, which claim is recognized by the adjoining owner, a grantee of such adjoining owner cannot recover damages from a successor in title of the planter of the hedge, for the removal of the fence and the manufacture of fence posts from the hedge trees. *Jones v. Derosset* (1915) — Mo. App. —, 185 S. W. 239.

But one cannot arbitrarily remove a division fence located wholly upon his own land, where he has permitted his neighbor to connect his fence with it; but in such case he must give his neighbor reasonable notice of his intention to remove the division fence, in order that the latter may protect his premises. *Sims v. Field* (1881) 74 Mo. 139.

And a statute making it unlawful for any person who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person, to remove the same without first giving the notice therein provided, is violated by the removal of a fence which is a part of one continuous line of separating or dividing fences, of which the adjoining owner also owns a part, although the fence removed, as well as the land upon which it stands, belongs to the one by whom it is removed. *St. Louis Cattle Co. v. Gholson* (1895) — Tex. Civ. App. —, 30 S. W. 269.

And if one remove a portion of a fence separating his land from that of his neighbor, although the part removed is his own fence and upon his own land, at a time and under circumstances that would naturally cause his stock to go into his neighbor's pasture, he is liable for the resulting injury to his neighbor. *Claunch v. Osborn* (1893) — Tex. Civ. App. —, 28 S. W. 937; *Jameson v.*

*Board* (1914) — Tex. Civ. App. —, 171 S. W. 1037.

A landowner, who, as an act of neighborly accommodation, permits an adjoining owner to erect a division fence upon the former's property, may remove such fence, upon his neighbor's failure to do so after a reasonable notice, since such permission was a mere license, revocable at the pleasure of the giver. *Wright v. Brown* (1912) 163 Mo. App. 117, 145 S. W. 518.

And it was held in *Kimball v. Adams* (1881) 52 Wis. 554, 9 N. W. 170, that a division fence built as a permanent structure by one person upon the land of a neighbor, without any agreement as to the right to remove it, became a part of the land upon which it was erected, and the owner thereof might remove such fence and dispose of its materials at his pleasure; and that this was so, even though the fence was composed of rails which were not otherwise attached to the land than by their weight, and were placed upon the adjoining land by mistake. Two years later, however, the legislature enacted a statute providing that when any owner or occupant of land shall have built a fence before a boundary line shall have been established between him and any adjoining land by the county surveyor, and it shall prove, after the boundary line is so surveyed, that the fence is on the adjoining land, the party who has built the same, or, if the land is sold, the party who built the same or the purchaser of the land, shall be the owner of the fence, provided that the owner of the fence remove the same on the boundary line so established, upon a notice served upon him by the adjoining owner of land. And in *Scholl v. Kinitzer* (1892) 83 Wis. 307, 53 N. W. 451, one who had erected a division fence upon his neighbor's land sought, upon the ground that he was the owner of such fence under such statutory provisions, to recover damages for the removal of the fence by the owner of the realty upon which it was situated, but was defeated by the fact that the boundary line between the lands of the parties had

been established by the county surveyor before the erection of the fence.

The owner of two adjoining city lots, after the sale of one of the lots with a division fence located wholly thereon, cannot remove such fence, since it is a part of the freehold and passes with the land on which it is built. *Bast v. Mason* (1912) 165 Mo. App. 718, 148 S. W. 398.

An act to enable persons to remove fences made by mistake on the land of other persons does not authorize one who has built a division fence upon adjoining public land by mistake, subsequently to remove the same, since such act does not apply to fences erected upon the lands of the United States, or of the state. *Blair v. Worley* (1835) 2 Ill. 178.

But one who incloses unimproved land with a rail fence, laying up the rails into a temporary fence because he does not know the exact location of the line, but expects at some future time, when the adjoining land is improved, to get a survey of the line and build his half of the line fence, may remove such fence, although it is wholly upon the land of the adjoining owner. *Curtis v. Leasia* (1889) 78 Mich. 480, 44 N. W. 500.

### III. Reconstruction.

One upon whose land a division fence stands may, against the protest of his neighbor, replace it with a better fence. *Bragg v. Rogers* (1875) 25 U. C. C. P. 156.

Or with a fence of a different kind. For example, an iron railing in place of a hedge. *WHITE v. THOMPSON* (reported herewith) ante, 1641.

He may rebuild it on the same site, as in the reported case (*WHITE v. THOMPSON*).

Or he may reconstruct it in a new location, as in *Bragg v. Rogers* (U. C.) supra, where he moved it in further upon his own land, and placed it on a different angle from the old one, and in *Thayer v. Wright* (1847) 4 Denio (N. Y.) 180, where he removed it from within his land, to the division line.

But one landowner has no right to remove a line fence situated wholly upon the land of an adjoining owner, and out of the material rebuild the fence upon his own land, a number of feet from the boundary line, thus leaving an opening through which cattle may stray upon the adjoining land to the owner's damage. *Botta v. Pene* (1910) 15 West. L. R. (Can.) 508.

It was held, however, in *Matson v. Calhoun* (1869) 44 Mo. 368, that where one has erected a rail fence on a line believed by him to divide his land from an adjoining owner, and a subsequent survey shows that it was built upon the adjoining owner's land, a considerable distance from the true boundary line, he may reset the fence in its true position, upon the ground that the mere erection of a fence on the other's land in such circumstances did not operate to vest the title therein.

G. V. L.

# COMBINED INDEX

## TO

## NOTES AND CASES.

---

### ABANDONMENT.

Of operation of railways, see CARRIERS.  
Of wife, see HUSBAND AND WIFE.

*Constitutionality of statute or ordinance providing for destruction of abandoned animals. 8-67.*

Of trust by personal representative. 8-170.

---

### ABATEMENT AND REVIVAL

By dissolution of corporation, see CORPORATIONS.

By appointment of receiver, see RECEIVERS.

Pendency of prior action.

Effect of pendency of a former action by the owner of the other car to recover damages accruing to him from the collision to abate action for damages for injury growing out of an automobile collision. 8-690.

Revival.

Failure to perfect an appeal from an order denying a new trial of a motion to set aside a revivor as abatement of motion to revive. 8-163.

Necessity of motion for new trial to review ruling on motion to revive case in name of personal representative. 8-163.

---

### ABUTTING OWNER.

Additional servitude as against, see EMINENT DOMAIN.

Liability of, for injury by defect in street or sidewalk, see HIGHWAYS.

### ACCEPTANCE.

Of resignation of personal representative, see EXECUTORS AND ADMINISTRATORS.

---

### ACCIDENT.

Presumption of negligence from, see EVIDENCE.

Injuries from accidental explosion, see EXPLOSIONS AND EXPLOSIVES.

To person in highway, see HIGHWAYS; NEGLIGENCE.

Insurance against, see INSURANCE.

Proximate cause of, see PROXIMATE CAUSE.

In general, see NEGLIGENCE; PERSONAL INJURIES.

---

### ACCIDENTAL DISCHARGE.

Of firearm, see FIREARMS.

---

### ACCIDENT INSURANCE.

See INSURANCE.

---

### ACCOUNTANTS.

Public accountants, see PUBLIC ACCOUNTANTS.

Bank accountant as a "laborer" within meaning of act penalizing importation of contract labor. 8-1438.

---

### ACCOUNTING.

Between partners, see PARTNERS.

Effect of prayer for accounting to confer jurisdiction upon equity of action to collect unsatisfied judgment the amount of which is certain. 8-435.

**ACCOUNTS.**

Effect of filing of account by personal representative, denominated "final account," to terminate the trust. 8-170.  
 Effect of a report made by an officer of a corporation as an account stated which precludes the corporation from denying its accuracy. 8-478.

**ACCRETIONS.**

See **WATERS.**

**ACCOMULATIONS.**

*Right of trustee to accumulate income under will or other instrument directing him to use it. 8-915 (case p. 904).*

**ACKNOWLEDGMENT.**

To interrupt Statute of Limitations, see **LIMITATION OF ACTIONS.**

*Character as witness of officer authorized to take acknowledgments who attaches his official certificate to a will. 8-1075.*

Effect of clerical error in name of clerk of court in certificate of acknowledgment by him. 8-489.

**ACQUIESCENCE.**

Estoppel by, see **ESTOPPEL.**

**ACTION FOR DEBT.**

Right to maintain, to recover damages for wrongful discharge of employee. 8-334.

**ACTION OR SUIT.**

**In general.**

Abatement or revival of, see **ABATEMENT AND REVIVAL.**

Appearance, see **COSTS AND FEES.**

Compromise of, see **COMPROMISE AND SETTLEMENT.**

Continuance of, see **CONTINUANCE AND ADJOURNMENT.**

By stockholder, see **CORPORATIONS.**

Costs and fees, see **COSTS AND FEES.**

Dismissal or discontinuance, see **DISMISSAL OR DISCONTINUANCE.**

Transfers between law and equity, see **EQUITY.**

Limitation of actions, see **LIMITATION OF ACTIONS.**

Effect of, on running of limitations, see **LIMITATION OF ACTIONS.**

Removal of, see **REMOVAL OF CAUSES.**

Suit against state, see **STATE.**

Suit against United States, see **UNITED STATES.**

Process, see **WRIT AND PROCESS.**

*Effect of Federal control on right of action against public utility. 8-983.*

**Nature; kind.**

Right to maintain action for debt to recover damages for wrongful discharge of servant. 8-334.

Civil or criminal. 8-1149, 1463.

**Splitting.**

Action by servant wrongfully discharged. 8-334.

**ACT OF CONGRESS.**

See **STATUTES.**

**ACT OF GOD.**

Liability of owner of dam for injuries caused by acts of God. 8-544.

**ADDITIONAL SERVITUDE.**

See **EMINENT DOMAIN.**

**ADEMPITION.**

Of devise or legacy, see **WILLS.**

**ADHESIVENESS.**

*Experimental evidence as to. 8-45.*

**ADJOINING OWNERS.**

As to fences, see **FENCES.**

**ADJOURNMENT.**

See **CONTINUANCE AND ADJOURNMENT.**

**ADMINISTRATION.**

Of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**.

**ADMINISTRATOR PENDENTE LITE.**

*Termination of authority of, by termination of litigation.* 8-180.

**ADMISSIONS.**

Admissibility in evidence, see **EVIDENCE**.  
By pleading or failure to plead, see **PLEADING**.

**ADOPTION.**

Of child, see **PARENT AND CHILD**.

**ADULTERY.**

Of wife as affecting prior separation agreement. 8-1452 (case p. 1447).

**ADVERSE POSSESSION.**

As to limitation of actions, see **LIMITATION OF ACTIONS**.

Sufficiency of showing of adverse title. 8-489.

**AFFIDAVITS.**

On appeal, see **APPEAL AND ERROR**.

Effect of statements in affidavits to cure lack of material averments in pleading. 8-290.

**AFFRAY.**

*Experimental evidence as to possibility of seeing, as testified to by witness.* 8-51.

**AGE.**

*Constitutionality of statute as affected by discrimination in punishment for same offense based upon age.* 8-854.

**AGENCY.**

See **PRINCIPAL AND AGENT**.

**AGGRAVATED ASSAULT.**

See **ASSAULT AND BATTERY**.

**AGREED CASE.**

*Submission on agreed statement of facts or agreed case as waiver of defect in pleading.* 8-1172 (case p. 1170).

Construction of word "also" in statement of agreed facts. 8-1014.

**ALIENS.**

**Immigration.**

*Who is "laborer" within Federal acts excluding contract laborers.* 8-1442 (case p. 1438).

**Deportation.**

*Limitation of time for deportation of alien.* 8-1236 (case p. 1232).

Deportation because of advocacy of unlawful destruction of property. 8-1282.

Sufficiency of warrant for arrest for deportation. 8-1282.

Fact that warrant for arrest for deportation is based upon one statute as rendering inapplicable later statute. 8-1282.

What may be considered by court in habeas corpus proceeding to review deportation order. 8-1282.

Effect of failure to inform alien of his right to be represented at hearing for deportation by an attorney until most of the testimony was taken. 8-1282.

Effect on validity of deportation proceedings of fact that record contained letters and clippings introduced without the knowledge of the alien where deportation was not based on anything contained therein. 8-1282.

**ALIMONY.**

See **DIVORCE AND SEPARATION**.

**AMBIGUITY.**

Parol evidence to explain, see **EVIDENCE**.

The dash in each citation stands for A.L.R.

**AMENDMENTS.**

On appeal, see **APPEAL AND ERROR**.  
Of pleading, see **PLEADING**.

**AMMONIA.**

*Experimental evidence as to inflammability of.* 8-45.

**AMUSEMENTS.**

*Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense.* 8-1628 (case p. 1590).

Carrying on of place of amusement as a private business. 8-1590.

**ANARCHIST.**

*Limitation of time for deportation of alien anarchist.* 8-1289.

**ANESTHETICS.**

*Experimental evidence as to impurity of.* 8-46.

**ANIMALS.**

In general.

Injury to, by railroad trains, see **RAILROADS**.

*Constitutionality of statute or ordinance providing for destruction of abandoned animals.* 8-67.

Injury by.

Recovery under Workmen's Compensation Act for injury by dog bite. 8-930.

Running at large.

*Constitutionality of statute or ordinance providing for destruction of certain animals running at large.* 8-74, 79.

Diseased animals.

*Constitutionality of statute or ordinance providing for destruction of diseased animal.* 8-69.

**ANSWER.**

See **PLEADING**.

**ANTI-TRUST LAW.**

Combinations in violation of, see **MONOPOLY AND COMBINATIONS**.

**APARTMENT HOUSES.**

Excluding apartment houses from restricted residence district under power of eminent domain. 8-585.

**APPEAL AND ERROR.**

Appellate jurisdiction generally.

Effect of statute denying writ of error to judgment for contempt because of nonperformance of or disobedience to a judgment, decree, or order. 8-1149.

— finality of decision.

Appealability of probate proceeding to remove administrator de bonis non. 8-170.

Judgment for contempt. 8-1149.

Effect of appeal.

*Waiver of statute or court rule requiring nonresident plaintiff to give security for costs where application therefor is not made until after appeal.* 8-1526, 1533.

Record — amending.

Amendment of action against railroad company so as to substitute the Director General of Railroads as defendant. 8-964.

— affidavits.

Necessity that affidavit presenting for review statements made during the trial, which the trial judge refused to require the stenographer to take down, should show that such statements had reference to the cause on trial and might properly be made part of the case made. 8-59.

— evidence.

Refusal of appellate court to review rulings as to instructions where evidence does not appear in the record. 8-59.

— objections and exceptions.

Necessity for exceptions to instructions. 8-544, 1426.

Necessity of exception to evidence. 8-760.

— raising question by motion or other mode.

Necessity of motion for new trial to review ruling on motion to revive case in name of personal representative. 8-163.

**Discretionary matters.**

*Discretion of trial court as to admission of experimental evidence as affected by similarity or dissimilarity of conditions. 8-24 (case p. 1).*

**Exclusion of evidence of experiments. 8-1.**

**Questions not raised below.**

**Questioning for first time on appeal failure of trial court to allow interest. 8-198.**

**Raising defense of fellow servant for first time on appeal. 8-1426.**

**Objection that case was tried on the wrong theory. 8-1426.**

**Review of facts.**

**Refusal to disturb verdict on conflicting evidence if it cannot be said that evidence preponderated in favor of losing party. 8-544.**

**Review of damages awarded in eminent domain proceeding. 8-1290.**

**— of findings by referee, commissioners, etc.**

**Review of findings of Workmen's Compensation Commission, see WORKMEN'S COMPENSATION.**

**Conclusiveness of finding of referee approved by trial judge. 8-1081.**

**Conclusiveness of finding of commissioner appointed to determine prejudice of judge. 8-1226.**

**What errors warrant reversal.**

**Discrepancy in summons in stating amount of bail bond. 8-363.**

**— admission or exclusion of evidence. Erroneous admission of harmless evidence. 8-1477.**

**Refusal to reverse because of admission of incompetent evidence in absence of proof that such action caused miscarriage of justice or violation of constitutional or statutory right. 8-163.**

**Admission of evidence of expert having no logical effect in the case. 8-11.**

**Admission by counsel for defendant in criminal case. 8-1331.**

**Exclusion of immaterial evidence. 8-1161.**

**Exclusion of evidence in homicide case that accused had told witness that decedent had threatened his life. 8-1357.**

**— as to instructions.**

**Refusal to reverse for technical inaccuracies. 8-544.**

**Refusal to reverse where charge considered as a whole is correct, though some expressions standing alone may be erroneous. 8-1214.**

**Omission of words "from the evidence" in charging the jury that if accused has failed to satisfy the jury they must make a certain finding. 8-1214.**

**— remarks of judge.**

**Statement by judge that evidence is admitted "for what it is worth." 8-1034.**

**— as to jury.**

**Court's refusal to sustain challenge for cause to juror who is afterwards excused on peremptory challenge. 8-1084.**

**— as to verdict.**

**Amount of verdict. 8-1116.**

**Judgment.**

**Affirming in part and reversing in part. 8-163.**

**— effect of decision.**

**Erroneous decision as law of the case on a subsequent appeal. 8-1033 (case p. 1023).**

**Right of parties to litigation to disregard mandate of court of appeals and ask trial court to enter judgment according to agreement between them. 8-938.**

---

**APPEARANCE.**

**Effect of appearance as waiver of privilege against arrest. 8-757.**

---

**APPOINTMENT.**

**Of receiver, see RECEIVERS.**

---

**ARBITRATION.**

**Improper attempt by influencing or by attempting to influence decision as ground for revocation of arbitration, or for avoidance of award thereunder. 8-1082 (case p. 1051).**

---

**ARGUMENT.**

**Of counsel, see TRIAL.**

---

**ARMY AND NAVY.**

**Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8-371 (case p. 363).**



**ARREST.**

Release from, on bail, see **BAIL AND RECOGNIZANCE**.

Privilege from, see **WRIT AND PROCESS**.

Time at which right to discharge from arrest is to be determined. 8-750.

Sufficiency of warrant for arrest for deportation of alien. 8-1282.

**ASSAULT AND BATTERY.**

*In attempting to prevent elopement. 8-660 (case p. 656).*

*Firearm used as a bludgeon as a deadly weapon. 8-1319 (case p. 1316).*

Liability of master for assault on servant by superintendent. 8-1426.

Striking one preparing to make an attack on the arm with a pistol so that blow glances and makes a slight wound on his head as an aggravated assault. 8-1316.

Putting to physician hypothetical question not based on particular facts of case. 8-1316.

**ASSESSMENTS.**

For insurance, see **INSURANCE**.

Of taxes generally, see **TAXES**.

**ASSIZE.**

*Power of court of, to punish for contempt. 8-1570.*

**ASSOCIATIONS.**

Religious societies, see **RELIGIOUS SOCIETIES**.

Capacity to act as trustee of library. 8-904.

Right of unincorporated association to take property given it by will. 8-904.

**ASSUMPTION OF RISK.**

By servant, see **MASTER AND SERVANT**.

**ATTACHMENT.**

Sale under, see **JUDICIAL SALE**.

*Effect of appointment of receiver for corporation upon enforcement of attachment lien. 8-459.*

**ATTESTATION.**

Of will, see **WILLS**.

**ATTORNEY GENERAL.**

As proper party to bring suit. 8-679.

**ATTORNEYS.**

*In general.*

As to attorney general, see **ATTORNEY GENERAL**.

As to district and prosecuting attorneys, see **DISTRICT AND PROSECUTING ATTORNEYS**.

Evidence of admissions by attorneys, see **EVIDENCE**.

As to power of attorney, see **POWER OF ATTORNEY**.

Argument of, see **TRIAL**.

*Fact that attorney for one of the parties to an arbitration agreement drafted the award as ground for setting it aside. 8-1089.*

*Application of Sunday laws to attorneys. 8-1356 (case p. 1353).*

Effect of failure to inform alien of his right to be represented at hearing for deportation by an attorney until most of the testimony was taken. 8-1282.

**Disbarment.**

*Disloyal acts or political opinions as ground for disbarment or suspension of attorney. 8-1262 (case p. 1259).*

Purpose of disbarment. 8-1259.

Statutory provision that conviction in any jurisdiction of felony or misdemeanor involving moral turpitude, whether the acts are so designated by local laws or not, shall be ground for disbarment. 8-1259.

False statements with intent to interfere with success of military or naval forces in time of war. 8-1259.

Right, in proceeding to disbar attorney because of conviction of crime, to inquire into his guilt or innocence of the crime. 8-1259.

**Compensation.**

Retainer fee and compensation for time spent in waiting in office at client's request. 8-1353.

Effect of performance of some work on Sunday on right to recover for the retainer and work done on secular days. 8-1353.

**AUCTIONS.**

*Implied authority of auctioneer to receive payment for commodities which he is authorized to sell. 8-227.*

**AUDIBILITY.**

*Experimental evidence as to. 8-32.*

**AUTHORITY.**

Presumption and burden of proof as to, see EVIDENCE.

**AUTOMOBILES.**

In general.

As to garage, see GARAGE.

*Experimental evidence as to speed of. 8-33.*

Liability of manufacturer of automobile to purchaser from middleman for injury from defects in car. 8-1023.

Negligence in use of; injuries by. Negligent driving generally, see NEGLIGENCE.

*Experimental evidence in action for personal injuries by automobile as affected by similarity or dissimilarity of conditions. 8-33.*

*Liability for negligence of chauffeur furnished with a car hired for an extended period. 8-484 (case p. 480).*

Opinion evidence as to speed of automobile; comparison with that of other car. 8-690.

Presumption of responsibility of owner of automobile for injury caused by chauffeur in operating it. 8-785.

Liability of owner for injury through negligent operation of car by one not in his employ nor engaged in his business. 8-785.

Effect of pendency of a former action by the owner of the other car to recover damages accruing to him from the collision, to abate action for damages for injury growing out of an automobile collision. 8-690.

**AWARD.**

Of arbitrators, see ARBITRATION.

**BACILLI.**

See BACTERIA.

**BACTERIA.**

*Experimental evidence as to bacteria in ice. 8-40.*

**BAD FAITH.**

See GOOD FAITH.

**BAIL AND RECOGNIZANCE.**

In general.

*Giving bail as waiver of privilege against arrest. 8-757.*

*Abolition of death penalty as affecting right to bail of one charged with murder in first degree. 8-1362 (case p. 1348).*

Reversal of judgment on bail bond because of discrepancy in summons in stating amount of bond. 8-363.

Release of bail.

*Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8-371 (case p. 363).*

Effect of insanity of principal to release surety. 8-363.

By arrest of principal by commonwealth for another offense. 8-363.

By arrest and confinement of principal in another state. 8-363.

By arrest and removal of principal by Federal government. 8-363.

By removal of infant principal by his mother from jurisdiction of the court. 8-363.

By confinement of principal by illness. 8-363.

By death of principal. 8-363.

**BANANA PEEL.**

*Experimental evidence in action for injury by slipping on. 8-88.*

**BANK EXAMINERS.**

See BANKS.

**BANKRUPTCY.**

*Power of referee in bankruptcy to punish for contempt.* 8-1575.

**BANKS.**

*In general.*

*Power and duty of bank which has acquired a public service plant to continue its operation.* 8-248 (case p. 242).

*Examination and supervision of banks by public officers as impairment of charter rights.* 8-898 (case p. 894).

*Bank accountant as a "laborer" within meaning of act penalizing importation of contract labor.* 8-1438.

*Estoppel to plead want of power to operate street or interurban road.* 8-242.

*Officers and agents.*

*Evidence on question whether check made payable to bank cashier was to pay a note to the bank or a debt to the cashier.* 8-298.

*Liability of bank for misappropriation by bank cashier of proceeds of check made payable to him personally to satisfy a note held by the bank.* 8-298.

*Application of rule that one paying a note to an agent without demanding the production of the note does so at his own risk in case of payment to a bank cashier of note held by bank.* 8-298.

**BAR.**

*Of limitation, see LIMITATION OF ACTIONS.*

**BARBERS.**

*Work of, on Sunday, see SUNDAY.*

**BASTARDY.**

*Presumption as to paternity of child, see EVIDENCE.*

*Marriage of mother of child to another man as defense to bastardy proceedings.* 8-426.

**BATTERY.**

*See ASSAULT AND BATTERY.*

**BENEFICIARIES.**

*In will, see WILLS.*

**BENEFITS.**

*Estoppel by receiving, see ESTOPPEL.*

**BEQUEST.**

*See WILLS.*

**BETTING.**

*See GAMING.*

**BIAS.**

*Disqualification of judge by, see JUDGES.*

**BILL OF PARTICULARS.**

*In general, see PLEADING.*

**BILLS AND NOTES.**

*In general.*

*Premium notes, see INSURANCE.*

*Payment of, see PAYMENT.*

*Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration.* 8-314 (case p. 309).

*Right to retain title to property sold where note is given for purchase price.* 8-789.

*Who are bona fide holders.*

*Presumption and burden of proof as to good faith of holder.* 8-309.

*Sufficiency of proof of good faith of holder.* 8-309.

*Actions and defenses.*

*Prior action on promissory note in which claim for breach of contract might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent action for such breach.* 8-710.

Effect of suit upon note taken for purchase price of property sold with retention of title for security, on the security. 8-789.

---

### BIRTHS.

Registration of, see VITAL STATISTICS.

---

### BLOW.

Experimental evidence as to force of. 8-83.

---

### BLUE FLAG RULE.

Right of servant to rely upon performance by another of the duty, equally incumbent upon himself, to comply with the "blue flag rule." 8-870 (case p. 865).

---

### BOARDS.

Board of health, see HEALTH.

Power of, to punish for contempt. 8-1578.

---

### BOILER.

Explosion of, see EXPLOSIONS AND EXPLOSIVES.

---

### BONA FIDE HOLDER.

Of note, see BILLS AND NOTES.

---

### BONDS.

In general.

Bail bonds, see BAIL AND RECOGNIZANCE.  
Security for costs, see COSTS AND FEES.  
Of personal representative, see EXECUTORS AND ADMINISTRATORS.

Obligee's concealment of facts or evasive answers as fraud against surety. 8-1486 (case p. 1477).

Corporate bonds.

Succession tax on bonds of domestic corporation owned by estate of nonresident and held at his residence. 8-863 (case p. 855).

### BOOT.

Experimental evidence as to freezing of, to railroad track. 8-84.

---

### BOUNDARIES.

Fence on boundary line, see FENCES.

---

### BRAKE.

Experimental evidence as to effect of release of, to make car jump forward. 8-84.

---

### BRIDGES.

Liability for injury on bridge at town, municipal, or county line. 8-1274 (case p. 1271).

---

### BRITISH COURTS.

Power of, to punish for contempt. 8-1570.

---

### BROKERS.

In general.

Authority of broker to receive payment for commodities which he is authorized to sell or for which he is to find a market. 8-210 (case p. 192).

Distinction between broker and factor or commission merchant. 8-192.

Burden of proof as to authority of broker to receive payment. 8-192.

When broker's relation to the transaction ceases ordinarily. 8-192.

Real estate brokers.

Constitutionality of statute or ordinance requiring real estate brokers to procure a license. 8-424 (case p. 418).

Liability of broker to purchaser for overstating lowest price at which owner is willing to sell. 8-1383 (case p. 1377).

Requiring applicant for license as real estate broker to file certificate of good character. 8-418.

Real estate broker as agent of property owner in fixing prices. 8-1377.

Employee of broker as subagent of owner of property. 8-1377.

Agent of real estate broker as acting within the scope of authority in naming to customer price fixed by broker as lowest price for which property can be had. 8-1377.

Liability of agent for real estate broker to customer for charging him in good faith an excessive price for the property named to him by the broker. 8-1377.

Liability of real estate broker who benefits by misrepresentations of his agent as to lowest sale price of property. 8-1377.

### BUILDINGS.

Elevators in, see ELEVATORS.

Negligence of landlord as to condition of, see LANDLORD AND TENANT.

Tenant's right as to, see LANDLORD AND TENANT.

Lien on, see MECHANICS' LIENS.

Experiments to show stability of cornice. 8-34.

Imposing building restrictions in exercise of power of eminent domain. 8-594 (case p. 585).

### BULLET HOLE.

Experimental evidence as to how bullet hole was caused. 8-34.

### BURDEN OF PROOF.

See EVIDENCE.

### BURNS.

Powder burns, see POWDER BURNS AND MARKS.

### BUSINESS.

On Sunday, see SUNDAY.

### CANADIAN COURTS.

Power of, to punish for contempt. 8-1571.

### CANDLE.

Experimental evidence as to appearance given by light from. 8-40.

### CAP.

Experimental evidence as to catching of, in shutting door. 8-36.

### CAPITAL PUNISHMENT.

Abolition of death penalty as affecting right to bail of one charged with murder in the first degree. 8-1352 (case p. 1348).

### CAR INSPECTOR.

Right of, to rely upon performance by another of the duty, equally incumbent on himself, of complying with "blue flag rule." 8-870 (case p. 865).

Assumption by car inspector of negligence of fellow inspector in failing to place blue flag to protect train on which they are working. 8-865.

Question whether fellow servant to whom car inspector delegated the duty of placing blue flag required by rules was the servant of the inspector or of the railroad company. 8-865.

### CARRIERS.

In general.

Injury to employee, see MASTER AND SERVANT.

Suit against railroad owned by, or in which interest is held by United States or state. 8-995 (case p. 990).

Passenger carriers.

Liability of carrier for giving misinformation to passenger as to running of train. 8-1183 (case p. 1178).

—injury to passenger.

Experimental evidence in action for injury to passenger. 8-34.

Instructions as to presumption and burden of proof in case of injury to passenger. 8-163.

Order of Director General of Railroads under Federal control, requiring actions for injuries to passengers to be brought against the Director General and not against the carriers. 8-959.

— ejection from train.

*Liability of carrier to passenger for ejection from train which he has mistakenly boarded because of misinformation as to its destination.* 8-1153.

— leaving at destination.

*Liability of carrier for giving misinformation to passenger as to destination of train.* 8-1153, 1158.

**Carriers of freight.**

*Service of government as excuse for failure of carrier to discharge duty to individual.* 8-163 (case p. 155).

**Governmental control; rates; running of trains.**

**Regulation of interstate business of, see COMMERCE.**

*Federal control of common carriers.* 8-969 (cases pp. 959, 964).

**Relation between railroad and government** after roads have been placed under government control. 8-964.

**Defense that acts causing injury were not those of defendant railroad company** but acts of the Director General of Railroads as an affirmative one. 8-964.

**Order of Director General of Railroads** under Federal control, requiring actions for injuries to passengers to be brought against the Director General and not against the carriers. 8-959.

**Amendment of action against railroad company** so as to substitute the director General of Railroads as defendant. 8-964.

**Power of legislature to confer on Public Service Commission control of the schedules, routing, and style of cars of street railway company.** 8-916.

**Order of Public Service Commission** changing schedules, routes, and types of cars of street railway company from those fixed by the ordinance under which the company is operating. 8-916.

— rates; discrimination.

*Free passes to public officials or employees.* 8-652 (case p. 679).

**Limitation of time for suit by shipper to recover overcharges.** 8-1254.

**Contract by sheriff to perform legal service for company in exchange for free pass.** 8-679.

**Definition of free pass.** 8-679.

— abandonment of operation.

*Power of court to authorize discontinuation of railroad or street railway upon foreclosing a mortgage on its plant.* 8-278 (case p. 282).

**General rule as to right to abandon operation of railroad.** 8-232.

**Assumption by purchaser of street railway at judicial sale of obligation of original grantee of franchise to operate the road.** 8-242.

---

## CASE.

**Liability of seller or manufacturer for injury due to defects in articles sold, see NEGLIGENCE.**

---

## CASHIER.

**Liability of bank for misappropriation by bank cashier of proceeds of check made payable to him personally to satisfy a note held by the bank.** 8-298.

**Application of rule that one paying a note to an agent without demanding the production of the note does so at his own risk in case of payment to a bank cashier of note held by bank.** 8-298.

**Evidence on question whether check made payable to bank cashier was to pay a note to the bank or a debt to the cashier.** 8-298.

---

## CASH REGISTER.

*Experimental evidence as to condition of.* 8-34.

---

## CATTLE.

**See ANIMALS.**

---

## CAUSE.

**Presumption and burden of proof as to, see EVIDENCE.**

**Of death of or injury to insured, see INSURANCE.**

**Proximate cause, see PROXIMATE CAUSE.**

*Experimental evidence as to cause of fire.* 8-37.

---

## CEMENT.

*Experimental evidence as to grade of.* 8-16.

**CERTIFICATES.**

Of acknowledgment, see **ACKNOWLEDGMENT**.  
 Of birth or death, see **VITAL STATISTICS**.  
 Requiring applicant for license as real estate broker to file certificate of good character. 8-418.

**CHANGE.**

Of name of corporation, see **CORPORATIONS**.  
 Of domicil, see **DOMICIL**.  
 Of judge, see **JUDGES**.  
 Of venue, see **VENUE**.

**CHARITY.**

Works of, on Sunday, see **SUNDAY**.

**CHARITIES.**

*Right of trustee of trust for benefit of charity to accumulate income under will or other instrument directing him to use it. 8-915 (case p. 904).*

Capacity of unincorporated association to act as trustee. 8-904.

**CHARTER.**

Of corporation, see **CORPORATIONS**.

**CHASTITY.**

*Unchastity of wife as affecting prior separation agreement. 8-1452 (case p. 1447).*

**CHATTEL MORTGAGE.**

*Right of grantee or transferee to be reimbursed for expenditures in payment of mortgage on property where conveyance or transfer is in fraud of creditors. 8-527 (case p. 523).*

**CHATTELS.**

Mortgage on, see **CHATTEL MORTGAGE**.  
 Sale of, see **SALE**.

**CHAUFFEUR.**

Negligence of, see **AUTOMOBILES**.

**CHECKS.**

Effect of Negotiable Instruments Law to repeal statute making void checks given for gambling debt. 8-309.  
 Burden of proof of good faith of holder of check given for gambling debt. 8-309.  
 Sufficiency of proof of good faith of holder of check given for gambling debt. 8-309.

**CHEMICALS.**

*Experiments to show erasure of writing by use of chemicals. 8-40.*  
*Applicability of "res ipsa loquitur" to explosion of. 8-500.*

**CHINESE.**

Immigration of, see **ALIENS**.

**CHRISTIAN SCIENCE.**

*Christian Scientist as a physician within meaning of statute in relation to vital statistics. 8-1072.*

**CHURCHES.**

In general, see **RELIGIOUS SOCIETIES**.

**CIRCUIT COURTS.**

*Power of, to punish for contempt. 8-1640, 1553.*

**CIRCULAR SAW.**

*Experimental evidence as to throwing of wood by. 8-34.*

**CITIZENS.**

As to aliens, see **ALIENS**.

**CITIZENSHIP.**

*As affecting right to remove cause to Federal court, see **REMOVAL OF CAUSES**.*

**OFFICES.**

See MUNICIPAL CORPORATIONS.

**CITY COURTS.**

See MUNICIPAL COURTS.

**CLAIMS.**

Against decedent's estate, see EXECUTORS  
AND ADMINISTRATORS.

**CLASSIFICATION.**

By statute, see STATUTES.

**CLAUSE.**

In deed, extrinsic evidence to explain.  
8-1335.

**CLERK.**

Clerk in steamship office as "laborer"  
within meaning of act penalizing im-  
portation of contract labor. 8-1438.

**CLOUD ON TITLE.**

Prior action to determine title to real  
property in which adverse claim  
might have been asserted by counter-  
claim, set-off, or cross petition as  
bar to subsequent independent ac-  
tion on such claim. 8-731.

Necessity that religious society establish  
its corporate capacity in order to  
maintain action to quiet title to the  
church property. 8-98.

**COINCIDENCE.**

Judicial notice of coincidence of the days  
of the week with the days of the  
month. 8-63 (case p. 59).

**COLLATERAL ATTACK.**

On judgment, see JUDGMENT.

**COLLATERAL CONTRACTS.**

Statute of Frauds as to, see CONTRACTS.

**COLLATERAL INHERITANCE TAX.**

See TAXES.

**COLLECTORS.**

Discrimination between collectors in stat-  
ute requiring license of real estate  
brokers. 8-418.

**COLLUSION.**

Effect of collusion between parties to re-  
ceivership proceeding on right to  
bring action against corporation or  
prosecute pending action after ap-  
pointment of receiver. 8-453.

**COLONIAL COURTS.**

Power to punish for contempt. 8-1572.

**COLOR.**

Constitutionality of statute as affected by  
discrimination in punishment for  
same offense based upon color.  
8-854.

**COMMERCE.**

Effect of act of Congress conferring upon  
Interstate Commerce Commission au-  
thority to compel interstate railroads  
to provide shipping facilities for  
shippers tendering interstate ship-  
ments to deprive Public Service Com-  
mission of jurisdiction to require such  
road to furnish such facilities to  
shipper offering intrastate commerce.  
8-155.

**COMMERCIAL BONDS.**

See BONDS.

**COMMERCIAL TRAVELERS.**

Authority of, to receive payment for com-  
modities which he is authorized to  
sell. 8-214.



**COMMISSION MERCHANTS.**

Distinction between broker and factor or commission merchant. 8-192.

**COMMISSIONS.**

Conclusiveness of findings of commissioner, see **APPEAL AND ERROR**.

Power of, to punish for contempt. 8-1577.

**COMMON CARRIERS.**

See **CARRIERS**.

**COMMON PLEAS.**

Power of courts of, to punish for contempt. 8-1560.

**COMPENSATION.**

Of attorney, see **ATTORNEYS**.

Of employee, see **MASTER AND SERVANT**.

Constitutional right to compensation on destruction by public authorities of diseased animal. 8-70.

Conferring power upon the head of one department to fix the salaries of his assistants, which power is not conferred upon the heads of other departments. 8-418.

**COMPETENCY.**

Of witness, see **WITNESSES**.

In general, see **INCOMPETENT PERSONS**.

**COMPETITION.**

Combinations in restraint of, see **MONOPOLY AND COMBINATIONS**.

**COMPLAINER.**

In criminal prosecution, see **INDICTMENT, ETC.**

In general, see **PLEADING**.

**COMPOSITION WITH CREDITORS.**

*Obligee's concealment of facts as fraud against surety for debtor entering into composition agreement with creditors. 8-1507.*

**COMPROMISE AND SETTLEMENT.**

Right of parties to litigation to disregard mandate of court of appeals and ask trial court to enter judgment according to agreement between them. 8-938.

Right of parties to suit to settle it at any time before or after final judgment. 8-938.

**COMPULSORY VACCINATION.**

See **HEALTH**.

**CONCEALMENT.**

As fraud, see **FRAUD AND DECEIT**.

Effect of, on running of limitations, see **LIMITATION OF ACTIONS**.

Experimental evidence as to existence of place of concealment. 8-56.

**CONCLUSION.**

Opinion as, see **EVIDENCE**.

Averment of, see **PLEADING**.

**CONDEMNATION.**

Of property, see **EMINENT DOMAIN**.

**CONDITIONAL SALE.**

See **SALE**.

**CONDITIONS.**

See **COVENANTS AND CONDITIONS**.

**CONFISCATION.**

Of property, constitutionality of, see **CONSTITUTIONAL LAW**.

**CONGRESS.**

Acts of Congress, see **STATUTES**.

---

**CONSENT.**

As defense to crime, see **CRIMINAL LAW**.

*Effect of consent of landlord to doing of act which results in injury to leased premises on liability of the wrongdoer to the tenant therefor.* 8-612.

---

**CONSIDERATION.**

Of contracts generally, see **CONTRACTS**.

Of conveyance attacked for fraud, see **FRAUDULENT CONVEYANCES**.

---

**CONSPIRACY.**

Combinations in restraint of trade, commerce, or competition, see **MONOPOLY AND COMBINATIONS**.

---

**CONSTITUTIONAL LAW.**

As to regulation of interstate commerce, see **COMMERCE**.

As to title of statute, see **STATUTES**.

Validity of statutes generally, see **STATUTES**.

**Amendments.**

Seventh amendment to Constitution preserving trial by jury as applicable only to Federal courts. 8-1463.

**Delegation of power.**

*General delegation of power to guard against spread of contagious disease.* 8-836 (case p. 831).

Right of legislature to confer right to exercise the police power upon agencies created by it. 8-916.

Delegating to Public Utilities Commission power to compel exercise of eminent domain to secure the public safety. 8-466.

To board of health. 8-831.

**Separation of powers.**

Judicial power to decide as to legislative acts, see **COURTS**.

Infringement of power of supreme judicial court by conferring final authority in election contests upon judges of the superior court. 8-1463.

**Local self-government.**

*Effect of constitutional provisions relative to home rule charters of villages and cities to authorize city to grant its city council the right to punish a witness for contempt.* 8-1582.

**Rights of persons and property; equal protection; due process; police power.**

Right to trial by jury, see **JURY**.

Special and local legislation, see **STATUTES**.

Meaning of phrases "law of the land" and "due process of law." 8-65.

**— amusements.**

*Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense.* 8-1628 (case p. 1590).

Police power as to. 8-1590.

Fixing wages of employee whom theater proprietor is compelled to employ for fire protection, forbidding any reduction in his salary and forbidding his discharge without approval of the fire commissioners. 8-1590.

**— animals.**

*Constitutionality of statute or ordinance providing for destruction of animals.* 8-67 (case p. 65).

**— banks.**

Impairment of charter rights of, see *infra*,  
Impairment of contract obligations.

**— carriers.**

Regulation of interstate business of, see **COMMERCE**.

*Federal control of.* 8-969 (cases pp. 959, 964).

Order of Public Service Commission regulating schedules, routing, and type of cars to be used by street railway company. 8-916.

**— confiscation, destruction, or seizure of property.**

*Statute or ordinance providing for destruction of animals.* 8-67 (case p. 65).

*Constitutionality of statute providing for confiscation or destruction, without notice, of intoxicating liquors, and vehicles or other property used in connection with same.* 8-888 (case p. 874).

**— criminal matters; penalties.**

*Discrimination as regards degree of penalty or punishment for violation of Sunday law.* 8-566 (case p. 563).

*Constitutionality of statute as affected by discrimination in punishment for same offense based upon age, color, or sex. 8-854 (case p. 848).*

Power of legislature under police power to impose penalty for violation of Sunday law. 8-563.

— elections.

See *infra*, Officers and elections.

— eminent domain.

Constitutional provision against taking private property for public use without compensation, see EMINENT DOMAIN.

— guaranties of justice.

Impairment of right of successful candidate for office to obtain justice freely by requiring him to go to another county to contest an election contest. 8-1463.

— impairment of contract obligations.

*Examination and supervision of banks by public officers as impairment of charter rights. 8-898 (case p. 894).*

Supervision of public utilities in exercise of police power. 8-916.

Power of state to place under control of the Public Service Commission private contracts for the purchase and sale of water for the irrigation of land. 8-249.

Order of Public Service Commission changing schedules, routes, and types of cars of street railway company from those fixed by the ordinance under which the company is operating. 8-916.

Regulating rates fixed in water certificates of irrigation company. 8-249.

— intoxicating liquors.

*Constitutionality of statute providing for confiscation or destruction without notice, of intoxicating liquors, and vehicles or other property used in connection with same. 8-888 (case p. 874).*

— license.

Discrimination in license tax, see LICENSE.

*Constitutionality of statute or ordinance requiring real estate brokers to procure a license. 8-424 (case p. 418).*

— municipal matters.

Validity as against city having interest in net earnings of street railway company and an option to purchase the railway, of order of Public Service Commission as to schedules, routes, and type of cars. 8-916.

— notice and hearing.

Notice and opportunity of hearing as necessary to constitute due process of law. 8-65.

Necessity of, before condemnation and destruction of property. 8-65.

Sufficiency of opportunity for hearing before some tribunal other than judicial. 8-65.

Sufficiency of rehearing upon application of one not made a party to a proceeding before a Public Service Commission which results in an order affecting his interests. 8-916.

— officers and elections.

As to voters and elections generally, see ELECTIONS.

Providing disqualification for office and disfranchisement only for successful candidates for public office who are guilty of corrupt practices. 8-1463.

Exempting from Corrupt Practices Act town officers elected in towns of less than ten thousand inhabitants. 8-1463.

Requiring election contests to be heard only in one county of the state. 8-1463.

Right to hold office and to vote as property within the meaning of the 14th Amendment. 8-1463.

— osteopaths.

See *infra*, Physicians and surgeons.

— penalties.

See *supra*, Criminal matters; penalties.

— physicians and surgeons.

Constitutionality of separate classification of osteopaths and regular physicians. 8-1066.

— public service corporations.

See also *supra*, Carriers.

*Validity of measures for Federal control of public utilities. 8-969.*

Regulation of public utilities in exercise of police power. 8-916.

— Sunday law.

See *supra*, Criminal matters; penalties.

— theaters.

See *supra*, Amusements.

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## CONSTRUCTION.

Of contracts generally, see CONTRACTS.

Of insurance policy, see INSURANCE.

Of lease, see LANDLORD AND TENANT.

Of pleading, see PLEADING.

Of statutes, see STATUTES.

Of will, see WILLS.

**CONSTRUCTIVE SERVICE.**

*Doctrine of, as applied to wrongfully discharged servant. 8-338 (case p. 334).*

**CONTAGIOUS AND INFECTIOUS DISEASES.**

*Of animals, see ANIMALS.*

*As to venereal disease, see VENEREAL DISEASE.*

*General delegation of power to guard against spread of. 8-836 (case p. 831).*

**CONTEMPT.**

*Statute expressly or impliedly denying power to enforce by process of contempt, order, judgment, or decree, for money, as applicable to order or decree for alimony. 8-1156 (case p. 1149).*

*What courts or officers have power to punish for contempt. 8-1543 (case p. 1541).*

*Power of municipal councils to punish for contempt. 8-1586 (case p. 1582).*

*Nature of contempt proceeding, as civil or criminal. 8-1149.*

*Appealability of judgment for contempt. 8-1149.*

*Power of equity to commit litigant for contempt for refusal to obey decree, by an order entered upon its own records under the style of the case in which such decree was pronounced. 8-1149.*

*Effect of constitutional provisions relative to home rule charters of villages and cities to authorize city to grant its city council the right to punish a witness for contempt. 8-1582.*

*Effect of statute to deny to courts of equity power to enforce decrees for payment of money by process of contempt. 8-1149.*

**CONTINUANCE AND ADJOURNMENT.**

*Application for continuance as waiver of right to dismissal because of plaintiff's failure to furnish security for costs. 8-1528.*

**CONTRACT LABOR.**

*Importation of, see ALIENS.*

**CONTRACTS.**

*Impairment of obligation of, see CONSTITUTIONAL LAW.*

*Of corporations, see CORPORATIONS.*

*Effect of custom on, see CUSTOM AND USAGE.*

*For separate support and maintenance, see DIVORCE AND SEPARATION.*

*As to insurance contract, see INSURANCE.*

*As to mortgage, see MORTGAGE.*

**Consideration.**

*Consideration of conveyance attacked for fraud, see FRAUDULENT CONVEYANCES.*

**Statute of Frauds.**

*Parol evidence to vary written contract, see EVIDENCE.*

*Validity of oral promise by stockholder to pay debt of corporation. 8-1198 (case p. 1195).*

*Signature with lead pencil. 8-1839 (case p. 1335).*

*When promise to pay debt of another is regarded as original. 8-1195.*

*Treating promise as collateral though new consideration moves to the promisor and is beneficial to him. 8-1195.*

**Construction.**

*Parol evidence as to meaning of parties to contract, see EVIDENCE.*

*Construction of insurance policy, see INSURANCE.*

*Of language of instrument as against one preparing it. 8-760.*

**—entirety.**

*When contract is indivisible so that invalid portion cannot be separated. 8-1353.*

**Validity; public policy.**

*Formal requisites, see supra.*

*Validity of insurance contract, see INSURANCE.*

*Free passes to public officials or employees. 8-682 (case p. 679).*

**Partial invalidity. 8-1353.**

**—gambling contracts.**

*Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration. 8-314 (case p. 309).*

**—restraint of trade.**

*Combinations between several persons or corporations in restraint of trade or commerce, see MONOPOLY AND COMBINATIONS.*

**Performance.**

Necessity that one who offers scrap iron, which he has accumulated for sale, deliver the estimated quantity, when estimate of quantity is made by agent of buyer. 8-745.

**Breach.**

Measure of damages for breach, see DAMAGES.

**Actions.**

*Effect of bill of particulars in action on contract.* 8-551.

*Prior action in which claim might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action thereon.* 8-698, 714, 716, 720.

**CONTRIBUTORY NEGLIGENCE.**

See NEGLIGENCE.

**CONVERSATION.**

*Experimental evidence as to possibility of overhearing.* 8-34, 48.

**CONVERSION.**

See TROVER.

**CONVEYANCES.**

In general, see DEEDS.

Fraudulent conveyances, see FRAUDULENT CONVEYANCES.

**CONVICTS.**

Extradition of, see EXTRADITION.

**COPLAINTIFFS.**

Right of one of several complaintiffs to dismiss action, see DISMISSAL OR DISCONTINUANCE.

**CORNICE.**

*Experimental evidence as to safety of.* 8-34.

**CORPORATIONS.**

As to associations, see ASSOCIATIONS.

Bonds of, see BONDS.

Impairment of obligation of contract as to, see CONSTITUTIONAL LAW.

Right to exercise power of eminent domain, see EMINENT DOMAIN.

Illegal combinations by, in restraint of trade, commerce, and competition, see MONOPOLY AND COMBINATIONS.

Religious societies, see RELIGIOUS SOCIETIES.

Service of process on, see WRIT AND PROCESS.

**Name.**

Estoppel of corporation to take advantage of having acted under a wrong name after receiving the consideration. 8-579.

Effect on validity of contracts of fact that they were entered into under a name which the corporation had assumed without authority. 8-579.

Power to change name. 8-579.

**Charter.**

Impairment of charter rights, see CONSTITUTIONAL LAW.

**Contracts.**

Effect on validity of contracts of fact that they were entered into under a name which the corporation had assumed without authority. 8-579.

**Officers and agents.**

*Power of directors to change time for regular meetings of stockholders.* 8-678 (case p. 678).

*Personal liability of officers for debts of corporation which has made an unauthorized change in its name.* 8-583 (case p. 579).

Effect of a report made by an officer of a corporation as an account stated which precludes the corporation from denying its accuracy. 8-478.

Authority of president to promise to pay debt. 8-478.

**Stock and stockholders.**

*Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding.* 8-295 (case p. 290).

Effect of recital that a judge had stated that he had disposed of all his stock in a corporation as an allegation of the fact of his ownership. 8-290.

Liability of public accountant making audit of books of corporation for loss sustained by one relying on audit in purchasing stock. 8-461.

**—rights of stockholders; actions.**

Right of one purchasing stock after corporation has dismissed a pending suit and conveyed its property to a trustee for the purpose of winding up its affairs, to undo what the corporation has done. 8-938.

Right of stockholder suing on behalf of himself and other stockholders to dismiss the action without prejudices. 8-938.

**—liability of stockholders.**

Validity of oral promise by stockholder to pay debt of corporation. 8-1198 (case p. 1195).

Personal liability of stockholders for debts of corporation which has made an unauthorized change in its name. 8-583 (case p. 579).

**—stockholders' meetings.**

Power of directors to change time for regular meeting of stockholders. 8-678 (case p. 676).

Necessity of notice of meeting. 8-676.

**Dissolution; insolvency.**

Appointment of receiver for corporation generally, see **RECEIVERS**.

Right to bring action against corporation or prosecute pending action as affected by the appointment of a receiver for the corporation. 8-441 (case p. 435).

Right of one purchasing stock after corporation has dismissed a pending suit and conveyed its property to a trustee for the purpose of winding up its affairs, to undo what the corporation has done. 8-938.

**CORRUPT PRACTICES ACT.**

See **ELECTIONS**.

**COSTS AND FEES.**

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs. 8-1510 (case p. 1508).

Charging trustee of fund with costs, for awaiting the judgment of the court in dispute as to beneficiary. 8-904.

Allowance as costs of mileage within the state of witnesses voluntarily attending, upon request, from another state. 8-11.

**COTENANCY.**

Tenancy by entirety, see **HUSBAND AND WIFE**.

**COUNSEL.**

See **ATTORNEYS**.

**COUNTERCLAIM.**

See **SET-OFF AND COUNTERCLAIM**.

**COUNTIES.**

Courts of, see **COUNTY COURTS**.  
Liability for injury on defective bridge, see **BRIDGES**.  
Liability for injury on defective highway, see **HIGHWAYS**.

**COUNTY ATTORNEY.**

See **DISTRICT AND PROSECUTING ATTORNEYS**.

**COUNTY COURTS.**

Power of, to punish for contempt. 8-1561, 1570, 1572.

**COURT OF CLAIMS.**

Power to punish for contempt. 8-1547.

**COURT RULE.**

Waiver of court rule requiring nonresident plaintiff to give security for costs. 8-1510 (case p. 1508).

**COURTS.**

In general.

Constitutional guaranty of justice in, see **CONSTITUTIONAL LAW**.

Contempt of, see **CONTEMPT**.

Jurisdiction of divorce suit, see **DIVORCE AND SEPARATION**.

Judicial notice by, see **EVIDENCE**.

As to judges, see **JUDGES**.

Mandamus to, see **MANDAMUS**.

Prohibition to restrain, see **PROHIBITION**.  
As to removal of causes, see **REMOVAL OF CAUSES**.

Process of, see **WRIT AND PROCESS**.

The dash in each citation stands for A.L.R.

*Power of court to authorize discontinuation of public service corporation upon foreclosing a mortgage on its plant.* 8-238 (case p. 232).

*Jurisdiction of action by or against public utility under Federal control.* 8-987.

**Relation to other departments of government.**

Review of findings of Public Service Commissions, see **PUBLIC SERVICE COMMISSIONS**.

Review of findings of Workmen's Compensation Commission, see **WORKMEN'S COMPENSATION**.

Review of findings of health officer. 8-831.

— **legislative department.**

Encroachment on judicial power, see **CONSTITUTIONAL LAW**.

As to validity of statutes generally, see **STATUTES**.

Assumption that legislative power has been properly exercised. 8-1590.

Inquiring into wisdom of legislation. 8-65.

Review of propriety and necessity of taking property for public use. 8-585.

**Jurisdiction over religious societies.**

*Determination by the civil courts of property rights between contending factions of an independent or congregational church.* 8-105 (cases pp. 98, 102).

**Legislative power as to.**

Infringement of power of supreme judicial court by conferring final authority in election contests upon judges of the superior court. 8-1463.

**State courts.**

Jurisdiction of election contests, see **ELECTIONS**.

— **transfer of cause.**

Duty of disqualified judge to grant motion to transfer the cause to another judge instead of calling in another judge. 8-290.

## COURTS-MARTIAL.

*Power to punish for contempt.* 8-1547.

## COURTS OF COMMON PLEAS.

See **COMMON PLEAS**.

## COVENANTS AND CONDITIONS.

Condition of right to maintain action to remove cloud from title, see **CLOUD ON TITLE**.

Condition in pardon or parole, see **CRIMINAL LAW**.

In insurance contract, see **INSURANCE**.

In lease, see **LANDLORD AND TENANT**.

Conditional new promise to pay barred claim, see **LIMITATION OF ACTIONS**.

## COWS.

*Constitutionality of statute or ordinance providing for destruction of diseased cows.* 8-69.

## CREDIBILITY.

Of witness, see **WITNESSES**.

## CRIMINAL LAW.

Whether action is civil or criminal, see **ACTION OR SUIT**.

District attorney, see **DISTRICT AND PROSECUTING ATTORNEYS**.

Violation of Corrupt Practices Act, see **ELECTIONS**.

Extradition, see **EXTRADITION**.

As to false pretenses, see **FALSE PRETENSES**.

Abandonment of wife, see **HUSBAND AND WIFE**.

Violation of Sunday law, see **SUNDAY**.

See also **FALSE PRETENSES**; **HOMICIDE**; **LARCENY**; **ROBBERY**.

**Capacity to commit crime.**

*Drunkenness as affecting existence of elements essential to murder in second degree.* 8-1052 (case p. 1034).

General rule as to effect of insanity. 8-1214.

Degree of insanity necessary to render one incapable of understanding nature of crime. 8-1214.

Irresistible impulse or moral insanity. 8-1034.

**Instigation or consent to crime.**

Conviction of attempt to obtain goods by false pretense although owner is not deceived but pretends to be for purpose of entrapping the guilty party. 8-652.

**Procedure.**

Bail and recognizance, see **BAIL AND RECOGNIZANCE**.

Presumption and burden of proof, see **EVIDENCE**.

Admissibility of evidence, see **EVIDENCE**.

Sufficiency of proof, see **EVIDENCE**.

Sufficiency of indictment, see **INDICTMENT**, ETC.

Disqualification of judge, see **JUDGE**.

Right to trial by jury, see **JURY**.  
 Instructions, see **TRIAL**.  
 Venue, see **VENUE**.  
 Impeaching or discrediting witness, see  
**WITNESSES**.

*Effect of bill of particulars on proof in  
 prosecution for crime. 8-556.*

Failure to object to predicate question  
 propounded to accused as estopping  
 him from objecting to admission  
 of testimony which is immaterial.  
 8-1357.

#### **Punishment.**

*Constitutionality of discrimination as re-  
 gards degree of penalty or punish-  
 ment for violation of Sunday law.  
 8-506 (case p. 503).*

*Constitutionality of statute as affected  
 by discrimination in punishment for  
 same offense based upon age, color  
 or sex. 8-854 (case p. 848).*

#### **Parole.**

*Extradition of one who violates parole.  
 8-908 (case p. 901).*

---

#### **CROPPERS.**

See **LANDLORD AND TENANT**.

---

#### **CROES.**

Evidence on question of injury to, see  
**DAMAGES**.  
 Tenant's right as to, see **LANDLORD AND  
 TENANT**.

---

#### **CROSSINGS.**

Injury at railroad crossing, see **RAIL-  
 ROADS**.

---

#### **CURVE.**

*Experimental evidence as to effect of.  
 8-35.*

---

#### **CUSTOM AND USAGE.**

Evidence of, generally, see **EVIDENCE**.

*Custom or previous dealing as imposing  
 an obligation upon party to contract  
 to accept something else in lieu of  
 cash. 8-1268 (case p. 1264).*

Negligence of employee in following a  
 custom with respect to interpretation  
 of a rule. 8-865.

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#### **DAMAGES.**

**In general.**

Review of, on appeal, see **APPEAL AND  
 ERROR**.

Relevancy of evidence as to. 8-595.  
 Prejudicial error as to measure of.  
 8-1116.

**For discharge of servant.**

*Doctrine of "constructive service."  
 8-388 (case p. 384).*

Stipulated salary for such period as dis-  
 charged employee is entitled to re-  
 cover damages, less any amount ac-  
 tually received or which might have  
 been received during such period af-  
 ter discharge, as measure of recovery.  
 8-334.

**In condemnation proceedings.**

Reduction of damages, see *infra*.

Time for which recoverable, see *infra*.

*Measure of compensation to owner of  
 fee when telegraph or telephone line  
 is erected along railroad right of way  
 or highway. 8-1298 (case p. 1290).*

Right of appellate court to review dam-  
 ages. 8-1290.

Time for which recoverable.

Right to assess permanent damages to  
 owner of fee for construction of tele-  
 graph line along railroad right of  
 way. 8-1290.

**Reduction.**

Effect on amount of damages to be al-  
 lowed owner of fee for construction  
 of telegraph line on railroad right of  
 way of fact that construction of ad-  
 ditional railroad tracks may impair  
 the enjoyment of the telegraph com-  
 pany. 8-1290.

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#### **DAMS.**

Liability for injury by bursting of.  
 8-544.

---

#### **DANGEROUS AGENCY.**

Explosives, see **EXPLOSIONS AND EXPLO-  
 SIVES**.



*Employment of incompetent, inexperienced employee to handle, as independent ground of negligence toward one other than an employee. 8-577.*

### DEADLY WEAPON.

*Firearm used as a bludgeon as a deadly weapon. 8-1319 (case p. 1319).*

### DEATH.

As to limitation of time for action for, see LIMITATION OF ACTIONS.

Proximate cause of, see PROXIMATE CAUSE.  
Registration of deaths, see VITAL STATISTICS.

Effect on competency of witness, see WITNESSES.

Effect of death of lessee to terminate lease. 8-1142.

Release of bail by death of principal. 8-363.

### DEATH PENALTY.

See CAPITAL PUNISHMENT.

### DEBT.

Action for, see ACTION FOR DEBT.

*Of personal representative to decedent's estate, liability for, on bond. 8-84 (case p. 79).*

### DEBTOR AND CREDITOR.

Composition with creditor, see COMPOSITION WITH CREDITORS.

Creditors of decedent, see EXECUTORS AND ADMINISTRATORS.

Conveyance fraudulent as to creditors, see FRAUDULENT CONVEYANCES.

As to exemptions, see HOMESTEAD.

Insolvency of debtor, see INSOLVENCY; RECEIVERS.

### DECEDENTS.

Administration of estates of, see EXECUTORS AND ADMINISTRATORS.

### DECEIT.

See FRAUD AND DECEIT.

### DECLARATIONS.

Admissibility in evidence, see EVIDENCE.

### DEDICATION.

Presumption of dedication. 8-249.

### DEEDS.

Acknowledgment of, see ACKNOWLEDGMENT.

Parol evidence as to, see EVIDENCE.

Presumption of undue influence on grantor, see EVIDENCE.

Tax deeds, see TAXES.

Effect of conveyance of real estate to a partnership in the name of which only the surname of one partner is mentioned. 8-489.

### DEFENSES.

To liability for abandonment or non-support of wife, see HUSBAND AND WIFE.  
In action to recover damages for nuisance, see NUISANCES.

### DEFINITIONS

See WORDS AND PHRASES.

### DEGREES.

Of homicide, see HOMICIDE.

### DELAY.

*Effect of, as waiver of statute or court rule requiring nonresident plaintiff to give security for costs. 8-1510 (case p. 1508).*

### DELEGATION OF POWER.

Constitutionality of, see CONSTITUTIONAL LAW.

### DELIVERY.

*Injury while making delivery as arising out of and in the course of employment within meaning of Workmen's Compensation Act. 8-935 (case p. 930).*

**DEMONSTRATIVE EVIDENCE.**

See EVIDENCE.

**DEMURRER.**In general, see PLEADING.  
To evidence, see TRIAL.**DEPARTMENTS.**

Of government, see GOVERNMENTAL DEPARTMENTS.

**DEPORTATION.**

Of alien, see ALIENS.

**DEPUTY SHERIFF.**

See SHERIFFS.

**DESCENT AND DISTRIBUTION.**As to rights in estate by entirety, see HUSBAND AND WIFE.  
Tax on right to take property by, see TAXES.**DESCRIPTION.**Of parties in deed, see DEEDS.  
Of property in lease, see LANDLORD AND TENANT.  
Of parties in pleading, see PLEADING.  
Of beneficiary in will, see WILLS.**DESERTION.**

Criminal liability for desertion of wife, see HUSBAND AND WIFE.

**DESTINATION.**

Leaving passenger at, see CARRIERS.

**DESTRUCTION.**

Constitutionality of statute or ordinance providing for destruction of property, see CONSTITUTIONAL LAW.

**DEVISE.**

In general, see WILLS.

**DIRECTION OF VERDICT.**

See TRIAL.

**DIRECTOR GENERAL OF RAILROADS.**

Orders of, see CARRIERS.

**DISABILITY.**

Effect of, on running of limitations, see LIMITATION OF ACTIONS.

**DISBARMENT.**

Of attorney, see ATTORNEYS.

**DISCHARGE.**Of firearm, see FIREARMS.  
Of employee, see MASTER AND SERVANT.  
Of trust, see TRUSTS.**DISCIPLINE.***Master's liability for injury of one servant by another in enforcing discipline. 8-1432 (case p. 1426).***DISCONTINUANCE.**Of operation of railways, see CARRIERS.  
Of action, see DISMISSAL OR DISCONTINUANCE.**DISCREDITING.**

Of witness, see WITNESSES.

**DISCRETION.**

Review of, on appeal, see APPEAL AND ERROR.

**DISCRIMINATION.**

Constitutionality of, see **CONSTITUTIONAL LAW**.  
In license tax, see **LICENSE**.

**DISEASE.**

Diseased animals, see **ANIMALS**.  
Contagious or infectious disease, see **CONTAGIOUS AND INFECTIOUS DISEASES**.

**DISINFECTION.**

*Power to require, under general delegation of power to guard against spread of contagious disease. 8-838.*

**DISLOYALTY.**

As ground for disbarment or suspension of attorney, see **ATTORNEYS**.

**DISMISSAL OR DISCONTINUANCE.**

*Application for continuance as waiver of right to dismissal because of plaintiff's failure to furnish security for costs. 8-1528.*

*Right of plaintiff to dismiss an action brought in behalf of himself and other persons. 8-950 (case p. 938).*

*Mandamus to compel dismissal of action. 8-938.*

*Effect of dismissal without prejudice. 8-938.*

*Right of parties of record to suit to agree to dismissal at any time. 8-938.*

*Right of one purchasing stock of corporation after motion to dismiss an action in which the stockholders are interested, to prevent such dismissal. 8-938.*

**DISQUALIFICATION.**

Of judge, see **JUDGES**.

*Of executor or administrator as affecting his removal. 8-181.*

**DISSIMILARITY.**

See **SIMILARITY**.

**DISSOLUTION.**

Of corporation, see **CORPORATIONS**.

**DISTANCE.**

*Experimental evidence as to. 8-35.*

**DISTRICT AND PROSECUTING ATTORNEYS.**

As to attorney general, see **ATTORNEY GENERAL**.

*Admissibility of threats by accused against prosecuting attorney in criminal case. 8-1861.*

*District attorney as proper person to bring suit against sheriff for forfeiture of his office. 8-679.*

**DISTRICT COURTS.**

*Power of, to punish for contempt. 8-1546, 1556.*

**DISTRICT OF COLUMBIA.**

*Power of courts of, to punish for contempt. 8-1547.*

**DIVISION FENCE.**

See **FENCES**.

**DIVORCE AND SEPARATION.**

*Prior action for divorce in which claim for divorce might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action for divorce. 8-721.*

*Effect of divorce on right of spouse or child to compensation under Workmen's Compensation Act. 8-1113 (case p. 1110).*

*Venereal disease as ground for divorce. 8-1540 (case p. 1534).*

*Residence of plaintiff for jurisdictional purposes. 8-1534.*

**Alimony.**

*Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective. 8-327 (case p. 326).*

*Right of wife to dispose of property awarded to her as support for herself and child. 8-651 (case p. 645).*

*Statute expressly or impliedly denying power to enforce by process of contempt, order, judgment, or decree for money as applicable to order or decree for alimony. 8-1156 (case p. 1149).*

#### **Separation agreements.**

*Unchastity of wife as affecting prior separation agreement. 8-1452 (case p. 1447).*

#### **DOGS.**

Liability for injury by, see **ANIMALS.**

#### **DOMICIL.**

Effect of removal of administrator from state appointing him to vacate his letters of administration. 8-163.

#### **DOOR.**

*Experimental evidence as to catching of cap in shutting door. 8-36.*

#### **DOWER.**

Election between legacy and dower, see **WILLS.**

*Prior action in equity in which claim for dower might have been asserted by counterclaim, set-off, or cross petition as barring subsequent independent action for dower. 8-717.*

#### **DRUGS AND DRUGGISTS.**

See also **CHEMICALS.**

*Experimental evidence in action for negligence in sale of. 8-36.*

#### **DRUNKENNESS.**

As affecting criminal responsibility, see **CRIMINAL LAW.**

*Taking property from drunken person by stealth as robbery. 8-359, 361 (case p. 357).*

Intentionally getting drunk a material witness for the adversary as ground for revocation of arbitration agreement. 8-1081.

#### **DUE PROCESS OF LAW.**

See **CONSTITUTIONAL LAW.**

#### **DYNAMITE.**

In general, see **EXPLOSIONS AND EXPLOSIVES.**

#### **EASEMENTS.**

*Right of owners of parcels into which dominant tenement has been divided, to use a right of way. 8-1363 (case p. 1363).*

Improvement of dominant estate which increases use of easement. 8-1343.

#### **EJECTION.**

Of passenger, see **CARRIERS.**

#### **EJECTMENT.**

*Prior action for possession in which claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action thereon. 8-719, 720.*

Laches as defense to action. 8-489.

Effect of allegation in complaint as to the time of defendant's possession to bind plaintiff so far as it relates to defendant's plea of limitations. 8-489.

Transfer of action to equity on ground that reformation of deed is necessary, in absence of pleading showing defect in deed and prayer for equitable relief. 8-489.

Effect of plea of limitations to raise an issue upon which plaintiff is entitled to jury trial. 8-489.

#### **ELECTION.**

Between legacy and dower, see **WILLS.**

#### **ELECTION OF REMEDIES.**

Transfers between law and equity, see **EQUITY.**

**ELECTIONS.****Right to vote.**

As property within meaning of the 14th Amendment. 8-1463.

**Corrupt practices.**

Providing disqualification for office and disfranchisement only for successful candidates for public office who are guilty of corrupt practices. 8-1463.  
Exempting from Corrupt Practices Act town officers elected in towns of less than ten thousand inhabitants. 8-1463.

**Contests.**

Election contest as a criminal proceeding within constitutional provision preserving jury trial in such proceedings. 8-1463.

Sufficiency of description of petitioners in election contest to show their right to vote for the officers whose election is contested. 8-1463.

Power of legislature to require all election contests to be tried in one county. 8-1463.

Jurisdiction. 8-1463.

Infringement of power of supreme judicial court by conferring final authority in election contests upon judges of the superior court. 8-1463.

Assignment by chief justice of judges to hear election contests as contravening constitutional provision that all judicial officers shall be appointed by the governor. 8-1463.

**ELECTRICITY.**

Conferring power of eminent domain upon corporation organized to supply electricity to public. 8-466.

**ELECTRIC TRANSFORMER.**

See TRANSFORMER.

**ELEVATORS.**

Employment of incompetent or inexperienced or negligent operator as independent ground of negligence toward one other than an employee. 8-576.

**ELOPEMENT.**

Homicide or assault in attempting to prevent an elopement. 8-660 (case p. 659).

**EMERY.**

*Experimental evidence as to direction taken by flying particles of.* 8-86.

**EMINENT DOMAIN.****In general.**

Delegation to Public Utilities Commission power to compel exercise of power of eminent domain to secure the public safety. 8-466.

Sufficiency of title of statute creating restricted residence districts in cities of first class under power of eminent domain. 8-585.

Review of legislative decision as to. 8-585.

**Who may exercise.**

Conferring power upon light and power company. 8-466.

Sufficiency of title of statute conferring upon public service corporations power of eminent domain. 8-466.

Effect of general corporation acts to confer right to acquire property by eminent domain. 8-466.

**For what purpose.**

Power to condemn against particular use of property. 8-594 (case p. 585).

Establishment of restricted residence district under power of eminent domain. 8-585.

**Procedure.**

What is sufficient attempt to agree on compensation. 8-471 (case p. 466).

Necessity of attempting to negotiate with other joint owner upon failure to agree with one joint owner. 8-466.

Taking of or injury to property; right to compensation.

As to what constitutes additional servitude, see *infra*.

Amount of recovery, see **DAMAGES**.

Constitutional right to compensation on destruction of diseased animals. 8-70.

Right to compensation in case of condemnation of particular use of property. 8-594.

Supervision of public utilities as a taking of property without compensation. 8-916.

Order of Public Service Commission regulating schedules, routing, and type of cars of street railway company as a taking for public use of the property of the company or of the city having an interest in its net earnings. 8-916.

Increasing rates for water for irrigation to those having easement in the system for the supplying of their quantum of water as an unauthorized taking of private property for public use. 8-249.

#### **Additional servitude.**

*Right and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway. 8-1293 (case p. 1290).*

Limitation of time for action for damages because of additional burden by construction of telegraph line along railroad right of way. 8-1290.

#### **EMPLOYEES.**

Rights, duties, and liabilities of, generally, see MASTER AND SERVANT.

#### **EMPLOYERS' LIABILITY.**

See MASTER AND SERVANT.

#### **ENCUMBRANCES.**

*Right of grantee or transferee to be reimbursed for expenditures in payment of encumbrances on property where conveyance of transfer is in fraud of creditors. 8-527 (case p. 523).*

#### **ENGINE.**

See LOCOMOTIVES.

#### **ENGINEER.**

Negligence of, in operation of train, see RAILROADS.

#### **ENGLISH COURTS.**

Power of, to punish for contempt. 8-1570.

#### **ENTIRETY.**

Of contract, see CONTRACTS.  
Estate by, see HUSBAND AND WIFE.

#### **EQUALITY.**

Of license tax, see LICENSE.

#### **EQUITABLE ESTOPPEL.**

See ESTOPPEL.

#### **EQUITY.**

*In general; jurisdiction.*

As to injunction, see INJUNCTION.

Limitation of actions in, see LIMITATION OF ACTIONS.

Jurisdiction to issue writ of ne exeat, see NE EXEAT.

Relief under prayer, see PLEADING.

As to reformation of instruments generally, see REFORMATION OF INSTRUMENTS.

Power of courts of equity to punish for contempt. 8-1551.

*Prior action on contract in which claim in equity might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action on such claim. 8-718.*

*Prior action for possession in which claim in equity might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent suit on such claim. 8-719.*

*Prior action in equity in which claim on contract might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action on contract. 8-716.*

*Prior action in equity in which claim in tort might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action in tort. 8-717.*

*Prior action in equity in which claim for foreclosure might have been asserted by counterclaim, set-off, or cross petition as bar to independent action for foreclosure. 8-718.*

*Prior action in equity in which claim in equity might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action on such claim. 8-718.*

Jurisdiction of suit to enforce judgment lien. 8-435.

Effect of prayer for accounting to confer jurisdiction upon equity of action to collect unsatisfied judgment the amount of which is certain. 8-435.

Effect of statutory abrogation of remedy afforded by general equity jurisprudence. 8-1149.

**- retaining jurisdiction.**

For purpose of authorizing the owner of the road to discontinue its operation where jurisdiction has been taken for purpose of enforcing the performance of a contract to operate a street or interurban railroad. 8-242.

**Transfers between law and equity.**

Transfer to equity of action to recover possession of real estate on ground that reformation of deed is necessary, in absence of pleading showing defect in deed and prayer for equitable relief. 8-489.

**Equity principles.**

*Right of grantee or transferee to affirmative equitable relief for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is set aside as in fraud of creditors.* 8-527 (case p. 528).

*Equitable relief against award of arbitrators obtained by fraud or unfair means.* 8-1083.

**ERRONEOUS DECISION.**

As law of the case on subsequent appeal, see **APPEAL AND ERROR**.

**ESTATE.**

By entirety, see **HUSBAND AND WIFE**.

**ESTOPPEL.****In general.**

By suing on part of claim, see **ACTION OR SUIT**.

Effect of statute on equitable estoppel. 8-750.

Estoppel to claim exemption from arrest. 8-750.

**Of married woman.**

Of married woman masquerading as a single one, to set up statutory exemption of married woman from arrest. 8-750.

**As to corporate powers.**

Estoppel of national bank by its purchase and temporary operation of street railway to plead its want of power to operate such road. 8-242.

**By laches, silence, or acquiescence.**

Laches as bar to action, see **LIMITATION OF ACTIONS**.

Silence of property owner after receiving notice from his neighbor of intention to remove a hedge on the division line. 8-164.

**By receiving benefits.**

Estoppel of corporation to take advantage of having acted under a wrong name after receiving the consideration. 8-579.

**ETHER.**

*Experimental evidence as to impurity of.* 8-45.

**EVIDENCE.**

Necessity for exception to, see **APPEAL AND ERROR**.

Review of discretionary rulings, see **APPEAL AND ERROR**.

Reception of, on trial, see **TRIAL**.

Demurrer to, see **TRIAL**.

Instructions upon, see **TRIAL**.

**Judicial notice.**

*Judicial notice of the coincidence of the days of the week with the days of the month.* 8-63 (case p. 59).

Acts of Congress. 8-964.

Proclamations of the President. 8-964.

Presumptions and burden of proof.

Instructions as to, see **TRIAL**.

Validity of statutes. 8-1066, 1590.

**- concerning persons.**

*Presumption as to paternity of child conceived or born before marriage.* 8-427 (case p. 426).

Authority of broker to receive payment. 8-192.

Authority of superintendent to use some force to compel obedience to rules by employees. 8-1426.

Good faith of purchaser of note. 8-309.

Undue influence. 8-1091.

Innocence. 8-1034.

**- cause.**

Cause of death of or injury to insured. 8-318.

**- negligence.**

*Applicability of "res ipsa loquitur" to explosion of gases or chemicals.* 8-500 (case p. 493).

Effect of doctrine of "res ipsa loquitur" to dispense with requirement that one alleging negligence must prove it. 8-493.

Presumption of responsibility of owner of automobile for injury caused by chauffeur in operating it. 8-785.

— as to official acts.

Burden of showing invalidity of tax sought to be enjoined. 8-792.

— as to contracts, instruments, and property.

Good faith of holder of note. 8-809.

Presumption of dedication of property to public use. 8-249.

#### Documentary evidence.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence. 8-1168 (case p. 1161).

#### Demonstrative evidence.

Experimental evidence as affected by similarity or dissimilarity of conditions. 8-18 (cases pp. 1, 11).

Review of discretion as to. 8-1.

Photographs. 8-1084.

Evidence of experiments to determine number of hogs that could be loaded in wagon of certain dimensions. 8-11.

Parol and extrinsic evidence concerning writings.

As to oral contracts, generally, see CONTRACTS.

Admissibility of parol evidence as to amount of commodity specified in written contract of sale. 8-747 (case p. 745).

As to purpose for which property was conveyed to religious society. 8-102.

To explain clause in deed. 8-1335.

Intent of parties to lease of house by street number. 8-669.

Intent of testator. 8-904.

#### Opinions and conclusions.

Weight of opinion evidence, see *infra*.

Hypothetical question not based on the particular facts. 8-1316.

Reversible error as to. 8-11.

Nonexpert opinions as to insanity of accused. 8-1034.

Opinion of sheriff as to insanity of one accused of murder. 8-1214.

Speed of automobile; comparison with that of other car. 8-690.

Right of witness to testify that a certain thing could not have happened without his seeing it as a conclusion of fact. 8-11.

#### Admissions.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence. 8-1168 (case p. 1161).

Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client. 8-1334 (case p. 1331).

Failure of addressee to reply to letter as evidence of facts therein stated. 8-1161.

Hearsay; declarations, *res gestae*.

Declarations of person indicating a particular state of mind where that is a relevant fact. 8-1214.

— declarations of accused.

Threats by accused, see *infra*.

Evidence of declarations of accused on issue of insanity. 8-1219 (case p. 1214).

Admissibility of voluntary and noncommittal statement by accused as to transaction upon which charge is based. 8-1084.

Voluntary statements to officer by one in custody or in jail. 8-1214.

Declarations of accused to show the state of his mind. 8-1214.

— of deceased person.

As to effect of death on competency of witness, as to transaction with deceased, see INCOMPETENT PERSONS.

— threats.

Admissibility of threats by accused against jury or prosecuting attorney in criminal case. 8-1361 (case p. 1357).

— telephone conversation.

Admissibility in prosecution for attempting to secure goods in name of credit customer by telephoning an order for them, of the telephone conversations, although accused has not been directly connected with them. 8-652.

#### Relevancy and materiality.

Under particular pleadings, see *infra*.

Evidence of results of experiment as affected by similarity or dissimilarity of conditions. 8-18 (cases pp. 1, 11).

Evidence of experiments to determine number of hogs that could be loaded in wagon of certain dimensions. 8-11.

Permitting witness to describe wounds in body of victim of homicide and state that some were in the back. 8-1357.

— custom.

Evidence in action for injury to person in boiler room of cotton gin, of custom to permit persons to enter that room. 8-760.



**— intent; fraud.**

Evidence on question whether check made payable to bank cashier was to pay a note to the bank or a debt to the cashier. 8-298.

Fraud. 8-1477.

**— damages.**

Diminution of usable value of land to tenant by lowering of water table. 8-595.

**— care; negligence.**

Evidence of custom, see *supra*.  
Similar acts or facts in negligence cases, see *infra*.

**— circumstances.**

Proof of surrounding circumstances upon prosecution for homicide in attempting to prevent elopement. 8-656.

**— similar acts or facts.**

Similarity of conditions attending accident and experiments. 8-1.  
Condition at other times. 8-1, 760.

**Weight, effect, and sufficiency.**

Instructions as to, see TRIAL.  
Credibility of witness, see WITNESSES.

*Dissimilarity of conditions as affecting weight of experimental evidence.* 8-26.

*Disregarding uncontradicted testimony in civil action.* 8-796 (cases pp. 785, 789, 792).

Weight of evidence as question for jury. 8-874.

Conclusiveness of testimony of justice of the peace who certifies on a will the character of the signatures that he did not sign as a witness. 8-1073.

Good faith of holder of check. 8-809.

Incompetency or inexperience of street car operatives. 8-569.

Communication of venereal disease by husband to wife. 8-1534.

To support conviction for murder. 8-1034.

Reasonable doubt. 8-656, 1034.

**Under particular pleadings.**

*Effect of bill of particulars on proof.* 8-550 (case p. 544).

Under general denial. 8-964.

**Variance.**

Proof of tenancy by sufferance as variance from election of monthly tenancy. 8-1508.

**EXAMINATION.**

Of bank, see BANKS.

**EXCAVATIONS.**

*Experimental evidence as to visibility of excavations in highway.* 8-36.

**EXCEPTIONS.**

See APPEAL AND ERROR; TRIAL.

**EXECUTION.**

Of writing required by Statute of Frauds, see CONTRACTS.

Exemptions, see HOMESTEAD.

Sale under, see JUDICIAL SALE.

Of will, see WILLS.

*Effect of appointment of receiver for corporation upon enforcement of execution lien.* 8-459.

Defense in action to remove a fraudulent conveyance from the path of an execution, that claim on which the judgment was entered and on which the execution was issued was invalid or inequitable. 8-523.

**EXECUTORS AND ADMINISTRATORS.**

Revival of action in name of personal representative, see ABATEMENT AND REVIVAL.

As to devise or legacy generally, see WILLS.

Competency of witness in action by or against, see WITNESSES.

Appointment; removal; termination of trust.

*What effects removal of executor or administrator.* 8-175 (cases pp. 163, 170).

What constitutes collateral attack on appointment. 8-163.

Appealability of probate proceeding to remove administrator de bonis non. 8-170.

Removal from state of administrator as ipso facto revoking his letters of administration. 8-163.

Necessity of formal acceptance of resignation to confer jurisdiction to appoint successor. 8-170.

Abandonment of trust by personal representative. 8-170.

Effect of filing of account by personal representative denominated "final account" to terminate the trust. 8-170.

**Powers and liabilities.**

*Bond of executor or administrator as covering debt due from principal to decedent. 8-84 (case p. 79).*

*Option of executor of tenant to keep the property or sublet it, or surrender it to landlord. 8-1142.*

*General rule as to liability of surety on bond. 8-79.*

*Indebtedness; claims against estate.*

*Rent accruing under lease after death of lessee as preferred claim or cost of administration. 8-1146 (case p. 1142).*

*What included in costs and charges of administration which statute makes a preferred claim. 8-1142.*

**EXEMPTIONS.**

*Homestead exemption, see HOMESTEAD.*  
*From arrest, see WRIT AND PROCESS.*

**EX PARTE COMMUNICATIONS.**

*With arbitrators as ground for relief against award. 8-1088.*

**EXPERIMENTAL EVIDENCE.**

*See EVIDENCE.*

**EXPERT ACCOUNTANTS.**

*See PUBLIC ACCOUNTANTS.*

**EXPERT TESTIMONY.**

*In general, see EVIDENCE.*

**EXPLANATION.**

*Parol evidence for purpose of, see EVIDENCE.*

**EXPLOSIONS AND EXPLOSIVES.**

*Of gas, see GAS.*

*Proximate cause of injury by, see PROXIMATE CAUSE.*

*Applicability of "res ipsa loquitur" to explosion of gases or chemicals. 8-500 (case p. 498).*

*Experimental evidence as affected by similarity or dissimilarity of conditions. 8-45.*

**EXPLOSIVES.**

*See EXPLOSIONS AND EXPLOSIVES.*

**EXTENSION OF TIME.**

*Waiver of statute or court rule requiring nonresident plaintiff to give security for costs where application therefor is made after extension of time to answer. 8-1511.*

**EXTRADITION.**

*Extradition of one who violates parole. 8-903 (case p. 901).*

*General rule as to extradition of convict. 8-901.*

*Duty of authorities of state where arrest is made to show facts justifying issuance of warrant. 8-901.*

*Issuance of warrant as prima facie authority to hold one against whom it is issued. 8-901.*

**EXTRINSIC EVIDENCE.**

*As to writing, see EVIDENCE.*

**EYESIGHT.**

*Compensation for loss or impairment of eyesight under Workmen's Compensation Act. 8-1324 (case p. 1322).*

**FACTORS.**

*Implied authority of factor to receive payment for commodities which he is authorized to sell. 8-227.*

*Distinction between broker and factor or commission merchant. 8-192.*

**FACTS.**

*Review of, on appeal, see APPEAL AND ERROR.*

**FALSE PRETENSES.**

*Conversion by telephone as false pretense. 8-656 (case p. 652).*

Admissibility in prosecution for attempting to secure goods in name of credit customer by telephoning an order for them, of the telephone conversations, although accused has not been directly connected with them. 8-652.

Conviction of attempt to obtain goods by false pretense although owner is not deceived and pretends to be for purpose of entrapping the guilty party. 8-652.

**FEDERAL COURTS.**

*Power to punish for contempt. 8-1545.*

**FEDERAL EMPLOYERS' LIABILITY ACT.**

See MASTER AND SERVANT.

**FEEs.**

See COSTS AND FEES.

**FELLOW SERVANTS.**

See MASTER AND SERVANT.

**FENCES.**

*Right to remove or rebuild fence separating one's land from his neighbor's land. 8-1644 (case p. 1641).*

Effect on implied admission in complaint for destroying a division fence, that it was on or near the line, of denial in the reply that the fence was on defendant's property. 8-1641.

Right to remove hedge on division line as carrying with it right to take down a supporting railing attached to the neighbor's house. 8-1641.

Estoppel of property owner to claim damages for removal of division fence by adjoining owner. 8-1641.

**FINALITY OF DECISION.**

For purpose of appeal, see APPEAL AND ERROR.

**FIREARMS.**

Firearm as a deadly weapon, see DEADLY WEAPONS.

*Evidence of experiments with. 8-37, 41, 58.*

**FIRE INSURANCE.**

See INSURANCE.

**FIREs.**

Proximate cause of loss or injury by, see PROXIMATE CAUSE.

Liability of railroad for, see RAILROADS.

*Experimental evidence as to cause of. 8-37.*

*Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire protection at his own expense. 8-1628 (case p. 1590).*

Negligence of owner of carload of gasoline in permitting ground along switch track to become saturated therewith, where fire is subsequently set to it by boys, to the injury of property in the neighborhood. 8-1243.

**FLASH.**

*Possibility of recognizing person by flash from gun or pistol. 8-58.*

**FLAVOR.**

*Experimental evidence as to. 8-45.*

**FLOOD.**

Liability for causing, see WATERS.

**FLYING PARTICLES.**

*Experimental evidence as to direction taken by. 8-38.*

**FOOT.**

*Experimental evidence as to catching of, in railroad track. 8-38.*

**FOOTBOARD.**

*Experimental evidence as to catching of footboard of locomotive at track intersections. 8-88.*

**FORCE.**

Of blow, see **BLOW**.  
As necessary element of crime of robbery, see **ROBBERY**.

**FORECLOSURE.**

Of mechanic's lien, see **MECHANICS' LIENS**.  
Of mortgage, see **MORTGAGE**.

**FORFEITURE.**

Confiscation of property, see **CONFISCATION**.  
Of insurance contract, see **INSURANCE**.  
Of public office, see **OFFICERS**.

**FORGERY.**

*Experiments to show erasure of writing by use of chemicals. 8-40.*

**FORMER SUIT PENDING.**

As ground for abatement, see **ABATEMENT AND REVIVAL**.

**FRAUD AND DECEIT.**

Statute of Frauds, see **CONTRACTS**.  
Evidence as to, generally, see **EVIDENCE**.  
Transfers in fraud of creditors, see **FRAUDULENT CONVEYANCES**.  
Effect of, on running of limitations, see **LIMITATION OF ACTIONS**.

*False representations as to status as waiver of privilege against arrest. 8-760.*

*Effect of collusion between parties to receivership proceeding on right to bring action against corporation or prosecute pending action after appointment of receiver. 8-463.*

*Liability of broker to purchaser for overstating lowest price at which owner is willing to sell. 8-1383 (case p. 1877).*

*Fraudulent concealment of facts from arbitrators as ground for avoiding award. 8-1087.*

*Obligee's concealment of facts or evasive answers as fraud against surety. 8-1486 (case p. 1477).*

*Effect of rule prohibiting parol evidence to vary written contract to preclude admission of such evidence to establish fraud in making the contract. 8-745.*

*Sufficiency of complaint based on negligence to sustain judgment based on fraud. 8-1023.*

*When suppression of truth or concealment constitutes fraud. 8-1477.*

**FRAUDULENT CONVEYANCES.**

*Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors. 8-527 (case p. 523).*

*Defense in action to remove a fraudulent conveyance from the path of an execution, that claim on which the judgment was entered and on which the execution, was issued was invalid or inequitable. 8-523.*

*Effect of valuable consideration where intent is to defraud creditors. 8-523.*

*Effect of purchaser's notice of transferee's fraud. 8-523.*

**FREEZING.**

*Experimental evidence as to freezing of boat to railroad track. 8-88.*

*Liability under accident policy for injury or death from freezing. 8-231 (case p. 222).*

**FREIGHT CARRIERS.**

See **CARRIERS**.

**FUGITIVES.**

Extradition of, see **EXTRADITION**.

**FUMES.**

*Experimental evidence in action for injury by. 8-88.*

**FURNACE.**

*Evidence of experiment to determine possibility of fire originating from. 8-37.*

**GAMING.**

Validity of gaming contract, see **CONTRACTS**.

Burden of proof of good faith of holder of check given for gambling debt. 8-309.

Sufficiency of proof of good faith of holder of check given for gambling debt. 8-309.

**GARAGE.**

Right of lessee of house by street number to enjoin erection by landlord of garage on rear of lot. 8-669.

**GAS.**

As to oil and gas leases, see **MINES**.  
See also **FUMES**.

*Experimental evidence as to inflammability of.* 8-46.

*Applicability of "res ipsa loquitur" to explosion of gas.* 8-500 (case p. 493).

Conferring power of eminent domain upon gas company. 8-466.

**GASOLENE.**

In general, see **EXPLOSIONS AND EXPLOSIVES**.

Liability for fire started by, see **FIRES**.

Proximate cause of injury by explosion of, see **PROXIMATE CAUSE**.

Right of lessee under oil lease who contracts to sell to another the gas produced from oil wells on the premises to be used in the manufacture of gasoline, to stimulate the flow of oil, although as a result thereof the gas may lose some of its gasoline properties. 8-414.

**GATE.**

*Experimental evidence as to safety of gate on street car.* 8-38.

**GENERAL DENIAL.**

Evidence admissible under, see **EVIDENCE**.

**GIFT.**

By will, see **WILLS**.

**GLANDERS.**

*Constitutionality of statute or ordinance providing for destruction of horses affected with.* 8-89.

**GOOD CHARACTER.**

Requiring applicant for license as real estate broker to file certificate of good character. 8-418.

**GOOD FAITH.**

Presumption and burden of proof as to, see **EVIDENCE**.

Sufficiency of evidence as to, see **EVIDENCE**.

**GOVERNMENT.**

*Service of government as excuse for failure of carrier to discharge duty to individual.* 8-162 (case p. 155).

**GOVERNMENTAL DEPARTMENTS.**

Conferring power upon the head of one department to fix the salaries of his assistants which power is not conferred upon the heads of other departments. 8-418.

**GRAND JURY.**

*Power of, to punish for contempt.* 8-1579.

**GRASS.**

*Right of tenant to recover damages from third person for injury to.* 8-605.

**GUARANTY.**

Statute of Frauds as to, see **CONTRACTS**.

*Obligor's concealment of facts or evasive answers as fraud against guarantor.* 8-1485 (case p. 1477).

**GUEST.**

*Breach of lessor's covenant to repair as ground of liability for damages for personal injury to guest of tenant.* 8-769.

**GUMMED PAPER.**

Adhesiveness of, see ADHESIVENESS.

**GUN.**

See FIREARMS.

**GUNPOWDER.**

In general, see EXPLOSIONS AND EXPLOSIVES.

**HABEAS CORPUS.**

Right of one isolated at state institution to discharge because he is able to provide himself with proper treatment at an isolated place in locality of his residence. 8-831.

Right of court reviewing deportation proceedings to weigh the testimony upon which deportation order was based. 8-1282.

Statute requiring court to dispose of the party as law and justice require. 8-1282.

**HALLWAY.**

Experimental evidence as to amount of light in. 8-58.

**HARMLESS ERROR.**

See APPEAL AND ERROR.

**HEADLIGHT.**

Experimental evidence as to amount of light cast by. 8-57.

**HEALTH.**

In general; board of health.

As to vital statistics, see VITAL STATISTICS.

Review by courts of findings of health officers. 8-831.

Delegation of power to health board. 8-831.

Regulations to protect health.

Regulations as to diseased animals, see ANIMALS.

General delegation of power to guard against spread of contagious disease. 8-836 (case p. 831).

Presumption of validity of health statute. 8-1066.

Providing for isolation of men infected with venereal disease. 8-831.

Right of one isolated at state institution to discharge because he is able to provide himself with proper treatment at an isolated place in locality of his residence. 8-831.

Effect of misnomer of state institution on validity of isolation order. 8-831.

--vaccination.

Right to require vaccination under general delegation of power to guard against spread of contagious disease. 8-841.

**HEARING.**

Necessity of, to constitute due process of law, see CONSTITUTIONAL LAW.

**HEARSAY.**

See EVIDENCE.

**HEDGE.**

Division hedge, see FENCES.

**HEEL.**

Experimental evidence as to catching of, upon steps. 8-39.

**HEIRS.**

Devise or bequest in favor of, see WILLS.

**HIGH COURT OF JUSTICE.**

Power of, to punish for contempt. 8-1570.

**HIGHWAYS.**

Additional servitude on, see EMINENT DOMAIN.

**Use of.**

Authority of abutting owner to eject from sidewalk children using it for roller skating. 8-1455.

**Defects; liability for injuries to travelers.**

Liability for injury on defective bridge, see **BRIDGES**.

Liability for injury due to negligent driving, see **NEGLIGENCE**.

Injury by trains at crossing, see **RAILROADS**.

*Experimental evidence in action for injury in highway.* 8-39.

*Liability for injury on highway at town, municipal, or county line.* 8-1274 (case p. 1271).

*Experimental evidence as to formation of ice upon sidewalk.* 8-39.

**— contributory negligence.**

Of person injured by street car, see **STREET RAILWAYS**.

*Experimental evidence as to visibility of defect or obstruction in highway.* 8-50.

**HOGS.**

*Constitutionality of statute permitting the destruction of hogs found running at large on or near public levees.* 8-79.

**HOLIDAYS.**

As to Sunday, see **SUNDAY**.

**HOME RULE.**

As to local self-government, see **CONSTITUTIONAL LAW**.

**HOMESTEAD.**

On public land, generally, see **PUBLIC LANDS**.

**Creditors' rights.**

Liability under enlarged Homestead Act of 1909 for debts of homesteader contracted before issuance of patent. 8-631.

Antecedent debts; construction of statute as to. 8-843.

**HOMICIDE.****In general.**

Prejudicial error in admission of evidence, see **APPEAL AND ERROR**.

Assault with intent to murder, see **ASSAULT AND BATTERY**.

Right of one accused of murder to bail, see **BAIL AND RECOGNIZANCE**.

Effect of insanity or irresistible impulse, see **CRIMINAL LAW**.

Effect of intoxication, see **CRIMINAL LAW**.

*Experimental evidence in prosecution for.* 8-39.

*Effect on liability of one inflicting personal injury on another who dies, of fact that negligence, mistake, or lack of skill of physician or surgeon contributed to the death.* 8-510.

Right of one accused of homicide to every reasonable doubt. 8-656.

Proof of surrounding circumstances upon prosecution for homicide in attempting to prevent elopement. 8-656.

Admissibility of photograph of scene of crime containing white spots to indicate places where victims fell. 8-1034.

Nonexpert opinion evidence as to sanity of accused. 8-1034.

Permitting witness to describe wounds in body of victim of homicide and state that some were in the back. 8-1357.

Sufficiency of evidence to support conviction. 8-1034.

Instructions in prosecution for. 8-1034.

**Excusable or justifiable homicide.**

Effect of intoxication, see **CRIMINAL LAW**.

*Homicide in attempting to prevent elopement.* 8-660 (case p. 656).

Taking life in defense of son. 8-656.

**— self-defense.**

*Experiments to determine from what distance pistol or gun was fired as bearing upon issue of self-defense.* 8-47.

**HORSES.**

In general, see **ANIMALS**.

*Constitutionality of statute or ordinance providing for destruction of diseased horses.* 8-69.

**HUSBAND AND WIFE.****In general.**

As to divorce, see **DIVORCE AND SEPARATION**.

Estoppel of married woman, see **ESTOPPEL**.

*Disqualification of judge by wife's ownership of stock in corporation which is party to action or proceeding.* 8-295 (case p. 290).

*Effect of marriage to terminate authority of executrix or administratrix.* 8-181.

#### Property rights.

As to dower, see DOWER.

*Estates by entirety in personal property.* 8-1017 (case p. 1014).

*Effect of entry by husband and wife into partnership with entirety funds to change the character of the estate.* 8-1014.

*Right of surviving wife as against husband's administrator to store property purchased with funds derived from property held by entireties.* 8-1014.

#### Actions; personal injuries.

*Breach of lessor's covenant to repair as ground of liability for damages for personal injuries to wife of tenant.* 8-767.

#### Abandonment of wife.

*Criminal responsibility of husband for abandonment or nonsupport of wife, who refuses to live with him.* 8-1314 (case p. 1312).

*Meaning of term "wilful" in statute providing punishment for desertion of wife and children.* 8-1312.

*Sufficiency of husband's contribution to support of wife and children to prevent conviction for desertion.* 8-1312.

---

#### HYPOTHETICAL QUESTION.

To expert, see EVIDENCE.

---

#### ICE.

*In street or on sidewalk, liability for injury by, see HIGHWAYS.*

*Experimental evidence as to bacilli in.* 8-10.

---

#### IDEM SONANS.

See NAME.

#### IDENTITY.

*Applicability of provisions of insurance contract as to injury intentionally inflicted where insured is injured because of mistake of identity.* 8-322.

---

#### ILLEGITIMACY.

As to proceedings in bastardy, see BASTARDY.

Presumption as to, see EVIDENCE.

---

#### ILLNESS.

See SICKNESS.

---

#### IMPAIRMENT OF OBLIGATIONS.

See CONSTITUTIONAL LAW.

---

#### IMPEACHMENT.

Of witnesses, generally, see WITNESSES.

---

#### INADEQUACY.

*Sale under power in mortgage or trust deed as affected by inadequacy of price.* 8-1001 (case p. 999).

---

#### INCOME.

*Right of trustee to accumulate income under will or other instrument directing him to use it.* 8-915 (case p. 904).

---

#### INCOMPETENT PERSONS.

Competency to commit crime, see CRIMINAL LAW.

Opinion evidence as to insanity, see EVIDENCE.

Sufficiency of proof of incompetency, see EVIDENCE.

As to married women, see HUSBAND AND WIFE.

Testamentary capacity, see WILLS.

Incompetency of witness, see WITNESSES.

*Experimental evidence as to effect of liquor to produce insanity.* 8-45.

*Statute rendering witness incompetent because of death of other person as applicable to latter's mental condition.* 8-1097 (case p. 1091).



Effect of insanity of principal to release surety on bail bond. 8-363.

Burden of showing invalidity of tax sought to be enjoined. 8-792.  
Effect of excessive prayer for relief. 8-595.

---

### I. W. W.

*Limitation of time for deportation of alien I. W. W.* 8-1289.

---

### INK.

*Experiments to show erasure of writing by use of chemicals.* 8-40.

---

### INEXPERIENCE.

Sufficiency of proof of. 8-569.

---

### INNOCENCE.

Presumption of, see EVIDENCE.

---

### INFANTS.

Effect of infancy on running of limitations, see LIMITATION OF ACTIONS.  
Adoption of, see PARENT AND CHILD.

---

### INSANITY.

See INCOMPETENT PERSONS.

*Termination of authority of administrator appointed to act during minority of next of kin by latter's coming of age.* 8-180.

*Intervening act of child as affecting question of proximate cause of damage to person or property of third person by fire or explosion.* 8-1250 (case p. 1243).

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### INSOLVENCY.

Of corporation, see CORPORATIONS.  
As to receivers, see RECEIVERS.

*Insolvency of insurer or employer as affecting liability for compensation under Workmen's Compensation Act.* 8-1346 (case p. 1342).

Release of bail by removal of infant principal by his mother from jurisdiction of the court. 8-363.

Ejection of children using sidewalk for roller skating. 8-1455.

Effect of insolvency of personal representative of estate on liability on his bond for debt due from him to decedent. 8-79.

---

### INFLAMMABILITY.

*Experimental evidence as to.* 8-45.

---

### INSPECTORS.

Car inspector, see CAR INSPECTOR.

---

### INHERITANCE TAX.

See TAXES.

---

### INSTRUCTIONS.

See TRIAL.

---

### INJUNCTION.

Injunction against sale under execution. 8-631.

Right to test reasonableness of order of Public Service Commission in proceeding to enjoin its enforcement. 8-916.

Injunction to prevent collection of tax assessed against property which taxpayer does not own. 8-792.

---

### INSURANCE.

The policy or contract generally.  
Provision for insurance for a period covered by each successive payment of assessments, terminating at the end of such period, to be revived for a like period by a new payment. 8-378.

Construction.  
General rule as to construction. 8-318.

**Conditions.**

As to vacancy or occupancy of property. 8-373.

**Forfeiture for nonpayment of premiums.**

Effect of estoppel or waiver, see *infra*.

*Provision suspending insurance during default in payment of premiums or assessments as affected by failure of insurer to declare a suspension before loss. 8-395 (cases pp. 378, 380, 391).*

When payment of overdue premium by mailed check is effected. 8-391.

**Duty of secretary of local camp of benefit society who has advanced assessments for member to continue making such advancements. 8-378.**

**Duty of company holding premium note under contract that it may collect such portion of it as equals the earned premiums to the date of lapse of the policy, to return the note in order to be entitled to rely on suspension of policy before loss, for nonpayment of an instalment when due. 8-391.**

**Reinstatement.**

Power of local camp officers of mutual benefit society to waive provisions as to reinstatement. 8-380.

Requiring express warranty of present sound bodily health as condition of reinstatement. 8-380.

Payment of premium after loss as reviving policy. 8-391.

**Premiums.**

Forfeiture for nonpayment, see *supra*.

Waiver by demand, acceptance, and retention of premium, see *infra*.

Payment of premium after loss as reviving policy. 8-391.

**Waiver; estoppel.**

Waiver of one condition as evidence of waiver of another condition. 8-373.

Estoppel or waiver as affected by power of agent. 8-378, 380.

By knowledge or notice. 8-378, 380.

**Establishment of custom to waive default in payment by single accommodation of holder of policy in permitting him to make overdue payment. 8-391.**

**Indorsement on policy that interest of insured is that of fee simple in remainder as waiver of condition avoiding the policy in case of vacancy of premises. 8-373.**

**Proofs of loss.**

Conclusiveness against insured of proofs furnished. 8-318.

**Risks and causes of loss, injury, or death.**

*Liability under accident policy for injury or death from freezing. 8-231 (case p. 229).*

*Applicability of provisions as to injuries intentionally inflicted where insured is injured because of mistake of identity. 8-322 (case p. 318).*

**Burden of proof as to cause of death. 8-318.**

**Injury to one person by another which is not the result of misconduct or provocation by the injured person and is unforeseen by him as an "accident." 8-318.**

---

**INTENT.**

Parol evidence as to, see **EVIDENCE.**

Evidence as to, generally, see **EVIDENCE.**

Of testator, see **WILLS.**

---

**INTENTIONAL INJURIES.**

To insured, see **INSURANCE.**

---

**INTEREST.**

Disqualification of judge by, see **JUDGES.**

*Disregarding uncontradicted testimony of interested witness in civil action. 8-314.*

Questioning for first time on appeal failure of trial court to allow interest. 8-198.

---

**INTERMEDIATE APPELLATE COURTS.**

Power to punish for contempt. 8-1550.

---

**INTERSTATE COMMERCE.**

See **COMMERCE.**

---

**INTERSTATE COMMERCE COMMISSION.**

**Effect of act of Congress conferring upon Interstate Commerce Commission authority to compel interstate railroads to provide shipping facilities for shippers tendering interstate shipments to deprive Public Service Commission of jurisdiction to require such road to furnish such facilities to shipper offering intrastate commerce. 8-155.**

**INTERURBAN RAILROADS.**

Power of national bank to obligate itself to operate. 8-242.  
 Estoppel of bank to plead want of power to operate. 8-242.  
 Retaining jurisdiction for purpose of authorizing the owner of the road to discontinue its operation where equity has taken jurisdiction for purpose of enforcing the performance of a contract to operate an interurban railroad. 8-242.

**INTERVENING AGENCY.**

Effect of, on proximate cause, see *PROXIMATE CAUSE*.

**INTOXICATING LIQUORS.**

*Experimental evidence as to effect of liquor to produce insanity.* 8-45.  
*Constitutionality of statutes providing for confiscation or destruction, without notice, of intoxicating liquors, and vehicles or other property used in connection with same.* 8-888 (case p. 874).

Failure to extend prohibition against intoxicating liquor to that used for sacramental purposes. 8-874.

**INTOXICATION.**

See *DRUNKENNESS*.

**IRRESISTIBLE IMPULSE.**

As defense to liability for crime, see *CRIMINAL LAW*.

**IRRESPONSIBILITY.**

Of person committing crime, see *CRIMINAL LAW*.

**IRRIGATION.**

As to irrigation districts and companies, see *WATERS*.

**JANITOR.**

*Liability of employer for acts of.* 8-1458 (case p. 1455).

**JOINT TENANTS.**

Estate by entireties, see *HUSBAND AND WIFE*.

**JUDGES.**

*In general.*

Prejudicial error in remarks or conduct of, see *APPEAL AND ERROR*.

Mandamus to, see *MANDAMUS*.

Assignment by chief justice of judges to hear election contests as contravening constitutional provision that all judicial officers shall be appointed by the governor. 8-1463.

*Disqualification; change.*

*Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding.* 8-295 (case p. 290).

*Prohibition to prevent prejudiced judge from proceeding with case.* 8-1238 (case p. 1226).

Interest of judge. 8-1226.

Bias; prejudice. 8-1226.

Change of judge as a change of venue within rule that state is not entitled to change of venue. 8-1226.

Right to change of judge because of prejudice against the state. 8-1226.

Duty of disqualified judge to grant motion to transfer the cause to another judge instead of calling in another judge. 8-290.

**JUDGMENT.**

*In general.*

Finality of, see *APPEAL AND ERROR*.

On appeal, see *APPEAL AND ERROR*.

*Waiver of statute or court rule requiring nonresident plaintiff to give security for costs by failure to apply therefor until after judgment.* 8-1525.

*Effect; conclusiveness.*

Pendency of one suit as abatement of another, see *ABATEMENT AND REVIVAL*.  
 Judgment for part of claim as bar to further suit, see *ACTION OR SUIT*.

On appeal, see *APPEAL AND ERROR*.

Effect of decree for alimony, see *DIVORCE AND SEPARATION*.

— collateral attack.

Collateral attack on appointment of administrator, see *EXECUTORS AND ADMINISTRATORS*.

Defense in action to remove a fraudulent conveyance from the path of an execution, that claim on which the judgment was entered and on which the execution was issued was invalid or inequitable. 8-523.

— what matters concluded.

*Prior action in which claim might have been asserted by counterclaim set-off, or cross petition, as barring or abating subsequent independent action thereon. 8-694 (cases pp. 685, 690).*

Effect of judgment against storage warehouse for injury to stored property on right to recover compensation for storage which was not set up as a counterclaim in the first action. 8-685.

— as to parties.

*Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor. 8-667 (case p. 663).*

**Lien.**

Priority as between judgment lien and lien of mortgage, see MORTGAGES.

Equity jurisdiction of suit to enforce lien. 8-435.

**Enforcement.**

*Effect of appointment of receiver for corporation on enforcement of judgment lien. 8-459.*

Effect of prayer for accounting to confer jurisdiction upon equity of action to collect unsatisfied judgment the amount of which is certain. 8-435.

**Vacation; opening.**

*Waiver of statute or court rule requiring nonresident plaintiff to give security for costs by failure to apply therefor until after judgment has been opened to permit defendant to plead. 8-1525.*

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## JUDICIAL NOTICE.

See EVIDENCE.

---

## JUDICIAL POWER.

Encroachment on, see CONSTITUTIONAL LAW.

## JUDICIAL SALE.

Injunction against, see INJUNCTION.

Foreclosure of mortgage, see MORTGAGE.

For taxes, see TAXES.

Assumption by purchaser of street railway at judicial sale of obligation of original grantee of franchise to operate the road. 8-242.

---

## JURISDICTION.

In general, see COURTS.

On appeal, see APPEAL AND ERROR.

Of election contests, see ELECTIONS.

Of equity, see EQUITY.

Retaining, see EQUITY.

---

## JURY.

In general.

Prejudicial error as to, see APPEAL AND ERROR.

Experiments before jury, see EVIDENCE.

Questions for, see TRIAL.

*Admissibility of threats by accused against jury in criminal case. 8-1361 (case p. 1357).*

Placing witness in charge of jury. 8-656.

Right to trial by.

*Right to jury trial in proceeding for removal of public officer. 8-1476 (case p. 1465).*

Trial by jury as essential to due process of law within meaning of the 14th Amendment. 8-1463.

Seventh Amendment in Constitution preserving trial by jury as applicable only to Federal courts. 8-1463.

Election contest as a criminal proceeding within constitutional provision preserving jury trial in such proceedings. 8-1463.

Effect of plea of limitations in action to recover possession of real estate to raise an issue upon which plaintiff is entitled to jury trial. 8-489.

---

## JUSTICE.

Guaranty of, see CONSTITUTIONAL LAW.

---

## JUSTICE OF THE PEACE.

*Prior action in justice's court in which claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action on such claim. 8-735.*

*Power to punish for contempt.* 8-1548, 1566, 1571, 1572.

Justice of the peace who certifies upon a will the character of the signatures as a witness to the will. 8-1073.

---

### JUVENILE COURTS.

*Power to punish for contempt.* 8-1548.

---

### KEROSENE.

See EXPLOSIONS AND EXPLOSIVES.

---

### KING'S BENCH.

*Power of, to punish for contempt.* 8-1570.

---

### LABORERS.

Contract laborers, see ALIENS.  
In general, see MASTER AND SERVANT.

---

### LACHES.

Effect of, to bar action, see LIMITATION OF ACTIONS.

---

### LAMP.

*Experimental evidence as to injury sustained in attempting to light.* 8-40.

---

### LANDLORD AND TENANT.

In general.

Relation between railroad and government after roads have been placed under government control as that of landlord and tenant. 8-964.

One working his wife's land by her permission and receiving the proceeds thereof as a tenant at will. 8-595.

Lease.

Oil and gas leases, see MINES.

*Property included in a lease of premises described by street number.* 8-673 (case p. 669).

*Lease of property as ademption or revocation of devise.* 8-1638 (case p. 1631).

*Parol evidence upon construction of lease.* 8-669.

*Sufficiency of description of leased property.* 8-1335.

—covenants in.

Effect of breach of covenant to repair on liability for personal injury, see infra.

*Prior action for rent in which claim for breach of covenant might have been asserted by counterclaim, set-off, or cross petition as barring subsequent independent action for such breach.* 8-709.

*Prior action for breach of covenant in which claim for rent might have been asserted by counterclaim, set-off, or cross petition as barring subsequent independent action for rent.* 8-710.

—terms.

Proof of tenancy by sufferancy as variance from election of monthly tenancy. 8-1508.

—termination.

Effect of death of lessee to terminate lease. 8-1142.

Rights and liabilities of parties.

*Right of tenant to recover damages from third person for injury to premises.* 8-600 (case p. 595).

Option of executor of tenant to take the property or sublet it, or surrender it to landlord. 8-1142.

Right of lessee of house by street number to enjoin erection by landlord of garage on rear of lot. 8-669.

Right of lessee of building by street number to use yard in rear. 8-669.

Right of lessee of house by street number to use of walk leading to alley in rear. 8-669.

Right of tenant at will to recover diminished annual value of property because of lowering of water level. 8-595.

Evidence on question of damages to tenant by lowering of water table under land. 8-595.

—as to fixtures or property on premises.

*Tenant's right to recover damages from third person for injury to buildings.* 8-609.

*Right of tenant to recover damages from third person for injury to crops or grass.* 8-605.

—liability of landlord for defective or dangerous premises.

*Breach of lessor's covenant to repair as ground of liability for damages for personal injuries to tenant, or one in privity with latter.* 8-765 (case p. 760).

Presumption of negligence of landlord from wrecking of building, to injury of employee of tenant, by explosion from unknown cause, where all explosives in the building were under the landlord's control. 8-493.

#### Rent:

*Prior action for rent in which claim for breach of covenant might have been asserted by counterclaim, set-off, or cross petition as barring subsequent independent action for such breach.* 8-709.

*Prior action for breach of covenant in which claim for rent might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action for rent.* 8-719.

*Rent accruing under lease after death of lessee as preferred claim or cost of administration.* 8-1146 (case p. 1142).

Re-entry; recovery of possession.

Proof of tenancy by sufferance as variance from allegation of monthly tenancy. 8-1508.

Notice to quit. 8-1508.

#### LARCENY.

Larceny by false pretenses, see FALSE PRETENSES.

*Experimental evidence in prosecution for.* 8-40.

*Effect of Federal control on liability of employee of carrier who stole property being transported.* 8-989.

#### LAST CLEAR CHANCE.

See NEGLIGENCE.

#### LAW.

Judicial notice of, see EVIDENCE.

#### LAW OF THE CASE.

Decision on former appeal as, see APPEAL AND ERROR.

#### LAW OF THE ROAD.

See NEGLIGENCE.

#### LAWYER.

See ATTORNEYS.

#### LEAD PENCIL.

*Signature with lead pencil.* 8-1339 (case p. 1335).

#### LEASE.

In general, see LANDLORD AND TENANT. Of railroad, see RAILROADS.

*Lease of property as redemption or revocation of devise.* 8-1636 (case p. 1631).

#### LEET.

*Power of steward of, to punish for contempt.* 8-1571.

#### LEGACY.

In general, see WILLS.

#### LEGAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

#### LEGISLATURE.

Relation of courts to, see COURTS.

#### Powers.

Delegation of power by, see CONSTITUTIONAL LAW.

Power as to courts, see COURTS.

Power as to public service corporations, see PUBLIC SERVICE CORPORATIONS.

Validity of statutes, see STATUTES.

Right to recall power delegated to one agency and confer it upon another. 8-916.

#### LETTERS.

Admissibility in evidence, see EVIDENCE. Failure of addressee to reply to letter as evidence of facts therein stated. 8-1161.

#### LETTERS OF ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

**LEVEES.**

*Constitutionality of statute permitting the destruction of hogs found running at large on or near public levees. 8-79.*

**LEVY AND SEIZURE.**

Sale under, see **JUDICIAL SALE**.

*Levy of execution on railroad property under Federal control. 8-988.*

**LIBERAL CONSTRUCTION.**

Of pleading, see **PLEADING**.

Of statutes, see **STATUTES**.

**LIBRARIES.**

Capacity of unincorporated association to act as trustee. 8-904.

**LICENSE.**

In general.

Partial invalidity of license act. 8-418.

Arbitrary power to refuse license; when conferred. 8-418.

Right to regulate lawful business; test of validity of limitation imposed. 8-418.

— on what business.

*Constitutionality of statute or ordinance requiring real estate brokers to procure a license. 8-424 (case p. 418).*

Requiring applicant for license as real estate broker to file certificate of good character. 8-418.

**Discrimination.**

Discrimination as to amount of license fee between real estate brokers and mere salesman in broker's employ. 8-418.

Excepting certain people from statute requiring real estate brokers to secure license. 8-418.

**LIENS.**

Of attachment, see **ATTACHMENT**.

Execution liens, see **EXECUTION**.

Of judgment, see **JUDGMENT**.

Mechanics' liens, see **MECHANICS' LIENS**.

Of mortgage, see **MORTGAGES**.

For storage, see **WAREHOUSEMEN**.

*Right of grantee or transferee to be reimbursed for expenditures in payment of liens on property where conveyance or transfer is in fraud of creditors. 8-527 (case p. 523).*

Reversing that part of a judgment which attempts to fix an unauthorized lien on the property of defendant to secure a money judgment and affirming the rest of the judgment. 8-163.

**LIFE INSURANCE.**

See **INSURANCE**.

**LIFE TENANTS.**

As to dower, see **DOWER**.

Liability of insurance company under policy issued to remaindermen for loss where property had been vacant for a longer period than that provided for in policy. 8-373.

**LIGHT.**

*Experimental evidence as to. 8-49, 55, 57, 58.*

**LIGHT AND POWER COMPANY.**

Conferring power of eminent domain upon. 8-466.

**LIMITATION OF ACTIONS.**

In general.

*Expiration of statutory period for settling an estate as affecting removal of executor or administrator. 8-178.*

*Limitation of time for deportation of alien. 8-1286 (case p. 1282).*

Effect of allegation in complaint to recover possession of real estate as to the time of defendant's possession to bind plaintiff so far as it relates to defendant's plea of limitations. 8-489.

Effect of plea of limitations in action to recover possession of real estate to raise an issue upon which plaintiff is entitled to jury trial. 8-489.

**Laches.**

Laches as defense to action to recover real estate. 8-489.

**When statute runs.**

*Applicability to limitation prescribed by statute which creates cause of action for death, of exceptions, express or implied, which attach to general statute of limitations. 8-145 (cases pp. 134, 141).*

**—fraud; concealment.**

*Applicability to limitation prescribed by statute which creates cause of action for death, of general rule as to effect of concealment of right of action. 8-151.*

**—suits relating to real property.**

Action for damages for imposing additional burden on fee by constructing telegraph line along railroad right of way. 8-1290.

**—absence from state.**

*Applicability to limitation prescribed by statute which creates cause of action for death, of rule tolling the general statute of limitations in case of non-residence. 8-149.*

**—infancy.**

*Applicability to limitation prescribed by statute which creates cause of action for death, of rule as to effect of infancy to toll general statute of limitations. 8-150.*

**When action is barred.**

*Applicability to limitation prescribed by statute which creates cause of action for death of exceptions, express or implied, which attach to general statute of limitations. 8-145 (cases pp. 134, 141).*

Effect of statute authorizing attorney general to sue for recovery of excessive freight charges and permitting shippers to participate in the funds recovered on presentation of their claims to the state on time within which suit by a shipper to recover such overcharges shall be brought. 8-1254.

**Interruption of statute; removal of bar.**

*Applicability to limitation prescribed by statute which creates cause of action for death, of general rule as to right to bring new action after prior failure although limitation period has expired. 8-148.*

*Amending complaint, after limitation period has expired, so as to come within Federal Employers' Liability Act as changing the cause of action. 8-1405 (case p. 1386).*

*General acknowledgment or promise in statement addressed to public as removing bar of limitation. 8-1253 (case p. 1254).*

Necessity that new promise identify the debt. 8-1254.

Effect of condition in new promise. 8-1254.

---

**LINE FENCE.**

See FENCES.

---

**LIS PENDENS.**

Abatement by pendency of action, see ABATEMENT AND REVIVAL.

---

**LIVE STOCK.**

See ANIMALS.

---

**LOCAL SELF-GOVERNMENT.**

See CONSTITUTIONAL LAW.

---

**LOCOMOTIVES.**

Setting of fire by sparks from, see RAILROADS.

*Experimental evidence as to amount of light cast by locomotive headlight. 8-57.*

---

**LOSS.**

Proof of loss insured against, see INSURANCE.

---

**LYING IN WAIT.**

*Experimental evidence of impossibility of concealment as negating. 8-56.*

---

**MACHINES.**

Evidence of experiments with. 8-41.

---

**MAGISTRATE.**

See JUSTICE OF THE PEACE.



**MAIL.**

See POSTOFFICE.

**MAINTENANCE.**

Agreement for separate maintenance of wife, see DIVORCE AND SEPARATION.

**MAJORITY.**

Power of, in religious societies, see RELIGIOUS SOCIETIES.

**MALPRACTICE.**

See PHYSICIANS AND SURGEONS.

**MANDAMUS.**

To compel trial court to dismiss a pending action and enter a judgment which has been agreed upon between parties. 8-938.

**MANSLAUGHTER.**

See HOMICIDE.

**MANUFACTURER.**

Liability for injury due to defects in articles manufactured, see NEGLIGENCE.

**MARKS.**

*Experimental evidence as to distance within which powder burns and marks will be produced by discharge of weapon. 8-41.*

**MARRIAGE.**

As to divorce or separation, see DIVORCE AND SEPARATION.

*Effect of, to terminate authority of executrix or administratrix. 8-181.*

*Venereal disease as ground for annulment of marriage. 8-1540 (case p. 154).*

Marriage of mother of child to another man as defense to bastardy proceedings. 8-426.

**MARRIED WOMEN.**

Estoppel of, see ESTOPPEL.

In general, see HUSBAND AND WIFE.

**MASTER AND SERVANT.**

In general.

Presumption as to authority of servant, see EVIDENCE.

Landlord's liability for injury to servants of tenant, see LANDLORD AND TENANT.

*Disregarding testimony of defendant's implicated employees in negligence case. 8-820.*

When relation exists.

*Liability for negligence of chauffeur furnished with a car hired for an extended period. 8-484 (case p. 480).*

For purpose of holding master liable for servant's acts. 8-785, 885.

Compensation; wages.

Validity of statute fixing wages of employee whom theater is compelled to employ for fire protection and forbidding any reduction in his salary. 8-1590.

Discharge.

Measure of damages for discharge, see DAMAGES.

*Wrongful discharge of servant—doctrine of "constructive service." 8-338 (case p. 334).*

Right to maintain action for debt for wrongful discharge. 8-334.

Successive actions for wrongful discharge. 8-334.

Forbidding discharge of employee whom theater proprietor is compelled to employ for fire protection without approval of the fire commissioners. 8-1590.

Master's liability for injury to servant. Effect of release by employee, see RELEASE.

Recovery under Workmen's Compensation Act for injury to servant, see WORKMEN'S COMPENSATION.

Liability of master whose negligence causes injury to employee for injury resulting from mistake of surgeon. 8-503.

—Federal employers' liability act.

*Amending complaint, after limitation period has expired, so as to come within Federal Employers' Liability Act, as changing the cause of action. 8-1405 (case p. 1386).*

Sufficiency of pleading in action under. 8-1386.

Effect of, on common-law liability of railroad for injury to employee in intrastate commerce. 8-1386.

Federal Employers' Liability Act as governing right to recover for injury to employee engaged in interstate commerce. 8-1386.

— assumption of risk.

Assumption by car inspector of negligence of fellow inspector in failing to place blue flag to protect train on which they are working. 8-865.

— contributory negligence.

Disobedience of rules, see *infra*.

*Right of servant to rely upon performance by another of the duty, equally incumbent upon himself, of complying with the "blue flag rule."* 8-870 (case p. 865).

Effect of negligence of injured employee on right to recover for injuries to which negligence of a fellow servant contributed. 8-865.

— disobedience of rules.

*Right of servant to rely upon performance by another of the duty, equally incumbent upon himself, of complying with the "blue flag rule."* 8-870 (case p. 865).

Duty of employees to obey rules issued by railroad company. 8-865.

Negligence of employee in following a custom with respect to interpretation of a rule. 8-865.

— fellow servants.

Assumption of fellow servant's negligence, see *supra*.

*Master's liability for injury of one servant by another in enforcing discipline.* 8-1432 (case p. 1426).

Raising defense of fellow servant for first time on appeal. 8-1426.

Question whether fellow servant to whom car inspector delegated the duty of placing blue flag required by rules was the servant of the inspector or of the railroad company. 8-865.

Effect of negligence of injured employee on right to recover for injuries to which negligence of a fellow servant contributed. 8-865.

Use of expression "apparent authority" instead of "implied authority" in instruction in action against master for assault by one employee upon another. 8-1426.

Liability of master for act of superintendent in enforcing obedience to rules where he acts wantonly and recklessly. 8-1426.

Presumption of authority of superintendent to use force to compel obedience to rules. 8-1426.

Assault by superintendent upon servant. 8-1426.

**Liability of master for acts of servant.**  
When relation exists, see *supra*.

*Employment of incompetent, inexperienced, or negligent employee as independent ground of negligence toward one other than an employee.* 8-574 (case p. 560).

*Liability of employer for acts of janitor.* 8-1458 (case p. 1455).

Authority of janitor of apartment building to eject from sidewalk in front thereof children using walk for roller skating. 8-1455.

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**MATERIALITY.**

Of evidence, see EVIDENCE.

---

**MAYOR.**

*Power of, to punish for contempt.* 8-1573 (case p. 1541).

---

**MEANING.**

Parol evidence as to, see EVIDENCE.

---

**MECHANICS' LIENS.**

*Prior action on contract in which claim on mechanic's lien might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action to foreclose lien.* 8-714.

---

**MEETINGS.**

Of stockholders, see CORPORATIONS.

---

**MENTAL CAPACITY.**

In general, see INCOMPETENT PERSONS.

---

**MILEAGE.**

Allowance as costs of mileage within the state of witnesses voluntarily attending, upon request, from another state. 8-11.

**MINES.**

Recovery under Workmen's Compensation Act for injury to employee in, see **WORKMEN'S COMPENSATION**.

Right of lessee under oil lease who contracts to sell to another the gas produced from oil wells on the premises to be used in the manufacture of gasoline to stimulate the flow of oil, although as a result thereof the gas may lose some of its gasoline properties. 8-414.

**MINORITY.**

Rights of, in religious societies, see **RELIGIOUS SOCIETIES**.

**MINORS.**

See **INFANTS**.

**MISAPPROPRIATION.**

By cashier of bank, see **BANKS**.

**MISINFORMATION.**

Liability of carrier for giving misinformation to passenger as to running of train. 8-1183 (case p. 1178).

**MISNOMER.**

See **NAME**.

**MISTAKE.**

Of identity, see **IDENTITY**.

**MONOPOLY AND COMBINATIONS.**

*The Steel Corporation Case and the Sherman Anti-trust Act.* 8-1140 (case p. 1121).

Duty of court when asked to dissolve a corporation to consider not what the corporation did or had power to do, but what it now has power to do and is doing. 8-1121.

Refusal to dissolve corporation where court cannot see that public interests will be served by so doing. 8-1121.

Validity of holding corporation which unites under one control competing companies but does not check monopoly. 8-1121.

**MORTGAGE.****In general.**

*Right of grantee or transferee to be reimbursed for expenditures in payment of mortgage on property where conveyance or transfer is in fraud of creditors.* 8-527 (case p. 523).

*Effect of appointment of receiver for corporation on mortgage lien.* 8-460.

Excepting trustee selling under deed of trust from statute requiring real estate brokers to secure licenses as discrimination against other trustees. 8-418.

Effect of prior law imposing conditions and limitations upon mortgages. 8-435.

**Priority.**

Priority of lien of judgment for personal injuries over prior mortgage under statute giving such lien priority over judgments, executions, and attachments levied upon the property. 8-435.

**Foreclosure.**

*Power of court to authorize discontinuation of public service corporation upon foreclosing mortgage upon its plant.* 8-238 (case p. 232).

*Right to bring action against corporation or prosecute pending action as affected by the appointment of receiver in a mortgage foreclosure proceeding against the corporation.* 8-453.

*Prior action in equity in which claim for foreclosure might have been asserted by counterclaim, set-off, or cross petition as bar to independent action for foreclosure.* 8-719.

*Prior action for foreclosure in which claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action on such claim.* 8-720.

Appointment in one state of receiver pendente lite in foreclosure proceedings as affecting pending suit in a court of another state to recover damages for personal injuries. 8-435.

**— sale.**

*Sale under power in mortgage or trust deed as affected by inadequacy of price.* 8-1001 (case p. 999).

Effect on validity of sale of absence of bidders other than a representative of the mortgagee. 8-999.

Liability for damages.

Liability for injury on defective bridge, see BRIDGES.

Liability for injury on defective highway, see HIGHWAYS.

### MOTIONS AND ORDERS.

Raising question for consideration on appeal by motion, see APPEAL AND ERROR.

What constitutes abatement of motion to revive. 8-163.

Setting aside order to revive action in name of personal representative of plaintiff because of irregularities in procuring it as a final determination of the right to revive. 8-163.

What constitutes final determination of right to revive action which will prevent further action on motion to revive. 8-163.

### MOTOR.

Evidence as to test of. 8-41.

### MOTORMAN.

Negligence of, in operation of street car, see STREET RAILWAYS.

### MUNICIPAL CORPORATIONS.

In general.

As to local self-government, see CONSTITUTIONAL LAW.

License from, see LICENSE.

Municipal courts, see MUNICIPAL COURTS.

Validity as against municipality having an interest in the net earnings of street railway company and an option to purchase the railway of order of Public Service Commission as to schedules, routes, and type of cars. 8-916.

Ordinances.

Effect of violation of, see VIOLATION OF LAW.

Validity of ordinances as to animals, see ANIMALS.

Power as to licenses, see LICENSE.

Constitutionality of ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense. 8-1638 (case p. 1590).

When ordinance is in conflict with statute. 8-690.

### MUNICIPAL COUNCIL.

See MUNICIPAL CORPORATIONS.

### MUNICIPAL COURTS.

Power of, to punish for contempt. 8-1562.

### MURDER.

See HOMICIDE.

### NAME.

Of corporation, see CORPORATIONS.

Effect of misnomer of state institution on validity of isolation order. 8-831.

Names McPherson and McPherson as idem sonans. 8-1357.

### NATIONAL BANKS.

Power to obligate itself to operate a street or interurban railroad. 8-242.

### NATURAL GAS.

In mines, see MINES.

### NECESSITY.

Easement by, see EASEMENTS.

Works of, on Sunday, see SUNDAY.

### NE EXEAT.

Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective. 8-327 (case p. 325).

How functions of writ are to be ascertained. 8-325.

**NEGLIGENCE.****In general.**As to bridges, see **BRIDGES**.As to elevators, see **ELEVATORS**.Presumption and burden of proof as to, see **EVIDENCE**.Relevancy of evidence as to, see **EVIDENCE**.Sufficiency of proof of, see **EVIDENCE**.As to condition of highway, see **HIGHWAYS**.Bar of Statute of Limitations, see **LIMITATION OF ACTIONS**.Of master or servant, see **MASTER AND SERVANT**.Of physician or surgeon, see **PHYSICIANS AND SURGEONS**.As to proximate cause of injury, see **PROXIMATE CAUSE**.Of public accountant, see **PUBLIC ACCOUNTANTS**.In operation of railroad train, see **RAILROADS**.Release from damages for injury by, see **RELEASE**.*Liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon. 8-506 (case p. 503).*

Sufficiency of complaint based on negligence to sustain judgment based on fraud. 8-1023.

General rule as to basis of liability for negligence. 8-351.

**Dangerous agencies.**As to explosives, see **EXPLOSIONS AND EXPLOSIVES**.As to fires, see **FIRES**.As to gas, see **GAS**.**—Liability of manufacturer or seller.**

Liability of manufacturer for injury due to defects in articles manufactured. 8-1023.

Liability of manufacturer of automobile to purchaser from middleman for injury from defects in car. 8-1023.

**Dangerous premises.**Liability of landlord for, see **LANDLORD AND TENANT**.*Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises. 8-356 (case p. 351).*

Liability of former owner for injury due to failure to make installation of a gas heater comply with municipal ordinance. 8-351.

**On highway.**In operation of automobile, see **AUTOMOBILES**.Injury at railway crossing, see **RAILROADS**.

Ordinance prescribing which of two vehicles crossing intersecting streets shall have the right of way as in conflict with statute fixing right of way in case of vehicles turning into one street from another. 8-690.

**Contributory negligence.**Of person injured by defect in highway, see **HIGHWAYS**.Of employee, see **MASTER AND SERVANT**.On street car track, see **STREET RAILWAYS**.**—last clear chance.**In case of injury by street car, see **STREET RAILWAYS**.

Necessity of knowledge of one accused of negligence as to the peril of person injured to bring into operation doctrine of last clear chance. 8-569.

**NEW PROMISE.**To interrupt Statute of Limitations, see **LIMITATION OF ACTIONS**.**NEW TRIAL.**Raising question for review on appeal by motion for, see **APPEAL AND ERROR**.**NISI PRIUS.**

Power of court of, to punish for contempt. 8-1570.

**NONOCCUPANCY.**Of insured property, see **INSURANCE**.**NONRESIDENTS.**Running of limitations in favor of nonresidents, see **LIMITATION OF ACTIONS**.

Succession tax on bonds of domestic corporation owned by estate of nonresident and held at his residence. 8-363 (case p. 355).

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs. 8-1510 (case p. 1505).

**NONSUPPORT.**Of wife, see **HUSBAND AND WIFE**.

**NOTARY PUBLIC.**

*Power of, to punish for contempt.*  
8-1574.

**NOTICE.**

Necessity of, to constitute due process of law, see **CONSTITUTIONAL LAW**.  
Of stockholders' meeting, see **CORPORATIONS**.  
Of fraud in conveyance, see **FRAUDULENT CONVEYANCES**.  
To insurance company, estoppel by, see **INSURANCE**.  
Before forfeiture of insurance policy, see **INSURANCE**.  
To tenant to quit, see **LANDLORD AND TENANT**.  
Necessity of, to bring into operation doctrine of last clear chance, see **NEG-LIGENCE**.  
Sufficiency of, to confer jurisdiction, see **WRIT AND PROCESS**.  
Imputing to street railway company knowledge of presence of person on track. 8-569.

**NUISANCES.**

*Right of tenant to recover damages from third person for injury to premises by nuisance.* 8-611.  
*Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises.* 8-356 (case p. 351).  
*Constitutionality of statutes providing for confiscation on destruction, without notice, of intoxicating liquors, and vehicles or other property used in connection with same, on theory of nuisance.* 8-888.  
*Effect of fact that nuisance existed at time of execution or renewal of lease on right of tenant to recover damages from third person for injury by nuisance.* 8-614.

**NUMBER.**

Street number, see **STREET NUMBER**.

**OBJECTIONS.**

To raise question on appeal, see **APPEAL AND ERROR**.  
In general, see **TRIAL**.

**OBSTRUCTION.**

Of water, see **WATERS**.  
Of view of train, experimental evidence as to. 8-55.

**OCCUPANCY.**

Of insured property, see **INSURANCE**.

**OCCUPATION TAX.**

See **LICENSE**.

**ODORS.**

*Permitting jury personally to test odor.*  
8-18.

**OFFICERS.**

*In general.*  
Taking of acknowledgment by, see **AC-KNOWLEDGMENT**.  
Of private corporations generally, see **CORPORATIONS**.  
Presumption and burden of proof as to acts of, see **EVIDENCE**.  
As to judges, see **JUDGES**.  
*Free passes to public officials or em-ployees.* 8-682 (case p. 679).  
Right to hold office as property within meaning of the 14th Amendment. 8-1463.  
*Eligibility to office.*  
Providing disqualification for office and disfranchisement only for successful candidates for public office who are guilty of corrupt practices. 8-1463.  
Disqualification for office of one guilty of corrupt practices. 8-1463.

*Term; expiration.*

*Expiration of term of office as terminat-ing authority of officer to act as ad-ministrator.* 8-182.

*Resignation or removal.*

*Resignation of officer as terminating his authority to act as administrator.* 8-182.

*Right to jury trial in proceeding for re-moval of public officer.* 8-1476 (case p. 1463).

*Who should bring suit for forfeiture of office.* 8-679.

**OFFSETS.**

In general, see SET-OFF AND COUNTER-CLAIM.

**OIL.**

As to oil mines, see MINES.

**OPENION.**

As evidence, see EVIDENCE.

**ORAL CONTRACTS.**

In general, see CONTRACTS.

**ORAL EVIDENCE.**

As to writing, see EVIDENCE.

**ORDER OF PROOF.**

See TRIAL.

**OSCILLATION.**

*Experimental evidence as to oscillation of hanging scaffold.* 8-41.

**OSTEOPATHS.**

*Osteopath as a physician within meaning of statute in relation to vital statistics.* 8-1070 (case p. 1066).

Constitutionality of separate classification of osteopaths and regular physicians. 8-1066.

Validity of statute denying to osteopaths right to furnish birth and death certificates. 8-1066.

**OWNERSHIP.**

Allegations as to, see PLEADING.

**PARENT AND CHILD.**

Presumption as to paternity of child, see EVIDENCE.

As to infants generally, see INFANTS.

*Right of children of an adopted child to take the share which the parent would have taken under a will if he had survived the testator.* 8-1012 (case p. 1010).

Right of man to take life in defense of his son. 8-656.

**PAROL CONTRACTS.**

In general, see CONTRACTS.

**PAROLE.**

Of one convicted of crime, see CRIMINAL LAW.

**PAROL EVIDENCE.**

As to writing, see EVIDENCE.

**PARTIAL INVALIDITY.**

Of contract, see CONTRACTS.

Of statutes, see STATUTES.

Of tax assessment, see TAXES.

**PARTICULARS.**

Bill of, see PLEADING.

**PARTIES.**

To deed, description of, see DEEDS.

Who is affected by judgment, see JUDGMENT.

Description of parties in pleading, see PLEADING.

**Plaintiffs.**

Action by attorney general, see ATTORNEY GENERAL.

**Defendants.**

Liability of state to suit, see STATE.

Liability of United States to suit, see UNITED STATES.

Order of director general of railroads under Federal control, requiring actions for injuries to passengers to be brought against the director general and not against the carriers. 8-959.

**Substitution.**

Substitution of parties on appeal. 8-964.

**PARTNERSHIP.**

Liability of corporate stockholders as partners, see **CORPORATIONS**.

*Prior action for accounting or to settle partners' affairs in which adverse claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action on such claim. 8-788.*

Effect of entry by husband and wife into partnership with entirety funds to change the character of the estate. 8-1014.

Effect of conveyance of real estate to a partnership in the name of which only the surname of one partner is mentioned. 8-489.

**PASSENGER CARRIERS.**

See **CARRIERS**.

**PASSES.**

Validity of pass issued by carrier, see **CARRIERS**.

**PAYMENT.**

*Making paper payable to agent as charging drawer with loss due to agent's misappropriation. 8-304 (case p. 298).*

*Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market. 8-208 (cases pp. 192, 198).*

*Custom or previous dealing as imposing an obligation upon a party to a contract to accept something else in payment in lieu of cash. 8-1268 (case p. 1264).*

Instruction that law presumes that money paid by one person to another was due to the latter. 8-298.

When payment sent by mail is effected. 8-391.

Burden of proof as to authority of agent to receive payment. 8-192.

Payment to authorized agent as discharging indebtedness although he misappropriates the money. 8-198.

Rule that one paying a note to an agent without demanding the note does so at his risk. 8-298.

Effect of fact that owner assists agent in making a sale to destroy the agent's authority to collect the purchase money. 8-198.

Payment to lessee of a mill who is authorized to market stock on hand when it is finished. 8-196.

**PEACE OFFICER.**

*Recovery under Workmen's Compensation Act for death of or injury to peace officer employed in private plant. 8-190 (case p. 187).*

**PENALTIES.**

*Constitutionality of discrimination as regards degree of penalty for violation of Sunday Law. 8-566 (case p. 563).*

**PENDENCY.**

Of action to abate suit, see **ABATEMENT AND REVIVAL**.

**PENDENTE LITE.**

*Termination of authority of administrator pendente lite by termination of litigation. 8-180.*

**PERFORMANCE.**

Of contract, see **CONTRACTS**.

**PERJURY.**

*Relief against award of arbitrators obtained by perjury. 8-1088.*

**PERSONAL INJURIES.**

By animal, see **ANIMALS**.

By automobile, see **AUTOMOBILES**.

On bridge, see **BRIDGES**.

Evidence in action for, see **EVIDENCE**.

By explosion, see **EXPLOSIONS AND EXPLOSIVES**.

On highway, see **HIGHWAYS**; **NEGLIGENCE**.

To insured, see **INSURANCE**.

Landlord's liability for, see **LANDLORD AND TENANT**.

To employee, see **MASTER AND SERVANT**.

Proximate cause of, see **PROXIMATE CAUSE**.

On leased railroad, see **RAILROADS**.

Release from liability for, see **RELEASE**.

In general, see **NEGLIGENCE**.



*Admission in action for, of experimental evidence as affected by similarity or dissimilarity of conditions. 8-18 (case p. 1).*

*Effect of bill of particulars on proof in action for. 8-555.*

Priority of lien of judgment for personal injuries over prior mortgage under statute giving such lien priority over judgments, executions, and attachments levied upon the property. 8-435.

Appointment in one state of receiver pendente lite in foreclosure proceedings as affecting pending suit in a court of another state to recover damages for personal injuries. 8-435.

#### PERSONAL PROPERTY.

Sale of, see SALE.

*Estate by entirety in. 8-1017 (case p. 1014).*

#### PERSONAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS.

#### PHOTOGRAPHS.

Admissibility in evidence, see EVIDENCE. As to X-ray pictures, see X-RAY.

#### PHYSICIANS AND SURGEONS.

In general.

*Who is a physician or surgeon within statute in relation to vital statistics. 8-1070 (case p. 1066).*

Constitutionality of separate classification of osteopaths and regular physicians. 8-1066.

Negligence; malpractice.

*Liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon. 8-506 (case p. 503).*

Liability of master whose negligence causes injury to employee for injury resulting from mistake of surgeon. 8-503.

Effect of release by injured employee of his employer to release a surgeon from liability for operating on the wrong side of the injured person. 8-503.

#### PIPE LINE COLLARS.

*Experimental evidence as to nonconformity to standard. 8-41.*

#### PISTOL.

See FIREARMS.

#### PLEADING.

Evidence admissible under, see EVIDENCE. Variance between pleading and proof, see EVIDENCE.

In criminal case, see INDICTMENT, ETC.

Construction.

Liberal construction of answer not attacked by pleadings to uphold judgment based upon it. 8-1170.

Conclusions.

Allegations of negligence resulting in personal injuries which are in effect mere conclusions of law. 8-493.

Defects waived or cured.

*Submission on agreed statement of facts or on agreed case as waiver of defect in pleading. 8-1172 (case p. 1170).*

Effect of statements of counsel in argument or statements in affidavits to cure lack of material averments in pleading. 8-290.

Bill of particulars.

*Effect of bill of particulars on proof. 8-550 (case p. 544).*

Relief under pleadings.

Refusal of court to consider irregularities charged against assessment which are not alleged in the petition. 8-660.

Sufficiency of complaint based on negligence to sustain judgment based on fraud. 8-1023.

Effect of excessive prayer for relief. 8-595.

Admissions.

Effect of allegation in complaint to recover possession of real estate as to the time of defendant's possession to bind plaintiff so far as it relates to defendant's plea of limitations. 8-489.

Effect on implied admission in complaint for destroying a division fence that it was on or near the line of the denial in the reply that the fence was on the defendant's property. 8-1641.

**Amendments.**

Amendment as affecting limitation of action, see **LIMITATION OF ACTIONS**.

Amendment to include additional items of injury. 8-544.

**Striking out.**

Effect of motion to strike out pleading upon its legal sufficiency. 8-79.

**Declaration or complaint.**

Sufficiency of description of petitioners in election contest to show their right to vote for the officers whose election is contested. 8-1463.

Effect of recital that a judge had stated that he had disposed of all his stock in a corporation as an allegation of the fact of his ownership. 8-290.

Action to recover under Federal Employers' Liability Act for injury to servant. 8-1386.

**Pleas and answer.**

Construction of answer, see *supra*.

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs by failing to apply therefor until after answer. 8-1512, 1530.

— what must be pleaded.

Defense that acts causing injury were not those of defendant railroad company but the acts of the director general of railroads. 8-964.

**Reply.**

Effect of denial in reply on admissions in complaint, see *supra*.

**Demurrer.**

Demurrer to evidence, see **TRIAL**.

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs by failing to apply therefor until after demurrer. 8-1512, 1520.

Right to consider facts not stated in the petition, although pertinent to its prayer, in considering a cause upon demurrer to the petition. 8-290.

Effect of overruling of demurrer to declaration on motion for directed verdict at close of evidence. 8-351.

**POCKETBOOK.**

Experimental evidence as to possibility of removal of, through out in cases. 8-40.

**POLICE.**

Free passes to. 8-682 (case p. 679).  
Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish police protection at his own expense. 8-1028 (case p. 1590).

**POLICE COURTS.**

Power to punish for contempt. 8-1564, 1572.

**POLICE POWER.**

See **CONSTITUTIONAL LAW**.

**POLITICAL OPINIONS.**

As ground for disbarment or suspension of attorney, see **ATTORNEYS**.

**POSSESSION.**

Right of tenant not in possession to recover damages from third person for injury to premises. 8-630.

**POSTOFFICE.**

Sending payment by mail; when effected. 8-391.

**POWDER.**

In general, see **EXPLOSIONS AND EXPLOSIVES**.

**POWDER BURNS AND MARKS.**

Experimental evidence as to. 8-41.

**POWER COMPANY.**

Conferring power of eminent domain upon. 8-466.

**POWER OF ATTORNEY.**

Excepting from statute requiring real estate brokers to secure licenses, person holding a duly executed power of attorney from the owner. 8-418.

**POWERS.**

Foreclosure under, see MORTGAGE.

As to power of attorney, see POWER OF ATTORNEY.

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**PREJUDICE.**

Disqualification of judge by, see JUDGES.

---

**PREJUDICIAL ERROR.**

See APPEAL AND ERROR.

---

**PREMIUMS.**

Insurance premiums, see INSURANCE.

---

**PRESIDENT.**

Of corporation, powers of, see CORPORATIONS.

Judicial notice of proclamations of President. 8-964.

---

**PRESUMPTIONS.**

In general, see EVIDENCE.

---

**PRICES.**

Conspiracy to control, see MONOPOLY AND COMBINATIONS.

---

**PRINCIPAL AND AGENT.**

As to brokers, see BROKERS.

As to agents of corporation, see CORPORATIONS.

When relation exists.

Real estate broker as agent of property owner in fixing prices. 8-1377.

Employee of broker as subagent of owner of property. 8-1377.

Agent's authority; liability of principal.

Power of corporate agent, see CORPORATIONS.

Presumption and burden of proof as to authority of agent, see EVIDENCE.

Power of insurance agent to estop company, see INSURANCE.

Imputing agent's knowledge to insurance company, see INSURANCE.

Authority of agent to receive payment, see PAYMENT.

General rule as to. 8-198.

Agent of real estate broker as acting within the scope of authority in naming to customer price fixed by broker as lowest price for which property can be had. 8-1377.

— agent's fraud or wrong.

*Making paper payable to agent as charging drawer with loss due to agent's misappropriation. 8-304 (case p. 298).*

Payment to authorized agent as discharging indebtedness although he misappropriates the money. 8-198.

Throwing loss upon principal who has clothed his agent with apparent authority where he or another innocent person must suffer. 8-198, 298.

Liability of real estate broker who benefits by misrepresentations of his agent as to lowest sale price of property. 8-1377.

Liability of agent.

*Liability of agent for shrinkage or shortage in commodity purchased for principal. 8-1120 (case p. 1116).*

Liability of agent of real estate broker to customer for charging him in good faith an excessive price for the property named to him by the broker. 8-1377.

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**PRINCIPAL AND SURETY.**

Surety on bail bond, see BAIL AND RECOGNIZANCE.

Liability on executor's or administrator's bond, see EXECUTORS AND ADMINISTRATORS.

*Obligee's concealment of facts or evasive answers as fraud against surety. 8-1485 (case p. 1477).*

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**PRIORITY.**

Of claims against decedent, see EXECUTORS AND ADMINISTRATORS.

Of mortgage, see MORTGAGE.

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**PRIVATE BUSINESS.**

Carrying on of theater or place of amusement as. 8-1590.

**PRIVILEGE TAX.**

See LICENSE.

**PRIVITY.**

Between seller or manufacturer and person injured, see NEGLIGENCE.

**PROBATE.**

*Of will subsequently discovered as effecting removal of administrator. 8-177.*

**PROBATE COURTS.**

*Power to punish for contempt. 8-1551.*

**PROCEDURE.**

In eminent domain proceeding, see EMINENT DOMAIN.

For removal of officers, see OFFICERS.

**PROCESS.**

See WRIT AND PROCESS.

**PROCLAMATIONS.**

Judicial notice of, see EVIDENCE.

**PROHIBITION.**

*Prohibition to prevent prejudiced judge from proceeding with case. 8-1288 (case p. 1286).*

Fact that jurisdiction of appeals in equity case is vested in a particular court as prohibiting another court from taking jurisdiction of proceeding to prohibit a trial court from proceeding to hear an equity cause. 8-290.

Prohibition to prevent court taking jurisdiction because subpoena was made returnable later than the date prescribed by statute where tribunal before which the proceeding is pending had not passed upon that objection. 8-1468.

**PROMISE.**

As affecting limitation of actions, see LIMITATION OF ACTIONS.

**PROOF OF LOSS.**

See INSURANCE.

**PROPERTIES OF SUBSTANCES.**

*Experimental evidence as to. 8-45.*

**PROPERTY.**

Destruction or forfeiture of, without notice, see CONSTITUTIONAL LAW.

Condemnation of, see EMINENT DOMAIN.

Right to hold office and to vote as property within the meaning of the 14th Amendment. 8-1463.

**PROSECUTING ATTORNEYS.**

See DISTRICT AND PROSECUTING ATTORNEYS.

**PROSPECTIVE DAMAGES.**

See DAMAGES.

**PROSTITUTION.**

*Limitation of time for deportation of alien prostitute. 8-1288.*

**PROXIMATE CAUSE.**

*Liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon. 8-506 (case p. 503).*

*Intervening act of child as affecting question of proximate cause of damage to the person or property of third person by fire or explosion. 8-1250 (case p. 1243).*

Negligence in permitting ground along switch track to become saturated with gasoline as proximate cause of loss from fire caused by boys throwing lighted matches into the gasoline. 8-1248.

Misinformation to passenger as to time of departure of train, as a result of which he misses it, as proximate cause of discomfort and inconvenience endured during automobile trip to his destination. 8-1178.

**PUBLIC.**

*Recovery under Workmen's Compensation Act for injury to workman representing public.* 8-1064 (case p. 1058).

*General acknowledgment or promise in statement addressed to public as removing bar of limitation.* 8-1258 (case p. 1254).

**PUBLIC ACCOUNTANTS.**

*Liability of public accountant.* 8-463 (case p. 461).

**PUBLIC LANDS.**

*As to rights of creditors in homestead on,* see HOMESTEAD.

*Enlarged Homestead Acts of 1909 and 1910.* 8-635 (case p. 631).

**PUBLIC OFFICERS.**

See OFFICERS.

**PUBLIC POLICY.**

*As affecting contract,* see CONTRACTS.

**PUBLIC PURPOSE.**

*Justifying exercise of right of eminent domain,* see EMINENT DOMAIN.

**PUBLIC SERVICE COMMISSIONS.**

*In general.*

*Delegation of power to,* see CONSTITUTIONAL LAW.

*Effect of act of Congress conferring upon Interstate Commerce Commission authority to compel interstate railroads to provide shipping facilities for shippers tendering interstate shipments to deprive Public Service Commission of jurisdiction to require such road to furnish such facilities to shipper offering intrastate commerce.* 8-155.

*Power of Public Service Commission to change rates specified in the water certificates for water furnished by irrigation company.* 8-249.

*Sufficiency of title of statute conferring upon Commission power to require additions, repairs, or improvements to or changes in existing plant or facilities of public utility.* 8-466.

*Sufficiency of rehearing upon his application to protect one not made a party to a proceeding which results in an order affecting his interests.* 8-916.

*Right to test reasonableness of order of Commission in proceeding to enjoin its enforcement.* 8-916.

*Effect of interest of municipality in, or option to purchase, street railway on authority of the Public Service Commission over the company.* 8-916.

*Power of legislature to confer on Commission control of the schedules, routing, and style of cars of street railway company.* 8-916.

*Review of findings of.*

*Refusal of courts to review findings of fact by Commission based on evidence.* 8-155.

*Review by courts of finding of Commission that a corporation whose rates it attempts to regulate is a public utility.* 8-249.

**PUBLIC SERVICE CORPORATIONS.**

*Power over, of Public Service Commission,* see PUBLIC SERVICE COMMISSIONS.

*Service of process on,* see WRIT AND PROCESS.

See also CARRIERS; RAILROADS; STREET RAILWAYS; WATERS.

*Power and duty of bank which has acquired a public service plant to continue its operation.* 8-248 (case p. 242).

*Power of court to authorize discontinuation of public service corporation upon foreclosing a mortgage on its plant.* 8-228 (case p. 232).

*Irrigation company as a public utility.* 8-268 (case p. 249).

*Federal control of public utilities.* 8-969 (cases pp. 959, 964).

*What necessary to constitute a public utility through the devotion of property to public use.* 8-249.

*Sufficiency of title of statute conferring upon public service corporations power of eminent domain.* 8-466.

*Power of legislature to regulate and control.* 8-916.

*Regulation of public utilities in exercise of police power.* 8-916.

*Supervision of public utilities as impairing obligation of contract.* 8-916.

**PUBLIC UTILITIES.**

See PUBLIC SERVICE CORPORATIONS.

**RUBBER WATER SERVILE.**

See **WATERS.**

**PUNISHMENT.**

For crime, see **CRIMINAL LAW.**

**PURPOSE.**

Relevancy of evidence as to, see **EVIDENCE.**

**QUALIFICATIONS.**

Of judge, see **JUDGES.**

For office generally, see **OFFICERS.**

**QUARANTINE.**

Regulations as to, generally, see **HEALTH.**

*Power to provide for, under general delegation of power to guard against spread of contagious disease. 8-836, 889 (case p. 881).*

**QUARTER SESSIONS.**

*Power to punish for contempt. 8-1571.*

**QUEEN'S BENCH.**

*Power to punish for contempt. 8-1570, 1571.*

**QUESTIONS FOR JURY.**

See **TRIAL.**

**QUIETING TITLE.**

See **CLOUD ON TITLE.**

**RAILROAD COMMISSION.**

See **PUBLIC SERVICE COMMISSIONS.**

**RAILROADS.**

**In general.**

For all questions involving the duty and liability of a railroad company as a carrier to its patrons or the public, or governmental control of railroad companies, see **CARRIERS.**

Abandonment of operation of, see **CARRIERS.**

Condemnation of property for, see **EMINENT DOMAIN.**

Additional servitude on railroad right of way, see **EMINENT DOMAIN.**

Rights and duties as to employees, see **MASTER AND SERVANT.**

*Suit against railroad owned by or in which interest is held by United States or state. 8-995 (case p. 990).*

Priority of lien of judgment for personal injuries over prior mortgage under statute giving such lien priority over judgments, executions, and attachments levied upon the property. 8-435.

**Lease.**

Liability of company leasing its property to another for the latter's negligent acts. 8-964.

**Injuries to persons on or near track.**

Injury to employee, see **MASTER AND SERVANT.**

*Experimental evidence as to possibility of seeing persons on or near track. 8-52.*

**Accidents at crossing.**

*Experimental evidence in action for injury at crossing. 8-46.*

**Injuries to animals by trains.**

*Experimental evidence as to possibility of seeing live stock on railroad track. 8-55.*

*Disregarding uncontradicted testimony of defendant's employees in action for killing stock by railroad train. 8-823.*

**Fires.**

*Experiments to show that cinders of sparks may be larger than meshes of spark arrester. 8-46.*

**RAILROAD TIE.**

*Experimental evidence as to possibility of brakeman stepping upon, in swinging from car. 8-46.*

**RATES.**

Of carriers, see **CARRIERS**.  
Irrigation rates, see **WATERS**.

**REAL ESTATE AGENTS.**

See **BROKERS**.

**REAL PROPERTY.**

Adverse possession of, see **ADVERSE POSSESSION**.  
Evidence of damage to, see **DAMAGES**.  
Dedication of, see **DEDICATION**.  
As to deeds, see **DEEDS**.  
Dower, see **DOWER**.  
Estoppel as to, see **ESTOPPEL**.  
Rights of husband and wife in, see **HUSBAND AND WIFE**.  
Mortgage on, see **MORTGAGE**.  
Of partnership, see **PARTNERSHIP**.  
Of religious societies, see **RELIGIOUS SOCIETIES**.  
Devise of, see **WILLS**.

**REASONABLE DOUBT.**

Doctrine of, in criminal case, see **EVIDENCE**.  
Instructions as to, see **TRIAL**.

**REASONABLENESS.**

Of order of Public Service Commission, see **PUBLIC SERVICE COMMISSIONS**.

**RECEIVERS.**

*Right to bring action against corporation, or prosecute pending action, as affected by the appointment of a receiver for the corporation. 8-441 (case p. 435).*

**RECOGNITION.**

*Experimental evidence as to possibility of recognition of person by flash of gun or pistol. 8-51.*

**RECOGNIZANCE.**

See **BAIL AND RECOGNIZANCE**.

**RECORDS AND RECORDING LAW.**

On appeal, see **APPEAL AND ERROR**.  
Registration of births and deaths, see **VITAL STATISTICS**.

**REDUCTION.**

Of damages, see **DAMAGES**.

**RE-ENTRY.**

By landlord, see **LANDLORD AND TENANT**.

**REFERENCE.**

Conclusiveness on appeal of findings by referee, see **APPEAL AND ERROR**.  
As to arbitration, see **ARBITRATION**.

*Power of referee to punish for contempt. 8-1575.*

**REFORMATION OF INSTRUMENTS.**

Transfer to equity of action to recover possession of real estate on ground that reformation of deed is necessary, in absence of pleading showing defect in deed and prayer for equitable relief. 8-489.

Necessity of reformation of tax deed because of error in the name of the clerk of court in the certificate of acknowledgment. 8-489.

**REFRIGERATING SYSTEM.**

*Experimental evidence as to inflammability of gases generated by explosion of. 8-46.*

**REIMBURSEMENT.**

*Of grantee or transferee for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors. 8-527 (case p. 528).*

**REINSTATEMENT.**

Of insured, see **INSURED**.

**RELEASE.**

Of surety on bail bond, see **BAIL AND RECOGNIZANCE.**

*Experimental evidence as to effect of release of brake to make car jump forward. 8-46.*

Effect of release by injured employee of his employer to release a surgeon from liability for operating on the wrong side of the injured person. 8-503.

**RELEVANCY.**

Of evidence, see **EVIDENCE.**

**RELIGIOUS SOCIETIES.**

*Determination by the civil courts of property rights between contending factions of an independent or congregational church. 8-105 (cases pp. 98, 102).*

Preference to certain religious denominations by failure to extend prohibition against intoxicating liquor to that used for sacramental purposes. 8-874.

Necessity that religious society establish its corporate capacity in order to maintain action to quiet title to the church property. 8-98.

Parol evidence as to purpose for which property was conveyed to religious society. 8-102.

**REMAINDERMEN.**

See **LIFE TENANTS.**

**REMOVAL.**

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS.**

Of officer, see **OFFICERS.**

**REMOVAL OF CAUSES.**

Change of venue, see **VENUE.**

*Effect of Federal control of public utility on removal of cause to Federal court. 8-988.*

**RENT.**

In general, see **LANDLORD AND TENANT.**

**REPAIRS.**

Liability of landlord for personal injury caused by failure to repair, see **LANDLORD AND TENANT.**

**REPEAL.**

Of statutes, see **STATUTES.**

**REPETITION.**

Of instructions, see **TRIAL.**

**REPLEVIN.**

*Recovery of shipment by replevin against carrier under Federal control, 8-988.*

**REPLY.**

In general, see **PLEADING.**

**REPORTS.**

Effect of a report made by an officer of a corporation as an account stated which precludes the corporation from denying its accuracy. 8-478.

**REPRESENTATIONS.**

By insured, see **INSURANCE.**

**RES GESTÆ.**

See **EVIDENCE.**

**RESIDENCE.**

See **DOMICIL.**

**RESIGNATION.**

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS.**  
Of officer, see **OFFICERS.**

**RES IPSA LOQUITUR.**

See **EVIDENCE.**



**RESPONDEAT SUPERIOR.**

See MASTER AND SERVANT.

**RESTRAINT OF TRADE.**

See MONOPOLY AND COMBINATIONS.

**RESTRICTED RESIDENCE DISTRICT.**

Power to create, under power of eminent domain. 8-585.  
Sufficiency of title of statute creating restricted residence districts in cities of first class under power of eminent domain. 8-585.

**RETAINING JURISDICTION.**

By equity, see EQUITY.

**REVERSIBLE ERROR.**

See APPEAL AND ERROR.

**REVERSION.**

Right of tenant to recover damages from third person for injury to the reversion. 8-620.

**REVIVAL.**

Of action, see ABATEMENT AND REVIVAL.

**REVOCATION.**

Of submission to arbitration, see ARBITRATION.  
Of letters of administration, see EXECUTORS AND ADMINISTRATORS.  
Of legacy, see WILLS.

**REVOLVERS.**

See FIREARMS.

**RIPARIAN OWNERS.**

Rights of, generally, see WATERS.

**RISK.**

Insured against, see INSURANCE.  
Assumption of, by employee, see MASTER AND SERVANT.

**ROBBERY.**

Taking property from the person by stealth as robbery. 8-359 (case p. 357).

Definition of robbery. 8-357.  
Force as essential element of crime of robbery. 8-357.

**ROLLER SKATING.**

Ejection of children using sidewalk for roller skating. 8-1455.

**RULES.**

Of court, see COURT RULES.  
Disobedience of, by servant, see MASTER AND SERVANT.

Master's liability for injury of one servant by another in enforcing rules. 8-1432 (case p. 1426).

**RUNNING.**

Possibility of hearing noise made by person in running. 8-16.

**RUNNING AT LARGE.**

Of animals, see ANIMALS.

**SACRAMENTAL WINES.**

Failure to extend prohibition against intoxicating liquor to that used for sacramental purposes. 8-874.

**SALE.**

In general.  
Judicial sale, see JUDICIAL SALE.  
On foreclosure, see MORTGAGE.  
Seller's liability for injury by defects in articles sold, see NEGLIGENCE.  
Sale for taxes, see TAXES.

Obligee's concealment of facts or evasive answers as fraud against surety in bond for performance of contract of sale. 8-1593.

Experimental evidence in action between parties to sale. 8-46.

Prior action for breach of contract in which counterclaim for purchase price might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent action for purchase price. 8-709.

Admissibility of parol evidence as to amount of commodity specified in written contract of sale. 8-747 (case p. 745).

Custom or previous dealing as imposing an obligation on seller to accept something else in lieu of cash. 8-1268 (case p. 1264).

Necessity that one who offers scrap iron which he has accumulated for sale, deliver the estimated quantity, when estimate of quantity is made by agent of buyer. 8-745.

#### Conditional sale.

Right to retain title to property sold where note is given for purchase price. 8-789.

Effect of suit upon note taken for purchase price of property sold with retention of title for security, on the security. 8-789.

#### Warranty.

Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor. 8-667 (case p. 663).

Prior action by seller in which claim for breach of warranty might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action for such breach. 8-706.

Right of remote vendee to benefit of warranty by original vendor. 8-663.

#### SALESMEN.

Discrimination as to amount of license fee between a real estate broker and a mere salesman in his employ. 8-418.

#### SANITY.

See INCOMPETENT PERSONS.

#### SAW.

Experimental evidence as to throwing of wood by. 8-47.

#### SCAFFOLD.

Experimental evidence as to safety of. 8-47.

#### SCRAP IRON.

Necessity that one who offers scrap iron, which he has accumulated for sale, deliver the estimated quantity, when estimate of quantity is made by agent of buyer. 8-745.

#### SEAMEN.

Liability of owner of vessel for injury of one servant by another in enforcing discipline. 8-1436.

#### SEARCH AND SEIZURE.

Seizure of property without notice to owner, see CONSTITUTIONAL LAW.

Right to seize property under general delegation of power to guard against spread of contagious disease. 8-840.

#### SECOND APPEAL.

See APPEAL AND ERROR.

#### SECRET COMMISSION.

Obligee's concealment of, as fraud against surety. 8-1505.

#### SECURITY.

For costs, see COSTS AND FEES.

#### SEEING.

See VISIBILITY.

**SELF-DEFENSE.**

Commission of homicide in, see **HOMICIDE**.

**SELF-GOVERNMENT.**

Local self-government, see **CONSTITUTIONAL LAW**.

**SENTENCE.**

For crime, see **CRIMINAL LAW**.

**SEPARATION.**

See **DIVORCE AND SEPARATION**.

**SERVANTS.**

See **MASTER AND SERVANT**.

**SERVICE.**

Of writ, see **WRIT AND PROCESS**.

**SERVITUDE.**

Additional servitude, see **EMINENT DOMAIN**.

**SET-OFF AND COUNTERCLAIM.**

*Prior action in which claim might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action thereon. 8-694 (cases pp. 685, 690).*

**SETTLEMENT.**

See **COMPROMISE AND SETTLEMENT**.

**SEX DISCRIMINATION.**

*Constitutionality of statute as affected by discrimination in punishment for same offense based upon sex. 8-884.*

**SHERIFFS.**

Compensation under Workmen's Compensation Act for death of deputy sheriff employed in private plant. 8-187.  
Contract by sheriff for free pass on railroad. 8-679.

Who should bring suit against sheriff for forfeiture of his office. 8-679.

**SHERMAN ANTI-TRUST ACT.**

See **MONOPOLY AND COMBINATIONS**.

**SHIPS.**

*Where wrecked vessel taxable. 8-663 (case p. 660).*

**SHOOTING.**

See **FIREARMS**.

**SHORTAGE.**

*Liability of agent for shortage in commodity purchased for principal. 8-1120 (case p. 1116).*

**SHOT.**

*Experimental evidence as to scattering of shot. 8-47.*

**SHOT FIRER.**

Shot firer in mine representing miners as an employee of the owner within meaning of Workmen's Compensation Act. 8-1058.

**SHOTGUNS.**

See **FIREARMS**.

**SHRINKAGE.**

*Liability of agent for shrinkage in commodity purchased for principal. 8-1120 (case p. 1116).*

**SICKNESS.**

Release of bail by confinement of principal by illness. 8-363.

**SIDEWALK.**

Liability of abutting owner for injury due to defects in, see **HIGHWAYS**.

**SIGNAL.**

*Experimental evidence as to visibility of.* 8-56.

**SIGNATURE.**

To writing required by Statute of Frauds, see **CONTRACTS**.  
Of attesting witness, see **WILLS**.

**SILENCE.**

Estoppel by, see **ESTOPPEL**.

**SIMILARITY.**

*Experimental evidence as affected by similarity or dissimilarity of conditions.* 8-18 (cases pp. 1, 11).

**SITUS.**

For purpose of taxation, see **TAXES**.

**SKATING.**

See **ROLLER SKATING**.

**SMALLPOX.**

As to compulsory vaccination, see **HEALTH**.

**SMELLS.**

See **ODORS**.

**SOUNDS.**

*Experimental evidence as to possibility of hearing.* 8-48.

**SPACE.**

*Experimental evidence as to.* 8-48.

**SPARK ARRESTERS.**

See **RAILROADS**.

**SPARKS.**

From railway locomotive, see **RAILROADS**.

**SPEAKING.**

*Experimental evidence as to possibility of overhearing conversation.* 8-48.

**SPECIAL LEGISLATION.**

See **STATUTES**.

**SPEED.**

Opinion evidence as to, see **EVIDENCE**.

*Experimental evidence as to.* 8-48.

**STABILITY.**

*Experimental evidence as to.* 8-48.

**STAINS.**

*Experimental evidence as to.* 8-48.

**STALE DEMAND.**

See **LIMITATION OF ACTIONS**.

**STATE.**

Right of state to change of venue, see **VENUE**.

*Suit against railroad owned by or in which interest is held by state.* 8-995.

Change of judge because of prejudice against the state. 8-1226.

**STATE COURTS.**

*Power to punish for contempt.* 8-1549.

**STATE'S ATTORNEY.**

See DISTRICT AND PROSECUTING ATTORNEYS.

**STATISTICS.**

Vital statistics, see VITAL STATISTICS.

**STATUTE OF FRAUDS.**

See CONTRACTS.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTIONS.

**STATUTES.**

In general.

Charter of corporation, see CORPORATIONS.

Review of, by courts, see COURTS.

Judicial notice of, see EVIDENCE.

Effect of violation of, see VIOLATION OF

LAW.

Definition of supplemental act. 8-631.

Validity generally.

Validity of statutes on various particular subjects, see those subjects.

Presumption and burden of proof as to validity, see EVIDENCE.

Right to declare law void because unnecessary or inexpedient. 8-65.

Partial invalidity. 8-418, 1590.

Entitling; expression of subject.

Effect of constitutional provision to prohibit passage of act containing provisions not fairly embraced in the title. 8-466.

Sufficiency of title indicating a single general subject where statute contains many provisions diverse but not inconsistent with the general subject. 8-466.

Statute conferring upon Commission power to require additions, repairs, or improvements to or changes in existing plant or facilities of public utility. 8-466.

Statute conferring upon public service corporations power of eminent domain. 8-466.

Statute creating restricted residence districts in cities of first class under power of eminent domain. 8-585.

Plurality of subjects.

Effect of constitutional provision to prohibit passage of act relating to different subjects embraced in the title. 8-466.

Local or special legislation.

Conferring power upon the head of one department to fix the salaries of his assistants, which power is not conferred upon the heads of other departments. 8-418.

Construction.

Construction of statutes relating to particular subjects, see those subjects.

Rule that express mention of one thing implies the exclusion of other similar things. 8-435.

Term "wilful" in statute providing punishment for desertion of wife. 8-1312.

— strict or liberal construction.

Workmen's Compensation Act. 8-930, 1058.

Repeal; amendment.

*Implied repeal by Negotiable Instruments Act of statute invalidating instrument given for gambling consideration. 8-314 (case p. 309).*

Amending statute by adding new provisions. 8-631.

Intention of Congress as determining whether act of Congress is or is not an amendment. 8-631.

**STEAM.**

*Experimental evidence as to time necessary to raise, in boiler. 8-46.*

**STEEL CORPORATION.**

*The Steel Corporation Case and the Sherman Anti-trust Act. 8-1140 (case p. 1121).*

**STEP.**

*Experimental evidence on action for injury involving. 8-49.*

**STOCKHOLDERS.**

See CORPORATIONS.

**STOPPING TRAIN.**

*Experimental evidence as to distance within which train could be stopped. 8-49.*

**STORAGE.**

See WAREHOUSEMEN.

**STONE.**

*Experimental evidence as to possibility of seeing into, from street.* 8-49.

**STRAT.**

*Experimental evidence as to possibility of accidental strangling by.* 8-49.

**STREET LAMPS.**

*Experimental evidence as to amount or conditions of light given by.* 8-49.

**STREET NUMBER.**

*Property included in a lease of premises described by street number.* 8-673 (case p. 669).

**STREET RAILWAYS.**

*In general:*

Abandonment of operation of, see CARRIERS.

As to interurban railways, see INTERURBAN RAILWAYS.

Power of national bank to obligate itself to operate. 8-242.

Assumption by purchaser of street railway at judicial sale of obligation of original grantor of franchise to operate the road. 8-242.

Retaining jurisdiction for purpose of authorizing the owner of the road to discontinue its operation where equity has taken jurisdiction for purpose of enforcing the performance of a contract to operate a street railroad. 8-242.

Power of legislature to confer on Public Service Commission control of the schedules, routing, and style of cars of street railway company. 8-916.

Effect of option of municipality to purchase street railway on authority of the Public Service Commission over the company. 8-916.

*Negligence in operation.*

As to injury to passenger on street car, see CARRIERS.

*Experimental evidence in action for injury on street railway track.* 8-49 (case p. 1).

Imputing to 'street railway' company knowledge of presence of person on track. 8-569.

Sufficiency of proof of incompetency or inexperience of street car operatives. 8-569.

Effect of employment of incompetent operators on liability for injury to person asleep on track. 8-569.

Application of doctrine of 'last clear chance.' 8-569.

**STREETS.**

See HIGHWAYS.

**STRICT CONSTRUCTION.**

Of statutes, see STATUTES.

**STRIKING OUT.**

Of pleading, see PLEADING.

**SUBMISSION OF CONTROVERSY.**

On agreed statement of fact, see AGREED CASE.

To arbitrators, see ARBITRATION.

**SUBPOENA.**

**SUBSCRIBING WITNESS.**

To will, see WILLS.

**SUBSTITUTION.**

Of parties, see PARTIES.

**SUBSURFACE WATERS.**

See WATERS.

**SUCCESSION TAX.**

See TAXES.

**SUCCESSIVE SUITS.**

See ACTION OR SUIT.

**SUCTION.**

*Experimental evidence as to suction of passing trains. 8-49.*

**SUFFRAGE.**

Right of, see ELECTIONS.

**SUICIDE.**

*Experimental evidence bearing upon question of. 8-49.*

**SUMMONS.**

See WRIT AND PROCESS.

**SUNDAY.**

*Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday Law. 8-566 (case p. 563).*

*Application of Sunday laws to attorneys. 8-1356 (case p. 1353).*

Power of legislature under police power to impose penalty for violation of Sunday Law. 8-563.

Validity of Sunday Law imposing upon barbers a more severe penalty for working on Sunday than that imposed by the General Sunday Act. 8-563.

Power of legislature to provide that keeping barber shops open on Sunday is not work of necessity. 8-563.

Effect of performance of some work by attorney on Sunday on his right to recover for retainer and work done on secular days. 8-1353.

**SUPERIOR COURTS.**

*Power of, to punish for contempt. 8-1558.*

**SUPERVISION.**

Of bank, see BANKS.

**SUPPLEMENTAL ACT.**

Definition of. 8-681.

**SUPPLEMENTARY PROCEEDINGS.**

*Power of referee in, to punish for contempt. 8-1576.*

**SUPPORT.**

Of wife, see DIVORCE AND SEPARATION; HUSBAND AND WIFE.

**SURROGATE COURTS.**

*Power to punish for contempt. 8-1551.*

**SUSPENSION.**

Of attorney, see ATTORNEYS.  
Of insurance, see INSURANCE.

**SWITCH.**

*Experimental evidence as to distance at which switch could be seen. 8-56.*

**TAKING.**

Of private property for public use, what constitutes, see EMINENT DOMAIN.

**TAX DEED.**

See TAXES.

**TAXES.**

In general.

Injunction against, see INJUNCTION.  
As to license generally, see LICENSE.

*Right of grantee or transferee to be reimbursed for expenditures in payment of taxes on property where conveyance or transfer is in fraud of creditors. 8-527 (case p. 523).*

Where taxable.

*Where wrecked vessel taxable. 8-663 (case p. 660).*

**Assessments.**

Refusal of court to consider irregularities charged against assessment which are not alleged in the petition. 8-660.  
 Partial invalidity of assessment. 8-792.

**Sale; deed.**

Effect of error in name of clerk of court in certificate of acknowledgment by him to tax deed. 8-489.

**Succession tax.**

*Succession tax on bonds of domestic corporation owned by estate of nonresident and held at his residence. 8-868 (case p. 855).*

The succession and not the thing inherited as the subject of tax. 8-855.

**TELEGRAPHS.**

*Right and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway. 8-1292 (case p. 1299).*

**TELEPHONES.**

Proof of telephone conversations, see EVIDENCE.

*Conversion by telephone as false pretense. 8-656 (case p. 652).*

**TEMPORARY ADMINISTRATOR.**

*Issuance of regular letters of administration as effecting removal of temporary administrator. 8-179.*

**TENANTS.**

See LANDLORD AND TENANT.

**TERMINATION.**

Of lease, see LEASE.  
 Of trust, see TRUST.

**TERM.**

Of tenant, see LANDLORD AND TENANT.  
 Of office, see OFFICERS.

**TESTAMENTARY CAPACITY.**

See WILLS.

**TESTATORS.**

See WILLS.

**THEATERS.**

*Constitutionality of statute or ordinance requiring proprietor of theater to furnish fire or police protection at his own expense. 8-1628 (case p. 1590).*

Carrying on of theater as a private business. 8-1590.

Partial invalidity of statute for protection of theater employees. 8-1590.

Fixing wages of employees whom theater proprietor is compelled to employ for fire protection, forbidding any reduction in his salary, and forbidding his discharge without approval of the fire commissioners. 8-1590.

**THREATS.**

Admissibility of, in evidence, see EVIDENCE.

**TIME.**

For deportation of alien, see ALIENS.

For meeting of stockholders, see CORPORATIONS.

*Experimental evidence as to. 8-35, 59.  
 Judicial notice of coincidence of the days of the week with the days of the month. 8-63 (case p. 59).*

*Liability of carrier for giving misinformation to passenger as to time of departure or arrival of train. 8-1186 (case p. 1178).*

Time at which right to discharge from arrest is to be determined. 8-750.

From which will takes effect. 8-1010.

**TITLE.**

Of statute, see STATUTES.

*Prior action to determine title to real property in which adverse claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action on such claim. 8-731.*



**TOBACCO.**

Liability of one contracting to purchase tobacco for another for shrinkage in weight of tobacco bought. 8-1116.

**TORTS.**

As to limitation of time for action for, see **LIMITATION OF ACTIONS.**

Master's liability for, see **MASTER AND SERVANT.**

Liability of United States for, see **UNITED STATES.**

Effect of bill of particulars on proof in action for tort. 8-554 (case p. 544).

Prior action on contract in which claim in tort might have been asserted by counterclaim, set-off, or cross petition as barring or abating subsequent independent action for the tort. 8-712.

Prior action in tort in which claim on contract might have been asserted by set-off, counterclaim, or cross petition as bar to subsequent independent action on contract. 8-714.

Prior action in equity in which claim in tort might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action in tort. 8-717.

Prior action for possession in which claim in tort might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent action in tort. 8-720.

**TOWNS.**

Liability for injury on defective bridge, see **BRIDGES.**

Liability for injury on defective highway, see **HIGHWAYS.**

**TRADE.**

Combinations in restraint of, see **MONOPOLY AND COMBINATIONS.**

**TRAINS.**

Injury by, see **RAILROADS.**

**TRANSFER.**

Between law and equity, see **EQUITY.**  
Of cause, see **REMOVAL OF CAUSES.**

**TRANSFER TAX.**

See **TAXES.**

**TRANSFORMER.**

Experimental evidence as to condition of. 8-51.

**TREES.**

Right of tenant to recover damages from third person for injury to. 8-608.

**TRIAL.**

In general.

Submission on agreed statement of facts, see **AGREED CASE.**

Continuance, see **CONTINUANCE AND ADJOURNMENT.**

Judicial notice by court or jury, see **EVIDENCE.**

Matters as to jury, see **JURY.**

As to witnesses, see **WITNESSES.**

Placing witness in charge of jury. 8-656.

Reception of evidence.

Order of proof. 8-477.

Statements and argument of counsel.

Sufficiency of statements of counsel in argument to cure lack of material averments in pleading. 8-290.

Objections and exceptions.

Consideration of, on appeal, see **APPEAL AND ERROR.**

Failure to object to predicate question propounded to accused as estopping him from objecting to admission of testimony which is immaterial. 8-1857.

Remarks of court.

Prejudicial error in, see **APPEAL AND ERROR.**

Submitting case to jury generally.

Effect of claim by counsel that uncontradicted testimony is not true to require submission of the case to the jury. 8-789.

Questions of law or fact.

Credibility of testimony of uncontradicted witness. 8-801.

Question for jury as to whether firearm used as a bludgeon is a deadly weapon. 8-1821.

Weight of evidence as question for jury. 8-874.

Question whether suspicions of drawer of check to order of bank cashier to take up note payable to the bank were, or should have been, aroused by fact that cashier made demand at drawer's place of business for a check payable to himself. 8-298.

Direction of verdict.

Direction of verdict for party on contradicted evidence in his favor. 8-302 (case p. 789).

Effect of overruling of demurrer to declaration on motion for directed verdict at close of evidence. 8-351.

Demurrer to evidence.

General rule as to how evidence should be treated upon demurrer thereto. 8-318.

Instructions.

Necessity for exceptions, see APPEAL AND ERROR.

Prejudicial error as to, see APPEAL AND ERROR.

Refusal of appellate court to review rulings as to instructions where evidence does not appear in the record. 8-59.  
Repetition of. 8-1034.

— on evidence and facts.

Instruction on question of fact. 8-298.  
Instruction that law presumes that money paid by one person to another was due to the latter. 8-298.

Presumption of innocence in criminal case. 8-1034.

Weight or amount of evidence. 8-1034.

Credibility of witness. 8-1034.

Reasonable doubt. 8-1034.

— correctness of instructions.

Prejudicial error as to instructions, see APPEAL AND ERROR.

As to presumption and burden of proof in case of injury to passenger. 8-163.

Use of expression "apparent authority" instead of "implied authority" in instruction in action against master for assault by one employee upon another. 8-1426.

As to measure of care owed by carrier to passenger. 8-1687.

In prosecution for homicide. 8-1034.

As to effect of intoxication at time of trial. 8-1034.

Verdict.

Direction of verdict, see supra.

Review of verdict on appeal, see APPEAL AND ERROR.

Prejudicial error as to, see APPEAL AND ERROR.

## TRUCK.

Conversion by cashier of bank, see BANKS.

Conversion by telephone as false pretense. 8-656 (case p. 652).

## TRUCK.

Experimental evidence as to speed of. 8-51.

## TRUST DEEDS.

See MORTGAGE.

## TRUSTEES.

In general, see TRUSTS.

## TRUSTS.

In general.

Monopolistic trusts, see MONOPOLY AND COMBINATIONS.

Excepting trustee selling under deed of trust from statute requiring real estate brokers to secure licenses as discrimination against other trustees. 8-418.

Termination.

Termination of trust of personal representative, see EXECUTORS AND ADMINISTRATORS.

Trustees.

Capacity of trustee in charitable gift, see CHARITIES.

Right of trustee to accumulate income under will or other instrument directing him to, see it. 8-915 (case p. 904).

Charging trustees of fund with costs, for awaiting the judgment of the court in dispute as to beneficiary. 8-904.

Right of trustees of fund, income of which is to be used for benefit of association, to expend the income themselves instead of turning it over to the association. 8-904.

## TUBERCULOSIS.

Constitutionality of statute or ordinance providing for destruction of cow affected with. 8-79.

**UNCHASTITY.**

See CHASTITY.

**UNDERGROUND WATERS.**

See WATERS.

**UNIFORMITY.**

Of license tax, see LICENSE.

**UNINCORPORATED ASSOCIATIONS.**

See ASSOCIATIONS.

**UNITED STATES.**

*Suit against railroad owned by or in which interest is held by United States. 8-995 (case p. 990).*

*Liability for tort committed by officers in discharge of their official duties. 8-990.*

**UNLIQUIDATED DAMAGES.**

*Prior action in justice's court in which claim for unliquidated damages might have been asserted by set-off, counterclaim, or cross petition as bar to subsequent independent action on such claim. 8-738.*

**USAGE.**

See CUSTOM AND USAGE.

**USURY.**

*Obtainer's concealment of, as fraud against surety. 8-1505.*

**VACANCY.**

Of insured property, see INSURANCE.

**VACCINATION.**

Requirement as to, generally, see HEALTH.

**VARIANCE.**

See EVIDENCE.

**VEHICLES.**

*Constitutionality of statute providing for confiscation or destruction, without notice, of vehicles used in connection with intoxicating liquors. 8-886 (case p. 874).*

**VENDOR AND PURCHASER.**

As to deeds, see DEEDS.

As to fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Rights and duties of purchasers at judicial sale, see JUDICIAL SALE.

Sale for taxes, see TAXES.

*Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises. 8-356 (case p. 351).*

**VENEREAL DISEASE.**

*As ground for divorce or annulment of marriage. 8-1540 (case p. 1534).*

*Sufficiency of proof of communication of, by husband to wife. 8-1534.*

*Conclusiveness on court of finding of health officer that person is infected with. 8-831.*

*Validity of ordinance and rules of board providing for isolation of men infected with. 8-831.*

**VENUE.**

In general.

What constitutes venue. 8-1226.

*Power of legislature to require all election contests to be tried in one county. 8-1463.*

Change of.

*Change of judge as a change of venue within rule that state is not entitled to change of venue. 8-1226.*

**VERDICT.**

See TRIAL.

**VESSEL.**

*Where wrecked vessel taxable. 8-663 (case p. 660).*

**VIBRATION.**

*As occasioning fall of object, experimental evidence as to. 8-51.*

**VIEW.**

*See VISIBILITY.*

**VIOLATION OF LAW.**

*Liability of former owner of real estate because of a violation of statute or ordinance relating to condition of premises. 8-356 (case p. 351).*

**VISIBILITY.**

*Experimental evidence as to. 8-51.*

**VITAL STATISTICS.**

*Who is a physician or surgeon within meaning of statute in relation to vital statistics. 8-1070 (case p. 1066).*

*Right of legislature to determine method to be employed in obtaining. 8-1066.*  
*Validity of statute denying to osteopaths right to furnish birth and death certificates. 8-1066.*

**VOLUNTARY DISMISSAL.**

*See DISMISSAL OR DISCONTINUANCE.*

**VOTERS AND ELECTIONS.**

*See ELECTIONS.*

**WAGERS.**

*Validity of wagering contract, see CONTRACTS.*

**WAGES.**

*In general, see MASTER AND SERVANT.*

**WAIVER.**

*Of defects in pleading, see PLEADING.*

*Waiver of privilege against, or nonliability to, arrest in civil action. 8-752 (case p. 750).*

*Waiver of statute or court rule requiring nonresident plaintiff to give security for costs. 8-1510 (case p. 1508).*

*Effect of statute on. 8-750.*

**WALKING.**

*Experimental evidence as to time necessary to cover given distance. 8-58.*

**WAR.**

*Service of government in war time as excuse for refusal of carrier to furnish shipping facilities to individual. 8-155.*

**WAREHOUSEMEN.**

*Effect of setting up lien for storage in action for conversion of property stored to render judgment denying the lien res judicata of right to recover compensation for the storage. 8-685.*

*Effect of judgment against storage warehouse for injury to stored property on right to recover compensation for storage which was not set up as a counterclaim in the first action. 8-685.*

**WARRANTY.**

*On sale of personalty, see SALE.*

**WATER.**

*See also WELLS.*

*Water rights as between individuals. Existence of common law as to riparian rights. 8-636.*

*—accretions.*

*Right to follow accretions across division line previously submerged by action of water. 8-640 (case p. 636).*

*—obstruction.*

*Liability for injury by bursting of dam; duty to provide against floods. 8-544.*

—subterranean waters.

Right of tenant at will to recover diminished annual value of property because of lowering of water level. 8-595.

**Public water supply.**

Water company as a public service corporation. 8-249.

Conferring power of eminent domain upon water company. 8-466.

—irrigation companies.

*Irrigation company as a public utility.* 8-268 (case p. 249).

Power of corporation which has sold real estate and undertaken to furnish water for its irrigation to declare itself a public utility and submit to jurisdiction of Public Service Commission. 8-249.

Effect of declaration in charter of water company which has sold land under contract to supply it with water for irrigation, that it is organized inter alia to supply the inhabitants of towns with water, as constituting a dedication of its property to a public use. 8-249.

Increasing rates for water for irrigation to those having easement in the system for the supplying of their quantum of water as an unauthorized taking of private property for public use. 8-249.

Changing rates fixed in water certificates as impairment of obligation of contract. 8-249.

Power of Public Service Commission to change rates specified in the water certificates for water furnished by irrigation company. 8-249.

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**WEAPONS.**

Deadly weapon, see DEADLY WEAPONS.

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**WELLS.**

*Experimental evidence as to condition of water in.* 8-58.

*Comparison of water from different wells.* 8-59.

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**WIDOW.**

Dower of, see DOWER.

Election by, between legacy and dower, see WILLS.

**WILLS.**

**In general.**

Parol evidence as to, see EVIDENCE.

Matters concerning executors and administrators, see EXECUTORS AND ADMINISTRATORS.

Tax on gifts by, see TAXES.

Creation of trust by will, see TRUSTS.

*Annulment of, as effecting removal of executor or administrator.* 8-177.

*Right of children of an adopted child to take the share which the parent would have taken under a will if he had survived the testator.* 8-1012 (case p. 1010).

Right of unincorporated association to take property given it by will. 8-904.

When will takes effect. 8-1010.

**Execution; attestation.**

*Experimental evidence as to possibility of testator seeing and hearing attesting witnesses.* 8-59.

*Character as witness of one who signed will for another purpose.* 8-1075 (case p. 1073).

In what attestation of will consists. 8-1078.

**Revocation.**

Revocation of devise or legacy, see *infra*.

**Who may make; capacity.**

*Effect of guardianship of adult on testamentary capacity.* 8-1375 (case p. 1370).

Degree of mental capacity. 8-1370.

**Probate.**

Parol evidence as to meaning of will, see EVIDENCE.

Description of beneficiaries; who may take.

Parol evidence as to intent of testator. 8-904.

Lawful heirs. 8-1010.

**Election.**

Effect of statute providing that no devise or bequest to a surviving spouse shall be treated as adding to the right secured to such survivor unless it clearly appears that such was testator's intent to put the spouse to an election. 8-1631.

**Ademption; revocation.**

*Lease of property as ademption or revocation of devise.* 8-1638 (case p. 1631).

**WITNESSES.****In general.**

Opinions and conclusions of, see EVIDENCE.  
To will, see WILLS.

Allowance as costs of mileage within the state of witnesses voluntarily attending upon request from another state. 8-11.

Placing witness in charge of jury. 8-656.  
Intentionally getting drunk a material witness for the adversary as ground for revocation of arbitration agreement. 8-1081.

**Competency.**

Statute rendering witness incompetent because of death of other person as applicable to latter's mental condition. 8-1097 (case p. 1091).

**Impeaching; discrediting.**

Experimental evidence as to possibility of witness having heard sounds or conversation to which he testified. 8-59.

Contradiction on immaterial matter. 8-1357.

**Credibility.**

As to discrediting witness, see supra.

Disregarding uncontradicted testimony in civil actions. 8-796 (cases pp. 785, 789, 792).

Rule that one calling a witness certifies to his credibility. 8-785.

Credibility of witness where facts demonstrate falsity of testimony. 8-792.

Instructions as to. 8-1034.

**WORDS AND PHRASES.**

Also. 1014.

Approaches. 8-1280 note.

Capital. 8-1348.

Capital crime. 8-1348.

Free pass. 8-679.

General agent. 8-192.

Laborer. 8-1442 note.

Liberty. 8-1590.

Master. 8-1590.

Real estate broker. 8-418.

Robbery. 8-357, 359 note.

Supplemental act. 8-631.

Venue. 8-1226.

Wilful. 8-1312.

**WORKMEN'S COMPENSATION.****In general.**

*Insolvency of insurer or employer; as affecting liability for compensation.* 8-1846 (case p. 1842).

**Construction of act generally.**

Liberal construction. 8-1058.  
Resolving doubt as to right to recover in favor of the employee or his dependents. 8-930.

**Review of decisions.**

Finding that injured person was not an employee of the one from whom compensation is sought. 8-1058.

**Who are employees.**

Workman representing employees, or public. 8-1064 (case p. 1008).

Review of finding of commissioners that injured person was not an employee. 8-1058.

**What injuries are within provisions of act.**

Compensation for loss or impairment of eyesight within Workmen's Compensation Acts. 8-1324 (case p. 1322).

Injury while making delivery as arising out of and in the course of employment. 8-935 (case p. 930).

Compensation for death of or injury to peace officer employed in private plant. 8-190 (case p. 187).

Liberal interpretation of provisions as to injury "arising out of and in the course of employment." 8-930.

Effect on right of employee to recover of fact that the public is exposed to the same hazard as that out of which the injury arose. 8-930.

Injury by dog bite while one employed to deliver packages is making a delayed delivery before beginning of working hours. 8-930.

**Who entitled to compensation.**

Effect of divorce on right of spouse or child to compensation. 8-1118 (case p. 1110).

**WORKS OF NECESSITY AND CHARITY.**

On Sunday, see SUNDAY.

**WOUNDS.**

Experimental evidence as to. 8-59.

**WRIT AND PROCESS.**

Estoppel to claim exemption from arrest.  
8-750.

Service on corporation.

*Effect of Federal control of public utilities on service of process. 8-987.*

Privilege.

**X-RAY.**

*Waiver of privilege against or nonliability to arrest in civil action. 8-754 (case p. 750).*

*Admissibility of X-ray photograph as affected by similarity or dissimilarity of conditions. 8-59.*

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Heavy italic type is used for annotations; roman type for cases.

